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COURT OF APPEALS

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TOLL NORTHVILLE LIMITED PARTNERSHIP
v NORTHVILLE TOWNSHIP

Docket Nos. 295732, 296499, and 301043. Submitted May 11, 2011, at Lansing. Decided May 31, 2011, at 9:00 a.m. *Toll Northville Ltd Partnership* (Docket No. 301043) reversed and remanded, 491 Mich 518.

Toll Northville Limited Partnership and Biltmore Wineman L.L.C. installed road access, streetlights, sewer service, water service, electrical service, natural gas service, telephone service, and sidewalks for a residential development project in Northville Township. The township increased the tax assessments on the property because of these public-service improvements. Toll Northville and Biltmore contested the assessments before the Tax Tribunal, and Toll Northville brought an action for declaratory judgment against the township in the Wayne Circuit Court, challenging the constitutionality of MCL 211.34d(1)(b)(*viii*), the statute on which the township based the assessment increases, arguing that the increases violated Const 1963, art 9, § 3. The Tax Tribunal stayed the proceeding before it pending a resolution of the lawsuit. The court, John A. Murphy, J., ruled that the statute was unconstitutional. The Court of Appeals, WHITBECK, C.J., and HOEKSTRA and WILDER, JJ., affirmed, concluding that improvements that become part of the real property as structures or fixtures constitute taxable "additions" under the Constitution and the statute, but that term does not include public-service improvements because title to the improvements will ultimately vest in the municipality or a utility company. 272 Mich App 352 (2006). The Supreme Court affirmed in part and vacated in part, holding that MCL 211.34d(1)(b)(*viii*) is unconstitutional because it is inconsistent with the meaning of the term "additions" as used in Const 1963, art 9, § 3. 480 Mich 6 (2008). Following the Supreme Court's decision, the Tax Tribunal removed the tax appeal from abeyance. Toll Northville and Biltmore argued that in light of the Supreme Court's ruling, the public-service improvements had to be removed from the taxable value of the properties even though the value of those

improvements had been added in a year not under appeal because that value was used as the starting point for calculating the taxable value for years properly under appeal. The tribunal concluded that it lacked jurisdiction to review the subject properties' taxable values in a year not under appeal, but nevertheless amended the taxable value of the properties in question because the assessed value of the properties included an amount for public-service improvements. Northville Township appealed (Docket No. 301043).

MJC/Lotus Group brought an action in the Tax Tribunal appealing the subject properties' valuation for the 2006 tax year by Brownstown Township, later amending the appeal to include subsequent years, in light of an increase in the taxable value of the property in 2005 as a result of the construction of a new road near the property. The Tax Tribunal stayed the proceeding pending a resolution of the *Toll Northville* litigation concerning the constitutionality of including the value of public-service improvements in taxable value. After the Supreme Court's decision on that question, the Tax Tribunal removed the tax appeal from abeyance. The tribunal granted summary disposition in favor of the township, concluding that the tribunal did not have subject matter jurisdiction to review the properties' 2005 taxable values and that the assessor correctly calculated the subject properties' subsequent taxable values using the previous years' taxable values. MJC/Lotus Group appealed (Docket No. 295732).

CW Development L.L.C./Meadow Walk brought an action in the Tax Tribunal appealing the subject properties' valuation for the 2005 tax year by Grand Blanc Township, later amended to include subsequent years, in light of an increase in the taxable value of the property in 2004 as a result of public-service improvements constructed in 2003. The Tax Tribunal stayed the proceeding before it pending a resolution of the *Toll Northville* litigation and removed the tax appeal from abeyance after the Supreme Court's decision on that question. The tribunal granted partial summary disposition in favor of the township, concluding that the properties' values were uncapped for the 2004 calendar year and that no improvements were subsequently added to the taxable values of the subject properties after that time. The tribunal then issued a final order holding that it had no jurisdiction over the 2004 taxable value and that the subsequent years' taxable values were proper as assessed. CW Development L.L.C./Meadow Walk appealed (Docket No. 296499). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

The taxable value of a property for a given year is the property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate,

plus all additions. The Tax Tribunal lacks jurisdiction to indirectly review the accuracy of a property's taxable value in a year not under appeal notwithstanding that such value is used as a starting point to calculate the property's taxable value in a year properly under appeal. Thus, the tribunal may not correct a prior year's taxable value even if it improperly included the value of a public-service improvement as an addition. In calculating taxable value, "losses" are defined as property that has been destroyed or removed. Public-service improvements may not be deducted as a "loss" on the basis that the improvements were separated from the property when a larger parcel was divided into a smaller parcel because a loss may not result from a property split.

MJC/Lotus Group (Docket No. 295732) affirmed.

CW Dev LLC/Meadow Walk (Docket No. 296499) affirmed.

Toll Northville Ltd Partnership (Docket No. 301043) reversed and remanded.

1. TAXATION — REAL PROPERTY — TAXABLE VALUE — ADDITIONS — PUBLIC-SERVICE IMPROVEMENTS — IMPROVEMENTS IMPROPERLY INCLUDED IN TAXABLE VALUE IN A YEAR NOT UNDER APPEAL — TAX TRIBUNAL — JURISDICTION.

The Tax Tribunal lacks jurisdiction to indirectly review the accuracy of a property's taxable value in a year not under appeal notwithstanding that such value is used as a starting point to calculate the property's taxable value in a year properly under appeal; the tribunal may not correct a prior year's taxable value even if it improperly included the value of a public-service improvement as an addition (MCL 205.735; MCL 211.27a[2][a]; MCL 211.34d[1][b][*viii*]).

2. TAXATION — REAL PROPERTY — TAXABLE VALUE — LOSSES — PROPERTY SPLITS.

In calculating taxable value, "losses" are defined as property that has been destroyed or removed; public-service improvements may not be deducted as a loss on the basis that the improvements were separated from the property when a larger parcel was divided into a smaller parcel because a loss may not result from a property split (MCL 211.27a[2][a]; MCL 211.34d[1][h][*i*]).

Hoffert & Associates, P.C. (by *Myles B. Hoffert*, *David B. Marmon*, *Julia S. Rosen*, *Gregory M. Elliot*, and *Paige R. Harley*), for MJC/Lotus Group, CW Development L.L.C./Meadow Walk, Toll Northville Limited Partnership, and Biltmore-Wineman, L.L.C.

Giarmarco, Mullins & Horton, P.C. (by *Stephen J. Hitchcock* and *Geoffrey S. Wagner*), for Brownstown Township.

Lyndon J. Lattie for Grand Blanc Township.

Hafeli Staran Hallahan & Christ, P.C. (by *Laura M. Hallahan* and *Amy K. Driscoll*), and *Rose & Abramson, P.C.* (by *Nevin A. Rose*), for Northville Township.

Amici Curiae:

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *Robert E. Thall*), for the Michigan Townships Association.

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

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

PER CURIAM. The three appeals at issue here have been consolidated for the purpose of appellate review. In Docket No. 295732, petitioner MJC/Lotus Group (MJC), appeals as of right the Tax Tribunal's order denying MJC's motions for immediate consideration and summary disposition and granting summary disposition in favor of respondent Brownstown Township (Brownstown) on the ground that the tribunal lacked jurisdiction to review the 2005 taxable values of MJC's properties. In Docket No. 296499, petitioner CW Development L.L.C./Meadow Walk (CW) appeals as of right the tribunal's opinion and judgment affirming, in favor of respondent Grand Blanc Township (Grand Blanc), the 2004 taxable values of CW's properties for the tax years at issue on the ground that the tribunal lacked

jurisdiction to review them. In Docket No. 301043, respondent Northville Township (Northville) appeals as of right the tribunal's opinion and judgment adjusting the taxable values of properties owned by petitioners Toll Northville Limited Partnership (Toll) and Biltmore Wineman, L.L.C. (Biltmore) for the tax years at issue. We hold that the tribunal lacks jurisdiction to indirectly review the accuracy of a property's taxable value in a year not under appeal notwithstanding that such value is used as a starting point to calculate the property's taxable value in a year properly under appeal. Accordingly, we affirm the judgments reached in Docket Nos. 295732 and 296499, but reverse the judgment reached in Docket No. 301043 and remand the case to the tribunal for further proceedings consistent with this opinion.

I. STANDARD OF REVIEW

The jurisdiction of the Tax Tribunal is set by statute, thereby raising a question of law, which we review de novo. *Nicholson v Birmingham Bd of Review*, 191 Mich App 237, 239; 477 NW2d 492 (1991). When examining a decision made by the tribunal, absent an allegation of fraud, our review is " 'limited to determining whether the tribunal erred in applying the law or adopted a wrong principle[.]' " *Danse Corp v Madison Heights*, 466 Mich 175, 178; 644 NW2d 721 (2002), quoting *Michigan Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994) (alteration in *Danse*). We treat the tribunal's factual findings as conclusive if " 'competent, material, and substantial evidence on the whole record' " supports them. *Id.* "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992).

II. THE TRIBUNAL LACKS JURISDICTION TO REVIEW TAXABLE VALUES IN YEARS NOT UNDER APPEAL

In each of the three consolidated appeals, the petitioning party challenges as unconstitutional the taxable values of the subject properties in the year immediately preceding the first tax year under appeal. In Docket No. 295732, MJC challenges the subject properties' 2005 taxable values in its petition filed in tax year 2006, amended to include subsequent years. In Docket No. 296499, CW challenges the subject properties' 2004 taxable values in its petition filed in tax year 2005, amended to include subsequent years. In Docket No. 301043, Toll and Biltmore challenge the subject properties' 2000 taxable values in its petition filed in tax year 2001, amended to include subsequent years.

Docket No. 301043 provided the background for the issue at hand. The Tax Tribunal held the case in abeyance while Toll and Biltmore pursued a declaratory judgment action in the Wayne Circuit Court challenging the constitutionality of MCL 211.34d(1)(b)(*viii*). The case reached the Michigan Supreme Court, which held as follows:

> The issue is the constitutionality of MCL 211.34d(1)(b)(*viii*), which, as written, defines "public services" as "additions" and, therefore, would allow for the taxation of the value added from the installation of public-service improvements, which are "water service, sewer service, a primary access road, natural gas service, electrical service, telephone service, sidewalks, or street lighting." We agree with the analysis and the decision of the Court of Appeals, which declared MCL 211.34(1)(b)(*viii*) unconstitutional. The Court of Appeals correctly concluded that the mere installation of public-service improvements on public property or on utility easements does not constitute a taxable "addition"—as that term was understood when the public adopted Proposal A—in this instance, involving infrastructure improvements made to land destined to

> become a residential subdivision. [*Toll Northville Ltd v Northville Twp*, 480 Mich 6, 13-14; 743 NW2d 902 (2008) (*Toll Northville II*).]

Although the invalidity of MCL 211.34d(1)(b)(*viii*) is not contested on appeal, there remain preliminary issues that must be addressed to decide the form of redress available to the parties in the instant actions.

The first question is whether the tribunal has subject matter jurisdiction to review the accuracy (here, the constitutional legitimacy) of the properties' taxable values in years not directly under appeal. The challenge is an indirect one by virtue of the mathematical formula that assessors use to compute a property's taxable value in a given year, the starting point of which is the property's taxable value in the immediately preceding year. The mathematical formula, set forth in MCL 211.27a(2)(a), provides that a property's taxable value in a given year equals "[t]he property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions." Petitioners in this case argue that the immediately preceding year's taxable values include "additions" for public-service improvements, which the Michigan Supreme Court declared unconstitutional. Therefore, according to petitioners, the tribunal must correct the constitutional errors, use the corrected taxable values to recalculate the taxable values in the first year under appeal, and similarly adjust the taxable values in subsequent years under appeal. We disagree.

Subject matter jurisdiction, which refers to the deciding body's authority to try a case of the kind or character pending before it, irrespective of the particular facts of the case, cannot be waived. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001). Concerns regarding subject matter jurisdiction

can be raised at any time, by any party, or sua sponte by the tribunal. *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 544; 656 NW2d 215 (2002). Indeed, when the tribunal finds that it lacks subject matter jurisdiction, it is obliged to dismiss the case and may proceed no further except to effectuate such dismissal. *Id*.

MCL 205.735(3) provides, in relevant part, that the tribunal's jurisdiction "is invoked by a party in interest, as petitioner, filing a written petition on or before June 30 of the tax year involved." Although the petitions in the instant cases are not themselves untimely, petitioners are attempting to use them to challenge the subject properties' taxable values from tax years not under appeal.

In *Leahy v Orion Twp*, 269 Mich App 527, 528-529; 711 NW2d 438 (2006), we addressed a similar situation in which a petition filed in 2003 challenged the subject property's 2003 assessed value on the ground that it had been incorrectly calculated in light of an error in the property's 2002 assessment. In challenging the 2002 assessment in his 2003 petition, the petitioner "argued that the tax code requires property taxes to be based on the prior year's assessed value, so that the prior year's value *must* be the correct value." *Id*. at 529. In rejecting the petitioner's argument, we held:

> Petitioner cannot be aggrieved by the tribunal's finding that respondent erroneously computed the 2003 assessment. Rather, petitioner challenges the 2003 assessment to the extent that it remains premised on an incorrect starting point. . . . However, this challenge presents a collateral attack on a matter that is no longer subject to litigation. [*Id*. at 530.][1]

We concluded that "the fixed assessment value must be

[1] The reference to a collateral attack was made in light of a 2002 action that the petitioner brought in the circuit court that had been dismissed,

used where, as here, a statutory assessment formula calls for the use of a now-unchallengeable assessed value." *Id*. at 531. In addition, we noted that the tribunal correctly dismissed the claim for lack of jurisdiction, explaining that the petitioner only appealed his 2003 assessment and any attempt to challenge prior years' assessments would have been untimely under MCL 205.735. *Id*. at 532.

Accordingly, the law prohibits the tribunal from revisiting the accuracy of assessments and other evaluations that have become "unchallengeable," whether because a final judgment has been entered regarding the values (collateral estoppel), or the window for filing a petition to challenge those values has lapsed (lack of jurisdiction). This long-held principle can be traced back to the Supreme Court's decision in *Auditor General v Smith*, 351 Mich 162, 168; 88 NW2d 429 (1958), in which it stated, "Failure to act to correct assessments and evaluations by the board of review in the manner as provided by statute precludes later attack upon the assessment."

Further, in *Toll Northville, Ltd v Northville Twp*, 272 Mich App 352, 360; 726 NW2d 57 (2006) (*Toll Northville I*), aff'd in part and vacated in part on other grounds *Toll Northville II*, 480 Mich 6, we previously acknowledged the implications of *Leahy* for the ultimate resolution of Docket No. 301043, which, at the time, was held in abeyance in the tribunal. We held that "[w]hile we acknowledge that . . . *Leahy* limit[s] the Tax Tribunal's authority to decide the accuracy and methodology of assessments to the tax years timely appealed, we do not agree that those decisions limit our ability to resolve the constitutional issue at hand." *Id.*

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affirmed on appeal, and became a final judgment when the petitioner failed to take advantage of further appellate opportunities. *Leahy*, 269 Mich App at 530-531.

Consequently, we disagree with petitioners that nothing forbids the tribunal from hearing a constitutional argument regarding an invalid action occurring in the preceding year used to calculate the tax assessment for the current year. MCL 205.735(3), *Leahy*, *Smith*, and the foreshadowing in *Toll Northville I* precisely forbid the tribunal from taking such action.

MJC argues that its case is distinguishable in that it involves freshly split parcels in the first year under appeal. We acknowledge that the original parent parcel, which MJC purchased in 2001, was split into the child parcels that are the subject of this appeal in 2006, the first year under appeal, and that, therefore, there are no taxable values corresponding to the child parcels in 2005, the year in which public-service improvements were included in the parent parcel's taxable value. What MJC fails to explain, however, is why MJC could not have challenged the public-service additions included in the taxable value of the parent parcel in 2005. Because MJC has not argued that anything prevented it from filing a petition in 2005, the distinction makes no difference.

We agree with petitioners that unconstitutional statutes are void *ab initio*. Nevertheless, a determination that a related statute is unconstitutional does not nullify the limitation on the tribunal's jurisdictional authority, under which it may only review the accuracy of taxable values in years properly under appeal. Contrary to petitioners' suggestion, the tribunal's lack of jurisdiction does not nullify the previous litigation involving Toll. That litigation was a declaratory judgment action to determine the constitutionality of MCL 211.34d(1)(b)(*viii*), not an appeal from a tribunal decision. *Toll Northville I*, 272 Mich App at 361. In that litigation, Northville argued that we were without ju-

risdiction to decide whether MCL 211.34d(1)(b)(*viii*) was unconstitutional because "the Tax Tribunal would have no authority to change the 2001 and 2002 tax assessments on the basis of additions that occurred in tax year 2000." *Id*. at 360. We noted that "the Tax Tribunal has not yet issued a ruling so as to invoke our review of its jurisdiction. The determination whether jurisdiction exists to hear the developers' challenge to the actual tax assessment is based on fact-finding within the province of the Tax Tribunal." *Id.* at 361. Thus, *Toll Northville I* undisputedly held that MCL 211.34d(1)(b)(*viii*) was unconstitutional, but recognized that a party's ability to invoke the tribunal's jurisdiction to lower a property's taxable value if, and to the extent that, such value includes additions for public-service improvements would rely solely on whether the facts in the specific case fell within the tribunal's jurisdiction—a question not before the Court at that time. *Id.* at 361, 376. That question is, however, precisely what is now before us and, as noted earlier in this opinion, we conclude that the tribunal lacks jurisdiction to reach back into years not under appeal to correct those constitutional errors.[2]

We also reject the argument that MCL 211.27a, which sets forth the mathematical formula used to determine a property's taxable value, somehow confers jurisdiction on the tribunal to review the prior year's taxable value. MCL 211.27a(2) provides, in pertinent part:

> Except as otherwise provided in subsection (3), for taxes levied in 1995 and for each year after 1995, the taxable value of each parcel of property is the lesser of the following:

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[2] We also note that permitting petitioners to challenge the constitutionality of the taxable values of properties in the year preceding the first tax years under appeal would nullify the mandates of MCL 205.735(3).

> (a) *The property's taxable value in the immediately preceding year* minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions. For taxes levied in 1995, the property's taxable value in the immediately preceding year is the property's state equalized valuation in 1994. [Emphasis added.]

Merely using a property's taxable value in the immediately preceding year to perform a calculation, as MCL 211.27a instructs, is quite different than reviewing the accuracy, constitutional or otherwise, of such taxable value. We reached a similar conclusion in a decision related to uncapping issues. In *Mich Props, LLC v Meridian Twp*, 292 Mich App 147, 149-150, 154; 808 NW2d 506 (2011), this Court concluded that the tribunal erred when it permitted property to be uncapped for the 2007 and 2008 tax years when the transfer had occurred in 2004. We conclude that the prohibition must cut both ways. If a taxing authority may not reach back into the past to "correct" a property value by uncapping when it failed to uncap at the time the transfer occurred, property owners must likewise be denied the ability to reach back into the past and "correct" values when they failed to appeal the taxable value during the designated statutory period. Thus, although MCL 211.27a calls for use of the immediately preceding year's taxable value, it does not extend the jurisdiction of the Tax Tribunal to permit a second bite at the apple to contest the taxable value in tax years that were not timely appealed.[3]

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[3] The *Leahy*, *Toll Northville I*, and *Smith* decisions make it apparent that whether the tribunal may revisit an earlier year's taxable value for the purpose of calculating the property's taxable value in a year properly under appeal is *not* an open question. Indeed, petitioners fail to cite to any case in which the tribunal has been permitted to reach back in time to correct taxable values in years not under appeal. Therefore, it is unnecessary to consider the parties' various policy arguments that the tribunal *should* be permitted to do so.

III. PUBLIC-SERVICE IMPROVEMENTS MAY NOT BE DEDUCTED AS A "LOSS"

Petitioners MJC, Toll, and Biltmore argue that, even assuming that the tribunal lacked jurisdiction to recalculate the subject properties' taxable values in years not under appeal that contain unconstitutional "additions" for public-service improvements, it should have deducted the same from the properties' taxable values in years properly under appeal as a "loss." For several reasons, this argument must fail.

"[L]osses" are defined, in pertinent part, as "[p]roperty that has been destroyed or removed." MCL 211.34d(1)(h)(*i*). Under MCL 211.27a(2)(a), the taxable value of a parcel of property equals "[t]he property's taxable value in the immediately preceding year *minus any losses*, multiplied by the lesser of 1.05 or the inflation rate, plus all additions." Here, no loss occurred because the public-service improvements were neither removed nor destroyed.

Petitioners argue that the value of the public-service improvements was "destroyed or removed" when the larger parcels were divided into the smaller subject parcels, resulting in a separation of the public-service improvements from the properties. This position is contrary to MCL 211.34d(1)(i)(*i*), which provides that the term, "losses," does not include decreased value attributable to splits of property. And petitioners have cited no caselaw in which the value of public service improvements, when such improvements are separated from property as a result of a split, have been considered a "loss" under MCL 211.34d(1)(h)(*i*) that must be deducted from a property's taxable value under MCL 211.27a(2)(a).

In any event, the *Toll Northville II* decision forecloses petitioners' argument. Under *Toll Northville II*,

the value of public-service improvements may not be included in a property's value as an "addition." Including such value is unconstitutional. In a timely filed petition, if a property's taxable value is found to include the value of public-service improvements, the tribunal must reduce the property's taxable value under *Toll Northville II*. If we were to accept petitioners' position, the tribunal would be required to reduce the property's taxable value again, and by the same amount, because the value of public-service improvements constitutes, not only an unconstitutional "addition," but also a "loss." Accordingly, we hold that there was no "loss" within the meaning of the statute in these cases. Rather, in years not properly under appeal, the subject properties' taxable values, which are now finalized, include unconstitutional additions for public-service improvements. The tribunal, however, lacks jurisdiction to reach back into years not under appeal to correct those constitutional errors.[4]

IV. NORTHVILLE'S ADDITIONAL ISSUES

In addition to its jurisdictional argument, Northville argues that the tribunal, by reducing the subject properties' taxable values by the amount of public-service additions, violated the doctrines of collateral estoppel, res judicata, and the law of the case. We decline to address these arguments because we find the tribunal's lack of jurisdiction a sufficient ground to reverse the tribunal's decision adjusting the subject properties' taxable values in a year not under appeal.

Finally, Northville argues that the tribunal clearly erred by calculating the properties' taxable values in-

[4] In light of our determination that there is no jurisdiction, we need not consider Grand Blanc's alternative argument regarding the application of MCL 211.27a(3).

consistently with the parties' stipulations. We conclude that, because the tribunal lacked jurisdiction, it should not have engaged in any recalculation and we reverse any adjustment in taxable values that occurred. Therefore, we need not determine whether the tribunal's recalculation comported with the parties' stipulations.

V. CONCLUSION

Because the taxable values challenged in the instant actions are beyond the tribunal's jurisdiction to revisit, the only remaining question is whether the assessor properly applied the mathematical formula used to determine the subject properties' taxable values in the years properly under appeal. With the exception of the "loss" argument, which we reject, the parties do not dispute that the assessor properly applied the statutory inflationary factor to the subject properties' taxable values from the immediately preceding year to arrive at the subject properties' taxable values in the years properly under appeal.

In Docket No. 295732, the tribunal properly found that it lacked jurisdiction to review the subject properties' 2005 taxable values. It further found that the assessor correctly calculated the subject properties' 2006 taxable values using the allegedly erroneous 2005 taxable values, and that the subject properties' 2007 and 2008 taxable values were also correctly calculated using the previous years' taxable values. Accordingly, it granted Brownstown's motion for summary disposition and dismissed the case. The tribunal did not err.

In Docket No. 296499, the tribunal properly found that it lacked jurisdiction to review the subject properties' 2004 taxable values. It further found that CW failed to show that the assessor misapplied the statutory formula to arrive at the taxable values in tax years

2005, 2006, 2007, and 2008. Accordingly, it affirmed the properties' taxable values for the tax years at issue and ordered the case closed. The tribunal did not err.

In Docket No. 301043, the tribunal properly found that it lacked jurisdiction to review the subject properties' taxable values in a year not under appeal. However, the tribunal then stated:

> The Tribunal finds that the taxable value of the properties as assessed includes an amount for public service improvements. The Tribunal finds that this was found to be unconstitutional and, therefore, prospectively amends the taxable value of the properties at issue to conform to the Supreme Court's decision in *Toll* [*II*] . . . ."

By reducing the properties' taxable values in a year not under appeal, the tribunal violated the jurisdictional statute. In this regard, the tribunal misapplied the law and adopted a wrong principle.

Accordingly, we affirm the orders in Docket Nos. 295732 and 296499. In Docket No. 301043, we reverse the order adjusting the subject properties' taxable values and remand the case back to the tribunal with instructions that it affirm the subject properties' taxable values for the tax years at issue because it lacks jurisdiction to review them. We do not retain jurisdiction.

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

LOCKWOOD v MOBILE MEDICAL RESPONSE, INC

Docket No. 295931. Submitted April 5, 2011, at Lansing. Decided June 7, 2011, at 9:00 a.m.

Kurt A. Lockwood, as personal representative of the estate of Jerri Lockwood, deceased, brought an action in the Saginaw Circuit Court against Mobile Medical Response, Inc., alleging that the defendant was negligent by failing to respond in a timely manner with its ambulance, containing a paramedic and an emergency medical technician, after a call was made to a 911 operator to seek help when the decedent became sick and began having difficulty breathing. Defendant moved for summary disposition on the basis that plaintiff's complaint alleged medical malpractice and plaintiff had failed to meet the procedural requirements to sustain a medical-malpractice action. Plaintiff responded that his claim did not sound in medical malpractice, because he did not question the quality of the medical care provided by defendant but instead alleged ordinary negligence with regard to the reasonableness of defendant's response time. The trial court, Janet M. Boes, J., denied defendant's motion, holding that plaintiff's complaint alleged ordinary negligence and not medical malpractice. Defendant sought leave to appeal the order denying its motion. The Court of Appeals, O'CONNELL and M. J. KELLY, JJ. (BORRELLO, P.J., dissenting), granted leave to appeal in an unpublished order, entered April 28, 2010 (Docket No. 295931).

The Court of Appeals *held*:

1. A medical-malpractice claim is a claim that arises during the course of a professional relationship and involves a question of medical judgment. A claim concerns common knowledge and not a question of medical judgment if lay jurors can evaluate the reasonableness of the defendant's actions using their common knowledge and experience. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented, through expert testimony, with the standards of care pertaining to a medical issue, a medical-malpractice claim is involved.

2. The events at issue in plaintiff's complaint occurred during the course of a professional relationship. The complaint also

alleged a claim involving a question of medical judgment because, although plaintiff did not explicitly define the standard of care governing the duty to timely respond, plaintiff referred to the guidelines promulgated by the agency charged by state law with overseeing the provision of emergency medical services and alleged that defendant violated those guidelines. A lay juror would require the testimony of an expert in order to understand the guidelines and to determine whether defendant's agents acted reasonably under the circumstances. Without an expert, a lay juror would be unable to know, given the nature and the seriousness of the decedent's medical emergency, what a timely response to the 911 call would be. Therefore, the claim involved medical judgment. The issue is not just a matter regarding timing, but concerns what is timely in the context of the deceased's specific medical emergency. Plaintiff's complaint sounds in medical malpractice, not ordinary negligence.

3. Plaintiff's failure to fulfill the procedural requirements for filing a medical-malpractice claim should have resulted in dismissal of the claim with prejudice because plaintiff could not refile the claim since the period of limitations had run. The trial court erred by denying defendant's motion for summary disposition.

Reversed.

RONAYNE KRAUSE, J., dissenting, agreed with the majority that the trier of fact will require expert testimony in order to understand the judgment exercised by defendant in getting its ambulance from its assigned station to the scene of the decedent's collapse, but disagreed that expert medical testimony is required. It is well within the realm of common knowledge and experience that the time it takes to respond to a cardiac arrest is critical. No professional judgment is needed to deduce that it was incumbent on defendant to get to the decedent as quickly as possible. What is not within the realm of common knowledge and experience is whether it was actually possible for defendant's ambulance to get to the decedent faster. The professional judgment exercised by defendant's driver in determining how to get to the decedent as quickly as possible, while outside the common knowledge of jurors, was not medical in nature. A decision that might have some ultimate medical consequences does not necessarily constitute an exercise of actual medical judgment. The order denying defendant's motion for summary disposition should have been affirmed.

1. NEGLIGENCE — MEDICAL MALPRACTICE.

A medical-malpractice claim is one that arises during the course of a professional relationship and involves a question of medical judg-

ment; a medical-malpractice claim is involved if the reasonableness of the defendant's action can be evaluated by a jury only after the jury is presented, through expert testimony, with the standards of care pertaining to a medical issue; a claim concerns common knowledge and not a question of medical judgment if lay jurors can evaluate the reasonableness of the defendant's actions using their common knowledge and experience.

2. NEGLIGENCE — MEDICAL MALPRACTICE — PROFESSIONAL RELATIONSHIPS.

A professional relationship exists, for purposes of a medical-malpractice action, when a defendant licensed health-care professional, licensed health-care facility or agency, or the agents or employees of a licensed health-care facility or agency, are subject to a contractual duty that requires that professional, facility, or agency, or the agents or employees of that facility or agency, to render professional health-care services to the plaintiff (MCL 600.5838a[1]).

Rutledge, Manion, Rabaut, *Terry & Thomas, P.C.* (by *Matthew J. Thomas* and *Paul J. Manion*), for Mobile Medical Response, Inc.

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

K. F. KELLY, J. Defendant, Mobile Medical Response, Inc., appeals by leave granted the trial court's order denying its motion for summary disposition. On appeal, defendant argues that the trial court erred by failing to grant its motion for summary disposition because plaintiff, Kurt Lockwood, as the personal representative of the estate of Jerri Lockwood (the decedent), filed a medical-malpractice complaint without following the procedures governing medical-malpractice claims. We agree and reverse the trial court's order.

I. BASIC FACTS AND PROCEDURE

On September 12, 2004, the decedent was playing softball in the city of Saginaw when she became sick

and began having difficulty breathing. A call was made to a 911 operator, and defendant's ambulance was dispatched to the scene at 1:48 p.m. Defendant's ambulance, containing a paramedic and an emergency medical technician (EMT), was en route to the scene at 1:49 p.m. and arrived at the scene at 1:57 p.m. Upon arrival, the paramedic and EMT found police officers performing CPR on the decedent and discovered that the decedent was "pulseless and apneic." They used a defibrillator on the decedent, intubated her, and transported her in the ambulance to Covenant Hospital, leaving the scene at 2:13 p.m. and arriving at the hospital at 2:25 p.m. Ultimately, the decedent was never revived and she died of arteriosclerotic heart disease.

More than four years later, on August 27, 2009, plaintiff filed a complaint against defendant, alleging that defendant was negligent by failing to timely respond to the 911 call and failing to timely provide transportation for the decedent to the hospital. Plaintiff contended that the decedent died as a result of defendant's failures. Plaintiff asked the trial court to enter a judgment on his behalf.

Instead of filing an answer to plaintiff's complaint, defendant's first responsive pleading was a motion for summary disposition, filed on October 9, 2009. Defendant moved pursuant to MCR 2.116(C)(7) and (8), arguing that plaintiff's complaint should be dismissed with prejudice because plaintiff's complaint alleged medical malpractice and plaintiff failed to meet the procedural requirements to sustain a medical-malpractice action.

On November 16, 2009, plaintiff filed a response in opposition to defendant's motion for summary disposition. Plaintiff denied that his claim sounded in medical malpractice on the basis that his complaint did not

question the quality of medical care provided by defendant. Instead, the complaint merely addressed the reasonableness of defendant's response time, a question that does not involve medical care, but is analogous to questioning the reasonableness of the time it takes for a fire department to respond to a fire. Plaintiff argued that he properly pleaded an ordinary negligence claim.

A hearing was held on defendant's motion for summary disposition on December 7, 2009. Defendant argued that plaintiff's claim sounded in medical malpractice because it related to a professional relationship between the decedent and defendant and the claim concerned a matter of medical judgment. Defendant contended that its response time involved a question outside the common knowledge of the jury because the standard governing response time for EMTs was delineated in guidelines issued by the Saginaw Valley Medical Control Authority (SVMCA) and required explanation by a medical expert. In response, plaintiff posited that there was no case on point finding that a complaint regarding the transportation services of EMTs sounded in medical malpractice. Plaintiff further argued that his complaint specifically excluded any references to medical judgment. According to plaintiff, the only issue pleaded was the reasonableness of the time it took for defendant to respond to the call made to 911. The trial court denied defendant's motion for summary disposition under MCR 2.116(C)(7) and (8), holding that "plaintiff's complaint as pled sounds in ordinary negligence, and not medical malpractice." The trial court issued a written order reflecting its ruling on December 21, 2009.

Defendant filed an application for leave to appeal the trial court's decision on January 8, 2010. This Court, O'CONNELL and M. J. KELLY, JJ. (BORRELLO, P.J., dissent-

ing), granted defendant's application for leave to appeal on April 28, 2010. *Lockwood v Mobile Med Response, Inc*, unpublished order of the Court of Appeals, entered April 28, 2010 (Docket No. 295931).

II. MEDICAL MALPRACTICE

Defendant argues that the trial court erred by denying its motion for summary disposition after holding that plaintiff's complaint sounded in ordinary negligence and not medical malpractice and by failing to dismiss plaintiff's complaint with prejudice on the basis that plaintiff did not comply with the procedural requirements for a medical-malpractice claim and the period of limitations had run. We agree.

A. STANDARD OF REVIEW

A motion for summary disposition is reviewed de novo, and the evidence with regard to each issue is viewed in the light most favorable to the nonmoving party. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). Under MCR 2.116(C)(7), summary disposition should be granted if the claim is barred as a matter of law, including by a relevant statute of limitations. *Vance v Henry Ford Health Sys*, 272 Mich App 426, 429; 726 NW2d 78 (2006). In reviewing a motion for summary disposition alleging that the claim is barred, we consider the affidavits, pleadings, and other documentary evidence presented by the parties and accept as true the plaintiff's well-pleaded allegations except those contradicted by documentary evidence. *Id.* at 429; *Davis v Detroit*, 269 Mich App 376, 378; 711 NW2d 462 (2006).

A motion for summary disposition based on the failure to state a claim under MCR 2.116(C)(8) tests the

legal sufficiency of the complaint on the basis of the pleadings alone. *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002). A motion should be granted under MCR 2.116(C)(8) "only if no factual development could possibly justify recovery." *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007). In reviewing the decision on the motion, we must consider only the pleadings and "accept the factual allegations in the complaint as true . . . ." *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008).

B. MEDICAL MALPRACTICE VERSUS ORDINARY NEGLIGENCE

Defendant contends that plaintiff's claim is, by definition, a medical-malpractice claim and not an ordinary negligence claim. A medical-malpractice complainant cannot avoid the procedural requirements for a malpractice action by framing its claim in terms of ordinary negligence. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999). A medical-malpractice claim is defined as a claim that arises during the course of a professional relationship and involves a question of medical judgment. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). A professional relationship exists when

> a licensed health care professional, licensed health care facility [or agency], or the agents or employees of a licensed health care facility [or agency], [are] subject to a contractual duty that require[s] that professional, that facility [or agency], or the agents or employees of that facility [or agency], to render professional health care services to the plaintiff. [*Id.*]

See MCL 600.5838a(1). A claim concerns common knowledge and not a question of medical judgment if lay jurors can evaluate the reasonableness of the defen-

dant's actions using their common knowledge and experience. *Bryant*, 471 Mich at 423. "If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented [through expert testimony with] the standards of care pertaining to the medical issue . . . , a medical malpractice claim is involved." *Id.*

The events at issue in plaintiff's complaint occurred during the course of a professional relationship. Defendant is a licensed health-care agency under the Public Health Code. MCL 333.20920; MCL 600.5838a(1)(a). The EMT and the paramedic were acting as defendant's agents when they responded to the call.[1] Additionally, the events at issue occurred at a time when defendant had a contractual obligation to provide medical services to the decedent. A 911 call was made and defendant's agents were dispatched to the scene for the purpose of providing medical services to the decedent. Accordingly, the first prong of the test for a medical-malpractice claim, that the claim arose from a professional relationship, was met.

Furthermore, the complaint alleged a claim involving a question of medical judgment. Plaintiff contended that defendant "held itself out as competent, capable and sufficiently equipped and staffed to respond when dispatched to transport qualified medical personnel to

[1] Defendant contends that the paramedic and the EMT that drove in the ambulance to the scene and provided medical care to the decedent were "licensed medical providers" for purposes of medical-malpractice claims. However, for purposes of the tort-reform statute, paramedics and EMTs are not "licensed health care professionals" because they are not licensed under article 15 of the Public Health Code, but are licensed instead under article 17 of the Public Health Code. MCL 600.5838a(1)(b); MCL 333.20950. Still, the paramedic and the EMT were acting as agents of a licensed health-care agency, and therefore, can still be the subjects of a malpractice claim. MCL 600.5838a(1).

an emergency medical situation." Plaintiff alleged in the complaint that defendant breached the duty to timely respond to the 911 call and that the breach resulted in the decedent's "untimely death . . . ." Although plaintiff does not explicitly define the standard of care governing the duty to timely respond, plaintiff refers to the guidelines promulgated by the SVMCA, an agency charged by state law[2] with overseeing the provision of emergency medical services in Saginaw and Tuscola counties, and indicates that defendant violated those guidelines. A lay juror would require the testimony of an expert to understand the SVMCA guidelines and to determine whether defendant's agents acted reasonably under the circumstances. Without an expert, a lay juror would be unable to know what a timely response to a 911 call would be, given the nature and the seriousness of the decedent's medical emergency.

Plaintiff argued at the hearing on the motion for summary disposition that his claim against defendant did not concern defendant's medical judgment, but only involved the response time of the ambulance. He analogized his claim to challenging the time it takes a fire department to respond to a fire. We disagree, and conclude that this claim involves medical judgment. By citing the SVMCA guidelines in the complaint, plaintiff conceded that ambulance response time is governed by a professional standard of care and not by the ordinary-person standard of care. Moreover, whether defendant was timely in arriving at a scene depends in large part on the nature of the medical emergency. Whether an ambulance arrives in a timely manner when the call concerns a broken bone is a very different question from whether an ambulance is timely when the medical emergency is a cardiac arrest. As a result, the issue in

[2] See MCL 333.20919.

plaintiff's complaint was not just a matter of timing, but concerns what is timely in the context of the decedent's specific medical emergency. Timeliness within the context of a medical emergency would not be easily understood and evaluated by lay jurors without expert testimony regarding the medical issue. As a result, plaintiff's complaint sounds in medical malpractice, not ordinary negligence.

C. PROCEDURAL REQUIREMENTS

Defendant further argues that because plaintiff's complaint amounted to a medical-malpractice claim, plaintiff was required to meet the procedural requirements for filing a medical-malpractice claim, including the provision of notice and the filing of an affidavit of merit. According to defendant, plaintiff's failure to conform to those procedural constraints should have resulted in dismissal of the claim. We agree.

Generally, a medical-malpractice claimant must provide to proposed defendants notice of his or her intent to sue at least 182 days before commencing an action. MCL 600.2912b(1); *Driver v Naini*, 287 Mich App 339, 345; 788 NW2d 848 (2010). A medical-malpractice claim may not be asserted against a health professional or health facility unless written notice is provided before the action is commenced. MCL 600.2912b(1); *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 685; 684 NW2d 711 (2004). Generally, the notice will toll the applicable statute of limitations. *Id.* at 686. The sanction for the failure to give notice of intent to claim medical malpractice is dismissal of the complaint without prejudice. *Dorris*, 460 Mich at 47.

In addition to the notice of intent, a plaintiff alleging medical malpractice or the plaintiff's attorney must file with the complaint "an affidavit of merit signed by a

health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness . . . ." MCL 600.2912d(1). The affidavit of merit must certify the following:

> [T]he health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
>
> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [MCL 600.2912d(1).]

"When a medical malpractice complaint is filed without an affidavit of merit, the complaint is ineffective and fails to toll the limitations period." *Vanslembrouck v Halperin*, 277 Mich App 558, 561; 747 NW2d 311 (2008). Moreover, the sanction for failing to file an affidavit of merit is dismissal without prejudice. *Dorris*, 460 Mich at 47.

Plaintiff failed to provide any notice of intent to sue defendant, failed to wait the statutory period before filing his complaint against defendant, and failed to file an affidavit of merit with his complaint. As a result, plaintiff could not assert his medical-malpractice claim and did not toll the relevant statute of limitations, and defendant was entitled to dismissal with prejudice. Generally, in cases where the statute of limitations has not run, a plaintiff who fails to file notice of intent to sue and/or an affidavit of

merit is entitled to dismissal without prejudice and is allowed to file a notice of intent to toll the statute of limitations and then refile a complaint with the attached affidavit. *Id.* However, plaintiff was unable to refile his complaint because the applicable period of limitations had run. Generally, the period of limitations for a medical-malpractice claim is two years. MCL 600.5805(6). Still, the period can be extended for the personal representative of a decedent. MCL 600.5852. A personal representative of a decedent must file a medical-malpractice claim within two years of receiving his or her letters of authority, but not more than three years after the original period of limitations has run. MCL 600.5852. The original period of limitations ran on September 12, 2006, and more than three years passed before defendant filed its motion for summary disposition. As a result, at the time defendant's motion for summary disposition was filed on October 9, 2009, plaintiff's claim was barred as a matter of law under MCR 2.116(C)(7) by the statute of limitations, and the trial court erred by denying defendant's motion for summary disposition.

Reversed. We do not retain jurisdiction.

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

RONAYNE KRAUSE, J. (*dissenting*). I respectfully dissent. The majority in this matter has very well-founded and appropriate concerns, both with regard to the ultimate merits of this case and with regard to the policy implications involved. I wholeheartedly agree that the trier of fact will require expert testimony in order to understand any judgment exercised by defendant in getting its ambulance from its assigned station to the scene of the decedent's collapse. But I cannot

comprehend how the majority concludes that the trier of fact will require expert *medical* testimony to do so.[1]

I agree with the majority's recitation of the test for whether a claim sounds in medical malpractice. There are two "defining characteristics" of medical-malpractice claims: the breach occurred within a "professional relationship" and "the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). I take no issue with the majority's conclusion that a professional relationship existed here. Furthermore, I agree that this claim raises questions of *some* kind of "judgment beyond the realm of common knowledge and experience." As such, *some* kind of expert testimony certainly will be required.[2] I cannot glean from the pleadings or the record any support for the conclusion that this claim raises questions of *medical* judgment.

In *Bryant*, our Supreme Court discussed whether various of the plaintiff's claims sounded in medical

[1] Plaintiff will likely need expert medical testimony to show cause-in-fact, i.e., whether the decedent would have survived if she had received more prompt care. Medical responders were *already* on the scene well before defendant's ambulance arrived, so it is doubtful that plaintiff could do so. But under the present procedural posture of this case, that issue is not before us, and the gravamen of a medical-malpractice claim is the need for expert medical testimony to explain the allegedly breached standard of care, not causation. If, in fact, plaintiff attempts to introduce expert medical testimony for anything other than causation, the trial court should not allow this into evidence. But this matter is before us on a motion for summary disposition pursuant to MCR 2.116(C)(8), so we are required to believe what plaintiff argued below: that there would be no expert medical testimony because there is no need to exercise medical judgment in driving an ambulance carefully.

[2] It would therefore be a false dichotomy to suggest that this claim must require *either* medical judgment *or* lay knowledge.

malpractice or ordinary negligence; it found one claim completely unrecognized by Michigan law, two claims to sound in medical malpractice, and one claim to sound in ordinary negligence. The two medical-malpractice claims were found to sound in medical malpractice because training staff to evaluate a patient's risk of asphyxia and checking facilities for a risk of asphyxia required specialized and complex knowledge of the pros and cons that varied from person to person under various circumstances. *Bryant*, 471 Mich at 426-430. In contrast, the claim that was found to sound in ordinary negligence entailed the defendant's receiving definite information that a specific patient was actually at risk, whereupon the defendant literally did nothing at all about it; no professional judgment was necessary for the fact-finder to determine that the defendant should have done *something*. *Id*. at 430-432.

Here, I believe that it is well within the realm of common knowledge and experience that the response time to a cardiac arrest is critical. No professional judgment of any kind is needed to deduce that it was incumbent on defendant to get to the decedent as quickly as possible. What is *not* within the realm of common knowledge and experience is whether *it actually was possible* for defendant's ambulance to get to the decedent any faster. In the real world, there are a multitude of considerations facing the driver of an emergency vehicle. Are there, for example, automatic traffic-signal-changing devices in the locality? How quickly does other traffic on the road really yield to emergency vehicles? In the absence of expert testimony on the topic of safe and competent operation of heavy emergency vehicles, it would invite chaos to leave the trier of fact to speculate with regard to whether defendant's driver should have, for example, gone through a

red light or taken a corner faster.[3]

But those judgments facing defendant *were not medical in nature*.[4] It would already have been established, and indeed obvious, that defendant's driver needed to get to the destination as quickly as possible. The issue is whether defendant's driver *did* get the ambulance to the decedent as quickly as possible, and so any judgments he or she exercised in the process pertain to such issues as driving skills, proper use of whatever emergency-signaling or traffic-control devices the ambulance had available, and, to be sure, professional judgments regarding whether an ambulance could safely execute maneuvers under the weather or traffic conditions then facing it. While these judgments are outside the common knowledge of jurors, they are simply not medical in nature.

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[3] Plaintiff asserts that defendant's tardiness "also violated the protocol, guidelines, and procedures dealing with dispatching and responding to emergency medical transportation calls," a reference to the provider agency standards issued by the Saginaw Valley Medical Control Authority. Such guidelines may be relevant to a determination of the applicable standard of care, although they do not per se establish it. See *Jilek v Stockson*, 289 Mich App 291, 306-310, 314; 796 NW2d 267 (2010). They *might* require a medical expert to interpret and explain them. But the only relevant portion of the provider agency standards here is that at least 90 percent of responses to life-threatening emergencies must be within 8 minutes and 59 seconds, which defendant satisfied. I see no reason why a lay juror would require expert medical testimony to understand this requirement or explain whether defendant acted reasonably in light of it.

[4] This is, of course, not to say that a claim involving the responsiveness of an ambulance operator to a reported medical emergency can never be a medical-malpractice claim. For example, if defendant had received multiple simultaneous emergency reports and had to decide the order in which to respond by evaluating the reports' comparative abilities to absorb a delay. Or if the ambulance crew were engaged in some other activity at the time of the dispatch—from purchasing coffee to actively treating another client—and had to decide whether they had time to finish before responding. In other words, there could certainly be situations in which an ambulance operator will need to exercise some kind of medical judgment. But none was alleged here.

According to the majority's reasoning, if a doctor who was on-call at a hospital chose to purchase a four-cylinder family car instead of an eight-cylinder sports-car or sport-utility vehicle, and was therefore not capable of getting from his or her home to the hospital as quickly or through the same road conditions in an emergency, the doctor's *decision to buy a particular model car* would potentially constitute medical malpractice. Likewise, an insurance company's delay in processing a claim, which can have serious consequences to an insured's ability to obtain medical care, could constitute medical malpractice. Alternatively, perhaps the majority intends to create a new legal rule that any matter involving an ambulance involves medical malpractice *per se*. Either way, I simply cannot agree that a decision that might have some ultimate medical consequences necessarily constitutes an exercise of actual medical judgment.

I would affirm.

PEOPLE v ANDERSON

Docket No. 300641. Submitted May 10, 2011, at Grand Rapids. Decided June 7, 2011, at 9:05 a.m. Vacated and remanded for reconsideration, 492 Mich 851.

Ted A. Anderson, an unregistered medical-marijuana user, was charged in the 8th District Court with manufacturing marijuana after the police discovered 15 small marijuana plants in a closet of defendant's home and an additional 11 small plants growing in a garden behind his garage. Defendant moved in the Kalamazoo Circuit Court for dismissal of the charge, citing the affirmative defense provided by § 8 of the Michigan Medical Marihuana Act (MMA), MCL 333.26428. The court, J. Richardson Johnson, J., denied the motion, concluding that defendant had failed to establish that the amount of marijuana in his possession was reasonably necessary to ensure the uninterrupted availability of the marijuana he needed to treat his chronic back pain, MCL 333.26428(b)(2). The court further held that because defendant had elected to pursue dismissal by motion and had failed to establish the affirmative defense provided by § 8, he was barred from presenting that defense again at trial. Defendant appealed by delayed leave granted.

The Court of Appeals *held*:

1. Contrary to defendant's assertion, the trial court did not require him to produce an expert witness to testify regarding the amount of marijuana reasonably necessary to ensure the uninterrupted availability of the marijuana he needed to treat his chronic back pain. Accordingly, defendant's argument that the trial court erred by requiring him to produce such testimony failed.

2. The failure to establish the elements of the affirmative defense provided by § 8 of the MMA at a pretrial hearing on a motion to dismiss does not necessarily preclude a defendant from reasserting that defense at trial. However, the court may bar the assertion of the defense if the evidence is undisputed and no reasonable jury could find that the defendant established the elements of the affirmative defense. In this case, defendant did not dispute that he had more than the 12 plants permitted under the MMA and that the plants were not kept in an enclosed, locked facility as required by § 4 of the MMA, MCL 333.26424(a). In light

of those facts, no reasonable jury could conclude that defendant met the elements of the affirmative defense, and the trial court did not err by barring defendant from asserting the defense at trial.

Affirmed.

M. J. KELLY, J., concurred, agreeing that the trial court did not err when it prohibited defendant from asserting the affirmative defense provided by § 8 of the MMA at trial in light of the fact that defendant could not establish the elements of that defense as a matter of law, but further asserted that it was necessary to address defendant's argument that the trial court erred by requiring him to present expert testimony in order to establish the reasonableness of the amount of marijuana that he possessed. He concluded that even if the trial court erred by requiring defendant to present such expert testimony, the court reached the correct result by denying defendant's motion to dismiss because defendant had failed to comply with the MMA's limitations on the number of marijuana plants a patient may keep and the requirement that those plants be kept in an enclosed, locked facility.

CONTROLLED SUBSTANCES — MEDICAL MARIJUANA — CRIMINAL DEFENSES — MOTIONS TO DISMISS.

The failure to establish the elements of the medical-purpose defense to a marijuana-related charge under the Michigan Medical Marihuana Act at a pretrial hearing on a motion to dismiss does not necessarily preclude a defendant from reasserting that defense at trial; however, the court may bar the assertion of the defense at trial if the evidence is undisputed and no reasonable jury could find that the defendant established the elements of the affirmative defense (MCL 333.26428).

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

John Targowski for defendant.

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM. In his delayed application for leave to appeal, defendant raises two alleged errors on the part

of the trial court relative to the denial of his motion to dismiss. First, he argues that the trial court erred in *requiring* him to produce expert testimony in support of his defense to the charges, and second, that he should not have been precluded from raising his statutory defense at trial even though the trial court rejected the defense as factually unsupported after a pretrial evidentiary hearing. As set forth below, we agree with, and therefore adopt as a unanimous opinion of this Court, parts I, II(A), and II(C)(3) of Judge M. J. KELLY's concurring opinion. That is, we agree with Judge KELLY's analysis and conclusion concerning defendant's second argument, i.e., that under these facts the trial court correctly forbade defendant from raising his defense at trial, but we provide an alternative explanation for why defendant cannot prevail on his first argument. Consequently, for the reasons stated below and in parts I, II(A), and II(C)(3) of Judge KELLY's opinion, we affirm.

As we noted, defendant's first argument is that the trial court erred in requiring him to produce expert testimony to establish his defense under MCL 333.26428.[1] This argument cannot be sustained, however, because the factual underpinning is incorrect. As the prosecution notes in its brief on appeal, the trial court did not *require* defendant to produce an expert in order to prevail on his defense. Instead, as the trial court's opinion makes clear, the trial court indicated that an expert would have been able to provide *relevant* testimony. In denying defendant's motion, the court considered both defendant's testimony and the testi-

[1] Although our concurring colleague would decide this issue on an alternative ground, we opt for deciding the issue raised by defendant and briefed by the parties. *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 302-303; 565 NW2d 650 (1997); *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 730-731; 344 NW2d 788 (1984).

mony of his family physician, but rejected both as either not being credible (defendant) or not being qualified to testify on the subject (defendant's physician). In the end, however, the court held that in the absence of relevant expert testimony and any other credible testimony supporting the defense, defendant could not establish a defense:

> The record is devoid of any explanation why growing marihuana outdoors in the open and having marihuana in amounts well in excess of the presumptive limit was reasonably necessary to treat Defendant's back pain. The court holds that expert testimony is relevant on this issue. This is not something a lay person would know. MRE 702. The Defendant's opinion on what he had for self-treatment is not creditable. The court finds on the proofs presented that his family doctor was not qualified to offer an opinion on this question, because there is no evidence she has experience working with patients for whom she has recommended marihuana, including experience with dosage. Her opinion is unpersuasive. There is no other evidence on this issue except the presumption within the [Michigan Medical Marihuana] Act. See MRE 301. Because the court has concluded the amount of marihuana exceeds the amount reasonably necessary, it need not resolve whether in fact the Defendant otherwise has met the requirement for a section 8 defense, or to what extent expert testimony is relevant to the other two requirements of section 8 [MCL 333.26428].

We see nothing in this opinion where the trial court ruled as a matter of law that defendant's motion was being denied because of the absence of an expert who was qualified to testify about the amount of marijuana reasonably necessary for defendant's medical condition. Rather, the trial court analyzed the other evidence presented by defendant, i.e., his testimony and that of his physician, and after rejecting that evidence as well as recognizing a lack of expert testimony, denied defen-

dant's motion. Hence, defendant's assertion that the trial court required him to produce an expert was incorrect, and as that was the basis for his argument, he cannot prevail.[2]

Affirmed.

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

M. J. KELLY, J. (*concurring*). In this interlocutory appeal, defendant, Ted Allen Anderson, appeals by leave granted the trial court's opinion and order denying his motion to dismiss the prosecution's charge that he unlawfully manufactured marijuana, see MCL 333.7401(1) and (2)(d), and barring him from arguing or presenting evidence that he had a valid defense to that charge under the Michigan Medical Marihuana Act (the MMA),[1] MCL 333.26421 *et seq*. On appeal, this Court must determine whether the trial court erred to the extent that it required Anderson to prove his defense under MCL 333.26428 with expert testimony and whether it erred when it barred Anderson from presenting that defense at his upcoming trial. I conclude that Anderson could not—as a matter of law—establish the elements of the defense provided under MCL 333.26428. As such, the trial court did not err when it denied Anderson's motion and did not err when it prohibited Anderson from presenting that defense at his trial. For this reason, I would affirm the trial court's order.

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[2] In essence, defendant has presented a hypothetical issue, as the trial court never held that an expert was required. We generally refrain from deciding hypothetical issues. *People v Turner*, 123 Mich App 600, 604; 332 NW2d 626 (1983).

[1] Although the statutory provisions at issue refer to "marihuana," by convention this Court uses the more common spelling—"marijuana"—in its opinions.

I. BASIC FACTS AND PROCEDURAL HISTORY

Anderson testified that he had a degenerative back condition and that, in 1997, he further injured his back while working as a baker. He sought treatment through his family physician, Shannon McKeeby, M.D.

Anderson said that his back pain made it difficult to get up and down stairs and bend over and pick things up. He could not even pick up his grandchildren. He exacerbated his condition with a slip and fall at work in 2007. The fall worsened his condition to the point that he had to quit his job. He testified that, after the fall, he pretty much stopped gardening and it was even hard to get in and out of the shower. He said he was in "a lot more pain . . . ." Although he used methadone for the pain, nothing helped with his sciatica. When his sciatic nerve got impinged on it sent a shooting pain down his leg "all the way to my foot" and "it feels like . . . I'm standing on a hot poker."

McKeeby testified that she had been treating Anderson at her family practice for at least 10 years. In addition to her general practice, she treated Anderson for chronic back pain. She stated that an MRI revealed that Anderson had a bulging disc in his back and that the disc was impinging on his nerves. She treated Anderson using different "modalities," but he was still in "significant pain," even with the medications that she was using to "try and control his pain . . . ." She said that Anderson used methadone and Vicodin to control his back pain and that he had used MS Contin and Percocet in the past.

McKeeby said that, on June 4, 2009, Anderson came to an appointment for "general issues." He discussed the new medical marijuana law and said it "was something that he would like to look into." McKeeby stated that Anderson had not, before that appointment, ever said that

he used marijuana. He asked her whether he might be a "good candidate" for using marijuana medically to treat his pain. After explaining the "risk and possible benefits," McKeeby expressed her opinion that he might be a good candidate. McKeeby agreed that she unequivocally expressed her opinion to Anderson at the June 2009 appointment that marijuana "was a therapeutic modality" for his pain. Because she was prevented from authorizing his medical use of marijuana under hospital policy, she referred Anderson to a pain clinic for evaluation of possible medical use of marijuana. However, after she discovered that the pain clinic did not offer that kind of service, she left Anderson to his own devices in pursuing that type of treatment. McKeeby agreed that it would be reasonable for Anderson to maintain a three-month supply of marijuana for his treatment.

Anderson testified that marijuana relaxes him and gives him relief from his chronic pain: "I could play catch. I could bend down a lot easier and pick things up." He also could stand longer without sciatica.

Georgeann Ergang testified that she worked for the Kalamazoo Township Police Department and that she was assigned to the Southwest Enforcement Team, which is a narcotics unit.[2] Ergang said that she went to Anderson's residence on June 9, 2009. An officer had earlier gone to Anderson's home to investigate a possible break-in that Anderson's estranged wife had reported. Ergang said that the other officer called her after he discovered what appeared to be marijuana plants.

Ergang searched Anderson's home with his estranged wife's permission and discovered 15 marijuana plants under a grow light in a closet in an upstairs

[2] Ergang testified at Anderson's preliminary examination and at the hearing on his motion to dismiss.

bedroom. She described the plants as starter plants or seedlings that ranged from three to six inches in height. Ergang testified that pictures of the growing operation in the bedroom seemed to show that the light was on. She also said that she did not turn on the light. She found a small plastic bag of marijuana and a bag with clippings of leaves and stems from marijuana plants. Ergang found an additional 11 marijuana plants growing in a garden behind Anderson's garage.

Anderson's wife testified that she went to his house to feed and water his animals while he was out of town. When she arrived, she discovered that the house had been burglarized and called the police. She did not know that Anderson had marijuana in the house or outside.

Ergang interviewed Anderson on June 15, 2009. She said that she asked him about the marijuana and he admitted that the plants were his. He explained that he used marijuana for his medical condition. He also said that he had "been smoking marijuana for a long time and that he decided that he would grow his own . . . ."

Anderson testified that he voluntarily spoke with Ergang and explained to her that he used marijuana to treat his back pain. He said he had some marijuana buds for smoking. He stated that he had tried to get some marijuana clones to grow in his closet, but he abandoned those plants and left them to die by turning off the grow light. He noticed that when he returned from his trip, the grow light was on again. He did have eight or nine plants growing outside. The outdoor plants were about three to four inches in height, and he did not expect to be able to harvest them until they were "three and four feet tall," which would not be until late fall. Anderson said that the medical benefits are from the female plant and the buds produce the most active

ingredients, with the leaves providing little active medical benefit. He expected only half of his plants to be female after maturation.

Anderson admitted that he had about 9 grams of marijuana that could be smoked. He explained that he needs to smoke about four pipes a day with about a quarter of a gram in each pipe. Therefore, he continued, 9 grams is about a one-week supply. He also admitted that he had about 110 grams of leaf cuttings. He said that he cannot smoke the leaves, but he does eat them by grinding them up and adding them to his Rice Krispies Treats. He said he eats three to four treats a day therapeutically.

The prosecutor ultimately charged defendant with manufacturing marijuana in violation of MCL 333.7401(1) and (2)(d)(*iii*). After a March 2010 preliminary examination, the district court bound Anderson over for trial.

In April 2010, Anderson moved under MCL 333.26428 to dismiss the charge of manufacturing marijuana. The trial court held a hearing on Anderson's motion over two days in late May and early June 2010. At the close of proofs, Anderson's trial counsel argued that the evidence showed that Anderson had a qualifying disability and had gotten a statement from his physician that she believed the medical use of marijuana might be useful for the treatment of his pain. He also argued that the evidence showed that Anderson possessed less than a three-month supply of useable marijuana in the form of buds and leaf cuttings and that the outdoor plants would not be ready for approximately three months. Because McKeeby had testified that it was reasonable for him to maintain a three-month supply, Anderson's counsel argued that the evidence clearly demonstrated that Anderson had es-

tablished that he had a reasonable amount of marijuana as required under MCL 333.26428. For that reason, he argued, Anderson was entitled to have the charges against him dismissed.

In August 2010, the trial court issued its opinion and order denying Anderson's motion to dismiss because he had failed to establish the elements of the defense under MCL 333.26428. In its opinion, the trial court stated that Anderson "elected his remedy" by filing his motion to dismiss. Because he failed to show at the hearing that he needed an amount of marijuana in excess of the presumptively reasonable amounts described under MCL 333.26424 and, with regard to the outdoor plants, failed to show that the plants were in an enclosed locked facility, he would not be permitted to present that defense under MCL 333.26428. In finding that Anderson had failed to establish the reasonableness of the amount of marijuana that he had, the trial court concluded that Anderson had to present expert testimony as to the amount of marijuana that was reasonably necessary to maintain an uninterrupted supply for his treatment.

After the trial court denied his motion for reconsideration, Anderson applied for leave to appeal the trial court's order and asked this Court to stay the lower court proceedings. On October 21, 2010, this Court granted leave to appeal and stayed the lower court proceedings.[3]

II. AFFIRMATIVE DEFENSES UNDER THE MMA

A. STANDARDS OF REVIEW

On appeal, Anderson argues that the trial court erred when it determined that he had to establish through an

[3] *People v Anderson*, unpublished order of the Court of Appeals, entered October 21, 2010 (Docket No. 300641).

expert that the amount of marijuana he had was reasonably necessary to treat his condition. He also argues that the trial court erred when it determined that, because he failed to establish his right to have the charges dismissed under MCL 333.26428 at the hearing on his motion to dismiss, he was also precluded from presenting a defense under that statutory provision at trial. This Court reviews de novo whether the trial court properly interpreted and applied the MMA to the facts of this case. See *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). This Court similarly reviews de novo additional questions of law, such as whether a trial court properly determined that a defendant cannot present a particular affirmative defense on the ground that the defendant failed to establish a factual basis for asserting the defense. See *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

B. SUMMARY OF THE MMA

As this Court has already noted, the MMA does not legalize the possession, manufacture, distribution, or use of marijuana. *People v King*, 291 Mich App 503, 507-509; 804 NW2d 911 (2011); see also *People v Redden*, 290 Mich App 65, 92-93; 799 NW2d 184 (2010) (opinion by O'CONNELL, P.J.) (noting that the MMA did not repeal "any drug laws" contained in the Public Health Code and that, as such, persons using marijuana are still "violating the Public Health Code"); MCL 333.26422(c) (recognizing that federal law still prohibits the use of marijuana). Instead, it prescribes a very limited set of circumstances under which certain persons involved in the use of marijuana for the treatment of serious or debilitating medical conditions may avoid prosecution under state law. See MCL 333.26422(b) (providing that the practical effect of the law is to

protect "from arrest the vast majority of seriously ill people who have a medical need to use marihuana"). Stated another way, although admitting that he or she has committed a criminal offense involving marijuana, a defendant may nevertheless establish the elements of the defense provided under the MMA and avoid criminal liability. See *People v Dupree*, 284 Mich App 89, 99-100; 771 NW2d 470 (2009) (opinion by M. J. KELLY, J.) (noting that an affirmative defense is one by which the defendant admits the commission of a crime, but seeks to justify, mitigate, or excuse the crime).

Section 7 of the MMA provides that the "medical use" of marijuana, generally, "is allowed" in Michigan, but only "to the extent that it is carried out in accordance with the provisions of this act." MCL 333.26427(a). The "medical use" of marijuana is very broadly defined to include "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana" as long as those activities are "to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(e). Section 7 establishes that the MMA applies to almost every conceivable activity that might be undertaken in furtherance of the cultivation, processing, distribution, and use of marijuana as long as the activities are for medical use. Nevertheless, by defining "medical use" to include activities that are "to treat or alleviate a *registered* qualifying patient's" medical condition or symptoms, the definitional section appears to limit the application of the defenses to activities taken by or for *registered* patients.[4] MCL

[4] The statutory provisions dealing with the registration of patients and the administrative rules governing the registration of patients are found at MCL 333.26425 and MCL 333.26426.

333.26423(e) (emphasis added). In addition, § 7 provides that certain actions involving marijuana are not permitted under the act even though those uses might otherwise qualify as a medical use of marijuana. For example, a person may not undertake "any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice." MCL 333.26427(b)(1). A person is also not permitted to possess or engage in the medical use of marijuana in a school bus; on the grounds of a preschool, primary, or secondary school; or in a correctional facility or to smoke marijuana on public transportation or in any public place. See MCL 333.26427(b)(2) and (3). Accordingly, § 7 establishes the base-line availability of the MMA's immunities and defenses: the activity must be for a "medical use," must be carried out "in accordance with the provisions of this act," and must not fall into one of the excepted categories set forth in MCL 333.26427(b).

The MMA provides immunity under § 4, MCL 333.26424, and an affirmative defense under § 8, MCL 333.26428. Section 4 provides the criteria for when a "qualifying patient" shall not be subject to penalties for the medical use of marijuana:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of

> seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. [MCL 333.26424(a).]

In order to qualify for this immunity, a person must be a "qualifying patient," must have been issued and possess a "registry identification card," and must not have more than "2.5 ounces of useable" marijuana or more than 12 marijuana plants.

Section 4 provides similar immunity to a "primary caregiver" who has been issued and possesses a registry identification card for his or her acts taken to assist a "qualifying patient to whom he or she is connected through the [Department of Community Health's] registration process with the medical use of marihuana in accordance with this act . . . ." MCL 333.26424(b). A primary caregiver is, likewise, limited to 2.5 ounces of useable marijuana for each qualifying patient and to no more than 12 marijuana plants per qualifying patient, which plants must be kept in an enclosed, locked facility. MCL 333.26424(b)(1) and (2). Section 4 also provides that certain other persons shall not be subject to "arrest, prosecution, or penalty" for actions taken with regard to the medical use of marijuana. See MCL 333.26424(f) (stating the conditions under which a physician shall not be subject to penalties); MCL 333.26424(g) (stating under what conditions a person who supplies marijuana paraphernalia shall not be subject to penalties). Further, there is a statutory presumption that a qualifying patient or primary caregiver "is engaged in the medical use of marihuana in accordance with this act" if the qualifying patient or caregiver is in possession of a registration card and in possession of an amount of marijuana that "does not exceed the amount allowed under this act." MCL 333.26424(d). It is noteworthy that § 4 does not provide

a mechanism for a person to challenge his or her arrest, prosecution, or subjection to a penalty in contravention of the prohibitions set forth in § 4; rather, the only provision for asserting an actual defense is found under § 8 of the MMA.

Under § 8, a "patient" or a "patient's primary caregiver" "may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana . . . ." MCL 333.26428(a). However, the use of the medical-purpose defense is limited to those situations in which the patient or caregiver shows all the following:

> (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
>
> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating condition; and
>
> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition. [MCL 333.26428(a).]

Moreover, a person "may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in [MCL 333.26428(a)]." MCL 333.26428(b).

C. ASSERTING A MEDICAL PURPOSE DEFENSE UNDER § 8

In this case, Anderson moved under § 8(b) for dismissal of the charge that he unlawfully manufactured marijuana. After a hearing on the merits, the trial court determined that Anderson had failed to establish the elements stated under § 8(a); namely, that he failed to establish that the amount he had in his possession was "reasonably necessary to ensure the uninterrupted availability" of the marijuana he needed to treat his medical condition or symptoms. The trial court also found that he had failed to meet the elements because the evidence showed that he did not keep the plants in an enclosed, locked facility, as required under § 4. For these reasons, the trial court denied Anderson's motion for dismissal of the charge against him. In addition, the trial court determined that, because Anderson had elected to pursue dismissal by motion and failed to establish his § 8 defense, he was barred from presenting that defense again at trial. On appeal, Anderson challenges whether he needed an expert witness to establish what constituted a reasonable amount of marijuana and challenges the propriety of the trial court's ruling that he was categorically barred from presenting his defense because his motion was unsuccessful.

1. THE ELEMENTS OF A § 8 DEFENSE

Before turning to whether the trial court properly determined that Anderson had to present expert testimony to establish whether he had an amount of mari-

juana that "was reasonably necessary to ensure the uninterrupted availability" of marijuana for his treatment, MCL 333.26428(a)(2), it is necessary to first determine the exact parameters of the elements that Anderson had to "show" in order to properly assert a § 8 defense. If Anderson could not establish the elements of the defense stated under § 8 without regard to the reasonableness of the amount of marijuana and marijuana plants that he possessed, then this Court will have no need to determine whether his assertion of this defense also failed because he had to present expert testimony to establish the reasonableness of the amount of marijuana and marijuana plants that he possessed under § 8(a)(2).

As already explained, § 7 provides the baseline criteria for the assertion of immunity or a defense under the MMA. In order to assert immunity or a defense, a person must generally show that the otherwise prohibited activity was for a "medical use," was carried out "in accordance with the provisions of [the MMA]," and did not fall into one of the excepted categories stated under MCL 333.26427(b). Because a "medical use" is defined as an action taken or related to the treatment or alleviation of "a *registered* qualifying patient's" medical condition or associated symptoms, MCL 333.26423(e) (emphasis added), it would appear that Anderson could not assert a § 8 defense, as a matter of law, because he was not a registered qualifying patient or caregiver at the time he manufactured the marijuana at issue. However, notwithstanding the limitations set forth in § 7, the provisions for the defense set forth in § 8 appear to apply broadly to conduct that is not for a "medical use."

Section 8 clearly refers to a "patient" rather than a "qualifying patient" and states that the "patient" may assert the "medical purpose" for using the marijuana as a

defense rather than "medical use." MCL 333.26428(a). Hence, § 8 appears to provide a catchall defense for the use of marijuana for a medical purpose—even for persons who are not registered. And, indeed, this Court has specifically held that a defendant asserting a § 8 defense need not be registered in order to assert the defense. *Redden*, 290 Mich App at 81-82.[5]

The defendants in *Redden* were charged with manufacturing marijuana after they were discovered with 1½ ounces of marijuana and 21 marijuana plants. *Id.* at 68. At their preliminary examination, the defendants asserted a § 8 defense and asked the district court to dismiss the charges against them. *Id.* at 69. The district court agreed that § 8 applied to the facts of their cases, even though the defendants did not have valid registration cards at the time of their arrest, and dismissed the charges against them. *Id.* at 73-75. The district court reasoned that the amount of marijuana found in the defendants' possession was presumptively reasonable because it was less than the amount specified under § 4. *Id.* at 74. The circuit court disagreed with the district court's decision to dismiss and reinstated the charges because, it concluded, the record was insufficiently developed regarding whether the defendants had established the § 8 defense. *Id.* at 75-76.

On appeal, this Court first addressed the prosecution's argument that the registration requirement stated under § 4 applied to a defense asserted under § 8 because § 8(a) incorporated § 7, which in turn required compliance with the other provisions of the act. The Court in *Redden* rejected the contention that the limi-

[5] Although the Court in *Redden* stated that a registered patient could assert a defense under § 4, there is no actual defense provided under § 4. See *Redden*, 290 Mich App at 82. Indeed, there are no provisions within the MMA to assert the immunity provided under § 4.

tations stated under § 4 generally applied to the assertion of a defense under § 8:

> However, as defendants argue, this position ignores that the [MMA] provides two ways in which to show legal use of marijuana for medical purposes in accordance with the act. Individuals may either register and obtain a registry identification card under § 4 or remain unregistered and, if facing criminal prosecution, be forced to assert the affirmative defense in § 8.
>
> The plain language of the [MMA] supports this view. Section 4 refers to a "qualifying patient who has been issued and possesses a registry identification card" and protects a qualifying patient from "arrest, prosecution, or penalty in any manner . . . ." MCL 333.26424(a). On the other hand, § 8(a) refers only to a "patient," not a qualifying patient, and only permits a patient to "assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana . . . ." MCL 333.26428(a). Thus, adherence to § 4 provides protection that differs from that of § 8. Because of the differing levels of protection in §§ 4 and 8, the plain language of the statute establishes that § 8 is applicable for a patient who does not satisfy § 4. [*Id.* at 81.]

The Court also found it significant that the ballot proposal "explicitly informed voters that the law would permit registered *and* unregistered patients to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana." *Id.* at 82. For this reason, the Court in *Redden* concluded that the "district court did not err by permitting defendants to raise the affirmative defense even though neither satisfied the registry-identification-card requirement of § 4." *Id.*

After concluding that the defendants did not have to be registered in order to assert a defense under § 8, the Court in *Redden* turned to the propriety of the circuit court's decision to reinstate the charges against the defendants. The Court first noted that the existence of

an affirmative defense is typically to be considered by a jury at trial. *Id.* at 84, citing *People v Waltonen*, 272 Mich App 678, 690 n 5; 728 NW2d 881 (2006). However, the Court acknowledged that when a defense is complete and there are no conflicting facts on the defense, it could be argued that there "would be no probable cause to believe a crime had been committed." *Redden*, 290 Mich App at 84. Nevertheless, because there were issues of fact that had to be resolved by a jury, the Court concluded that the circuit court did not err by reinstating the charges and binding the defendants over for trial. *Id.*

Accordingly, under *Redden*, a person may assert a § 8 defense even if he or she does not have a valid registration card, as required under § 4. But it must be noted that, in reaching this conclusion, the Court in *Redden* did not directly address whether any of the other limitations stated under § 4 apply to the assertion of a defense under § 8. Indeed, the Court in *Redden* reached its conclusion on the basis of the reference to "patient"—as opposed to "qualifying patient"—in § 8 and the fact that the ballot language indicated that the MMA provided a defense to unregistered patients. As such, the holding in *Redden* did not preclude application of the remaining limitations stated in § 4 to the assertion of a defense under § 8.

Under § 8(a), a person may "assert" a "medical purpose" defense to any prosecution involving marijuana, "[e]xcept as provided in section 7 . . . ." Although § 7(b) does provide a list of situations in which the immunity and defense provided under the MMA will not apply, § 7(a) also clearly states that the use of marijuana is "allowed" only "to the extent that it is carried out in accordance with the provisions of this act." MCL 333.26427(a). That is, a person asserting a

defense under § 8 must demonstrate that he or she has complied with the entire MMA.

In § 4, the MMA provides limitations on the amount of marijuana that a "qualifying patient" or "primary caregiver" may possess and provides limitations on the locations where those persons can keep marijuana plants and the number of plants they may keep. MCL 333.26424(a) and (b). Because the § 4 limitations apply in part to "qualifying patients," as opposed to "patients" generally, one might be tempted to conclude that these limitations cannot apply to § 8, which refers only to a "patient." See MCL 333.26428(a)(1) to (3). But the defense provided under § 8 does apply to a "primary caregiver," and § 4(b) limits the amount of marijuana and number of marijuana plants that the caregiver may lawfully possess similarly to how § 4(a) limits the amount of marijuana and number of marijuana plants that a qualifying patient may possess. Moreover, § 4(d) provides that there is a "presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana" if he or she "is in possession of an amount of marihuana that does not exceed the amount allowed *under this act*." MCL 333.26424(d) (emphasis added). It is striking that the presumption provided under § 4(d) refers to the amount stated under this *act*, rather than under this *section*. Because the only true limitations on the amount of marijuana or marijuana plants that may be possessed are those stated under § 4, it appears that § 4(d) contemplates that the limitations stated under § 4(a) and (b) apply to the *whole act*. And it would seem absurd to permit a person who has not registered to possess marijuana and marijuana plants in excess of the amounts permitted for those persons who comply with the registration requirements. In any event, it is not necessary to resolve this question because, after the decision in *Redden*, a different panel

of this Court concluded that the limitations stated under § 4(a) and (b) do apply to the assertion of a defense under § 8.

In *King*, 291 Mich App at 505-506, the defendant was charged with manufacturing marijuana after police officers discovered marijuana growing in a dog kennel in his backyard and in an unlocked living room closet. After the defendant had been bound over for trial, he moved for the dismissal of his charges under § 8 of the MMA. *Id.* The trial court concluded that the defendant had complied with the MMA and dismissed the charges against him. *Id.* at 506-507.

On appeal, this Court disagreed with the trial court's conclusion that the defendant had complied with the MMA and was entitled to the dismissal of the charges against him under § 8. *Id.* at 505. The Court in *King* first addressed whether the limitations set forth in § 4 apply to the assertion of a defense under § 8. The Court determined that § 8(a) incorporated § 7 by stating that the defense applied " '[e]xcept as provided in section 7 . . . .' " *Id.* at 509, quoting MCL 333.26428(a) (alteration in *King*). The Court went on to note that § 7(a) provided that " '[t]he 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*.' " *King*, 291 Mich App at 509, quoting MCL 333.26427(a). Because the defendant was growing marijuana in a dog kennel that did not constitute an "enclosed, locked facility," MCL 333.26424(a), and in a closet that was not locked, the Court in *King* concluded that the defendant had not complied with the requirements stated under § 4 and, consequently, could not avail himself of the defense provided under § 8. *King*, 291 Mich App at 505 ("We disagree that defendant adhered to the requirements of § 4 of the [MMA] and therefore hold that

defendant is not entitled to the benefit of the protections of the [MMA].”). As such, this Court reinstated the charges against the defendant and remanded the matter for trial. *Id.* at 514. Although the defendant in *King* was a registered user, it is clear that the Court in *King* determined that the limitations set forth in § 4 applied to anyone asserting a § 8 defense—without regard to whether he or she was registered. See *id.* at 510 (“We further hold that the express reference to § 7 and the statement in § 7(a) that medical use of marijuana must be carried out in accordance with the provisions of the [MMA], require defendant to comply with the provisions of § 4 concerning growing marijuana.”).

Therefore, in order to assert a medical-purpose defense under § 8, a patient must show that he or she acted in accordance with the provisions of the MMA; that is, the patient must show that he or she had 2.5 ounces or less of useable marijuana, had 12 or fewer marijuana plants, and had his or her plants in an “enclosed, locked facility.” See MCL 333.26424(a) and (b). Further, even when an unregistered patient has marijuana within these limits, the patient must also show that the amount that he or she possessed did not exceed an amount that “was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient’s serious or debilitating medical condition or symptoms . . . .” MCL 333.26428(a)(2). I do not agree that § 8(a)(2) must be understood to permit a patient—registered or otherwise—to possess more marijuana or marijuana plants than permitted under § 4, as long as the patient can demonstrate that he or she needed the additional marijuana to ensure an uninterrupted supply of marijuana. Although the medical-purpose defense set forth in § 8(a)(2) refers to an amount of marijuana

or number of marijuana plants that is reasonably necessary to "ensure the uninterrupted availability" of marijuana, when read in light of the other provisions set forth in § 4, I conclude that this is an *additional limitation* to those set forth in § 4.

Under MCL 333.26424(d), a "qualifying patient" is presumed to be engaged in the "medical use" of marijuana if the patient is in possession of a registration card and in possession of an amount of marijuana or number of marijuana plants that does not exceed the limits stated under § 4(a). That is, a patient who is registered is entitled to immunity if he or she possesses not more than 2.5 ounces of marijuana and not more than 12 marijuana plants, even if the actual amounts exceed what the patient needs to ensure an uninterrupted supply of marijuana. Accordingly, a properly registered patient has an absolute defense under § 8(b) if he or she is properly registered and otherwise in compliance with § 4. In contrast, a patient who has not registered has no immunity under § 4. Notwithstanding that, the unregistered patient may still assert a defense under § 8, but must show that he or she has no more marijuana than permitted by § 4 *and* must show that that amount is reasonably necessary to ensure an uninterrupted supply of marijuana to treat his or her particular medical condition or symptoms. For that reason, it is possible for a finder of fact to conclude that a person who has an amount of marijuana or number of marijuana plants that is permitted under § 4 still has not met the elements of a defense under § 8 because, given the nature of the patient's serious or debilitating condition, the amount of marijuana or number of marijuana plants he or she actually possessed was greater than what was reasonably necessary to ensure an uninterrupted supply of marijuana to treat his or her medical condition or symptoms.

In addition to those proofs, the patient must also establish that he or she consulted with a physician during the course of a bona fide physician-patient relationship and, after a "full assessment of the patient's medical history and current medical condition," the physician "has stated" his or her professional opinion that the patient "is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate" the patient's serious or debilitating medical condition or the symptoms from such a condition. MCL 333.26428(a)(1). Finally, the patient must show that he or she was engaged in the "acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia . . . to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition." MCL 333.26428(a)(3).

2. ANDERSON'S MOTION FOR DISMISSAL

At the hearing on his motion for dismissal, Anderson presented evidence that he consulted with his family physician, Dr. McKeeby, before his arrest about whether marijuana might be a viable alternative to treat his back pain. McKeeby testified that she had been Anderson's physician for at least 10 years and had treated his chronic back pain throughout that period. She also stated that she had advised him that she thought he might benefit from the use of marijuana. Anderson further testified that he used marijuana for the specific purpose of treating his chronic back pain. Anderson presented evidence, through his own testimony, that he possessed less than a three-month supply of marijuana, and McKeeby testified that it was reasonable for a patient to maintain a three-month supply. On the basis

of this evidence, Anderson's trial counsel argued that Anderson had established a § 8 defense.

The trial court concluded otherwise. The trial court explained that "expert testimony" was "relevant" to establish the reasonableness of the amount that Anderson possessed because, citing MRE 702, this was not something a "lay person would know." Further, the trial court found that Anderson's "family doctor was not qualified to offer an opinion" because there was no evidence that "she has experience working with patients" that she treated with marijuana and because she had no "experience with dosage." As such, there was no evidence "on this issue . . . ." Given that there was no evidence to establish the reasonableness of the amount of marijuana that Anderson possessed, the court concluded that Anderson had not established that element of the § 8 defense. For that reason, it did not need to consider whether Anderson met any of the other elements of the § 8 defense.

On appeal, Anderson argues that he did not need an expert to establish that the amount of marijuana he possessed was reasonable; rather, he argues that he was in the best position to testify about his own marijuana needs. Because the MMA does not require the use of an expert, he maintains that the trial court erred to the extent that it imposed a higher evidentiary burden for that element of the § 8 defense. Although the trial court's opinion is not entirely clear, when read as a whole, one can plausibly argue that the trial court did conclude that Anderson needed to present expert testimony in order to establish the reasonableness of the amount of marijuana that he possessed. Had the trial court concluded otherwise, it would not have stated that there was no evidence to support this element; it would simply have found that this element had not been

met—notwithstanding the evidence actually presented. Therefore, I conclude that this Court should address this claim of error.

Typically, a trial court may not interfere with a prosecutor's decision to bring charges against a defendant. See *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683-684; 194 NW2d 693 (1972) (noting that the prosecutor is the chief law enforcement officer of the county and stating that it would be a violation of the constitutional separation of powers for a trial court to claim the power to control the institution and conduct of prosecutions). Thus, a trial court may not dismiss the charges against a defendant over the prosecutor's objection unless specifically permitted by statute or on the basis of constitutionally insufficient evidence. See *People v Morris*, 77 Mich App 561, 563; 258 NW2d 559 (1977). It is plain that the MMA provides statutory authority for the dismissal of charges involving marijuana: "A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in [MCL 333.26428(a)]." MCL 333.26428(b). This subsection does not just authorize a trial court to dismiss charges involving a marijuana violation; it actually mandates dismissal. However, the trial court is only required to dismiss the charges after an "evidentiary hearing" in which the person moving for dismissal "shows" the elements stated under § 8(a). The statute does not specify the burden of proof applicable to the moving party's motion or clearly state whether the trial court has the authority to make findings of fact or resolve credibility disputes in making its determination. Michigan courts have long safeguarded a defendant's right to have a jury resolve factual disputes and make credibility determinations. See *People v Hamm*, 100

Mich App 429, 433; 298 NW2d 896 (1980) (characterizing the right to a jury in a criminal trial as "sacred"); see also Const 1963, art 1, § 20 (guaranteeing that, in every criminal prosecution, the "accused shall have the right to a speedy and public trial by an impartial jury"). The right to a fair and impartial jury extends also to the people, who have the right to have a jury that will ensure a "righteous verdict." *People v Bigge*, 297 Mich 58, 64; 297 NW 70 (1941) (quotation marks and citation omitted). And for that reason, this Court should not lightly conclude that the Legislature intended to grant trial courts the authority to usurp the role of the jury in determining whether a defendant has established a particular defense. See *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998) ("The question being one of credibility posed by diametrically opposed versions of the events in question, the trial court was obligated, 'despite any misgivings or inclinations to disagree,' to leave the test of credibility where statute, case law, common law, and the constitution repose it 'in the trier of fact.' "). As such, in the absence of any statutory guidance, I conclude that the proper standard for a trial court conducting a hearing under § 8 of the MMA is that applicable to a motion for a directed verdict of acquittal at a criminal trial. See *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003).

Accordingly, on a defendant's motion for dismissal under § 8 of the MMA, the trial court must hold an evidentiary hearing to provide the defendant with an opportunity to show the medical-purpose defense set forth in § 8. See MCL 333.26428(b). At the close of the hearing, the trial court must evaluate all the evidence in the light most favorable to the prosecution to determine whether there is a question of fact on any of the elements of the defense. See *Riley*, 468 Mich at 139-140

(noting that the trial court must evaluate a motion for a directed verdict by examining the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the elements at issue). If no reasonable jury could find that the defendant had failed to establish a § 8 defense, then the trial court must dismiss the charges. MCL 333.26428(b). If, however, a reasonable jury could conclude that the defendant had not established one or more elements, then dismissal is not appropriate; rather, the case must be submitted to a jury on the merits. See *Lemmon*, 456 Mich at 646-647.

Turning to the evidentiary hearing at issue here, I conclude that even if Anderson did not need an expert to establish that the amount of marijuana and number of plants that he had were "reasonably necessary" under § 8(a)(2), he nevertheless was not entitled to the dismissal of the charge against him under § 8(b). As noted earlier in this opinion, a defendant may not assert a medical-purpose defense under § 8 unless the defendant first shows that he or she complied with the remainder of the MMA, which includes compliance with the limitations set forth in § 4. *King*, 291 Mich App at 510. In this case, it was undisputed that Anderson had a total number of marijuana plants that exceeded the limit of 12 provided in § 4. Further, it was undisputed that the plants that Anderson was growing behind his garage were not in an enclosed, locked facility. See MCL 333.26424(a). Because he failed to comply with the limitations on the possession of marijuana and marijuana plants set forth in § 4, he was not entitled to the dismissal of the charge against him under § 8(b). See *King*, 291 Mich App at 514 ("Because defendant failed to comply with the strict requirements in the [MMA] that he keep the marijuana in an 'enclosed, locked facility,' he is subject to prosecution . . . and the trial

court abused its discretion by dismissing the charges against defendant."). This is true without regard to whether the amount of marijuana and number of marijuana plants that Anderson possessed could otherwise be considered reasonably necessary to ensure an uninterrupted supply of marijuana to treat his medical condition or symptoms. Consequently, because he clearly failed to establish his § 8 defense on other grounds, it is unnecessary to determine whether Anderson had to present expert testimony in order to establish the reasonableness of the amount of marijuana or number of marijuana plants that he possessed. See, e.g., *Acox v Gen Motors Corp (On Remand)*, 192 Mich App 401, 408; 481 NW2d 749 (1991) (declining to address a statutory legal issue because consideration of the issue would be dicta given the Court's determination that the statute did not apply under the facts of the case).

I also do not believe that Anderson's testimony regarding the plants at issue altered the proof that he violated the § 4 limitations. At the evidentiary hearing, Anderson testified that he expected that only 1/2 of the marijuana plants growing behind his garage would be female after maturation and that only the female plants would produce useable marijuana. He also testified that he abandoned the plants that were found in his closet. Accordingly, Anderson implicitly invited the trial court to conclude that the male plants and abandoned plants should not be counted against his total when determining what was reasonably necessary to ensure an uninterrupted supply of marijuana. But at no place in the MMA did the drafters distinguish between immature and mature plants or between those that are male and female. Likewise, the MMA does not instruct that plants that have been abandoned—or indeed plants that are dead—should not be counted against a patient or caregiver's maximum permitted amount under § 4.

In contrast to the amount of marijuana that a patient may possess, § 4 does not even provide that the plants must be useable. See MCL 333.26424(a) (referring to "2.5 ounces of usable marihuana" and "12 marihuana plants"). Given this statutory language, I conclude that the reference to 12 marijuana plants is absolute; that is, one must count every marijuana plant regardless of its level of maturation or sex and without regard to whether the patient or caregiver intended to abandon the plant but had not yet destroyed it. Here, the undisputed proofs showed that Anderson had far more marijuana plants than permitted under § 4; consequently, he clearly did not—and could not—establish a ground for dismissal under § 8(b). Although the trial court arguably denied Anderson's motion on the basis of his failure to establish the reasonableness of the amount of marijuana that he possessed through an expert, even if the trial court erred in this regard, it nevertheless came to the correct result. Therefore, I would affirm its denial of Anderson's motion to dismiss. *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998).

3. THE TRIAL COURT'S DECISION TO PRECLUDE ANDERSON'S § 8 DEFENSE

Anderson plainly failed to establish the right to have the charge against him dismissed on his motion under § 8. Nevertheless, that fact alone does not necessarily preclude him from asserting the same defense at trial. Indeed, I disagree with the trial court's conclusion that a defendant who moves for dismissal under § 8 has elected his or her remedy and, for that reason, is categorically barred from raising a § 8 defense at trial in the event that he or she does not prevail on the motion. See *People v Kolanek*, 291 Mich App 227, 241-242; 804 NW2d 870 (2011) ("Because the statute does not pro-

vide that the failure to bring, or to win, a pretrial motion to dismiss deprives the defendant of the statutory defense before the fact-finder, defendant's failure to provide sufficient proofs pursuant to his motion to dismiss does not bar him from asserting the § 8 defense at trial nor from submitting additional proofs in support of the defense at that time."). Rather, as previously stated, whether a defendant has established an affirmative defense will typically be a matter for the jury. *Waltonen*, 272 Mich App at 690 n 5. It is, however, well settled that the defendant has the burden to establish a prima facie case for his or her affirmative defense by presenting some evidence on all the elements of that defense. *People v Lemons*, 454 Mich 234, 248; 562 NW2d 447 (1997); see also *People v Dempster*, 396 Mich 700, 713-714; 242 NW2d 381 (1976) (noting that a defendant normally bears the burden of showing by competent evidence that an exemption to a criminal statute applies to the facts of his or her case). And if the defendant fails to establish an element of his or her defense at trial, the trial court should not present the defense to the jury for consideration. See *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998) ("A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense."). It is also equally well settled that the Legislature can limit a defendant's ability to present an affirmative defense. See, e.g., *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001).

The MMA provides an affirmative defense to prosecution for any marijuana offense, but that defense is quite limited. Because of those limitations, there may be situations when a defendant simply cannot establish the right to assert a § 8 defense. In such situations, a trial court might be warranted in barring a defendant

from presenting evidence or arguing at trial that he or she is entitled to the defense set forth in § 8(a). Therefore, I conclude that a trial court may bar a defendant from presenting evidence and arguing a § 8 defense at trial when, given the undisputed evidence, no reasonable jury could find that the elements of the § 8 defense had been met.

In this case, there is no dispute about the number of plants that Anderson possessed or that the plants were not kept in an enclosed, locked facility. No reasonable jury could, therefore, find that he had 12 or fewer plants or that the plants were in an enclosed, locked facility. Consequently, no reasonable jury could acquit Anderson on the basis of a § 8 defense. The trial court did not err when it precluded Anderson from presenting a § 8 defense at trial.

III. CONCLUSION

Given the undisputed evidence that he possessed more than 12 marijuana plants and that he kept at least some of those plants in a place other than an enclosed, locked facility, Anderson could not establish the elements of a defense under § 8 of the MMA. For that reason, the trial court did not err when it denied his motion to dismiss the charge against him. Likewise, because no reasonable jury could find that Anderson qualified for the defense under § 8, the trial court did not err when it precluded him from presenting a defense under § 8 at trial.

I would affirm for these reasons.

FISHER SAND AND GRAVEL COMPANY v NEAL A SWEEBE, INC

Docket No. 297156. Submitted May 13, 2011, at Lansing. Decided June 7, 2011, at 9:10 a.m. Leave to appeal granted, 491 Mich 914.

On August 13, 2009, Fisher Sand and Gravel Company brought an action in the Midland Circuit Court against Neal A. Sweebe, Inc., asserting claims for breach of contract, account stated, and unjust enrichment with regard to concrete supplies plaintiff provided to defendant and alleging that defendant owed a remaining balance of $92,968.57, including finance charges, as of June 30, 2009. Plaintiff filed an amended complaint on October 29, 2009, that added a claim entitled "amount owed on open account." Plaintiff had provided some supplies from October 1991 through October 2004 and issued invoices, and defendant had periodically made payments toward the accrued balance. On May 9, 2005, defendant received a delivery of goods from plaintiff and plaintiff issued an invoice for $152.98. On May 13, 2005, defendant made a payment of $152.98, which was the last date that defendant made any payment to plaintiff. Defendant moved for summary disposition, contending that the action was barred by the four-year limitations period in the Uniform Commercial Code (UCC) pertaining to contracts for sale, MCL 440.2725(1). Plaintiff contended that defendant's obligation to pay an open account was an obligation that was distinct from the underlying contract for the sale of goods and that the action was governed by the general six-year limitations period applicable to actions for breach of contract contained in the Revised Judicature Act (RJA), MCL 600.5807(8). The court, Michael J. Beale, J., agreed with defendant and granted its motion for summary disposition. Plaintiff appealed.

The Court of Appeals *held*:

1. Although Michigan jurisprudence recognizes that payment on an account stated or an open account may be treated as a new and distinct promise, there is no established authority holding that an open account arising from the sale of goods is not subject to the UCC.

2. When two statutes are *in pari materia*, because they relate to the same subject matter and share a common purpose, but conflict with one another on a particular issue, the more-specific

statute must control over the more-general statute. The statute containing the UCC limitations period pertains specifically to contracts for the sale of goods and is the more-specific statute involved in this case.

3. The official comment to the section of the UCC involved, MCL 440.2725, militates in favor of applying the UCC's four-year limitations period in this case to promote uniformity and consistency.

4. Although an account stated is based on a separate agreement between the parties, it relates to and cannot be divorced from the underlying sales transaction. The UCC drafters intended that one limitations period apply to all transactions involving the sale of goods, regardless of the theory of liability asserted. To hold that the UCC limitations period does not apply to actions on account, despite the underlying sale of goods, would run counter to the drafters' purpose of providing consistency and predictability in commercial transactions.

5. The trial court did not err by concluding that the action was subject to the UCC's four-year limitations period and that, because the action was filed more than four years after defendant's last payment, defendant was entitled to summary disposition

Affirmed.

O'CONNELL, J., dissenting, disagreed with the majority for two reasons. First, the current state of the law in Michigan provides that payment on an open account triggers a new obligation, separate and distinct from an underlying agreement. Until such time as the Supreme Court reverses its decisions stating the current state of the law, the Court of Appeals must follow those decisions. The RJA provides a six-year limitations period for actions to recover damages or sums due for breach of contract that should be applied in this action. Secondly, the UCC does not implicitly overrule Michigan's jurisprudence concerning open accounts. There exists no affirmative provision of the UCC or other Michigan legislation that exhibits a legislative intent to abrogate Michigan's jurisprudence concerning open accounts. The Supreme Court has rejected the notion of repeal by implication with respect to the repeal of statutes. The UCC provides that unless displaced by the particular provisions of the UCC, the principles of law and equity shall supplement its provisions. MCL 440.1103. The decision of the trial court should have been reversed.

1. CONTRACTS — WORDS AND PHRASES — OPEN ACCOUNT.

An "open account" is an unpaid or unsettled account or an account that is left open for ongoing debit and credit entries and that has

a fluctuating balance until either party finds it convenient to settle and close, at which time there is a single liability.

2. CONTRACTS — SALE OF GOODS — OPEN ACCOUNT — LIMITATION OF ACTIONS — UNIFORM COMMERCIAL CODE.

An action that concerns an open account related to the sale of goods is governed by the four-year limitations period in article 2 of the Uniform Commercial Code concerning contracts for sale rather than the six-year limitations period provided in the Revised Judicature Act that is applicable to contract actions generally (MCL 440.2725[1], 600.5807[8]).

Allan Falk, P.C. (by *Allan Falk*), and *McClintic & McClintic, P.C.* (by *William M. McClintic* and *Gavin W. McClintic*), for plaintiff.

W. Jay Brown PLC (by *W. Jay Brown*) for defendant.

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

OWENS, P.J. In this action concerning an open account related to the sale of goods, plaintiff, Fisher Sand and Gravel Company, appeals as of right the trial court's order granting defendant, Neal A. Sweebe, Inc., summary disposition pursuant to MCR 2.116(C)(7) on the basis of the statute of limitations. We affirm.

Plaintiff provided some concrete supplies to defendant from October 1991 through October 2004. Plaintiff periodically issued invoices to defendant for the goods, and defendant periodically made payments toward the accrued balance. On May 9, 2005, defendant received a delivery of goods for which plaintiff issued an invoice for $152.98. On May 13, 2005, defendant made a payment of $152.98, which was the last date that defendant made any payment to plaintiff. Plaintiff filed this action on August 13, 2009, asserting claims for breach of contract, account stated, and unjust enrichment, and alleging that defendant owed a remaining

balance of $92,968.57 (including $3,718.32 in finance charges) as of June 30, 2009. In an amended complaint filed on October 29, 2009, plaintiff added a claim entitled "amount owed on open account."

Defendant moved for summary disposition on the ground that plaintiff's action was barred by the four-year limitations period in § 2725 of the Uniform Commercial Code (UCC), MCL 440.2725. Plaintiff contended that defendant's obligation to pay an open account was an obligation that was distinct from the underlying contract for the sale of goods and, therefore, its action was instead governed by the general six-year limitations period applicable to contract actions, MCL 600.5807(8). The parties also disputed whether defendant's May 13, 2005, payment was a payment on the open account, or a payment for a distinct transaction that was not part of the open account.

The trial court agreed with defendant that because the parties' open account related to the sale of goods, plaintiff's action was governed by the four-year limitations period in Article 2 of the UCC, MCL 440.2725, rather than the six-year limitations period applicable to contract actions generally, MCL 600.5807(8) and, accordingly, granted defendant's motion.

We review de novo a trial court's ruling on a motion for summary disposition brought pursuant to MCR 2.116(C)(7). *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 638; 692 NW2d 398 (2004). We must consider all affidavits, pleadings, and other documentary evidence submitted by the parties. Absent a disputed question of fact, the determination whether a cause of action is barred by the statute of limitations is a question of law reviewed de novo. *Id.*

This case also involves the application of a statute. Issues involving the interpretation or application of a statute are reviewed de novo as questions of law. *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 493; 791 NW2d 853 (2010). The primary goal of statutory construction is to give effect to the Legislature's intent. *McCormick v Carrier*, 487 Mich 180, 191; 795 NW2d 517 (2010). If statutory language is clear and unambiguous, we presume that the Legislature intended the meaning expressed in the language. *Id.*

Plaintiff first challenges the trial court's determination that its action is governed by the four-year limitations period in § 2725 of the UCC, MCL 440.2725, rather than the six-year period applicable to contract actions generally. The Revised Judicature Act provides a limitations period of six years "for . . . actions to recover damages . . . due for breach of contract." MCL 600.5807(8); *Citizens Ins Co of America v American Community Mut Ins Co*, 197 Mich App 707, 708-709; 495 NW2d 798 (1993). All sales of goods are governed by Article 2 of the UCC, MCL 440.2102. Section 2725 of the UCC, MCL 440.2725, provides that "[a]n action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued." Plaintiff argues that an open account is a distinct agreement from an underlying agreement for the sale of goods and, therefore, is not subject to the four-year limitations period in the UCC.

The definition of an "open account" is " '1. An unpaid or unsettled account. 2. An account that is left open for ongoing debit and credit entries and that has a fluctuating balance until either party finds it convenient to settle and close, at which time there is a single liability.' " *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345, 355-356; 771 NW2d 411

(2009), quoting Black's Law Dictionary (7th ed). "In actions brought to recover the balance due upon a mutual and open account current, the claim accrues at the time of the last item proved in the account." MCL 600.5831. Plaintiff contends that its claim accrued on May 13, 2005, the last date on which defendant made a payment. Assuming, without deciding, that defendant's May 13, 2005, payment may be considered a payment toward the parties' open account, plaintiff's action was filed in August 2009, more than four years after the May 2005 payment. Thus, if plaintiff's action is governed by the four-year limitations period in the UCC, it is untimely.

We have not found any Michigan caselaw that specifically and directly addresses whether payment on an open account that relates to the sale of goods is subject to the four-year limitations period in the UCC. The most relevant case is *First of America Bank v Thompson*, 217 Mich App 581; 552 NW2d 516 (1996). In that case, the plaintiff, an assignee bank under an automobile retail installment sales contract, brought a deficiency action against the defendant, a cobuyer of the automobile, following the repossession and sale of the vehicle. *Id.* at 582-583. The defendant contended that the plaintiff's action was governed by the four-year limitations period in Article 2 of the UCC. *Id.* at 584. The plaintiff argued that the UCC did not apply because there was no sale of goods between itself and the defendant. *Id.* at 584. This Court agreed with other jurisdictions, principally *Assoc Discount Corp v Palmer*, 47 NJ 183; 219 A2d 858 (1966), that a deficiency action is more closely related to the sales aspect of a combined sales-security agreement rather than the security aspect and, therefore, was governed by the four-year limitations period in Article 2 of the UCC. *Thompson*, 217 Mich App at 589-590.

Plaintiff here relies principally on cases that predate this state's enactment of the UCC in 1962,[1] to support its argument that payment on an open account triggers a new obligation, separate and distinct from an underlying agreement. See, e.g., *Collateral Liquidation, Inc v Palm*, 296 Mich 702, 704; 296 NW 846 (1941), *Miner v Lorman*, 56 Mich 212, 216; 22 NW 265 (1885), and see also *Bonga v Bloomer*, 14 Mich App 315; 165 NW2d 487 (1968). Although these cases tend to support plaintiff's general argument that payment on an open account may be viewed as a new promise separate from any underlying contract, none of the cases involved the sale of goods subject to the UCC. Thus, they are not helpful in resolving the question presented in this appeal.

Statutes that relate to the same subject matter and share a common purpose are *in pari materia* and must be read together as one law. *Donkers v Kovach*, 277 Mich App 366, 370-371; 745 NW2d 154 (2007). When two statutes are *in pari materia* but conflict with one another on a particular issue, the more-specific statute must control over the more-general statute. *Id.* at 371. This principle favors applying the limitations period in Article 2 of the UCC in this case, because it pertains specifically to contracts for the sale of goods. Additionally, application of Article 2 is consistent with this Court's decision in *Thompson*, 217 Mich App at 589-590, in which this Court determined that the plaintiff's deficiency action was more closely related to the sales aspect than the security aspect of a combined sales-security agreement, and was therefore subject to § 2725 of the UCC. Although plaintiff maintains that an open account is separate and distinct from the underlying sale of goods, the account exists solely to facilitate

[1] See 1962 PA 174.

plaintiff's sale of goods to defendant. The official comment for § 2725 states the purpose of the provision as follows:

> To introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred. This Article takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern business practice. This is within the normal commercial record keeping period.

Although the official comments to the UCC do not have the force of law, they are useful aids to the interpretation and construction of the UCC. *Prime Fin Servs LLC v Vinton*, 279 Mich App 245, 260 n 6; 761 NW2d 694 (2008). In addition, "the comments were intended to promote uniformity in the interpretation of the UCC." *Id.* The official comment to § 2725 militates in favor of applying the four-year limitations period in this case to promote uniformity and consistency.

Other jurisdictions that have addressed this question have favored applying the UCC limitations period to an action based on an open account related to the sale of goods. In particular, both parties cite *Moorman Mfg Co of California, Inc v Hall*, 113 Or App 30; 830 P2d 606 (1992). In that case, the court stated:

> Oregon courts have not had an occasion to decide which limitation applies to an account or an account stated claim involving an underlying sale of goods. Generally, when two statutes conflict, the more specific provision governs over the more general one. [Or Rev Stat (ORS)] 174.020. In this instance, ORS 12.080, the general provision, carves out a specific exception for actions based on the sale of goods,

> shortening the time within which such actions may be brought. Other jurisdictions have held that the UCC limitation governs actions based on accounts that involve a sale of goods. In *Greer Limestone Co. v. Nestor*, 175 W.Va. 289, 332 S.E.2d 589 (1985), the West Virginia Supreme Court held that the "UCC Statute of Limitations supersedes any general statute of limitations with regard to transactions involving the sale of goods" and held that the UCC applies to an account stated claim relating to such transactions. *See also Sesow v. Swearingen*, 552 P.2d 705 (Okl.1976); *Ideal Builders Hardware Co. v. Cross Const. Co., Inc.*, 491 S.W.2d 228 (Tex.Civ.App.1972).
>
> Plaintiff contends that, because an account stated is a separate contract, independent of the underlying sale of goods, the UCC limitation, although more specific, does not apply. We disagree. Although an account stated is based on a separate agreement between the parties, it relates to and cannot be divorced from the underlying sales transaction. *See Edwards v. Hoevet*, 185 Or. 284, 200 P.2d 955 (1949). The UCC drafters intended that one limitation apply to all transactions involving the sale of goods, regardless of the theory of liability asserted. To hold that the UCC limitation period does not apply to actions on account, despite the underlying sale of goods, would run counter to the drafters' purpose of providing consistency and predictability in commercial transactions. ORS 71.1020; *Community Bank v. Jones*, 278 Or. 647, 667, 566 P.2d 470 (1977). [*Moorman Mfg*, 113 Ore App at 32-33.]

Plaintiff relies on a partial dissenting opinion in *Moorman Mfg*, which reasoned that an account stated is an independent contract that ought not be governed by the UCC. *Id*. at 34 (Rossman, J., dissenting in part). Plaintiff argues that the dissenting opinion in *Moorman Mfg* is more consistent with "well established Michigan jurisprudence." As discussed previously, however, although Michigan jurisprudence recognizes that payment on an account stated or an open account may be treated as a new and distinct promise,

there is no established authority holding that an open account arising from the sale of goods is not subject to the UCC.

We are persuaded that the majority opinion in *Moorman Mfg* is consistent with this state's enactment of the UCC to govern transactions involving the sale of goods and the UCC's purpose of promoting uniformity among states with respect to transactions in goods, as well as this Court's decision in *Thompson*, 217 Mich App 581. Accordingly, the trial court did not err by concluding that this action was subject to the UCC's four-year limitations period in MCL 440.2725. Because it is undisputed that this action was filed more than four years after the date of defendant's last payment on the account, the trial court properly determined that defendant was entitled to summary disposition pursuant to MCR 2.116(C)(7).[2]

Affirmed.

METER, J., concurred with OWENS, P.J.

O'CONNELL, J. (*dissenting*). I respectfully dissent.

This appears to be a case of first impression in Michigan. The majority concludes that the payment on an open account that relates to the sale of goods is subject to the four-year limitations period in the Uniform Commercial Code (UCC), MCL 440.2725(1). I disagree with the majority, for two reasons. First, the current state of the law in Michigan requires a different conclusion. Second, the UCC does not abrogate common-law jurisprudence in Michigan concerning open accounts.

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[2] In light of our decision, it is unnecessary to address plaintiff's claim that its action was timely filed within the six-year limitations period because its claim accrued on the date of defendant's last payment in May 2005.

I. CURRENT STATE OF THE LAW

The current state of the law in Michigan is as follows: Payment on an open account triggers a new obligation, separate and distinct from an underlying agreement. See, e.g., *Collateral Liquidation, Inc v Palm*, 296 Mich 702, 704; 296 NW 846 (1941), and *Bonga v Bloomer*, 14 Mich App 315, 319; 165 NW2d 487 (1968). The Revised Judicature Act provides a limitations period of six years for "actions to recover damages or sums due for breach of contract." MCL 600.5807(8). Until such time as the Supreme Court reverses these decisions, this Court is required to follow the decisions. *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006).

II. THE UCC CANNOT IMPLICITLY ABROGATE MICHIGAN'S OPEN-ACCOUNT JURISPRUDENCE

The majority concludes that the UCC *implicitly abrogates* Michigan's jurisprudence concerning open accounts.[1] I disagree. There exists no affirmative provision of the UCC or other Michigan legislation that exhibits a legislative intent to abrogate Michigan's jurisprudence concerning open accounts. More importantly, with respect to the repeal of statutes, our Supreme Court has rejected the notion of repeal by implication. In *Valentine v Redford Twp Supervisor*, 371 Mich 138, 144; 123 NW2d 227 (1963), the Court, quoting *People v Buckley*, 302 Mich 12, 22; 4 NW2d 448 (1942), stated:

> "Repeal by implication is not permitted if it can be avoided by any reasonable construction of the statutes. *Couvelis* v. *Michigan Bell Telephone Co.*, 281 Mich 223 [274

[1] The majority also indicates that MCL 440.2725 conflicts with MCL 600.5807(8). *Ante* at 72. I find no conflict in these two statutes. Differing statutes of limitations do not a conflict make.

> NW 771 (1937)]; *People* v. *Hanrahan*, 75 Mich 611 (4 LRA 751) [42 NW 1124 (1889)]. If by any reasonable construction 2 statutes can be reconciled and a purpose found to be served by each, both must stand, *Garfield Township* v. *A.B. Klise Lumber Co.*, 219 Mich 31 [188 NW 459 (1922)]; *Edwards* v. *Auditor General*, 161 Mich 639 [126 NW 853 (1910)]; *People* v. *Harrison*, 194 Mich 363 [160 NW 623 (1916)]. The duty of the courts is to reconcile statutes if possible and to enforce them, *Board of Control of the Michigan State Prison* v. *Auditor General*, 197 Mich 377 [163 NW 921 (1917)]. The courts will regard all statutes on the same general subject as part of 1 system and later statutes should be construed as supplementary to those preceding them, *Wayne County* v. *Auditor General*, 250 Mich 227 [229 NW 911 (1930)]. See, also, *Rathbun* v. *State of Michigan*, 284 Mich 521 [280 NW 35 (1938)]."

Section 1103 of Article 1 of the UCC expressly provides that, "[u]nless displaced by the particular provisions of this act, *the principles of law and equity . . . shall supplement its provisions*." MCL 440.1103 (emphasis added).

There exists no language in UCC Article 2 that can be interpreted to abrogate Michigan's common-law jurisprudence concerning open accounts. To prevail in the present case, defendant is required to demonstrate that a particular provision of the UCC displaces plaintiff's claim for an open account. Defendant has not done so, and therefore plaintiff's cause of action is subject to the six-year period of limitations. See *Gen Motors, LLC v Comerica Bank*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No. 291236), pp 4-6 (stating that the UCC did not displace the plaintiff's unjust-enrichment claim).

In *Moorman Mfg Co of California, Inc v Hall*, 113 Or App 30, 34; 830 P2d 606 (1992), Judge Rossman, in a partial dissent, explained the issue as follows:

> The statement of an account, or an "account stated," is an agreement to pay a fixed amount that is due as a result of previous transactions in which a debtor-creditor relationship was created. *See EIMCO-BSP Ser. v. Valley Inland Pac. Constructors*, 626 F.2d 669, 671 (9th Cir. 1980). When the parties themselves agree upon a sum that the debtor owes and promises to pay to the creditor, that promise creates an *independent* contract between the parties; the new contract is enforceable in its own right, "even though the antecedent debt has been barred by [the] statute of limitations or has been discharged in bankruptcy." *Corbin on Contracts* § 1304, 237 (1962 & 1991 Supp.); *see also Meridianal Co. v. Moeck*, 121 Or. 133, 253 P. 525 (1927).

For the reasons stated above, I concur with Judge Rossman's astute analysis.

III. CONCLUSION

While I conclude that the majority position is not unreasonable, I am constrained to follow the aforementioned Michigan Supreme Court decision. Because an open account triggers a new obligation, separate and distinct from an underlying agreement, the Revised Judicature Act provides a limitations period of six years for "actions to recover damages or sums due for breach of contract." MCL 600.5807(8).

I would reverse the decision of the trial court.

PEOPLE v JOHNSON

Docket No. 295664. Submitted February 3, 2011, at Detroit. Decided June 14, 2011, at 9:00 a.m. Leave to appeal denied, 490 Mich 993.

A Wayne Circuit Court jury convicted Angelo Johnson of possession with intent to deliver less than five kilograms of marijuana and possession of a firearm during the commission of a felony. Before he committed those offenses, defendant had been charged with a misdemeanor for which he had been granted bond, but that bond had been forfeited. The court, Daniel P. Ryan, J., sentenced defendant to a term of five months to four years' imprisonment for the marijuana-possession conviction and to a consecutive two-year term for the felony-firearm conviction. Defendant appealed.

The Court of Appeals *held*:

1. The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. Sufficient evidence was presented for a rational jury to have concluded that defendant had constructive possession of two rifles during the commission of a felony in light of the evidence that the police seized the rifles from the home where defendant had admittedly been selling marijuana for a month and that the rifles had been in defendant's vicinity in that home while he was seated behind a table that contained marijuana.

2. Prior record variable (PRV) 6, MCL 777.56, considers an offender's relationship to the criminal justice system. A trial court should assess five points for PRV 6 when the offender is on bond awaiting adjudication or sentencing for a misdemeanor, but should assess zero points when the offender has no relationship to the criminal justice system. Because defendant's bond had been forfeited, he was not "on bond" when he committed the sentencing offense, but he still had a relationship with the criminal justice system because of the pending misdemeanor charge. Accordingly, the trial court did not err by assessing five points instead of zero for PRV 6.

3. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel made errors so serious that he or she was not performing as the counsel guaranteed by the Sixth Amendment. There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption

that counsel's performance was sound trial strategy. Defendant failed to meet that burden. Defendant's counsel was not ineffective because he failed to object to the scoring of PRV 6. The decision not to object to the scoring may have been trial strategy aimed at avoiding the possibility of the assessment of even more points for PRV 6.

Affirmed.

WILDER, J., concurred, agreeing with the majority's reasoning and result with respect to defendant's claims regarding sufficiency of the evidence and ineffective assistance of counsel, but disagreeing with the majority's conclusion that defendant was not "on bond" for purposes of scoring PRV 6 when he committed the sentencing offense. He would have held that the phrase "on bond" meant "subject to an obligation" and that because defendant's obligation to appear on the misdemeanor charge had not been discharged at the time of the sentencing offense, he was on bond for purposes of scoring PRV 6.

SENTENCES — SENTENCING GUIDELINES — PRIOR RECORD VARIABLE 6 — RELATIONSHIP TO THE CRIMINAL JUSTICE SYSTEM — BOND REVOCATION.

Under prior record variable 6, a trial court should assess five points if the offender was on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor when he or she committed the sentencing offense; a trial court should assess zero points if the offender had no relationship with the criminal justice system; an offender who forfeited his or her bond on a charge that remained pending when he or she committed the sentencing offense still had a relationship with the criminal justice system and could properly be assessed points under prior record variable 6 (MCL 777.56).

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

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

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM. A jury convicted Angelo Johnson of possession with intent to deliver less than five kilograms of marijuana[1] and possessing a firearm during the commission of a felony (felony-firearm).[2] The trial court sentenced him to a prison term of five months to four years for the possession-of-marijuana conviction and a consecutive two-year prison term for the felony-firearm conviction. He appeals as of right. We affirm.

I. FACTS

Johnson's convictions arise from a police raid at a house in Detroit. On April 8, 2008, the police executed a search warrant at 9577 Winthrop. When the police officers entered through the front door, they observed Johnson sitting on a couch in the front room. There was suspected marijuana on the table in front of him. The parties stipulated that Officer Booker Tooles confiscated, from the table in front of Johnson, one small plastic bag containing 5 vials of marijuana and 21 ziplock bags of marijuana totaling 55.9 grams. The officer in charge, Sergeant Marcellus Ball, confiscated $256, which he thought was on the "dining room table next to the marijuana . . . ."

Officer Wade Rayford confiscated two rifles (a Mossberg .22 caliber bolt-action rifle and a Marlin .35 caliber lever-action rifle) from the "front room of that location," which is the first room when a person enters the house. He could not remember if the room was actually the dining room or the living room, explaining, "I don't know if it was a dining room that had the appearance of a living room or vice versa." Officer Rayford clarified that he was "not saying that [Johnson] was sitting next

[1] MCL 333.7401(1) and (2)(d)(*iii*).

[2] MCL 750.227b.

to the guns . . . .” He believed that the weapons were recovered from “[approximately the] northwest corner of that room.” Officer Brian Johnson, the first officer to enter, did not see Angelo Johnson in physical possession of a rifle, nor did Sergeant Ball personally see Angelo Johnson in possession of the rifles.

No latent prints of comparison value were developed from the rifles. Johnson gave a statement in which he admitted having one ounce of marijuana in his possession and that he had been selling marijuana from 9577 Winthrop for one month. He stated that he was not going to answer any questions about “the weapon.”

The jury convicted Johnson, as stated earlier in this opinion. Johnson now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Johnson first argues that the evidence was insufficient to support his felony-firearm conviction because the evidence failed to show that he had actual or constructive possession of the firearms. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.[3]

B. LEGAL STANDARDS

“The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or

[3] *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

the attempt to commit, a felony."[4] One must carry or possess the firearm when committing or attempting to commit a felony.[5] Possession of a firearm can be actual or constructive, joint or exclusive.[6] "[A] person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant."[7] Possession can be proved by circumstantial or direct evidence and is a factual question for the trier of fact.[8]

C. APPLYING THE LEGAL STANDARDS

The evidence indicated that the police seized the rifles from the corner of the front room of the house, in the vicinity of where Johnson was seated behind the table that contained marijuana. Johnson admitted that he had been selling marijuana from the house for a month. He contends that there was no evidence that the weapons were in plain sight and no proof that they were his. However, the sizes of the rifles and the testimony describing their location in the corner of the front room, coupled with the fact that Johnson had admittedly been selling drugs from the house for a month, were sufficient to enable the jury to rationally find that he was aware of the rifles and that they were reasonably accessible to him. Thus, there was sufficient evidence that Johnson constructively possessed the rifles to support his felony-firearm conviction.

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[4] *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

[5] *People v Burgenmeyer*, 461 Mich 431, 436-437; 606 NW2d 645 (2000).

[6] *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989).

[7] *Id*. at 470-471 (citation omitted).

[8] *Id*. at 469.

III. SCORING OF PRV 6

A. STANDARD OF REVIEW

Johnson argues that resentencing is required because the trial court erroneously assessed five points for prior record variable (PRV) 6 of the sentencing guidelines. "This Court reviews a trial court's scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score."[9] "A trial court's scoring decision for which there is any evidence in support will be upheld."[10] To the extent that a scoring challenge involves a question of statutory interpretation, this Court reviews the issue de novo.[11]

B. LEGAL STANDARDS

PRV 6 considers an offender's relationship to the criminal justice system.[12] A trial court should assess five points when "[t]he offender is on probation or delayed sentence status or *on bond* awaiting adjudication or sentencing for a misdemeanor[.]"[13]

C. APPLYING THE LEGAL STANDARDS

Johnson acknowledges that before committing the sentencing offense in April 2008, he had been charged with a misdemeanor for which he had been granted bond. However, it is undisputed that he forfeited his

[9] *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (quotation marks and citation omitted).

[10] *Id*. (quotation marks and citation omitted).

[11] *People v Osantowski*, 481 Mich 103, 107; 748 NW2d 799 (2008).

[12] MCL 777.56.

[13] MCL 777.56(1)(d) (emphasis added).

bond in July 2007, before he committed the sentencing offense. Therefore, Johnson argues that he was not "on bond" when he committed the sentencing offense and that the trial court should not have assessed five points for PRV 6.[14]

Under PRV 6, the trial court assesses points on the basis of the defendant's relationship to the criminal justice system when he or she committed the sentencing offense:[15]

> Prior record variable 6 is relationship to the criminal justice system. Score prior record variable 6 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:
>
> * * *
>
> (d) The offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor ..... 5 points
>
> (e) The offender has no relationship to the criminal justice system ..... 0 points[16]

The principles of statutory interpretation apply to the interpretation of the sentencing guidelines to determine if the term "on bond" includes those defendants whose bonds have been revoked.

> [T]he primary goal of statutory construction is to give effect to the Legislature's intent. To ascertain that intent,

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[14] The record indicates that Johnson was arrested for another misdemeanor offense in December 2006, but he apparently was not arraigned on that offense until April 2009, after the sentencing offense was committed. The prosecution does not contend that the scoring of PRV 6 may be upheld on the basis of Johnson's status with respect to that offense.

[15] *People v Young*, 276 Mich App 446, 454; 740 NW2d 347 (2007).

[16] MCL 777.56(1).

> this Court begins with the statute's language. When that language is unambiguous, no further judicial construction is required or permitted, because the Legislature is presumed to have intended the meaning it plainly expressed.[17]

In interpreting the language of PRV 6, this Court has previously affirmed a trial court's assessment of five points for an individual who did not fit squarely within the language of the statute. In *People v Endres*, the offender's circumstances did not fit the criteria in the statute, but this Court determined that there was no plain error in assessing five points for PRV 6, explaining:

> [D]efendant correctly argues that he was not on probation at the time that the present offenses were committed. The record indicates that his probation for a 1999 retail fraud juvenile adjudication was completed before the offense dates of June 1, 2001, to July 27, 2001. However, the record also indicates that on May 12, 2001, defendant was charged with purchasing, consuming, or possessing alcohol as a minor, to which he pleaded guilty on June 18, 2001, and was sentenced to pay $85 in fines, costs, and fees. Therefore, defendant had a relationship with the criminal justice system at the time he committed the offenses in the present case, and no plain error is apparent in the trial court's assessment of five points for PRV 6.[18]

In essence, this Court determined that there was sufficient evidence to show that the defendant had a relationship with the criminal justice system. This Court determined that the evidence was sufficient despite its not falling precisely within the statutory criteria.

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[17] *Osantowski*, 481 Mich at 107 (quotation marks and citations omitted) (alteration in *Osantowski*).

[18] *People v Endres*, 269 Mich App 414, 422-423; 711 NW2d 398 (2006).

In addition, this Court considered PRV 6 under the former judicial sentencing guidelines in a case involving an offender whose bond was revoked before he committed the sentencing offense. Under the former judicial sentencing guidelines, a court had to assess 15 points for PRV 6 if a "[p]ost-conviction relationship exists or the offender committed the instant offense within six months of termination of probation or parole[.]"[19] The court had to assess five points when "[an]other relationship exist[ed]," and the court had to assess zero points when "[n]o relationship exist[ed]."[20] The instructions stated that a "post-conviction relationship" existed if, "at the time of the instant offense," the offender was incarcerated, on parole or probation, awaiting sentence (including on a probation violation), or on delayed sentence status.[21] The instructions further stated that "[an]other relationship exist[ed] if, at the time of the instant offense," the offender was "on bond and/or bail[.]"[22] In *People v Lyons*, before committing the sentencing offense, the defendant was arrested and posted bond. When he did not show up at the hearing, his bond was revoked.[23] This Court concluded that five points were properly assessed for PRV 6. This Court held that a revoked bond did not fit a label of "no relationship" with the criminal justice system:

> Under these circumstances, at the time of this offense, defendant had a prior relationship with the criminal justice system. In addition, the guidelines do not state that five points can be assessed *only* in the enumerated circum-

[19] Michigan Sentencing Guidelines (2d ed), p 97.

[20] *Id*.

[21] *Id.*

[22] *Id.*

[23] *People v Lyons (After Remand)*, 222 Mich App 319, 322; 564 NW2d 114 (1997).

> stances. The sentencing guidelines are interpreted in accordance with the rules of statutory construction. The primary rule of statutory construction is to ascertain the intent of the drafters. Statutes must be construed to prevent absurd or illogical results and to give effect to their purposes. It would be absurd to suggest that the drafters of the guidelines intended that a defendant would receive more lenient treatment by being, in the words of the trial court, a "runaway" from the criminal justice system. The trial court did not err in assessing defendant five points for PRV 6.[24]

Endres suggests that a five-point score for PRV 6 is not improper when the defendant committed the sentencing offense while awaiting adjudication or sentencing for a misdemeanor, regardless of his or her bond status. The case illustrates this Court's refusal to categorize a defendant as having no relationship with the criminal justice system when it is obvious that such a relationship exists.

Moreover, although merely persuasive, *Lyons* is also useful to our current analysis because it illustrates that this Court has held that a defendant had a relationship with the criminal justice system despite not being "on bond."

In this case, in spite of his not being technically on bond, the trial court chose to assess five points for PRV 6 rather than classify Johnson as having no relationship to the criminal justice system. Johnson clearly had a relationship with the criminal justice system, and the trial court did not see it fit to categorize him otherwise.

Admittedly, when an offender commits an offense after his or her bond has been forfeited or revoked, the offender is not "on bond," as PRV 6 states. However, when an offender's bond is revoked, he or she is also not

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[24] *Id.* at 322-323 (citations omitted).

free and clear of the criminal justice system. A condition of any pretrial release (bond) is that the defendant will appear in court as required.[25] We note that even if a defendant's bond is forfeited, the condition that the defendant appear in court is still in place and is an inherent condition of any pretrial release. Forfeiting the monetary part of a bond does not relieve the defendant of the obligation to comply with the condition that he or she appear as required by the court.

A court does not have discretion when scoring PRV 6.[26] As such, the trial court had to decide whether to score PRV 6 at five points, in spite of Johnson's revoked bond, or to score the variable at zero points. Zero points are assessed when a defendant has *no* relationship to the criminal justice system.[27] This clearly is not the case with Johnson. He was granted bond, which was subsequently revoked for his failure to pay. The ramifications of the underlying misdemeanor do not dissipate simply because his bond was revoked. If anything, the urgency of the matter was compounded when a warrant was issued thereafter. To say that Johnson had no relationship to the criminal justice system would be to ignore the reality of his previous conduct. The continued existence of the prior misdemeanor charge created a relationship with the criminal justice system that survived the revoked bond.

In summary, we find no error in the lower court's scoring PRV 6 at five points. Johnson was charged with a misdemeanor for which he was granted bond. That bond was subsequently revoked, but the ramifications of the charge remained. When Johnson committed the

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[25] See MCR 6.106(C) and MCR 6.106(D).

[26] MCL 777.56(1) does not use discretionary language. It states to "score" PRV 6 by "assigning" a number of points.

[27] MCL 777.56(1)(e).

sentencing offense, the misdemeanor charge was still pending. As such, this Court cannot classify Johnson as having had "no relationship" with the criminal justice system. Accordingly, the trial court did not misscore PRV 6 at five points.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Johnson argues that defense counsel's failure to object to the scoring of the guidelines constituted ineffective assistance of counsel. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law."[28] "A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."[29] This Court reviews for clear error a trial court's factual findings, while we review de novo constitutional determinations.[30] This Court reviews unpreserved claims of ineffective assistance of counsel for errors apparent on the record.[31]

B. LEGAL STANDARDS

There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[32] To establish ineffective assistance of counsel, "the defendant must show that counsel's per-

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[28] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[29] *Id.*

[30] *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

[31] *Id.*

[32] *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

formance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed the defendant by the Sixth Amendment."[33]

C. APPLYING THE LEGAL STANDARDS

As stated, the trial court assessed five points for PRV 6. Again, a trial court is to assess five points for "[an] offender [who] is . . . on bond awaiting adjudication or sentencing for a misdemeanor[.]"[34] Because Johnson's bond had been revoked, he argues that he was no longer "on bond" at the time the sentencing offense was committed and thus should have had zero points assessed. Therefore, he contends that defense counsel was ineffective for failing to object to the PRV 6 scoring.

Defense counsel's decision to not object to the scoring may have been trial strategy. A trial court may assess 15 points under PRV 6 if "[t]he offender is incarcerated in jail awaiting adjudication or sentencing on a conviction or probation violation[.]"[35] When Johnson's bond was revoked, a warrant was issued for his arrest. It can be argued that he should have been in jail when he committed the sentencing offense and therefore should have had 15 points assessed, rather than five points. Johnson's total PRV score was 25 points, which placed him at PRV level D (25-49 points) on the sentencing grid. If the trial court had assessed zero points for PRV 6, he would have shifted to PRV level C (10-24 points). If the trial court had assessed 15 points, he would have remained at PRV level D. The PRV level C recommended

[33] *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[34] MCL 777.56(1)(d).

[35] MCL 777.56(1)(b).

minimum sentence range for someone like Johnson, who commits a crime in offense class F and is at offense variable level II is between zero and 17 months, while the minimum sentence range with PRV level D is 5 to 23 months.[36] But a higher point total within the point range for PRV level D might have resulted in a longer minimum sentence within the minimum sentence range specified for PRV level D.

Defense counsel may have thought that aiming for a shorter minimum sentence within the range for PRV level D constituted a better strategy than challenging the score in hopes of falling within the range for PRV level C but with a risk of a higher sentence under PRV level D if that challenge failed. Put differently, if defense counsel objected and was awarded a review of the scoring, there is a chance that Johnson might have wound up in PRV level C, but there is also a chance that his score would have risen to a higher number under PRV level D. There is a strong presumption that defense counsel's actions represented sound trial strategy, and because there is a basis for defense counsel's not objecting to the PRV 6 score, Johnson cannot overcome that presumption. Furthermore, because sentence ranges for PRV level C and level D partially overlap, it is possible that sentencing could have been the same regardless of whether he was within PRV level C or level D. Johnson cannot prove that, but for counsel's errors, the proceedings would have turned out differently. Because Johnson has not met his burden, his claim of ineffective assistance of counsel fails.

We affirm.

WHITBECK, P.J., and O'CONNELL, J., concurred.

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[36] MCL 777.67.

WILDER, J. (*concurring*). I concur in the majority's reasoning and result with respect to defendant's claims regarding sufficiency of the evidence and ineffective assistance of counsel. However, I respectfully disagree with the majority's conclusion that defendant was not "on bond" for purposes of MCL 777.56(1)(d) when he committed the sentencing offense.

The primary goal of statutory interpretation is " 'to discern and give effect to the Legislature's intent.' " *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006), quoting *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). " '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.' " *Williams*, 475 Mich at 250, quoting *Morey*, 461 Mich at 330. If a statute is ambiguous, judicial construction is appropriate. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008).

MCL 777.56(1) provides, in relevant part:

> Prior record variable 6 is relationship to the criminal justice system. Score prior record variable 6 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:
>
> * * *
>
> (d) The offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor ..... 5 points

"On" is defined as "so as to be or remain supported by or suspended from" and "subject to." *Random House Webster's College Dictionary* (2001). "Bond" is defined as "[a]n obligation; a promise." Black's Law Dictionary

(9th ed). Therefore, the phrase "on bond" in MCL 777.56(1)(d) can be interpreted to mean "subject to an obligation."

The State Court Administrative Office's Manual for District Court Magistrates provides, "The posting of the bail requires the creation of a contract between the defendant, the bail poster (a third party or a surety), and the court. This contract is known as a **bond**." SCAO, Manual for District Court Magistrates (2011), § 4.1(A), p 1. The manual further provides, "There are three types of bail for which a bond is required: [1] cash bail (which includes the posting of 10 percent), [2] secured bail, or [3] unsecured bail (personal recognizance)." *Id*. While bail is the security required by the court for release, bond is the obligation or contract between the defendant, the bail poster, and the court.

A pretrial release on an unsecured bail is subject to the following conditions: "that the defendant *will appear as required*, will not leave the state without permission of the court, and will not commit any crime while released . . . ."[1] See MCR 6.106(C) and MCR 6.106(D)(1) (emphasis added). MCR 6.106(E) provides, in relevant part, "If the court determines for reasons it states on the record that the defendant's appearance or the protection of the public cannot otherwise be assured, money bail, with or without conditions described in subrule (D), may be required." Even if the trial court opts to only require money bail under subrule (E), and not other conditions described in subrule (D), appearance remains a condition of the release in light of the language "defendant's appearance . . . cannot otherwise be assured." With each type of bail, therefore, the defendant is subject to the minimum obligation to

[1] The court may impose additional conditions.

appear as required, which I conclude is the defendant's bond, obligation, or contract with the court.

MCR 6.106(I)(2) provides, in relevant part, instructions regarding a defendant's failure to comply with conditions of a release:

> If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.

Although this rule refers to the forfeiture of "bail money deposited or the surety bond," the language does not discharge the defendant's obligation to appear. Instead, the language gives the trial court discretion to further compel the obligation to appear with an order revoking the release and an arrest warrant. Because forfeiture of bail money or a surety bond does not discharge the defendant's underlying bond, obligation, or contract with the court to appear as required, I conclude that defendant's obligation to appear was not discharged at the time of the sentencing offense and that he was "on bond" for purposes of MCL 777.56(1)(d).

PEOPLE v ORLEWICZ

Docket No. 285672. Submitted June 8, 2011, at Detroit. Decided June 14, 2011, at 9:05 a.m. Leave to appeal sought.

Jean P. Orlewicz was convicted by a jury in the Wayne Circuit Court of first-degree premediated murder, first-degree felony murder, and mutilation of a dead body and was sentenced by the court, Annette J. Berry, J., to life imprisonment for each murder conviction and 50 to 120 months in prison for the mutilation conviction, all sentences to be served concurrently. Defendant filed a motion for a new trial and also appealed in the Court of Appeals. While the appeal was pending, the successor trial court judge, Bruce U. Morrow, J., issued an opinion in which he concluded that the trial court's exclusion of certain psychiatric testimony at defendant's trial had denied defendant the effective assistance of counsel, thereby depriving him of a fair trial. The court granted defendant's motion for a new trial. The prosecution cross-appealed that order.

The Court of Appeals *held*:

1. The psychiatric testimony would have cast no light whatsoever on which of the two versions of the events was the more likely. It is not apparent, under the circumstances of this case, how the proposed testimony would have assisted the jury in determining which version of the events was more credible or whether, under defendant's version, he would have honestly and reasonably believed that he was in imminent and grave danger from the victim. The trial court did not abuse its discretion by excluding the testimony and the successor trial court judge erred by granting defendant's motion for a new trial on the basis that the testimony was erroneously excluded. The order granting a new trial is reversed.

2. The trial court did not err by excluding evidence of personal protection orders issued against the victim. Although evidence concerning the aggressive character of a homicide victim is admissible in furtherance of a self-defense claim to prove that the victim was the probable aggressor, this form of character evidence may only be admitted in the form of reputation testimony, not by testimony regarding specific instances of conduct unless the testimony regarding those instances is independently admissible for some other reason or where character is an essential element of a

claim or defense. The victims' character is not an essential element of defendant's self-defense claim. The personal protection order documents concerned specific instances of conduct and were properly excluded on that basis.

3. Evidence of the victim's MySpace page should have been admitted because it constituted general reputational evidence rather than evidence regarding specific instances of conduct. Exclusion of the evidence was harmless error because it would have been sufficiently cumulative evidence regarding the victim's violent and aggressive character.

4. The trial court's jury voir dire was not deficient.

5. The prosecution improperly introduced evidence that a computer search for criminal-defense attorneys was conducted on the computer in defendant's home shortly after the offense. The improper admission of the evidence was harmless under the circumstances of this case.

6. Defendant's various claims of ineffective assistance of counsel were either not supported by the record or, if counsel committed an error, defendant was not prejudiced thereby.

7. The evidence was sufficient for the jury to find that defendant killed the victim while harboring an intent to steal his gun. Sufficient evidence supported the felony-murder conviction.

8. Defendant's conviction of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim violated double-jeopardy principles. The appropriate remedy is to correct the judgment of sentence to specify that defendant is convicted of a single count of first-degree murder supported by two theories.

9. Defendant waived his right to a public trial during the jury voir dire under the circumstances of this case.

Order granting new trial reversed; convictions and sentences affirmed as modified; remanded for modification of the judgment of sentence.

1. EVIDENCE — RELEVANT EVIDENCE.

Evidence is relevant if it tends to make a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence (MRE 401).

2. HOMICIDE — CLAIM OF SELF-DEFENSE — EVIDENCE — VICTIM'S AGGRESSIVE CHARACTER.

Evidence concerning the aggressive character of a homicide victim, even if the defendant was unaware of it at the time of the

homicide, is admissible in furtherance of a self-defense claim to prove that the victim was the probable aggressor, but such character evidence may only be admitted in the form of reputation testimony, not by testimony regarding specific instances of conduct unless the testimony regarding those instances is independently admissible for some other reason or where character is an essential element of a claim or defense (MRE 404[a][2]; MRE 405).

3. HOMICIDE — FELONY-MURDER DOCTRINE.

The felony-murder doctrine does not apply if the intent to commit the underlying felony is not formed until after the homicide; a murder committed during the unbroken chain of events surrounding a predicate felony is committed in the perpetration of that felony; the murder and the felony need not be contemporaneous and the defendant need only have intended to commit the underlying felony when the homicide occurred for the felony-murder doctrine to apply.

4. HOMICIDE — CONSTITUTIONAL LAW — DOUBLE JEOPARDY — FIRST-DEGREE MURDER — FELONY MURDER — SINGLE VICTIM.

It is a violation of double jeopardy protections when a defendant is convicted of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim; the proper remedy is to modify the conviction to specify that it is for a single count of first-degree murder supported by two theories.

5. CONSTITUTIONAL LAW — RIGHT TO PUBLIC TRIAL — VOIR DIRE — WAIVER OF RIGHT TO PUBLIC TRIAL.

The Sixth Amendment right to a public trial extends to the voir dire of prospective jurors; the right to a public trial is not self-executing and the defendant must timely assert the right; failure to timely assert the right waives the right and forecloses the later grant of relief.

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

Elizabeth L. Jacobs for defendant.

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), and mutilation of a dead body, MCL 750.160. He was sentenced to life imprisonment for each murder conviction and 50 to 120 months' imprisonment for the mutilation conviction, all sentences to be served concurrently. Defendant appealed, and while that appeal was pending, a successor trial court judge granted his motion for a new trial. The prosecutor then filed a cross-appeal from that order. We reverse the trial court's order granting defendant a new trial and affirm defendant's convictions and sentences as modified in this opinion.

There is no dispute that defendant killed the victim, dismembered the victim's body, and attempted to dispose of it by burning it. The gravamen of the dispute in this matter is why defendant did so. At the time, defendant was 17 years old, 5 feet 7 inches tall, and weighed approximately 150 pounds. The victim was 26 years old, six-feet tall, weighed approximately 250 pounds, and was intimidating; additionally, the victim had a reputation for physical and verbal violence, association with guns, aggression, a quick temper, and for being confrontational. In essence, the prosecution's theory was that defendant did not like the victim and was upset that the victim refused to repay a debt, and he devised a plan to commit the "perfect crime" of killing the victim and leaving no evidence. Defendant contended that he was coerced into involvement in a robbery scheme devised by the victim and that, when the plan failed, the victim threatened defendant's life, whereupon defendant killed the victim in self-defense and attempted to conceal the body out of panic. The jury found the prosecution's case more credible.

After defendant was convicted and sentenced, he filed a motion for a new trial. He also filed a motion to disqualify the trial judge because of her comments at sentencing. The trial judge denied the motion for disqualification, but the chief judge granted it to avoid an appearance of impropriety. The case was reassigned to a new judge who conducted an evidentiary hearing on defendant's motion for a new trial. The successor judge later issued an opinion in which he concluded that the trial court's exclusion of certain psychiatric testimony at defendant's trial denied defendant the effective assistance of counsel, thereby depriving defendant of a fair trial. Accordingly, the court granted defendant's motion for a new trial. We address the prosecutor's cross-appeal of that order first, because most of defendant's issues on appeal could be moot if we were to uphold it.

A court may grant a new trial "on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 641; 576 NW2d 129 (1998). A trial court's decision concerning the conduct and scope of voir dire is also reviewed for an abuse of discretion. *People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996). Further, evidentiary rulings are also reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). An appellate court should generally defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

We review constitutional and statutory questions de novo. *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004). Further, preliminary questions of law such as whether a rule of evidence or a statute precludes the admission of evidence, are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Defendant's motion for a new trial was based, in relevant part, on the trial court's exclusion of psychiatric testimony that defendant argued was relevant to his self-defense claim. We are puzzled by the successor judge's reliance on principles regarding ineffective assistance of counsel to conclude that defendant was entitled to a new trial, given that the trial court found no deficiencies in counsel's performance, nor do we. However, the Sixth Amendment guarantees defendants " 'a meaningful opportunity to present a complete defense.' " *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (citation omitted). We find that defendant is entitled to have the merits of his claims addressed, irrespective of the label given to them. Therefore, we will address the merits of those claims.

The right to present a defense is not absolute or unfettered. A trial court may exclude evidence if its probative value is outweighed by factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. *Id.* at 326. Therefore, a court may exclude evidence that is repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues. *Id*. at 326-327. Similarly, defendants are entitled to present witnesses in their defense, but again that right is not absolute. *People v McFall*, 224 Mich App 403, 407-408; 569 NW2d 828 (1997). "To the contrary, it requires a showing that the witness' testi-

mony would be both material and favorable to the defense." *Id*. at 408. The underlying question is whether the proffered evidence or testimony is relevant and material, or unfairly prejudicial.

A claim of self-defense at common law required an honest and reasonable belief of an imminent danger of death or great bodily harm. *People v Dupree*, 486 Mich 693, 707-708; 788 NW2d 399 (2010). The Self-Defense Act, MCL 780.971 *et seq*., which became effective before the killing in this case, continues to require an honest and reasonable belief of imminent death or harm. MCL 780.972. A defendant's history and psychological makeup may be relevant to explain the reasonableness of a defendant's belief that he or she was in inescapable danger. *People v Wilson*, 194 Mich App 599, 604; 487 NW2d 822 (1992) (discussing the "battered spouse syndrome"). And reasonableness depends on what an ordinarily prudent and intelligent person would do on the basis of the perceptions of the actor. *People v Doss*, 406 Mich 90, 102; 276 NW2d 9 (1979) (discussing what constitutes "reasonable force" for a police officer to effectuate an arrest). A defendant's psychological idiosyncrasies may, at least in theory, be relevant to the reasonableness of the defendant's belief that he or she was in danger. But that is not the situation in the case before us.

Evidence is relevant if it tends to make a "fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. This case featured two starkly contrasting, and largely incompatible, narratives of what *factually* transpired just before the killing. Under the prosecution's version of events, there is no possible way defendant could have been legitimately defending himself. Under defendant's version of events, there is

absolutely no leap of logic or faith required to conclude that it is objectively reasonable to fear for one's life when a large, intimidating person with an undisputed reputation for violence is pointing a gun at him and explicitly threatening to "blow [his] fricking brains out." Defendant's self-defense claim here depends purely on which of the two factual scenarios actually happened. Therefore, the psychiatric testimony would only have been relevant if it had some bearing on which scenario occurred.

Simply put, the psychiatric testimony would have cast no light whatsoever on which of the two versions of events was the more likely. Either defendant carefully planned the victim's demise and disposition, or the victim lost his temper and presented a highly convincing threat of immediate death. We are unable to perceive how, under the circumstances of this case, the proposed psychiatric testimony would have assisted the jury in determining which version of events was more credible or whether, under defendant's scenario, he would have honestly and reasonably believed that he was in imminent and grave danger. The trial court did not abuse its discretion by excluding the psychiatric testimony, and the successor judge erred by granting defendant's motion for a new trial on that basis. We reverse the order granting defendant's motion for a new trial.

In defendant's appeal, he argues that he was additionally deprived of his right to present a case because the trial court excluded evidence of personal protection orders (PPOs) issued against the victim and evidence of the victim's MySpace page.[1] Defendant contends that

[1] MySpace is a social-networking website. Users can post various semistatic descriptions of themselves, as well as photographs and other media, public discussions, links to friends or other websites, and various

this evidence would have been relevant to show that the victim was the initial aggressor. We agree in part, although we find the error harmless.

Evidence concerning the aggressive character of a homicide victim, even if the defendant was unaware of it at the time, is admissible in furtherance of a self-defense claim to prove that the victim was the probable aggressor. MRE 404(a)(2); *People v Harris*, 458 Mich 310, 315-316; 583 NW2d 680 (1998). However, this type of character evidence may only be admitted in the form of reputation testimony, not by testimony regarding specific instances of conduct unless the testimony regarding those instances is independently admissible for some other reason or where character is an essential element of a claim or defense. MRE 405; *Harris*, 458 Mich at 318-319. The victim's character is not an essential element of defendant's self-defense claim. The PPOs concerned specific instances of conduct and were properly excluded on that basis.[2]

However, we find that the MySpace page is not evidence concerning a specific instance of conduct. While a social-networking or other kind of personal website might well contain depictions of specific instances of conduct, such a website must be deemed a gestalt and not simply a conglomerate of parts. When considered by *itself*, a social-networking or personal website is more in the nature of a semipermanent yet fluid autobiography presented to the world. In effect, it

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forms of personal-status updates. The victim's MySpace page presented the victim consistently with his reputation for violence, including aggressive language, and references to guns, bullets, gang activities, drugs, and vengeance.

[2] We refer to the PPO documents themselves, which constitute allegations of specific conduct. However, defendant would have been free to call the plaintiffs in the PPO actions as witnesses to testify with regard to reputation only and not with regard to the specific instances of conduct.

is self-directed and self-controlled general-character evidence. Clearly, because people change over time, its relevance might be limited only to recent additions or changes; furthermore, it is obviously possible for people to misrepresent themselves, which could present a fact issue. But in the abstract, social-networking and personal websites constitute general reputational evidence rather than evidence concerning specific instances of conduct, and so the victim's MySpace page should have been admissible.

Nonetheless, the exclusion of the MySpace page itself was harmless here. Defendant was able to testify about the page and the contents thereof. We are unpersuaded that the specific page in this particular case was so visceral that its essence could not be captured by a spoken testimonial description. Furthermore, and of particular consequence, the victim's violent and aggressive character was not seriously in doubt. Presenting the page itself to the jury would have been sufficiently cumulative that we find its exclusion harmless.

Defendant next argues that the trial court's jury voir dire was deficient because the court failed to ask probing questions designed to expose juror bias arising from pretrial publicity. We disagree. Defendant fails to articulate what the trial court should have asked in addition to the questions it did ask, and the trial court appears from the record to have given the attorneys the opportunity to request questions to be asked. The trial court inquired into the jurors' prior knowledge and opinions of the matter and their ability to decide the case fairly and impartially, and it did not do so in a manner that created bias. Defendant has a right to a fair and impartial jury, but he does not have a right to individual, sequestered voir dire. *People v Tyburski*, 445 Mich 606, 618-619; 518 NW2d 441 (1994). We find no abuse of discretion.

Defendant next argues that misconduct by the prosecutor deprived him of a fair trial. We disagree. Because defendant did not object to the prosecutor's conduct in the trial court, his claims of misconduct are not preserved. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).[3] Therefore, defendant must show a plain error affecting his substantial rights. *Id.*; see also *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and any challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

Defendant argues that it was improper for the prosecutor to introduce evidence that a computer search for criminal-defense attorneys was conducted on the computer in defendant's home shortly after the offense. We agree. Evidence that defendant, or someone who used the computer, searched for an attorney infringes on defendant's right to an attorney and should not have been introduced into evidence. Moreover, we find that it cannot possibly have been a good-faith effort on the part of the prosecutor. *Noble*, 238 Mich App at 660. However, we find this misconduct harmless under the circumstances. There was no objection to this evidence at trial, presumably because, under the unique circumstances of this case, the search for an attorney could have supported either version of events. It was, after all, undisputed that defendant was fearful of the consequences of the discovery of the victim's death, irrespective of whether he acted out of calculated malice or out

[3] Abrogated on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

of a panicked response to an imminent and credible threat. While we do not condone the admission of this evidence, we find it harmless under the circumstances.

Defendant also argues that the prosecutor improperly referred to defendant's failure to produce evidence of the victim's violent character. Viewed in context, the prosecutor did not comment on defendant's failure to produce evidence, but rather on the evidence that *was* presented and what that evidence did not show. The prosecutor accurately stated that none of the witnesses claimed to have seen the victim engage in an actual act of violence. Therefore, the remark was not improper. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). Further, the comment was a legitimate response to defense counsel's personal attacks on the victim. *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001).

Defendant lastly argues that he was prejudiced by a prearraignment remark in which Wayne County Prosecutor Kym Worthy referred to this offense as a "thrill kill" during a press conference. The remark was made long before trial. As the prosecution argues on appeal, the only way it could have deprived defendant of a fair trial would be if it tainted the jury pool. However, there is no basis for concluding that it did. Defendant never moved for a change of venue before trial. Further, jury voir dire presented defendant with the opportunity to explore the issue of juror bias at trial. Defendant has not demonstrated that the remark prejudiced his right to a fair trial.

Defendant next argues that he received ineffective assistance of counsel, arguing that trial counsel should have made a number of additional objections and requests for jury instructions. We disagree. To establish ineffective assistance of counsel, a defendant must show

that counsel's performance was so objectively deficient that counsel was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must also show that he was prejudiced thereby. *Id*. at 312. To establish prejudice, defendant must show that there is a reasonable probability that the alleged error made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, 446 Mich at 312.

Defendant argues that counsel should have objected to the previously discussed evidence of the computer search for defense attorneys and the prosecutor's commentary thereon. However, as discussed, although that evidence was improper, it was harmless under the circumstances and could even have supported the defense theory, so defense counsel was not ineffective for failing to object. *LaVearn*, 448 Mich at 216. Defense counsel was similarly not ineffective for failing to make a futile objection to the prosecutor's comment that a codefendant failed to corroborate defendant's claim that the victim threatened to kill them; this was an accurate and therefore proper comment on the evidence. *Marji*, 180 Mich App at 538. Defense counsel was not ineffective for failing to raise additional arguments in favor of admitting the PPOs; as discussed, they were properly excluded.

Counsel was not ineffective for failing to raise additional objections to the introduction of recorded telephone conversations between defendant and his father from jail. Defendant placed his character at issue by attempting to introduce evidence of his peacefulness, so the prosecutor properly introduced the recordings to rebut that evidence. The recordings or the contents thereof were variously admissible as reputation or

opinion evidence under MRE 405 and under several exceptions to the hearsay-evidence rule. Furthermore, the trial court took great and commendable care to ensure that the jury truly understood that evidence of defendant's character was not evidence that he committed any of the crimes for which he was charged. Counsel was not ineffective for failing to raise further objections to the recordings, and even if counsel committed an error, we find that defendant would not have been prejudiced thereby.

Defendant next argues that counsel was ineffective for failing to request a cautionary instruction regarding accomplice testimony. The trial court did give the jury the undisputed-accomplice testimony instruction, CJI2d 5.4, but did not give the cautionary instruction that should have followed, CJI2d 5.6. Nevertheless, we review the instructions as a whole to determine whether the trial court fairly protected defendant's rights and informed the jury of the issues to be determined. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994), see also *People v Young*, 472 Mich 130, 144; 693 NW2d 801 (2005) (explaining that the trial court has discretion whether to give the cautionary accomplice instruction and an unpreserved claim regarding the failure to do so is reviewable only for plain error). The trial court did give the general witness-credibility instruction, which includes an instruction to consider whether a witness has any prejudice or personal interest in the outcome of a case and whether the witness had been subjected to any influences that might affect his or her testimony. In light of defense counsel's extensive attacks on the accomplices' credibility, including their agreements with the prosecutor and strong motivation to blame defendant, we find that defendant's rights were not prejudiced by counsel's failure to request CJI2d 5.6.

Defendant also argues that defense counsel was ineffective for failing to object to certain errors in the trial court's jury instruction on defense of others, CJI2d 7.21. The trial court properly instructed the jury that the lawful defense of others may excuse a criminal act and that defendant must have "honestly and reasonably believed" that his codefendant was in imminent danger of death or serious injury, even if it later turned out that defendant was mistaken. Further, when instructing the jury on self-defense, the trial court stated that defendant's conduct was to be judged according to how the circumstances appeared to him at the time, and the court indicated that "this instruction also includes defense of others." Although the trial court technically omitted part of CJI2d 7.21(2) and slightly misread part of CJI2d 7.21(4), the trial court's instructions as a whole properly and completely instructed the jury and protected defendant's rights. Counsel was not ineffective for failing to object.

Defendant next argues that defense counsel was ineffective for failing to move to strike a portion of defendant's statement in which he explained that the Drano found in his truck was for making bombs. Although defendant argues that the comment was not probative of any issue, the comment was elicited in the context of a conversation in which defendant referred to himself as a "pyro," a statement that was relevant in light of the evidence that the victim's body was burned. Because any objection would have been futile, counsel was not ineffective for failing to object.

Defendant lastly argues that defense counsel was ineffective for failing to request an instruction on second-degree murder as a necessarily included lesser offense of felony murder. Given that defendant was convicted of the alternative theory of first-degree pre-

meditated murder, for which the jury received a lesser-offense instruction on second-degree murder, defendant cannot establish that he was prejudiced by counsel's failure to request a second-degree-murder instruction.

Defendant argues that his felony-murder conviction must be vacated because there was insufficient evidence that the victim was killed during the commission or attempted commission of a larceny. We disagree. The sufficiency of the evidence is evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985).

The predicate felony in this case was larceny of the victim's gun, which defendant contends he did not take until after the killing, and then he only did so for the purpose of hiding it. The felony-murder doctrine does not apply if the intent to steal the victim's property was not formed until after the homicide. *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992). However, "a murder committed during the unbroken chain of events surrounding the predicate felony is committed 'in the perpetration of' that felony . . . ." *People v Gillis*, 474 Mich 105, 121; 712 NW2d 419 (2006). The murder and the felony need not be contemporaneous; rather, the defendant need only have intended to commit the underlying felony when the homicide occurred. *Brannon*, 194 Mich App at 125. Viewed in a light most favorable to the prosecution, the evidence was sufficient for the jury to find that defendant killed the victim while harboring an intent to steal his gun. Defendant's reason for doing so was a question of fact for the jury. The evidence was sufficient to support defendant's felony-murder conviction. Therefore, in addition, any

error in defendant's bind over was harmless. *People v Moorer*, 246 Mich App 680, 682; 635 NW2d 47 (2001).

However, convicting a defendant of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim is a violation of double-jeopardy protection. *People v Williams*, 265 Mich App 68, 72; 692 NW2d 722 (2005). We will uphold a single conviction for murder based on two alternative theories. *Id*. Accordingly, the proper remedy when a defendant is convicted of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim is to modify the conviction to specify that it is for a single count of first-degree murder supported by two theories.

Defendant finally argues that he was denied the right to a public trial. Had defendant properly raised this as a constitutional issue, we would agree. At the very beginning of the trial, the trial court cleared the courtroom for voir dire because of the large number of potential jurors. Defendant did not object. However defense counsel subsequently asked: "[I]s it possible to have the family stay[?]" The judge said that there was not enough room. Again, defendant did not object, let alone assert that he had a constitutional right to the presence of his family or others in the courtroom during jury selection.

In *Presley v Georgia*, 558 US 209, ___; 130 S Ct 721, 724; 175 L Ed 2d 675 (2010), the Court held that "the Sixth Amendment right to a public trial extends to the voir dire of prospective jurors," subject to certain exceptions:

> "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alterna-

> tives to closing the proceeding, and it must make findings adequate to support the closure." [*Id*. at ___; 130 S Ct at 724, quoting *Waller v Georgia*, 467 US 39, 48; 104 S Ct 2210; 81 L Ed 2d 31 (1984).]

The Court in *Presley* indicated that the number of prospective jurors would not be an overriding concern, that reasonable alternatives had to be considered even if not advanced by the parties, and that possible alternatives when the venire was large could "include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members." *Presley*, 558 US at ___; 130 S Ct at 725. Significantly, in *Presley*, there was a specific objection to the exclusion of the public from the courtroom, *id*. at ___; 130 S Ct at 722, whereas in the present case, there was no specific objection.

The record does not show that there was a basis for excluding defendant's family or others from the courtroom during the jury voir dire. However, the request for the presence of family was not a legal objection to their exclusion. In context, it appears that defendant was requesting an exception for his family to the judge's announcement regarding closure of the courtroom, not that defendant was challenging the ruling on any constitutional or legal basis.

Like the defendant here, the defendant in *People v Vaughn*, 291 Mich App 171; 804 NW2d 764 (2010), failed to object to closure of the courtroom. This Court upheld the conviction, stating:

> [T]his right [to a public trial] is not self-executing: the defendant must timely assert the right. *Levine v United States*, 362 US 610, 619-620; 80 S Ct 1038; 4 L Ed 2d 989 (1960) ("Due regard generally for the public nature of the

> judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal."). Thus, the failure to timely assert the right to a public trial forecloses the later grant of relief. See *United States v Hitt*, 473 F3d 146, 155 (CA 5, 2006) ("Where a defendant, with knowledge of the closure of the courtroom, fails to object, that defendant waives his right to a public trial."); *Freytag v Comm'r of Internal Revenue*, 501 US 868, 896; 111 S Ct 2631; 115 L Ed 2d 764 (1991) (Scalia, J., concurring) (noting that review of a claim of error with regard to certain rights, such as the Sixth Amendment right to a public trial, may be foreclosed by the failure to timely assert the right); see also *Peretz v United States*, 501 US 923, 936-937; 111 S Ct 2661; 115 L Ed 2d 808 (1991) (noting that the failure to timely assert the right to have an Article III judge preside over jury voir dire forecloses the grant of relief). [*Id*. at 196.]

We conclude that defendant waived his right to a public trial during the jury voir dire.

In conclusion, the successor judge erred by granting defendant's motion for a new trial, and we reverse that order. Defendant has not presented to us any errors or infringements of his rights that warrant reversal, and he waived his public-trial issue. We remand for the administrative task of correcting defendant's judgment of sentence to show that he is convicted of a single count of first-degree murder supported by two theories and affirm defendant's convictions and sentences as modified. We do not retain jurisdiction.

FORT HOOD, P.J., and DONOFRIO, J., concurred with RONAYNE KRAUSE, J.

PEOPLE v MEEKS

Docket No. 297030. Submitted June 8, 2011, at Grand Rapids. Decided June 16, 2011, at 9:00 a.m.

Michael Meeks was convicted by a Kent Circuit Court jury of assault with a dangerous weapon, MCL 750.82. The court, Dennis B. Leiber, J., sentenced defendant as a second-offense habitual offender to a prison term of 21 to 72 months. When scoring the sentencing guidelines, the court assessed five points for prior record variable (PRV) 2, MCL 777.52(1)(d) (prior low-severity felony convictions), because defendant had an out-of-state conviction for purchasing a stolen firearm. Defendant appealed.

The Court of Appeals *held*:

MCL 777.52(1)(d) requires the assessment of five points for PRV 2 when the defendant has one prior low-severity felony conviction. Defendant's prior conviction for purchasing a stolen firearm fell within the definition of a prior low-severity felony because it was for a felony from another state that corresponded to MCL 750.535b(2) (receiving a stolen firearm), which is a felony in offense class E of the sentencing guidelines under MCL 777.16z. Defendant argued that his prior conviction should have been treated as a misdemeanor because the value of the weapon he purchased was less than $200, which would generally have constituted misdemeanor-level receiving and concealing under MCL 750.535(5). However, MCL 750.535b(2) is a more specific statute relating particularly to stolen firearms and classifies such a crime as a felony. Moreover, defendant's prior conviction had to be treated as a felony even though the sentence he served for the conviction was only one year. A felony remains a felony irrespective of the sentencing peculiarities of another jurisdiction. Accordingly, the trial court properly assessed five points for PRV 2.

Affirmed.

SENTENCES — SENTENCING GUIDELINES — PRIOR RECORD VARIABLE 2 — OUT-OF-STATE CONVICTIONS.

Prior record variable 2 requires an assessment of points when a defendant has one or more prior low-severity felony convictions, including convictions from another jurisdiction for crimes that

correspond to crimes listed in certain offense classes under the sentencing guidelines; a conviction for an out-of-state crime is properly considered a low-severity felony when the offense is classified as a felony by the other jurisdiction and the offense falls within the definition of low-severity felony in MCL 777.52(2), even if the sentencing particularities of the other jurisdiction resulted in the defendant serving a sentence of one year or less.

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

State Appellate Defender (by *Gail Rodwan*) for defendant.

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

PER CURIAM. Defendant Michael Meeks appeals as of right his sentence of 21 to 72 months' imprisonment after a jury found him guilty of assault with a dangerous weapon, MCL 750.82. The court sentenced defendant as a second-offense habitual offender, MCL 769.10. We affirm.

This case arises out of an incident that took place outside the Herkimer Hotel/Apartments in Grand Rapids wherein defendant accosted two friends who were talking. Tempers rose, some racist talk entered into the confrontation, some scuffling took place, and then defendant stabbed one of the friends in the arm with a knife.

At sentencing, defense counsel admitted that defendant had an earlier conviction in Indiana. The trial court elaborated that defendant had purchased a stolen firearm for $175 in Richmond, Indiana. Defendant confirmed those details. Defense counsel urged the court to treat that conviction as a misdemeanor for

purposes of scoring the sentencing guidelines, but the trial court determined that it should instead be treated as a low-severity felony. Specifically, the court declined to regard defendant's Indiana conduct as corresponding to a violation of the misdemeanor level of Michigan's receiving-and-concealing statute, MCL 750.535(5), but instead treated it as corresponding to this state's statute setting forth the crime of knowingly receiving a stolen firearm as a 10-year felony, MCL 750.535b(2).

Defendant argues that because the statute in question requires that a sister-state conviction be assessed by how it "corresponds" to Michigan law, his conviction should be considered as corresponding to MCL 750.535(5), which is the misdemeanor of receiving or concealing stolen goods worth less than $200. We disagree.

The proper application of the statutory sentencing guidelines presents a question of law, calling for review de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

At issue is the scoring of prior record variable 2, which takes into account earlier low-severity felonies. MCL 777.52(1)(d) prescribes the assessment of five points when the defendant has one prior low-severity felony conviction. Subsection (2) defines "prior low severity felony conviction," in pertinent part, as follows:

> (b) A felony under a law of the United States or another state that corresponds to a crime listed in offense class E, F, G, or H.
>
> * * *
>
> (d) A felony under a law of the United States or another state that does not correspond to a crime listed in offense

> class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years. [MCL 777.52(2)(b) and (d).]

The parties agree that defendant's Indiana conviction came under Ind Code 35-43-4-2, which penalizes receiving stolen property. Both parties attached that statute to their respective briefs on appeal. Subpart (a) declares that "[a] person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use," thereby in general commits a class D felony under Indiana's criminal statutes or a class C felony if specified aggravating factors are present. Ind Code 35-43-4-2(a). There is no provision for a misdemeanor-level violation. Defendant argues that he served only one year in jail for his violation and insists that this indicates that his earlier conviction should be viewed as a misdemeanor for purposes of sentencing for this offense. Nonetheless, we conclude that a felony remains a felony even if a jurisdiction's peculiarities related to sentencing cause the sentence to mimic one for a misdemeanor. Accordingly, defendant's conviction was for a felony under a law of another state for purposes of MCL 777.52(2)(b) or (d).

There is no dispute that defendant's Indiana conviction resulted from his having purchased a stolen firearm at its fair-market price of $175. That would indeed have constituted misdemeanor-level receiving and concealing in Michigan. MCL 750.535(5). But the canons of statutory construction recognize the principle that when a specific statutory provision differs from a related general one, the specific one controls. See *People v Houston*, 237 Mich App 707, 714; 604 NW2d 706 (1999). The more specific statute applicable in this case is the one the trial court cited, MCL 750.535b(2), which

declares that "[a] person who receives, conceals, stores, [or] barters . . . a stolen firearm . . . , knowing that the firearm . . . was stolen, is guilty of a felony, punishable by imprisonment for not more than 10 years . . . ." That offense is a felony in offense class E of the sentencing guidelines. MCL 777.16z.

Affirmed.

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

In re VanDALEN

Docket Nos. 301126 and 301127. Submitted June 7, 2011, at Detroit. Decided June 16, 2011, at 9:05 a.m.

The Department of Human Services petitioned the Monroe Circuit Court, Family Division, to take jurisdiction of two minor children of respondent-mother D. Leader and respondent-father G. VanDalen, alleging that the children had been abused. Later, petitioner amended its petition to also seek termination of respondents' parental rights. The court, John A. Hohman, Jr., J., acquired jurisdiction over the children following an adjudicative proceeding before a jury. After a dispositional hearing, the court found that the evidence clearly and convincingly established grounds for termination under MCL 712A.19b(3)(g) (failure to provide proper care and custody) and MCL 712A.19b(3)(j) (reasonable likelihood that child will be harmed if returned to the parents' home). The court further found that termination was clearly in the children's best interests under MCL 712A.19b(5) and terminated respondents' parental rights. Respondents appealed separately, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Parents have a due-process liberty interest in caring for their children. When assessing whether that right was violated, the question is whether the procedures used were constitutionally adequate. There is no requirement that the jurors deciding whether the court should take jurisdiction of a child must reach a consensus regarding which specific statutory grounds for termination alleged in the petition were proved. Jurisdiction exists as long as five jurors find that the petitioner proved one or more statutory grounds for jurisdiction. Thus, the family court's instructions to the jury, which complied with MCR 3.972(E) and the standard jury instructions, adequately and fairly presented the applicable law and protected respondents' due-process rights when they indicated that the possible verdicts were (1) that none of the grounds alleged in the petition had been proved or (2) that one or more of the statutory grounds alleged in the petition had been proved and that a verdict was reached when five jurors agreed on a verdict.

2. The family court did not violate respondents' right to due process when, after the close of proofs, it obtained the custody order from prior proceedings involving L. VanDalen in an effort to resolve a conflict in the testimony. The court gave the parties a meaningful opportunity to be heard, as required by due process, when it notified the parties of its actions, gave the parties an opportunity to review the previous order, and gave the parties an opportunity to present additional evidence and argument in light of the previous order.

3. The family court did not clearly err by finding that petitioner had established by clear and convincing evidence statutory grounds for termination in light of the evidence that both children, as infants, suffered unexplained, serious, nonaccidental injuries consistent with intentional abuse while in respondents' sole care and custody. The evidence demonstrated a pattern of abuse indicating a substantial risk of future harm to the children. Termination of parental rights under MCL 712A.19b(3)(g) and (j) is permissible even in the absence of determinative evidence regarding the identity of the perpetrator when the evidence shows that the respondents must have either caused the intentional injuries or failed to safeguard the children from injury. The evidence also clearly supported the trial court's finding that termination was in the children's best interests in light of the evidence that the children would not be safe in respondents' custody and the evidence that the children were thriving in the care of their foster parents.

Affirmed.

1. COURTS — JURISDICTION — CHILD PROTECTIVE PROCEEDINGS — DUE PROCESS — VERDICTS — JUROR CONSENSUS.

There is no requirement that the jurors reach a consensus regarding which specific statutory grounds alleged in a petition for jurisdiction in a child protective proceeding were proved; jurisdiction exists as long as five jurors find that the petitioner proved one or more statutory grounds for jurisdiction (MCR 3.972[E]).

2. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — STATUTORY GROUNDS — FAILURE TO PROVIDE PROPER CARE AND CUSTODY — REASONABLE LIKELIHOOD THAT CHILD WILL BE HARMED IF RETURNED TO PARENTS' HOME — ABSENCE OF DETERMINATIVE EVIDENCE REGARDING THE IDENTITY OF THE PERPETRATOR OF ABUSE.

Termination of parental rights under MCL 712A.19b(3)(g) and (j) is permissible even in the absence of determinative evidence regarding the identity of the perpetrator when the evidence shows that

the respondents must have either caused the child's intentional injuries or failed to safeguard the child from injury.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William P. Nichols*, Prosecuting Attorney, and *Michael C. Brown*, Assistant Prosecuting Attorney, for the Department of Human Services.

Robert A. Manion for the minor children.

J. Henry Lievens for G. VanDalen.

Jeffery A. Yorkey for D. Leader.

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM. In these consolidated appeals, respondents appeal as of right the order terminating their parental rights to the minor children under MCL 712A.19b(3)(g) (failure to provide proper care and custody) and (j) (reasonable likelihood that the child will be harmed if returned to the parents' home). Because the trial court did not violate respondents' right to due process, the evidence clearly and convincingly established statutory grounds for the termination of respondents' parental rights, and the termination of respondents' parental rights was in the children's best interests, we affirm.

I

In early 2007, respondents had a child, L. VanDalen, the older child at issue. At the time of his birth, L. VanDalen's meconium tested positive for marijuana. Respondent-mother admitted that she had smoked marijuana when she was four months pregnant before she became aware of her pregnancy, after which she

quit smoking it. Children's Protective Services (CPS) conducted an investigation but decided not to remove the child from respondents' care and services were provided to respondents, including substance abuse counseling and parenting services.

When L. VanDalen was only two weeks old, he was hospitalized after a nurse at his wellness checkup noticed oral lesions in his mouth. He also had an abrasion around his nostril. Medical personnel were concerned that the lesions may have been puncture marks in his throat. Dr. Leena Dev, a physician on the hospital's child protection team, evaluated L. VanDalen and opined that the lesions in his mouth could have been caused by trauma, possibly burns caused by hot formula from a baby bottle, or could have been herpes. There was not enough evidence to indicate intentional abuse. But a subsequent skeletal survey revealed that L. VanDalen had a fractured leg (tibia), which could have been caused by pulling the leg back and forth forcefully. Dr. Dev concluded that L. VanDalen's fracture, which was not related to birth trauma, "appeared to be an inflicted fracture consistent with child abuse[.]" Respondents, who were L. VanDalen's primary caretakers, did not know what caused his lesions or how he fractured his leg. According to respondent-mother, L. VanDalen had never been outside of respondents' sight after his birth and they "could only conjecture as to how [his] injuries occurred." Respondents believed that his fracture could have occurred when the technician drew blood from his ankle/heel area after his birth.

After L. VanDalen was diagnosed with a fractured leg consistent with abuse, petitioner, the Department of Human Services, filed a petition requesting the court to take temporary jurisdiction over him, and he was re-

moved from respondents' care and placed with Linda Golab, respondent-mother's stepmother. The court subsequently assumed jurisdiction over L. VanDalen. Respondent-mother described certain incidents to both the foster-care worker assigned to the case as well as Golab in which respondent-father would cover L. VanDalen's nose and mouth because he thought it was funny to see him squirm and pull on L. VanDalen's legs because he did not like how they bowed. While respondent-mother told the foster-care worker that she did not do anything about it because she thought respondent-father was "playing," she told Golab that she never trusted respondent-father alone with L. VanDalen and would even take him into the bathroom with her.

After L. VanDalen's removal, respondent-mother cooperated with regard to the services offered and did "anything" petitioner instructed her to do. Respondent-father, however, failed to cooperate or comply with regard to the services. The caseworker told respondent-mother that respondent-father's noncompliance with services would be problematic if they remained together, and her attorney and the caseworker advised her to distance herself from him.

By November or December 2007, respondents had ended their relationship. After respondents separated, respondent-mother expressed her desire that L. VanDalen not be left alone with respondent-father. At that time, respondent-mother, with assistance from Golab, had obtained employment as a nursing aide and had moved into rental housing, independent of respondent-father, that was located closer to L. VanDalen. According to Golab, respondent-mother was doing "fantastic," indicated she was "done" with respondent-father, was participating in services, and was moving on with her life.

In July 2008, approximately 16 months after L. VanDalen was removed from respondents' care, because of respondent-mother's compliance and progress with services L. VanDalen was placed in her home with intensive in-home family-reunification services in place. Respondent-mother indicated to the caseworker that she remained separated from respondent-father and they did not have a relationship and were planning for L. VanDalen separately. Afterward, respondent-father failed to participate in any services, maintain contact with the caseworker, visit L. VanDalen on a regular basis (only visiting a couple times in approximately six months), or obtain employment or stability.

In November 2008, pursuant to the caseworker's recommendation, the court dismissed its jurisdiction over L. VanDalen and put a custody order in place for respondent-father. At this time, the caseworker believed that respondent-mother would protect L. VanDalen from respondent-father and understood how to prevent physical abuse given her progress with services and her concern about respondent-father visiting L. VanDalen in an unsupervised setting. After the court closed the case, respondent-mother believed that she had primary physical custody over L. VanDalen, with visitation to be determined between respondents, but the caseworker believed that respondent-father was only allowed supervised visits with L. VanDalen, to be supervised by respondent-mother. It was never determined how L. VanDalen sustained his injuries.

Subsequently, the caseworker discovered that respondents had actually reunited and moved in together in October/November 2008 despite respondent-mother's awareness that the caseworker had discouraged her from being with respondent-father. Respondent-mother never indicated to the caseworker

that she had gotten back together with respondent-father, and the caseworker would not have recommended dismissal of the case if she had been aware that respondents had reunited. In March 2009, respondent-mother told Golab that respondent-father had changed, that he was excited about being a father, and that they were residing together and were very happy.

II

Around March 2009, respondent-mother became pregnant. During her pregnancy, in April 2009, respondent-mother tested positive for marijuana. Late in 2009, respondent-mother gave birth to D. VanDalen, the youngest child at issue. Respondents were D. VanDalen's primary caretakers. In April/May 2010, respondents and family members noticed that D. VanDalen, who had been developing normally, had regressed developmentally and was no longer progressing as expected. Specifically, they noticed that her toes were pointing downward, that she was not using her legs, and that she would not put any weight on her legs. Family members also noticed that D. VanDalen's eyes looked "dull," that she had a bump on her back, and that her left foot was swollen. Glenda Shultz, respondent-mother's 16-year-old half-sister, also noticed that D. VanDalen "just wasn't right" because she would cry and scream "like it hurt" when her diaper was changed.

On Friday June 11, 2010, respondent-mother and Glenda, who had arrived at respondents' home earlier in the month to help baby-sit the children over the summer while respondent-mother attended nursing school, left D. VanDalen with respondent-father to go to the library. When they returned, D. VanDalen was lying on the floor sleeping, "whimpering," and "whining,"

and would not wake up. Respondent-mother, who was a certified nursing assistant, thought D. VanDalen might have had a seizure and that she should take her to the hospital, but respondent-father, who believed D. VanDalen was acting normally and was not in any pain, said that respondent-mother was being a "hypochondriac," that D. VanDalen "was fine, and that respondent mother did not need to take her to the hospital." Respondent-mother and Glenda continued to try to wake D. VanDalen up by taking off her diaper, which usually awoke her, rubbing her back, rolling her over, talking to her, and taking her outside, but she did not wake up. At least 10 but up to 30 minutes later, D. VanDalen finally awoke but they could not get her to follow a finger visually. Glenda was upset and worried about D. VanDalen, but respondent-mother did not take D. VanDalen to the doctor.

Over the weekend, respondents noted that D. VanDalen, who was teething, was fussier than usual, irritable, sleeping more than usual, and not eating normally. Glenda also noted that D. VanDalen was crying and sleeping a lot more over the weekend, slept all day on Saturday, which was not normal, but acted "fine" on Sunday, June 13, 2010. Respondent-mother attributed D. VanDalen's increased sleepiness to teething.

On Sunday, respondent-father became angry when D. VanDalen spit up on his shirt while he was feeding her, went into a rampage, and started throwing stuff around while D. VanDalen lay on the floor. Glenda heard stuff being thrown around inside the house from her room. Respondent-mother told Glenda that, during respondent-father's rampage, L. VanDalen was scared and would not come out of his bedroom and that she should have put L. VanDalen in Glenda's room.

Respondent-father denied becoming angry when D. VanDalen spit up on him.

On Monday, June 14, 2010, respondent-mother went to school in the morning and left D. VanDalen with her grandmother (Helen Griffin) and Glenda. According to respondent-mother, D. VanDalen was awake, happy, and active in the morning. According to Griffin, D. VanDalen appeared happy, was talking and smiling in the morning, but by the afternoon she "did not look right" and had a "blank look" on her face. Griffin also noticed that D. VanDalen cried when Glenda changed her diaper and let out the "most excruciating cry" Griffin had ever heard when Glenda held her on her shoulder, which Griffin felt was not a "regular" cry. According to Glenda, D. VanDalen was whiny and sleepy on Monday. When respondent-mother returned home in the afternoon, Griffin told her that D. VanDalen did not look right, that there was something wrong with her, and that she was not herself. Respondent-mother agreed that D. VanDalen did not look right because her hand was out to the side and she had a "little stare," prompting respondent-mother to take her to the doctor immediately.

At the doctor's office, D. VanDalen started having ongoing, uncontrolled seizures, which were severe and would not stop on their own, and she had to be immediately taken to the hospital. At the hospital, Dr. Randall Schlievert, a physician board-certified in child abuse pediatrics, examined D. VanDalen and noticed two areas in her spine that were raised and movable, that her toes pointed downward persistently, and that she had low tone and "floppiness" in both arms and legs, which was indicative of a brain injury. Respondents indicated to Dr. Schlievert that there had been no accidental trauma to D. VanDalen.

Subsequent MRIs of D. VanDalen's brain revealed damage to her brain cells, examination of her eyes revealed retinal hemorrhaging and "some ridges where the retina had been pulled away from the underlying eye tissue." X-rays revealed numerous fractures of varying ages in her ribs, back, leg, and toes. Dr. Schlievert believed that a fracture on her left tibia and fibula could have been caused by repetitive pulling or yanking of her limbs. With regard to fractures in the toes of her left foot, Dr. Schlievert found these "pretty rare" and suggested that they could have been caused by forceful bending of her foot or if her foot was bent while she was shaken. According to Dr. Schlievert, the rib fractures on D. VanDalen's side, which showed swelling and signs of recent tissue injury and were at least 7 to 10 days old, differed in age from the rib fractures on her back, which were "maybe" several weeks old. The spinal fractures were difficult to date, but the advanced state of healing on the spinous processes indicated fractures that were several weeks to several months old, and the leg fractures were at least 7 to 10 days to several weeks old or older. Dr. Schlievert considered and ruled out possible medical causes for D. VanDalen's injuries, such as metabolic diseases, birth defects, infections, or bone diseases. He concluded that her brain injury, seizures, and numerous fractures were a result of shaken baby syndrome caused by more than one episode of "severe shaking," which could have been fatal. Dr. Schlievert could not recall a case with so many fractures and was "quite disturbed" when he saw the extent of D. VanDalen's injuries.[1]

Dr. Schlievert opined that, given the extent of her injuries, D. VanDalen was expected to have permanent

[1] Over the previous eight years, Dr. Schlievert had evaluated approximately 300 to 400 cases a year for potential child abuse.

brain damage resulting in motor problems, problems with the use of her arms or legs, or both, delayed walking, problems with decreased strength and tone, likely physical and cognitive delays or impairments, and possible vision damage. According to Dr. Schlievert, D. VanDalen's brain damage might have been mitigated had respondent-mother sought medical treatment when she first noticed that D. VanDalen was difficult to wake and appeared unconscious, and her failure to do so was neglectful because D. VanDalen's symptoms were possibly life threatening. Dr. Schlievert further opined that, without knowing who caused D. VanDalen's "repeated serious trauma," her caretakers should not be allowed access to the children.

III

After the extent and nature of D. VanDalen's injuries were revealed, L. VanDalen and D. VanDalen were removed from respondents' care pursuant to the petition requesting that the court take permanent custody over the children and terminate respondents' parental rights. The children were eventually placed with Golab. Respondents, who remained in a relationship and planned to marry by the time of the termination hearing in October 2010, denied ever hurting the children or doing anything harmful to them and never observed anyone else, including each other or family members, harming the children. Several family members who occasionally cared for D. VanDalen also testified that they never hurt the children or observed anyone hurt them. According to respondent-mother, she sought medical care for her children when she believed they needed it. Further, according to respondent-mother, she had never been afraid of respondent-father, he had never threatened or screamed at her, and she had never

seen him lose his temper in a manner that caused her concern about her children's welfare. The circumstances surrounding the children's injuries were never revealed, and petitioner never ascertained who injured the children.

After an adjudicatory trial, the jury found that a preponderance of the evidence established statutory grounds for jurisdiction under MCL 712A.2(b). Pursuant to the jury's verdict, the court assumed jurisdiction over the children and proceeded to determine at the initial dispositional hearing whether respondents' parental rights should be terminated. By October 2010, the foster-care worker opined that respondents' parental rights should be terminated and that termination would clearly be in the children's best interests. Pertinent to her opinion was the severity of D. VanDalen's injuries, the fact that this was the second time L. VanDalen had been removed from respondents' care because of abuse, the similarity of L. VanDalen's and D. VanDalen's unexplained fractures to their legs, and the fact that respondents were not always forthright.

After conducting a termination hearing, the court found that the evidence clearly and convincingly established grounds for termination under MCL 712A.19b(3)(g) and (j). The court then found that termination was clearly in the children's best interests under MCL 712A.19b(5) given the history of child abuse occurring while in respondents' care and proceeded to terminate respondents' parental rights. Respondents now appeal as of right.

IV

Respondents' first two claims on appeal allege violations of their right to procedural due process. We review de novo "[c]onstitutional questions and issues of statu-

tory interpretation, as well as family division procedure under the court rules . . . ." *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006); see also *In re CR*, 250 Mich App 185, 203; 646 NW2d 506 (2002). Procedural due process " 'limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by due process, such as life, liberty, or property.' " *CR*, 250 Mich App at 204, quoting *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001). " 'A procedural due process analysis requires a court to consider "(1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient." ' " *CR*, 250 Mich App at 204, quoting *AMB*, 248 Mich App at 209 (citation omitted). Generally, three factors will be considered to determine what is required by due process:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." [*In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), quoting *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976); see also *In re MU*, 264 Mich App 270, 281; 690 NW2d 495 (2004).]

Respondents correctly contend that "parents have a due process liberty interest in caring for their children," *CR*, 250 Mich App at 204 (quotation marks and citation omitted), and that interest is at stake in child protective proceedings, see *Brock*, 442 Mich at 109-111. Further, the government's interest in protecting the welfare of children, which "coincides with the child's interest of

being free from an abusive environment," *MU*, 264 Mich App at 281, is significant here considering the severe abuse suffered by respondents' children while in their care. Given the competing interests at stake, "the pertinent question [is] whether the procedures used were constitutionally adequate." *CR*, 250 Mich App at 204, citing *AMB*, 248 Mich App at 209.

A

Respondents first allege that they were denied their right to due process during the adjudicatory trial when the court refused to deviate from the standard jury instructions that require a verdict that jurisdiction exists when five jurors agree that "one or more of the statutory grounds alleged in the petition have been proven" by a preponderance of the evidence.[2] MCR 3.972(E); see also M Civ JI 97.35; M Civ JI 97.49; M Civ JI 97.60. We review de novo claims of instructional error. *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). "If, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury, no error requiring reversal occurs." *Id.* Reversal is not warranted when the instructional error did not affect the outcome of the trial. *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008).

Our review of the record reveals no error in the court's instructions, which complied with MCR 3.972(E) and the standard jury instructions. MCR

[2] "Ordinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights." *In re SLH*, 277 Mich App 662, 668; 747 NW2d 547 (2008). However, when, as here, the termination occurs "at the initial disposition as a result of a request for termination contained in the original, or amended, petition for jurisdiction," a challenge to the adjudication "is direct and not collateral . . . ." *Id.*

3.972(E) plainly states that in child protective proceedings, " 'the verdict must be whether one or more of the statutory grounds alleged in the petition have been proven' " for the court to exercise its jurisdiction. *AMAC*, 269 Mich App at 536, quoting MCR 3.972(E). Accordingly, contrary to respondents' argument, there is no requirement that the jurors must reach a consensus regarding which specific statutory grounds supported jurisdiction. Instead, in accordance with MCR 3.972(E), jurisdiction exists as long as five jurors find that petitioner proved "one or more of the statutory grounds" for jurisdiction. MCR 3.972(E). Therefore, the trial court's instructions indicating that the possible verdicts were (1) that none of the statutory grounds alleged in the petition had been proved, or (2) that one or more of the statutory grounds alleged in the petition had been proved and that a verdict was reached when five jurors agreed on a verdict "adequately and fairly presented" the applicable law for the jury to find that jurisdiction existed. *Lewis*, 258 Mich App at 211.

Moreover, it was evident from the verdict form and the polling of the jury that all six jurors unanimously agreed that the court had jurisdiction over the children under all three statutory grounds asserted by petitioner and, thus, respondents could not have been prejudiced by the court's instructions as given. The verdict form submitted to the jury listed each individual statutory ground for jurisdiction asserted by petitioner with check boxes by each ground for the jury to indicate whether petitioner had proved or failed to prove each specific ground asserted. The jury found that "the court does have jurisdiction on all three . . . statutory grounds," and the jurors all indicated when polled by the court that that was, in fact, their verdict. The trial court's refusal to deviate from the standard instructions did not deprive respondents of their liberty inter-

est in the care and custody of their children. See also *Brock*, 442 Mich at 111, 114-115; *MU*, 264 Mich App at 281. The court's instructions did not prejudice respondents or deprive them of the fundamental fairness required by due process. See *CR*, 250 Mich App at 204.

B

Respondents next contend that they were denied their right to due process during the termination hearing when the court obtained evidence, on its own motion, after the close of evidence and without input from the parties. Respondents failed to object before the trial court and thus failed to properly preserve this issue for appellate review. *In re Hildebrant*, 216 Mich App 384, 389; 548 NW2d 715 (1996). We review unpreserved claims of constitutional error under a plain-error analysis. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). " 'To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.' " *Kern*, 240 Mich App at 336, quoting *Carines*, 460 Mich at 763.

L. VanDalen was initially removed from respondents' care as an infant and was made a temporary ward of the court as a result of his unexplained injuries which were consistent with abuse. Approximately 18 months later, pursuant to petitioner's recommendation, the court dismissed its jurisdiction over the child and the child was returned to respondent-mother's care after respondent-mother complied with participation in services and separated from respondent-father. The caseworker testified that she believed that the court allowed respondent-father only supervised visits with the child

with respondent-mother supervising the visits. Respondent-mother, however, testified that she believed that the court awarded her primary physical custody over the child and respondents were to agree on respondent-father's visits. Respondent-mother did not recall a requirement by the court that respondent-father's visits with the child be supervised. Thus, respondent-mother's and the caseworker's testimony conflicted regarding the terms of the custody arrangement and whether respondent-father's visits were required to be supervised.

After the conclusion of the termination hearing, the court, on its own motion, attempted to obtain the custody order from the court that had presided over the prior proceedings in an effort to resolve the conflict in the testimony. At the termination hearing, the court notified the parties that it had, in fact, sought out the custody order, but was unable to locate any information. The court then proceeded to hear closing arguments. Four days later, during the scheduled decision of the court, the court notified the parties that it had, in fact, obtained the pertinent custody order, which granted respondent-mother primary physical custody of the child with "reasonable visitation" for respondent-father and did not specify that the visits had to be supervised. The order, therefore, supported respondent-mother's testimony that she understood that there was no requirement that respondent-father's visits had to be supervised. The court further notified the parties that it had sought and obtained the transcript from the prior custody hearing, which indicated that petitioner was not comfortable with respondent-father's lack of compliance with his treatment plan and desired respondent-mother to supervise his visits with L. VanDalen. The transcript further indicated that the parties had agreed that respondent-mother would supervise the child's visits with respondent-father. The

transcript, therefore, supported the caseworker's testimony that she believed that respondent-father's visits were required to be supervised.

The trial court then gave the parties an opportunity to review both the order and the transcript and an opportunity to present additional evidence or argument in light of the newly obtained evidence. Respondents' attorney indicated that he wanted additional time to review the new information and that he would contact the court if he needed to do anything additional, and the court adjourned the proceedings. Two days later, the court admitted the order and transcript into evidence, without objection, and proceeded to render its decision. In its decision, the court noted the conflict between the transcript, which indicated that the parties agreed that respondent-father would have supervised visits only, and the actual court order, which did not specify a requirement that respondent-father's visits be supervised.

The trial court has authority to produce additional evidence when, as here, it obtained the evidence in an attempt to resolve a conflict in the testimony, which bore on respondent-mother's ability to adequately protect the children from harm or abuse, an issue pertinent to the termination decision. In child protective proceedings, under MCR 3.923(A),

> [i]f at any time the court believes that the evidence has not been fully developed, it may:
>
> (1) examine a witness,
>
> (2) call a witness, or
>
> (3) adjourn the matter before the court, and
>
> * * *
>
> (b) order production of other evidence.

We likewise conclude that the court's conduct did not deprive respondents of their right to due process. The record reveals that the court fully apprised the parties of its conduct in obtaining the additional evidence, allowed the parties to review the evidence, and gave the parties the opportunity to call additional witnesses and present additional evidence in light of the newly obtained evidence before rendering its decision. Respondents did not object to the court's actions or the admission of the newly obtained evidence, despite having the opportunity to do so. It is apparent, therefore, that the court gave respondents a meaningful opportunity to be heard, as required by due process. *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). Additionally, the newly obtained evidence did not contradict respondent-mother's testimony, and thus respondents could not have been unduly prejudiced by its admission. Under these circumstances, the court's conduct did not deprive respondents of their liberty interest in the custody and care of their children in a manner that violated their right to due process. See *Brock*, 442 Mich at 111; *MU*, 264 Mich App at 281. Likewise, respondents failed to demonstrate plain error that affected their substantial rights. See *Carines*, 460 Mich at 763-764; *Kern*, 240 Mich App at 336.

V

Respondents argue that petitioner failed to establish by clear and convincing evidence a statutory ground for termination. The trial court terminated their parental rights to the children under MCL 712A.19b(3)(g) and (j), which provide for termination under the following circumstances:

> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no

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

In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met. *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993). "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). We review the trial court's determination for clear error. *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 3.977(K).

The trial court did not clearly err by finding that the statutory grounds for termination were established by clear and convincing evidence. See *Trejo*, 462 Mich at 356-357; *Jackson*, 199 Mich App at 25. Both children, as infants, suffered unexplained, serious, nonaccidental injuries consistent with intentional abuse while in respondents' sole care and custody. Although the record contains no direct evidence implicating either respondent in the abuse, the extent and seriousness of the injuries to both children were consistent with prolonged abuse and clearly demonstrated a pattern of abuse in respondents' home indicating a substantial risk of future harm. This is especially so given the ongoing

uncertainty about the circumstances of the children's intentionally inflicted injuries.

Respondent-mother and respondent-father have consistently denied having any knowledge of the cause of their children's severe, nonaccidental injuries. We are dumbfounded by this bold claim. Again, in more than eight years of practice, consistently evaluating 300 to 400 cases a year, Dr. Schlievert could not recall a case with so many fractures and was "quite disturbed" when he saw the extent of D. VanDalen's injuries. Respondent-mother and respondent-father lived together in the same house with the children and shared responsibility for their care at the time the injuries occurred. Both noticed the children exhibiting different signs of distress related directly to their injuries. Surprisingly, other caregivers seemed to find the children's symptoms more alarming than respondents did. The facts are eminently clear in this case: Two infant children suffered severe, and in one case life-altering, injuries, at the hands of respondents because at least one of them perpetrated this shocking abuse and one of them failed to adequately safeguard the children from the abuse. Expert testimony established that there was absolutely no doubt that the injuries were not the result of accidents, they were not the result of birth trauma, and there were no other possible medical causes (either disease or defects) for the injuries. Respondents provided no plausible alternative explanation for the injuries that occurred in their home to their children, under their watch. Instead, they provided nothing more than far-fetched conjecture or silence. The evidence is uncontroverted that these injuries were the direct result of repeated, brutal abuse perpetrated by respondents. It does not matter in the least which of them committed these heinous acts.

On this record, we conclude that the evidence clearly and convincingly established a reasonable likelihood of harm or abuse if the children returned to respondents' home. MCL 712A.19b(3)(j). Likewise, the same evidence clearly and convincingly established that there was no reasonable expectation that respondents would be able to provide proper care and custody for the children within a reasonable time. MCL 712A.19b(3)(g). In sum, we hold that termination of parental rights under MCL 712A.19b(3)(j) and MCL 712A.19b(3)(g) is permissible even in the absence of determinative evidence regarding the identity of the perpetrator when the evidence shows that the respondents must have either caused the intentional injuries or failed to safeguard the children from injury.

VI

The evidence clearly supported the trial court's finding that termination was in the children's best interests. MCL 712A.19b(5). Compelling evidence indicated that the children would not be safe in respondents' custody considering that both children suffered unexplained injuries consistent with serious abuse while in respondents' primary care. L. VanDalen had been outside respondents' care almost half of his life because of the incidences of abuse. The children were young (L. VanDalen was 3½ years old and D. VanDalen was 10 months old at the time of the termination hearing), and the ongoing uncertainty about the circumstances surrounding the serious abuse of the children while in respondents' care weighed heavily against additional reunification efforts. The children had been placed in a stable home where they were thriving and progressing and that could provide them continued stability and permanency given the foster parents' desire to adopt them.

Given that the children's safety and well-being could not reasonably be assured in light of the past severe abuse of the children while in respondents' care, which remained unresolved, and that the children were thriving in the care of their foster parents, the court did not clearly err by finding that termination of respondents' parental rights was in the children's best interests. See *Trejo*, 462 Mich at 354, 356-357; MCL 712A.19b(5). The trial court did not err by terminating respondents' parental rights.

Affirmed.

FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ., concurred.

MICHIGAN AFSCME COUNCIL 25 v WOODHAVEN-BROWNSTOWN SCHOOL DISTRICT

Docket No. 299945. Submitted April 12, 2011, at Detroit. Decided May 3, 2011. Approved for publication June 16, 2011, at 9:10 a.m.

Michigan AFSCME Council 25 and its affiliate Local 3552, which represented noninstructional employees of Woodhaven-Brownstown School District, brought an action in the Wayne Circuit Court to enjoin the school district from privatizing custodial, facility maintenance, and transportation work performed by members of the bargaining unit pending resolution of plaintiffs' unfair labor practice charge before the Michigan Employment Relations Commission (MERC). The court, Michael F. Sapala, J., granted a preliminary injunction. Defendant sought leave to appeal. In lieu of granting leave, the Court of Appeals peremptorily reversed in an unpublished order, entered September 3, 2010 (Docket No. 299945). Plaintiffs sought leave to appeal in the Michigan Supreme Court. In lieu of granting leave, the Supreme Court vacated the Court of Appeals' order and remanded the case to the Court of Appeals for expedited plenary consideration. 488 Mich 974 (2010).

The Court of Appeals *held*:

1. When deciding whether to grant an injunction under traditional equitable principles, a court must consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. Considering all of these factors, the circuit court abused its discretion by granting the preliminary injunction.

2. The irreparable-harm factor is an indispensible requirement for a preliminary injunction. The circuit court in this case erred when it found that plaintiffs would suffer irreparable harm if the members of the bargaining unit lost their health insurance benefits pending the resolution of the unfair labor practice charge because plaintiffs failed to produce evidence of any particularized

harm that would result from the loss of health insurance. Nor did plaintiffs establish that their bargaining unit would be destroyed or that MERC could not craft an appropriate remedy if the preliminary injunction was not granted.

3. The question whether plaintiffs were given an opportunity to bid on the contract for noninstructional support services on an equal basis as other bidders was central to whether plaintiffs were likely to succeed on the merits. Contrary to the circuit court's conclusion, it was unlikely that plaintiffs would prevail in the MERC proceedings because their argument was dependent on their position that they were entitled to input into the terms of any request for proposal before the bidding process or to have the request-for-proposal terms drafted in a manner that would permit the bargaining unit an opportunity to submit a bid on terms that differed from those of other potential bidders. Plaintiffs were not so entitled.

4. In the context of labor disputes, public policy generally disfavors issuing injunctions absent a showing of violence, irreparable injury, or breach of the peace. None of those factors was present here, and the circuit court's speculation regarding the possible economic and emotional consequences of privatization was insufficient to justify an injunction.

5. The circuit court abused its discretion in evaluating the risk that plaintiffs would be harmed more by the absence of an injunction than defendant would be by the granting of the injunction given that the circuit court failed to account for the fact that the risk of economic harm to defendant was that it would be unable to recoup tax dollars spent for bargaining unit work and there was no evidence that defendant was provided with a means of recouping tax dollars in the event it succeeded in defending against the unfair labor practice charge in the MERC proceedings.

Reversed and injunction vacated.

Miller Cohen, P.L.C. (by *Bruce A. Miller* and *Robert D. Fetter*), for plaintiffs.

Clark Hill PLC (by *Thomas P. Brady*, *John L. Gierak*, *Mark W. McInerney*, and *Sarah A. Geddes*) for defendant.

Before: SERVITTO, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM. Plaintiffs Michigan AFSCME Council 25 and its affiliate, Local 3552, a labor union that represents noninstructional employees of defendant Woodhaven-Brownstown School District, brought an action in circuit court to enjoin defendant from privatizing custodial, facility maintenance, and transportation work performed by members of the bargaining unit pending resolution of plaintiffs' unfair labor practice charge before the Michigan Employment Relations Commission (MERC). The circuit court granted a preliminary injunction. Defendant filed an application for leave to appeal and this Court, in lieu of granting leave to appeal, peremptorily reversed the circuit court's order. *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, unpublished order of the Court of Appeals, entered September 3, 2010 (Docket No. 299945). Thereafter, in lieu of granting leave to appeal, our Supreme Court vacated this Court's order and remanded the case to this Court for "expedited plenary consideration." *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 488 Mich 974; 790 NW2d 831 (2010). We again reverse the circuit court's decision and vacate the preliminary injunction.

A court's issuance of a preliminary injunction is generally considered equitable relief. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 11; 753 NW2d 595 (2008). "The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights."[1] *Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 655-656; 588 NW2d 133

[1] Injunctive relief is generally considered an extraordinary remedy that issues where justice requires, there is an inadequate remedy at law, and there is a real and imminent danger of irreparable injury. *Kernen v Homestead Dev Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998); see also *Pontiac Fire Fighters*, 482 Mich at 8.

(1998). A trial court's grant of injunctive relief is reviewed for an abuse of discretion. *Mich Coalition of State Employee Unions v Civil Serv Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007); see also *Pontiac Fire Fighters*, 482 Mich at 8. The trial court's factual findings are reviewed for clear error. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 467; 719 NW2d 19 (2006); *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America, UAW v Michigan*, 231 Mich App 549, 551; 587 NW2d 821 (1998). Issues involving the proper interpretation of a court rule or statute are reviewed de novo as questions of law. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009); *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

As a preliminary matter, we note that the parties' briefs on appeal include documentary evidence that was not presented to the circuit court. Enlargement of the record on appeal is generally not permitted. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Because neither party moved to amend the record pursuant to MCR 7.216(A)(4), we shall limit our review to the record presented to the circuit court at the time it considered plaintiffs' motion for a preliminary injunction. See *Golden v Baghdoian*, 222 Mich App 220, 222 n 2; 564 NW2d 505 (1997).[2]

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[2] We note that if a party believes that a change of circumstances warrants modification or dissolution of an injunction, it may move for such relief in the trial court. See *City of Troy v Holcomb*, 362 Mich 163, 169-170; 106 NW2d 762 (1961). "[A]n injunction is always subject to modification or dissolution if the facts merit it." *Opal Lake Ass'n v Michaywé Ltd Partnership*, 47 Mich App 354, 367; 209 NW2d 478 (1973);

The parties do not dispute that plaintiffs had a right to seek injunctive relief from the circuit court pending resolution of their unfair labor practice charge by the MERC. Under the public employment relations act (PERA), MCL 423.201 *et seq.*, a charging party may petition a circuit court for "appropriate temporary relief or restraining order, in accordance with the general court rules, and the court shall have jurisdiction to grant to the commission or any charging party such temporary relief or restraining order as it deems just and proper." MCL 423.216(h). Therefore, plaintiffs had the burden of showing that a preliminary injunction should be issued. MCR 3.310(A)(4). "Traditional equity principles are a circuit court's guide to whether injunctive relief is 'just and proper'." *Local 229, Mich Council 25, AFSCME, AFL-CIO v Detroit*, 124 Mich App 791, 794-795 n 3; 335 NW2d 695 (1983).

We decline plaintiffs' invitation to apply the standards adopted by the Sixth Circuit Court of Appeals in *Ahearn v Jackson Hosp Corp*, 351 F3d 226 (CA 6, 2003), in considering whether to grant temporary injunctive relief to the National Labor Relations Board under § 10(j) of the National Labor Relations Act, 29 USC 160(j), to determine whether injunctive relief was appropriate in this case. Plaintiffs did not present this argument to the circuit court, leaving it unpreserved for appeal. See *City of Riverview v Sibley Limestone*, 270 Mich App 627, 633 n 4; 716 NW2d 615 (2006). Indeed,

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see also *In re Prichard Estate*, 169 Mich App 140, 148; 425 NW2d 744 (1988). " 'A continuing decree of injunction directed to events to come is subject to adaptation as events may shape the need.' " *First Protestant Reformed Church of Grand Rapids v DeWolf*, 358 Mich 489, 495; 100 NW2d 254 (1960), quoting *United States v Swift & Co*, 286 US 106, 114; 52 S Ct 460; 76 L Ed 999 (1932). Because the matter before us involves only the preliminary injunction issued by the circuit court, the subsequent events addressed by the parties on appeal are not relevant.

the circuit court applied the four-part test urged by plaintiffs below, except that it considered the likelihood of plaintiffs succeeding on the merits in place of the "futility" factor proposed in plaintiffs' motion. A party may not take one position in the trial court and then seek redress in an appeal on a contrary ground. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997).

Moreover, we note that federal circuit courts disagree on the appropriateness of the standard for granting injunctive relief applied by the Sixth Circuit in *Ahearn*. See *Muffley ex rel Nat'l Labor Relations Bd v Spartan Mining Co*, 570 F3d 534, 541-543 (CA 4, 2009) (adopting a traditional equitable test). In light of this Court's decision in *Local 229*, 124 Mich App at 794-795 n 3, that traditional equitable principles apply, we agree that the circuit court applied the proper test for evaluating whether to grant a preliminary injunction. Nonetheless, we conclude that the circuit court failed to reach a reasonable and principled decision in its evaluation and application of the relevant factors.

When deciding whether to grant an injunction under traditional equitable principles,

> a court must consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Alliance for the Mentally Ill*, 231 Mich App 660-661.]

With respect to the first factor, we note that our Supreme Court has declined to consider a party's likelihood of success on the merits when the irreparable-

harm factor was not established. *Pontiac Fire Fighters*, 482 Mich at 13 n 21. Therefore, we shall first consider the irreparable-harm factor.

The irreparable-harm factor is considered an indispensible requirement for a preliminary injunction. *Id.* at 8-9. It requires a particularized showing of irreparable harm. *Id.* at 9. "[I]t is well settled that an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural." *Dunlap v City of Southfield*, 54 Mich App 398, 403; 221 NW2d 237 (1974); see also *Pontiac Fire Fighters*, 482 Mich at 9 n 15. The injury is evaluated in light of the totality of the circumstances affecting, and the alternatives available to, the party seeking injunctive relief. *Mich State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 167; 365 NW2d 93 (1984). "Equally important is that a preliminary injunction should not issue where an adequate legal remedy is available." *Pontiac Fire Fighters*, 482 Mich at 9.

In finding a danger of irreparable harm in this case, the circuit court focused on the loss of health insurance benefits to members of the bargaining unit if they were to be laid off pending the resolution of the unfair labor practice charge. In *Mich State Employees Ass'n*, 421 Mich at 167 n 10, our Supreme Court noted that certain circumstances, such as the loss of health insurance benefits, might be sufficient to establish irreparable harm to an employee affected by the loss of employment when there is a "serious immediate or ongoing need for medical treatment," but the *Mich State Employees Ass'n* Court was not presented with a request for injunctive relief on that ground. The plaintiff in that case was a discharged civil service employee who sought a preliminary injunction pending the resolution of a

grievance procedure. She alleged that she would not be able to feed herself and her son if the defendant was not restrained from discharging her and stopping her pay. *Id.* at 167. The trial court took no testimony and admitted no evidence before granting the preliminary injunction. *Id.* at 168. In remanding the case to the trial court for further proceedings, the Supreme Court held:

> *We do not hold that the absence of usable resources and of obtainable alternative sources of income with which to support one's self and one's dependents, coupled with the prospect of destitution, serious physical harm, or loss of irreplaceable treasured possessions, could never support a finding of irreparable injury in an appropriate case*. We merely hold that the issuance of a preliminary injunction preventing discharge pending final decision in the civil service grievance procedures must be determined under the standards articulated herein. [*Id.* (emphasis added).]

Later, however, in *Pontiac Fire Fighters*, 482 Mich at 10 n 20, the Supreme Court expressed doubt about the correctness of the "dictum" in *Mich State Employees Ass'n*, but, in any event, found that the record before it did not support application of that principle. The Court also observed that the MERC has a number of means available to it to remedy economic injuries, such as awarding back pay and reinstating a laid-off employee to make the employee whole. *Id.* at 10; see also MCL 423.216(b). The alleged injury in that case, which involved financial hardship for laid-off firefighters, was found insufficient to satisfy the requirement of irreparable harm because there existed an adequate remedy at law. *Pontiac Fire Fighters*, 482 Mich at 10.

In this case, there was no evidence that any affected union member would suffer the loss of medical treatment if defendant acted on either request for proposal and privatized certain services. Although plaintiffs' counsel asserted at the motion hearing that he had

witnesses willing to testify about their medical conditions and inability to afford health insurance, no affidavit from any member was presented. Under MCR 2.119(E)(2), when a motion is based on facts not appearing in the record, the trial court "may hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition." An affidavit must be based on personal knowledge, "state with particularity facts admissible as evidence," and show that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit. MCR 2.119(B)(1). Because plaintiffs did not file an appropriate affidavit and it would be speculative to conclude from the record that the requisite particularized irreparable harm would occur, the circuit court did not reach a principled decision in finding that the requisite irreparable harm showing was made. Contrary to plaintiffs' argument on appeal, it is not self-evident from the record that the requisite harm exists.

Plaintiffs' alternative claim that they will suffer irreparable harm by ceasing to exist in their current form if a preliminary injunction is not granted was not a basis for the circuit court's decision to grant the preliminary injunction. In any event, this Court's decision in *Van Buren Pub Sch Dist v Wayne Circuit Judge*, 61 Mich App 6; 232 NW2d 278 (1975), which is the basis for plaintiffs' argument, is somewhat inconsistent in its evaluation of whether the MERC could provide an adequate remedy if a school district is permitted to engage in privatization pending resolution of an unfair labor practice charge. Moreover, *Van Buren Pub Sch Dist* was decided before the Legislature amended MCL 423.215 to specifically address whether contracts with third parties should be a proper subject of collective bargaining. The statute presently provides, in pertinent part:

(3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:

* * *

(f) The decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract for noninstructional support services other than bidding described in this subdivision; or the identity of the third party; or the impact of the contract for noninstructional support services on individual employees or the bargaining unit. However, this subdivision applies only if the bargaining unit that is providing the noninstructional support services is given an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders.

* * *

(4) Except as otherwise provided in subsection (3)(f), the matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide. [MCL 423.215(3) and (4).]

By contrast, the version of the statute in effect when *Van Buren Pub Sch Dist* was decided did not contain any provision that expressly addressed contracts with third parties, but rather required mandatory collective bargaining with respect to wages, hours, and other employment conditions. The question before the MERC as relevant to the preliminary injunction issued by the trial court in *Van Buren Pub Sch Dist* was whether the contracting of bus-transportation work performed by bargaining unit members was a mandatory subject of bargaining under MCL 423.215. In considering whether irreparable harm occurred, this Court focused on the harm that would occur to the union's bargaining posi-

tion if the school district were free to terminate the employment of bus drivers pending the MERC decision. It found the MERC's remedial system inadequate to ensure that there would still be something to bargain about in the event the MERC decided there was a duty to bargain. *Van Buren Pub Sch Dist*, 61 Mich App at 17. The Court viewed the passage of time as making the school district's decision irrevocable, explaining:

> In order to be certain that a MERC decision would not be rendered nugatory by the mere passage of time, the court was asked to insure that there would be something to bargain about, in the event MERC decided there was a duty to bargain. The court was concerned with preventing the overwhelming impact of a *fait accompli*. In order to make certain there would be something to bargain about, Van Buren had to be enjoined from shifting completely and irrevocably to its new transportation system. Time was of the essence in a way that MERC's remedial system was not designed to appreciate. Only a court of equity could provide an adequate remedy. [*Id.* at 17-18.]

At the same time, the facts before this Court indicated that the school district had failed to abide by the preliminary injunction. *Id.* at 31. Further, this Court had an opportunity to consider the actual MERC action, which was consolidated with the appeal of the trial court's contempt finding against the school district. In the MERC action, the school district's contemptuous behavior was considered by the MERC in deciding to remedy unfair labor practices by, among other things, requiring that the school district rescind its contract with the third party, reinstate services to those existing before the unlawful privatization, offer reinstatement and provide back pay to former employees, and bargain upon request with the union with respect to the privatization of bargaining unit work. *Id*. at 32. This Court upheld the MERC's remedies, finding that they were

"designed to return the parties to the bargaining positions they were in before the unfair labor practices were engaged in, in full recognition of the fact that in order to make the duty to bargain meaningful there must be something to bargain about." *Id.* at 33.

While this Court in *Van Buren Pub Sch Dist* thus upheld a trial court's determination that the passage of time would make the decision to privatize irrevocable and leave nothing to bargain about, when presented with the actual remedies that the MERC was able to fashion to return the parties to the status quo to provide for meaningful bargaining, in the face of the school district's contemptuous behavior, it is clear that the privatization did not become "irrevocable."

In this case, there may very well be union members who would decide to find other employment and not consider returning to the bargaining unit if plaintiffs succeed in the MERC. But there was neither evidence nor a finding by the circuit court that the bargaining unit would be totally destroyed if a preliminary injunction was not granted. Plaintiffs' own evidence that the membership in Local 3552 includes clerical, security, and food service personnel who are unaffected by the instant dispute contravenes any claim that the bargaining unit would be destroyed.

Because plaintiffs failed to establish that they would be eliminated if a preliminary injunction was not granted or that the MERC could not craft an appropriate remedy to protect collective bargaining rights, the circuit court did not abuse its discretion by failing to consider this circumstance when assessing the element of irreparable harm. Nonetheless, the circuit court did not reach a principled decision given its failure to require particularized irreparable harm with regard to

individual members of the bargaining unit affected by the privatization of their work.

While we conclude that the lack of evidence of a particularized injury alone provides support for defendant's argument that the preliminary injunction should be reversed, we also find merit to defendant's challenges to other relevant factors.

With respect to the first factor, it is apparent from the record that the issue central to the likelihood of plaintiffs succeeding on the merits of their unfair labor practice charge is whether they were given "an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders." MCL 423.215(3)(f). While the circuit court stated that there were sufficient factual issues to conclude that plaintiffs were likely to succeed on the merits, the circuit court failed to address the legal merits of the unfair labor practice charge and, in particular, whether it is supported by the statutory language. The MERC's resolution of legal issues in the course of resolving an unfair labor practice charge is not binding on courts. See *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 322-323; 550 NW2d 228 (1996). An agency's interpretation of a statute is "entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons. . . . But, in the end, the agency's interpretation cannot conflict with the plain meaning of the statute." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008). A statutory provision is ambiguous if it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177 n 3; 730 NW2d 722 (2007). Statutory provisions are read as a whole to determine legislative intent.

Robinson v City of Lansing, 486 Mich 1, 15; 782 NW2d 171 (2010). An undefined word or phrase is accorded its plain and ordinary meaning unless it is a term of art with a unique legal meaning. *People v Flick*, 487 Mich 1, 11; 790 NW2d 295 (2010).

Our consideration of the placement of the exception for bidding described in MCL 423.215(3)(f) and the requirement that there be an "opportunity to bid on the contract . . . on an equal basis as other bidders" reveals no ambiguity. The word "bid," in a contractual setting, denotes an offer. It is defined in *Random House Webster's College Dictionary* (1997) as "to offer (a certain sum) as the price one will charge or pay: *They bid $25,000 and got the contract.*" The phrase "equal basis as other bidders," examined in context, also is not ambiguous. It does not support plaintiffs' position that they were entitled to input into the terms of any request for proposal before the bidding process, or to have terms drafted in a manner that would permit the bargaining unit an opportunity to submit a bid on terms that differed from those of other potential bidders. This approach would put plaintiffs in a superior position to other bidders.

While opinions of the Attorney General are not binding on the courts, *Danse Corp v City of Madison Hts*, 466 Mich 175, 182 n 6; 644 NW2d 721 (2002), we find the Attorney General's interpretation of MCL 423.215(3)(f) in OAG, 2010, No 7249 (June 15, 2010), persuasive with respect to the legislative intent. In particular, we conclude that once the opportunity is afforded to a bargaining unit to bid for a contract on an equal basis with other bidders, the prohibition against collective bargaining concerning all listed subjects in MCL 423.215(3)(f) applies. Considered in this context, it is unlikely that plaintiffs will prevail in the MERC

proceedings so as to prevent defendant from going forward with either request for proposal with respect to custodial, facility maintenance, and transportation work. The circuit court's contrary conclusion regarding whether plaintiffs were given an opportunity to bid on an equal basis with other bidders lacks both factual and legal support.

With respect to the public-interest factor, it has been said that the private interests of union members are not tantamount to the public interest. *Alliance for the Mentally Ill*, 231 Mich App at 665-666. In the context of labor disputes, public policy generally disfavors issuing injunctions absent a showing of violence, irreparable injury, or breach of the peace. *Pontiac Fire Fighters*, 482 Mich at 8. Because plaintiffs failed to show irreparable injury and this case does not involve violence or a breach of peace, the circuit court did not reach a principled decision in evaluating the harm to the public interest. The circuit court's speculation regarding possible economic and emotional consequences of defendant's actions is insufficient to justify an injunction. *Id.* at 9.

The circuit court's speculation with respect to the harm to plaintiffs' members also permeated its evaluation of "the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief[.]" *Alliance for the Mentally Ill*, 231 Mich App at 661. Considering the burden imposed on plaintiffs to establish that they had the greater risk of harm, the circuit court did not reach a principled decision by finding that defendant would achieve "purported future savings" if it was allowed to privatize, but that, on balance, the potential harm to plaintiffs and their members outweighed the harm to defendant. As indi-

cated in *Alliance for the Mentally Ill*, the risk of economic harm to an entity such as defendant is that it would be unable to recoup tax dollars spent for bargaining unit work if it succeeds in the MERC. *Id.* at 666. There was no evidence in this case that defendant was provided with a means of recouping tax dollars in the event it succeeded in defending against the unfair labor practice charge in the MERC.

Considering all relevant factors, we conclude that the circuit court abused its discretion by granting the preliminary injunction. Accordingly, the circuit court's decision is reversed and the injunction is vacated. In light of our decision, it is unnecessary to consider defendant's challenge to the circuit court's decision not to require a bond as security for the preliminary injunction.

Reversed and vacated. This opinion is to have immediate effect pursuant to MCR 7.215(F)(2).

SERVITTO, P.J., and HOEKSTRA and OWENS, JJ., concurred.

PEOPLE v RAPP

Docket Nos. 294630 and 295834. Submitted February 3, 2011, at Lansing. Decided May 10, 2011. Approved for publication June 21, 2011, at 9:00 a.m. Affirmed in part and reversed in part, 492 Mich 67.

Jared Rapp was charged in the 54-B District Court, David L. Jordan, J., with violating Michigan State University (MSU) Ordinance 15.05, a misdemeanor, which prohibits a person from disrupting the normal activity of any person, firm, or agency while carrying out service, activity, or agreement for or with the university. The jury convicted defendant, and he appealed his conviction in the Ingham Circuit Court, Paula J. Manderfield, J., which reversed his conviction with prejudice. The circuit court relied on *City of Houston v Hill*, 482 US 451 (1987), and determined that the challenged ordinance was unconstitutional because it was facially overbroad. The Court of Appeals granted the prosecution leave to appeal (Docket No. 294630). Thereafter, the circuit court granted defendant's motion to tax costs pursuant to MCR 7.101(O). The Court of Appeals granted the prosecution leave to appeal this decision as well (Docket No. 294630), and consolidated the appeals.

The Court of Appeals *held*:

1. MSU Ordinance 15.05 is not facially unconstitutional under the overbreadth doctrine, which allows challenges to a law on the basis that it is written so broadly that it impinges on speech protected by the First Amendment. The circuit court's reliance on *Hill* was misplaced and distinguishable on the facts. The ordinance bars the disruption of persons, firms, or agencies carrying out a service, agreement, or activity for the university, but does not grant those persons unlimited discretion to enforce the ordinance, unlike the police in *Hill*, who had unfettered discretion to arrest a violator. The word "disrupt," used in the ordinance, contemplates causing confusion or disorder and thus cannot be deemed to reach a substantial amount of constitutionally protected conduct. Moreover, the ordinance is not focused solely on speech. The circuit court erred by holding that the ordinance was unconstitutional and reversing defendant's conviction with prejudice.

2. The circuit court erred by granting defendant's motion for taxation of costs because MCR 2.625 and MCR 7.101(O) provide no

basis to award costs in a criminal matter. MCL 600.2441(2) similarly provides for taxation of costs in civil, not criminal, matters and does not provide a basis to award costs in a criminal proceeding. Defendant cited no authority suggesting that the assessment of costs against the prosecution in a criminal appeal is permissible, and the prosecution has broad statutory discretion in its charging decisions.

Reversed and remanded to the circuit court to address defendant's remaining issues.

COSTS — APPEAL — CIRCUIT COURT — APPLICABILITY — CRIMINAL MATTERS.

A prevailing party may tax only the reasonable costs incurred in an appeal in the circuit court, including (1) the cost of an appeal or stay bond, (2) the transcript, (3) documents required for the record on appeal, (4) fees paid to the clerk incident to the appeal, (5) taxable costs allowed by law in appeals in the Supreme Court, and (6) other expenses taxable under applicable court rules or statutes, but these costs are only taxable in civil, rather than criminal, matters (MCL 600.2441[2]; MCR 2.625, MCR 7.101[O]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Stuart J. Dunnings, III*, Prosecuting Attorney, *Guy L. Sweet*, Appellate Division Chief, and *John J. Murray*, Assistant Prosecuting Attorney, for the people.

J. Nicholas Bostic for defendant.

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

PER CURIAM. In these consolidated appeals, the prosecution appeals by leave granted the circuit court's orders reversing defendant's misdemeanor convictions on the basis of its determination that the ordinance on which defendant's convictions were based was unconstitutional and assessing costs against the prosecution. Because the ordinance at issue is not facially overbroad, we reverse and remand this matter to the circuit court to permit the court to address defendant's other claims of error.

On September 16, 2008, defendant received a parking ticket in a Michigan State University (MSU) parking structure. Upset about the ticket, defendant confronted university parking enforcement employee Ricardo Rego, who was in the area where defendant's vehicle was parked. Rego was in the process of having another vehicle towed when defendant sped toward his service vehicle. Defendant stopped his vehicle in front of the service vehicle, got out, and walked quickly toward Rego in what Rego perceived to be an aggressive manner. Defendant yelled at Rego, asked if he was the one who gave defendant the ticket, and demanded to know his name. Rego attempted to speak with defendant, but then got into his service vehicle and called for a police officer because defendant was acting aggressively. During the approximately 10 to 15 minutes it took for the police to arrive, defendant remained outside Rego's service vehicle, taking pictures of him with his camera phone. Defendant was thereafter charged with violating MSU Ordinance 15.05, which provides:

> No person shall disrupt the normal activity or molest the property of any person, firm, or agency while that person, firm, or agency is carrying out service, activity or agreement for or with the University.

A jury convicted defendant of the misdemeanor ordinance violation. On appeal, the circuit court reversed defendant's conviction and dismissed the charges with prejudice, concluding that the ordinance was unconstitutionally overbroad on its face. The prosecution sought leave to appeal the circuit court's decision, which we granted (Docket No. 294630). Thereafter, defendant moved to tax costs in the circuit court. The circuit court granted defendant's motion and ordered the prosecution to pay $833.65 in taxable costs. The prosecution

moved for leave to appeal that order as well, and this court granted leave (Docket No. 295834), consolidating both cases.

This Court reviews de novo a circuit court's determination regarding the constitutionality of a statute. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 608-609; 673 NW2d 111 (2003). Statutes and ordinances are presumed to be constitutional. *People v Barton*, 253 Mich App 601, 603; 659 NW2d 654 (2002). Further, we must construe a statute or ordinance as constitutional unless its unconstitutionality is clearly apparent. *Owosso v Pouillon*, 254 Mich App 210, 213; 657 NW2d 538 (2002). In determining whether a statute or ordinance is unconstitutionally vague or overbroad, a reviewing court should consider the entire text of the statute and any judicial constructions of the statute. See *People v Rogers*, 249 Mich App 77, 94-95; 641 NW2d 595 (2001).

On appeal, the prosecution contends that the circuit court erred by declaring the ordinance at issue facially unconstitutional and reversing defendant's convictions on that basis. We agree.

"The First Amendment commands, 'Congress shall make no law . . . abridging the freedom of speech.' " *Ashcroft v Free Speech Coalition*, 535 US 234, 244; 122 S Ct 1389; 152 L Ed 2d 403 (2002). To that end, statutes have been successfully challenged as unconstitutional on the basis that they, by their very words, impinge upon that freedom and are thus overbroad on their faces. The overbreadth doctrine "allows a party to challenge a law written so broadly that it may inhibit the constitutionally protected speech of third parties, even though the party's own conduct may be unprotected." *In re Chmura*, 461 Mich 517, 530; 608 NW2d 31 (2000).

Claims of facial overbreadth have been entertained in cases involving statutes that by their terms seek to regulate only spoken words; cases involving statutes that purport to regulate "the time, place, and manner of expressive or communicative conduct"; and cases in which "such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights." *Broadrick v Oklahoma*, 413 US 601, 612-613; 93 S Ct 2908; 37 L Ed 2d 830 (1973). The United States Supreme Court has repeatedly emphasized, however, that " 'where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep.' " *Virginia v Black*, 538 US 343, 375; 123 S Ct 1536; 155 L Ed 2d 535 (2003) (opinion of Scalia, J.), quoting *Osborne v Ohio*, 495 US 103, 112; 110 S Ct 1691; 109 L Ed 2d 98 (1990). "[A]n otherwise overbroad or vague statute may be saved from invalidation when it has been or could be subject to a narrow and limiting construction." *Barton*, 253 Mich App at 604; see also *Broadrick*, 413 US at 613. The United States Supreme Court has further explained that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 800; 104 S Ct 2118; 80 L Ed 2d 772 (1984). Rather, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Id*. at 801. Courts routinely construe statutes in a manner that avoids a statute's potentially overbroad reach, apply the statute in that case, and leave the statute in place. *Id*. at 799-800.

Relying almost exclusively on *City of Houston v Hill*, 482 US 451; 107 S Ct 2502; 96 L Ed 2d 398 (1987), the circuit court concluded that MSU Ordinance 15.05 was unconstitutionally overbroad on its face because the language barring any person from disrupting the normal activity of various persons associated with the university "obviously criminalizes an extremely broad range of speech. Moreover, just as in [*Hill*], there is nothing in the ordinance that tailors the rule to prohibit only disorderly conduct or fighting words."

In *Hill*, an action was brought challenging the constitutionality of a city ordinance that made it illegal to in any manner oppose, molest, abuse or interrupt a police officer in the execution of his or her duty. The United States Supreme Court held that the ordinance was facially overbroad because it criminalizes a substantial amount of, and is susceptible of regular application to, constitutionally protected speech, and accords the police unconstitutional enforcement discretion. *Id*. at 455, 466-467. The ordinance prohibited persons from "in any manner . . . interrupt[ing]" an officer in the execution of the officer's duty, and noting that the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics of our free nation, the Court expressed its concern that while the ordinance was admittedly violated scores of times daily, only some individuals—those chosen by the police in their unguided discretion—are arrested. *Id*. at 465-467. The ordinance thus gave the confronted officers unfettered discretion to arrest those in violation as they saw fit.

The ordinance in this matter is distinguishable from that addressed in *Hill*. First, the ordinance in *Hill* concerned police officers—who have the power to arrest—and gave them direct, indiscriminate power to arrest (or not)

those they deemed in violation of the ordinance. The ordinance here prohibits the disruption of MSU employees and others serving the university who are performing their duties. And because all those persons do not have the power to arrest an ordinance violator, the enforcement of the ordinance is not subject to the unlimited discretion of the person.

Second, there is a distinct and important difference in the definitions of the word "interrupt," used in the *Hill* ordinance, and the word "disrupt," used in the ordinance at issue. "Interrupt" is defined in part as "[t]o break the continuity or uniformity of[.]" *The American Heritage Dictionary of the English Language* (2006). The word "disrupt," on the other hand, is defined in part as "[t]o throw into confusion or disorder" and "[t]o interrupt or impede the progress, movement, or procedure of[.]" *Id*. Although one definition of "disrupt" includes the word "interrupt," the word "disrupt" clearly contemplates more than a minimal break in the continuity of an action. The strong words used in its definition ("disorder" and "confusion") support such a finding. One can interrupt an action without causing disorder or confusion, such as by merely asking a question. However, the same conduct does not necessarily disrupt, and by definition, one cannot disrupt an action without causing disorder or confusion. Thus, while "interrupt" could be deemed, as it was in *Hill*, to reach a substantial amount of constitutionally protected conduct, the same can not necessarily be said of "disrupt."

Finally, in *Hill*, the United States Supreme Court's concern focused on the fact that the enforceable portion of the ordinance, as drafted (and as applied to the defendant in that case), served to criminalize only verbal interruptions, of any nature whatsoever, of po-

lice. The ordinance at issue here bars the disruption of MSU employees and others serving the university while performing their duties and is not focused solely on speech. Accordingly, the trial court's reliance on *Hill* was misplaced and defendant's facial challenge of the ordinance based on overbreadth must fail.

We also note that defendant asserted in the trial court and again on appeal in the circuit court that not only was the ordinance unconstitutional on its face, but also as applied to the facts of this case. The circuit court did not address this issue or several other issues defendant raised on appeal in the circuit court. We thus reverse the circuit court's ruling that the ordinance was facially unconstitutional, but remand this matter to the circuit court to address whether the ordinance was unconstitutional as applied and any remaining issues previously raised by defendant on appeal in that court.

The prosecution next contends that the circuit court cannot assess costs absent statutory authority and that no statutory authority allowed the assessment of costs in this matter. We agree.

Defendant moved for taxation of costs pursuant to MCR 7.101(O), which provides:

> Costs. Costs in an appeal to the circuit court may be taxed as provided in MCR 2.625. A prevailing party may tax only the reasonable costs incurred in the appeal, including:
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> (1) the cost of an appeal or stay bond;
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> (2) the transcript;
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> (3) documents required for the record on appeal;
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> (4) fees paid to the clerk or to the trial court clerk incident to the appeal;
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> (5) taxable costs allowed by law in appeals to the Supreme Court (MCL 600.2441); and

> (6) other expenses taxable under applicable court rules or statutes.

Notably, MCR 2.625, referred to in MCR 7.101(O), applies to the taxation of costs but appears in the rules of civil procedure. Defendant has provided no authority suggesting that either of these court rules is applicable to appeals of criminal matters. As such, there is no basis to award costs under either court rule.

At oral argument on his motion for taxation of costs, defendant also relied on MCL 600.2441. However, MCL 600.2441(2) provides, "In all civil actions or special proceedings in the circuit court, . . . the following amounts shall be allowed as costs in addition to other costs . . . ." Thus, this statute specifically provides for the taxation of costs in *civil* matters and also provides no basis for the assessment of costs against the prosecution in a criminal matter. Defendant fails to cite any other authority suggesting that an assessment of costs against the prosecution in a criminal appeal is permissible. Moreover, this Court will not undermine the broad statutory discretion granted the prosecution in its charging decisions. See, e.g., *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999). Accordingly, an assessment of costs against the prosecution in defendant's criminal appeal in the circuit court was not appropriate.

We reverse and remand this matter to the circuit court to permit the court to consider defendant's other claims of error. We do not retain jurisdiction.

SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ., concurred.

REED ESTATE v REED

Docket No. 297528. Submitted June 14, 2011, at Grand Rapids. Decided June 23, 2011, at 9:00 a.m. Leave to appeal denied, 490 Mich 912.

The estate of Daren R. Reed moved in the Muskegon Circuit Court to recover the decedent's 401(k) proceeds from the designated beneficiary, his ex-wife Mae Lynn Reed (Reed), pursuant to a waiver provision in the Reeds' divorce judgment that awarded the parties their respective retirement benefits free from any claim by the other. Reed argued that this waiver provision was preempted by the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq*., and was otherwise invalid because the divorce judgment, which had been entered by default, did not represent a knowing relinquishment of her rights. The court, Gregory C. Pittman, J., granted the motion, and Reed appealed.

The Court of Appeals *held*:

1. The resolution of this case was not contingent on whether ERISA preempted state law. Once the proceeds from a plan have been distributed to the designated beneficiary, ERISA is no longer implicated. Therefore, whether the proceeds may be retained despite the terms of the divorce judgment is an issue governed exclusively by state law.

2. The provision in the divorce judgment awarding the decedent his retirement benefits free from any claim by Reed constituted a valid waiver of Reed's rights as the designated beneficiary. A waiver is the voluntary, intentional relinquishment of a known right that may be shown by express declarations or by declarations that manifest the parties' intent and purpose. An implied waiver may be established by a party's decisive, unequivocal conduct from which an intent to waive may be reasonably inferred. While a waiver generally will not be implied from a party's mere silence, a waiver may be implied from silence if the party had an obligation to speak. In this case, Reed was obligated to speak in the divorce action by filing an answer or contesting the entry of the default and subsequent judgment. Her consistent failure to do so, despite having received notice of the proceedings and their intended

outcome, as well as copies of all documents filed, constituted a waiver implied by conduct inconsistent with an intent to assert her rights.

3. The fact that the divorce judgment was entered by default was irrelevant to whether its waiver provision was enforceable. Default judgments are conclusive adjudications and are as binding on the litigants as judgments obtained following a trial or settlement.

Affirmed.

1. DIVORCE — JUDGMENTS — PREEMPTION OF STATE LAW — RETIREMENT PLANS — EMPLOYEE RETIREMENT INCOME SECURITY ACT.

The determination of whether the designated beneficiary of a retirement plan may retain its proceeds despite the contrary terms of a divorce judgment is governed exclusively by state law; once the proceeds from a retirement plan have been distributed to the designated beneficiary, the federal Employee Retirement Income Security Act is no longer implicated (29 USC 1001 *et seq*.).

2. DIVORCE — JUDGMENTS — DEFAULT JUDGMENTS — WAIVER PROVISIONS — IMPLIED WAIVERS.

A waiver is the voluntary, intentional relinquishment of a known right that may be shown by express declarations or by declarations that manifest the parties' intent and purpose; an implied waiver may be established by a party's decisive, unequivocal conduct from which an intent to waive may be reasonably inferred; while a waiver generally will not be implied from a party's mere silence, a waiver may be implied from silence if the party had an obligation to speak; a waiver of rights contained in a default divorce judgment may be implied when a party who received notice of the proceedings and their intended outcome failed to file an answer or contest the entry of the default or subsequent judgment.

3. DIVORCE — JUDGMENTS — DEFAULT JUDGMENTS — WAIVER PROVISIONS.

The fact that a divorce judgment was entered by default is irrelevant to whether a waiver provision contained in the judgment is enforceable; default judgments are conclusive adjudications and are as binding on the litigants as judgments obtained following a trial or settlement.

Parmenter O'Toole (by *Rachel L. Terpstra*) for the estate of Daren R. Reed.

Robert J. Riley for Mae Lynn Reed.

Before: TALBOT, P.J., and GLEICHER and M. J. KELLY, JJ.

TALBOT, P.J. Mae Lynn Reed (Reed) challenges the enforcement of the pension benefits waiver provision in her divorce judgment. Specifically, Reed contests the trial court's order that she turn over the proceeds she received from the retirement account's plan administrator to the estate of her late ex-husband, Daren Reed (the decedent). We affirm.

The following undisputed facts are provided for both background and perspective. The parties were married on August 23, 2002. The complaint for divorce filed by Daren Reed indicated the parties ceased their cohabitation in November 2003. The summons was issued and the divorce complaint was filed on July 30, 2007. The complaint indicated that the parties had no issue of the marriage and had acquired no real property. Reed was personally served with the summons and complaint on August 1, 2007. The trial court mailed a notice to the parties on August 15, 2007, to appear for a nonjury trial in this matter on November 5, 2007. Reed never filed an answer or appearance, and a proposed divorce judgment, affidavit, default, entry of default, and notice of hearing were forwarded to her on October 19, 2007. After taking proofs the trial court entered the divorce judgment on November 5, 2007, and a copy of the signed judgment was forwarded to Reed on November 7, 2007. The lower court record demonstrates, and the parties do not dispute, that Reed did not appear or respond to any pleadings filed in the divorce action and took no steps to have the judgment set aside following its entry.

The relevant portions of the divorce judgment are:

> IT IS FURTHER ORDERED AND ADJUDGED that both the Plaintiff and the Defendant herein shall each be and they are hereby awarded their respective pension plans, [individual retirement accounts], annuities, etc., if any, free and clear from any claim by the other.
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> IT IS FURTHER ORDERED AND ADJUDGED that all the rights of either party in and to the proceeds of any policy or contract of life insurance, endowment, or annuity upon the life of the other party in which he or she has been named or designated a beneficiary, or in which he or she became designated by assignment or change of beneficiary, during the marriage or in anticipation thereof, whether such contract or policy was heretofore or shall hereafter be written or become effective, shall be extinguished and any benefits shall hereupon become payable to the minor children of the parties. As long as they are under the age of 18 years, such designation will be irrevocable.
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> It shall be the responsibility of each party to make the appropriate changes in beneficiary designation of any polices on his/her life to effectuate the intent of this judgment in light of the recent conflict in the Federal District Court decisions regarding the effect of divorce on beneficiary designation.

Daren Reed died on September 9, 2009, without having effectuated a change of beneficiary form with his employer's 401(k) plan administrator. Subsequently, Reed filed a claim and was paid the decedent's retirement benefits of approximately $150,000 as the designated beneficiary. When the decedent's adult offspring learned of the distribution, the estate initiated the present action seeking to enforce the divorce judgment and recover any proceeds obtained by Reed.

In the lower court proceedings, neither party challenged the propriety of the distribution of the funds to Reed by the plan administrator in accordance with the

Employee Retirement Income Security Act (ERISA)[1] based on Reed's being the designated beneficiary on the account. Focus of the litigation centered on whether Reed had the right to retain the proceeds given the waiver provision contained in the divorce judgment. The estate argued that ERISA was not implicated and did not challenge the distribution by the plan administrator. The estate contended that state law governed enforcement of the divorce judgment, including the pension waiver provision and the validity of the waiver. The estate also argued that Reed should be estopped from challenging the waiver provision and that to permit Reed to retain the proceeds would be inequitable because it would constitute an unjust enrichment as a windfall.

Reed responded by asserting that ERISA preempted state law and that she was entitled to receive and retain the distribution. In making this assertion, Reed argued that since the divorce judgment was entered by default, the waiver provision was invalid or unenforceable because it did not constitute an overt act or a knowing waiver of her rights. In ordering Reed to relinquish the funds to the estate, the trial court explained, in pertinent part:

> The argument has been put forward that either Mr. Reed did not intend what was indicated in the default Judgment of Divorce, and I don't buy that at all. I think it's pretty clear that Mr. Reed did not intend that—or did not change his mind about the fact that Ms. Reed was not to be the beneficiary of any of those type of instruments.
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> [S]imply by virtue of the fact that the judgment that was entered in this divorce severing this marriage was a default

[1] 29 USC 1001 *et seq.*

> judgment, does not diminish the effect of the judgment that was entered. . . . [T]he default judgment has as much faith, credit, and effect as it would if it were a judgment that was based upon the consent of the parties, or based upon the opinion that would have been written by the Court had it been a trial issue. . . . Ms. Reed simply by not following through, or answering, pleading, or otherwise defending as recognized by law here; and therefore a default judgment being entered, in effect did make a decision. She did participate to the extent that she chose not to participate.
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> There is no two-tiered system of judgments of divorce in this state of Michigan, or different levels of effect, or seriousness, or import, or any other term that you would place on it to show that one judgment has a different—should be taken in a different light than the other judgment. The full faith and credit of the Court is indicated through its judgment, whether it would be default, consent, or the Court rendered opinion. But never the less the provisions of that judgment should be given their full faith—should be given their full affect [sic] accordingly.

This appeal ensued.

"Waiver is a mixed question of law and fact. The definition of a waiver is a question of law, but whether the facts of a particular case constitute a waiver is a question of fact."[2] We review for clear error a trial court's findings of fact and review de novo its conclusions of law.[3] We also review a trial court's equitable decisions de novo,[4] but the underlying factual findings remain subject to review for clear error. "A finding is clearly erroneous when, although there is evidence to

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[2] *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006) (citation omitted).

[3] *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

[4] *Wengel v Wengel*, 270 Mich App 86, 91; 714 NW2d 371 (2006).

support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed."[5]

At the outset, Reed attempts to obfuscate the issue by suggesting that it is more complicated than it appears and implying that resolution of the issue is contingent on the federal-law preemption by ERISA. Neither is true, particularly given the fact that the parties do not contest the propriety of the distribution of the funds by the plan administrator, merely Reed's right to retain them. In this instance, preemption is not "the ultimate issue . . . ."[6] Rather, "the issue presented is most appropriately resolved under principles of waiver . . . ."[7] As discussed by this Court: " 'Even where ERISA preempts state law with respect to determining beneficiary status under an ERISA-regulated benefits plan, ERISA does not preempt an explicit waiver of interest by a nonparticipant beneficiary of such a plan.' "[8] It is generally accepted by a majority of courts "that waivers of beneficiary rights are possible under ERISA-governed plans . . . because 'ERISA is silent on the issue of what constitutes a valid waiver of interest,' the courts must turn to federal common law and state law to fill the gap."[9] The issue to be addressed is "whether there is proof of a specific termination of the rights in question or, stated differently, whether a waiver by a designated beneficiary of an ERISA-regulated benefits plan was explicit, voluntary, and made in good faith."[10] Specifically,

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[5] *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

[6] *MacInnes v MacInnes*, 260 Mich App 280, 285; 677 NW2d 889 (2004).

[7] *Id.* at 286.

[8] *Id.*, quoting *Melton v Melton*, 324 F3d 941, 945 (CA 7, 2003).

[9] *MacInnes*, 260 Mich App at 287, quoting *Melton*, 324 F3d at 945.

[10] *MacInnes*, 260 Mich App at 287.

> when we are evaluating whether the waiver is effective in a given case, we are more concerned with whether a reasonable person would have understood that she was waiving her interest in the proceeds or benefits in question than with any magic language contained in the waiver itself. Michigan courts have defined "waiver" as the voluntary and intentional relinquishment of a known right.[11]

This is consistent with rulings by our Supreme Court in similar cases that held the issue of "whether plaintiff, having lawfully renounced her interest in the insurance proceeds in a binding judgment of divorce, may lawfully retain them" to be "governed exclusively by Michigan law . . . ."[12] In other words:

> [W]hile a plan administrator must pay benefits to the named beneficiary as required by ERISA, this does not mean that the named beneficiary cannot waive her interest in retaining these proceeds. Once the proceeds are distributed, the consensual terms of a prior contractual agreement may prevent the named beneficiary from retaining those proceeds.[13]

Of significance is our Supreme Court's recognition of "the general proposition that ERISA is not implicated once a plan administrator distributes the proceeds from a plan to the beneficiary . . . ."[14] Support is similarly found in decisions of the United States Supreme Court, which has implicitly recognized that whether ERISA preempts state law is a separate and distinct issue from whether an "[e]state could have brought an action in state or federal court against [the recipient of the plan proceeds] to obtain the benefits after they were distributed" with favorable citation of state court holdings

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[11] *Id.* (citations and quotation marks omitted).

[12] *Sweebe*, 474 Mich at 155.

[13] *Id.* at 156.

[14] *Id.* at 155 n 2.

indicating "that ERISA did not preempt enforcement of allocation of ERISA benefits in state-court divorce decree as the pension plan funds were no longer entitled to ERISA protection once the plan funds were distributed."[15]

As the trial court recognized, the issue thus becomes the validity of the waiver provision contained in the divorce judgment. We address this issue by determining what constitutes a valid waiver and whether the fact that the waiver is contained in a default judgment affects its enforceability. In accordance with our Supreme Court's jurisprudence, at its most basic, a " '[w]aiver is the intentional relinquishment of a known right' " that "may be shown by express declarations or by declarations that manifest the parties' intent and purpose."[16] The recognized definition of the term "waiver" is "[t]he voluntary relinquishment or abandonment — express or implied — of a legal right or advantage . . . . The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it."[17] To effectuate a valid waiver, "no magic language" need be used.[18] "Rather . . . a waiver must simply be explicit, voluntary, and made in good faith."[19] In order to ascertain whether a waiver exists, a court must determine if a reasonable person would have understood that he or she was waiving the interest in question.[20]

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[15] *Kennedy v Plan Administrator for DuPont Savings & Investment Plan*, 555 US 285, 299 n 10; 129 S Ct 865; 172 L Ed 2d 662 (2009) (citations and quotation marks omitted).

[16] *Sweebe*, 474 Mich at 156-157, quoting *Bailey v Jones*, 243 Mich 159, 162; 219 NW 629 (1928).

[17] Black's Law Dictionary (9th ed).

[18] *Sweebe*, 474 Mich at 157.

[19] *Id.*

[20] *Id.*

An "implied waiver" is defined as "[a] waiver evidenced by a party's decisive, unequivocal conduct reasonably inferring the intent to waive."[21] In addition:

> An implied waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it. Waiver may be inferred from conduct or acts putting one off his guard and leading him to believe that a right has been waived. Mere silence, however, is no waiver unless there is an obligation to speak.[22]

Our Supreme Court has applied this definition, stating:

> Waiver is a matter of fact to be shown by the evidence. It may be shown by express declarations, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or it may be shown by a course of acts and conduct, and in some cases will be implied therefrom. It may also be shown by so neglecting and failing to act as to induce a belief that there is an intention or purpose to waive. Proof of express words is not necessary, but the waiver may be shown by circumstances or by a course of acts and conduct which amounts to an estoppel.[23]

Within the context of estoppel, caselaw has also recognized: " 'There are some circumstances . . . wherein justice requires that a person be treated *as though* he had waived a right where he has done some act inconsistent with the assertion of such right and without regard to whether he knew he possessed it. This is the doctrine of estoppel.' "[24]

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[21] Black's Law Dictionary (9th ed), p 1717.

[22] *Id*. at 1717-1718 (citation and quotation marks omitted); see also *Girlish v Acme Precision Prod, Inc*, 404 Mich 371, 388; 273 NW2d 62 (1978), citing Black's Law Dictionary (4th ed).

[23] *Klas v Pearce Hardware & Furniture Co*, 202 Mich 334, 339; 168 NW 425 (1918) (citation and quotation marks omitted).

[24] *Landelius v Sackellares*, 453 Mich 470, 480; 556 NW2d 472 (1996), quoting *Kelly v Allegan Circuit Judge*, 382 Mich 425, 427; 169 NW2d 916 (1969).

Reed does not dispute that she was aware of the lower court proceedings in which the decedent was seeking entry of a divorce judgment. Personal service of the complaint is conceded. Reed does not deny having been served with a proposed copy of the divorce judgment before its entry, notice of default, at least two notices of the hearing or trial date, and receipt of the final judgment as entered by the trial court. There is no suggestion that the proposed judgment differed in any significant manner, wording, or content from the actual judgment ultimately entered by the trial court. There is no suggestion that the very simple and straightforward judgment contained any confusing or ambiguous language that could not be easily comprehended. Reed acknowledges that she did not appear, respond, or file any pleadings in the original action and that she took no steps to challenge or set aside the final judgment.

We conclude that Reed's consistent course of acts and conduct established a valid waiver. Reed cannot take refuge in the assertion that her "mere silence" did not constitute a waiver. Although Reed neither made an express declaration nor engaged in a demonstrable physical act, this is insufficient to challenge the efficacy of her waiver because "mere silence" will not constitute a waiver "unless there is an obligation to speak." In the divorce proceedings, Reed was obligated to "speak" by filing an answer or contesting the entry of the default and subsequent judgment. As she did neither, her lack of action speaks louder than words and is just as binding. Reed's consistent failure to respond or to challenge the resultant judgment in a timely manner constitutes a waiver "implied by conduct inconsistent with the intent to assert the right."[25]

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[25] *Burton v Reed City Hosp Corp*, 471 Mich 745, 760; 691 NW2d 424 (2005) (KELLY, J., dissenting), citing 28 Am Jur 2d, Estoppel and Waiver, § 209, pp 612-613.

We note that in the lower court proceedings to enforce the divorce judgment, Reed's counsel implied a lack of competency or impaired functioning on Reed's part at the time of the divorce, stating, "Mae Reed's conduct is consistent to someone suffering from a major disabling mental disorders [sic], if anything." First, there is nothing in the lower court record to substantiate this opinion, and it is difficult to discern how counsel came to this conclusion from interactions with his client occurring two years or more after the divorce proceedings occurred. Second, this opinion is highly questionable as it was not elicited from an expert in the field of either psychology or psychiatry and fails to recognize the inherent difference between an individual having a condition or diagnosis and the actual impact of that condition or diagnosis on a person's competency. This blatant assertion is also suspect given that Reed was clearly cognizant and functioning when, following the death of her ex-husband, she successfully filed a claim for his benefits. It would seem that any constraints or impediments she was operating under at the time the divorce judgment was entered were sufficiently resolved to permit her to pursue receipt of the decedent's benefits.

Finally, we address Reed's contention that because the judgment entered was the result of a default, the waiver contained therein was not enforceable. "A default judgment will not be disturbed on appeal absent a clear showing of abuse."[26] Statutory authority provides for the entry of default divorce judgments by stating that "[s]uits to annul or affirm a marriage, or for a divorce, shall be conducted in the same manner as other suits in courts of equity; and the court shall have the

[26] *Muscio v Muscio*, 62 Mich App 167, 170; 233 NW2d 224 (1975).

power to award issues, to decree costs, and to enforce its decrees, as in other cases."[27] In addition, it is routinely acknowledged:

> "A court possesses inherent authority to enforce its own directives. A divorce case is equitable in nature, and a court of equity molds its relief according to the character of the case; once a court of equity acquires jurisdiction, it will do what is necessary to accord complete equity and to conclude the controversy."[28]

This is consistent with "[w]ell-settled policy considerations favoring finality of judgments . . . ."[29]

A long history of caselaw recognizes that default judgments are conclusive adjudications and are as binding on the litigants as judgments obtained following a trial or settlement.[30]

> In Michigan, it is an established principle that "a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue." . . . In other words, where a trial court has entered a default judgment against a defendant, the defendant's liability is admitted and the defendant is estopped from litigating issues of liability.[31]

Further, "[u]nless it is set aside by the court, a default judgment is absolute and is fully as binding, under the doctrines of estoppel and merger of judgment, and res judicata, as one after appearance and contest."[32] As

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[27] MCL 552.12.

[28] *Wiand v Wiand*, 178 Mich App 137, 144; 443 NW2d 464 (1989), quoting *Schaeffer v Schaeffer*, 106 Mich App 452, 457; 308 NW2d 226 (1981).

[29] *Rose v Rose*, 289 Mich App 45, 58; 795 NW2d 611 (2010).

[30] *Barnes v Jeudevine*, 475 Mich 696, 705; 718 NW2d 311 (2006).

[31] *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 78-79; 618 NW2d 66 (2000), quoting *Wood v DAIIE*, 413 Mich 573, 578; 321 NW2d 653 (1982) (citations omitted).

[32] 7 Michigan Pleading and Practice (2d ed), § 44:17, p 25.

such, "[d]efault judgments are not lesser judgments by any means. Like other judgments, a default judgment of divorce operates as a final statement of fact and law to the world."[33] We, therefore, reject Reed's contention that the default nature of the judgment negatively affected the enforceability of its provisions.

In conclusion, we hold that Reed's waiver of her rights to any of the decedent's benefits is valid and enforceable. Reed had knowledge and notice of the proceedings and their intended outcome and routinely failed to act or respond. This course of conduct evidenced her intention to waive any rights. Similarly, the default judgment in this matter is conclusive because Reed has neither asserted nor demonstrated any procedural error in its entry. Reed does not dispute having received notice of the proceedings, the proposed content of the judgment, and a copy of all documents filed. As she failed to respond or to seek having the judgment set aside, she cannot at this late date contend that only select portions of the judgment, favorable to her, are enforceable. We, therefore, concur with the trial court's determination that Reed must return to the decedent's estate all funds obtained from the plan administrator in conformance with her valid waiver in the divorce judgment.

Affirmed.

GLEICHER and M. J. KELLY, JJ., concurred with TALBOT, P.J.

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[33] *Barnes*, 475 Mich at 709-710 (KELLY, J., dissenting).

In re CONSERVATORSHIP OF TOWNSEND

Docket No. 296358. Submitted May 5, 2011, at Grand Rapids. Decided June 23, 2011, at 9:05 a.m.

Larry D. Townsend petitioned the Montcalm County Probate Court for the appointment of a conservator for the estate of his mother, Kathryn M. Townsend. He contended that after the death of Kathryn's husband in 2003, several of Kathryn's children had gratuitously spent her money, that she had accumulated excessive debt, and that she was in danger of destitution if a conservator was not appointed to protect her remaining assets. Following a hearing on the petition, the court, Charles W. Simon, III, J., held that Kathryn had property that would be wasted or dissipated unless proper management was provided. The court further held that although Kathryn did not have any of the conditions specified in MCL 700.5401(3)(a) as providing a basis for the appointment of a conservator, the presence of one of the enumerated conditions was not a prerequisite for the appointment of a conservator. The court concluded that Kathryn was a vulnerable adult who could not manage her financial affairs and granted the petition to appoint a conservator. Kathryn appealed.

The Court of Appeals *held*:

1. Under MCL 700.5401(3)(a), a probate court may appoint a conservator for an individual who is unable to effectively manage his or her property and business affairs for reasons such as mental illness or deficiency, physical illness or disability, chronic intoxication or drug use, confinement, detention by a foreign power, or disappearance. The phrase "for reasons such as" is one of enlargement and does not limit the appointment of conservators only for individuals having one of the listed conditions, but under the statute a conservator may only be appointed if the individual is unable to effectively manage his or her property and business affairs because of one of the listed conditions or a condition of a similar nature and quality as the listed conditions.

2. Under the Social Welfare Act (SWA), MCL 400.1 *et seq*., to establish that an individual is vulnerable, one must establish that the individual has a mental, physical, or advanced-age-related impairment. This definition of "vulnerability" is sufficiently simi-

lar to the conditions listed in MCL 700.5401(3)(a) to allow the SWA definition of "vulnerable adult" to be categorized as being of a similar nature or quality as those conditions. Using that definition, the evidence failed to establish that Kathryn was vulnerable because she did not have a mental or physical impairment and there was no evidence that her inability to say no when family members asked her for financial assistance was related to her age. The probate court erred by appointing a conservator over Kathryn's estate.

Reversed.

1. CONSERVATORSHIPS — APPOINTMENT OF A CONSERVATOR — STATUTES — LISTED CONDITIONS — INABILITY TO MANAGE AFFAIRS AS A RESULT OF AN UNLISTED CONDITION.

A probate court may appoint a conservator for an individual who is unable to effectively manage his or her property and business affairs for reasons such as mental illness or deficiency, physical illness or disability, chronic intoxication or drug use, confinement, detention by a foreign power, or disappearance; the phrase "for reasons such as" is one of enlargement and does not limit the appointment of conservators only for individuals having one of the listed conditions, but a conservator may only be appointed if the individual is unable to effectively manage his or her property and business affairs because of a condition that is not listed if the condition is of a similar nature and quality as the listed conditions (MCL 700.5401[3][a]).

2. CONSERVATORSHIPS — APPOINTMENT OF A CONSERVATOR– STATUTES — INABILITY TO MANAGE AFFAIRS AS A RESULT OF AN UNLISTED CONDITION — VULNERABLE ADULTS — SOCIAL WELFARE ACT DEFINITION.

Under the Social Welfare Act (SWA), to establish that an individual is vulnerable, one must establish that the individual has a mental, physical, or advanced-age-related impairment; this definition of "vulnerability" is sufficiently similar in nature and quality to the conditions listed in the statute permitting the appointment of a conservator to allow the appointment of a conservator for a person meeting the SWA definition of "vulnerable adult" (MCL 400.11; MCL 700.5401[3][a]).

Larry D. Townsend *in propria persona*.

Doss Law Office, P.C. (by *Kenneth W. Doss*), for Kathryn M. Townsend.

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM. Appellant, Kathryn Townsend (Townsend), appeals as of right the probate court's order appointing a conservator over her estate. At issue in this case is whether a conservator may be appointed for a reason not listed in MCL 700.5401, specifically whether a conservator may be appointed for a "vulnerable adult" and, if so, whether the evidence supported the probate court's finding that Townsend is a vulnerable adult. We conclude that a probate court may appoint a conservator for a vulnerable adult, but under a proper definition of "vulnerable adult," the facts do not support the probate court's finding that Townsend is a vulnerable adult. Accordingly, we reverse.

In October 2009, Townsend's son, appellee Larry Townsend (appellee), petitioned the probate court for the appointment of a conservator for Townsend's estate. In his petition, appellee asserted that Townsend suffered from a diminished mental capacity and that without proper management her property would be wasted or dissipated. Appellee alleged that after the death of Townsend's husband in 2003 and the sale of real property, Townsend had assets totaling between $700,000 and $750,000, but the subsequent "gratuitous spending" of Townsend's money by some of appellee's siblings, Townsend's excessive debt accumulation, and the downturn in mutual fund share prices had left Townsend with less than $200,000. Appellee further alleged that he was concerned that the "considerable drain" on Townsend's finances would leave Townsend destitute.

At the hearing on the petition, Townsend admitted that she financially helped her children and grandchildren.

When she loaned them money, she did not charge interest and allowed them to repay the loan as they were able, and she often accepted work in exchange for repayment of money. The testimony established that Townsend had provided financial assistance for the purchase of vehicles, wedding dresses, gas and tires, groceries, and trips, as well as in the payment of mortgage payments, property taxes, education expenses, attorney fees, and medical and dental fees. Townsend also acknowledged that she had accumulated a large amount of credit card debt and that she had been late on bill payments.

Townsend's personal physician, Dr. Henry Danielsky, testified that Townsend scored "a perfect" 30 out of 30 on a mini mental-status examination. According to Danielsky, Townsend's score meant that "she's not demented and that she's a normal human being as far as her thought goes." He believed that Townsend's mental capabilities were above average. Danielsky had no doubt that Townsend was able to manage her property and business affairs.

At the conclusion of the hearing, the probate court first addressed the "easier issue," whether Townsend had property that would be wasted or dissipated unless proper management was provided. According to the probate court, the answer was "clearly yes." It explained that Townsend had only $59,000 because she had "burned through" $440,000 in the past six years.[1] The probate court then addressed the "hard question," whether Townsend was in need of a conservator. Referring to the statutory criteria for appointment of a

[1] At the hearing, Townsend testified that after the death of her husband she had approximately $400,000 to $500,000. The probate court stated that at a minimum and by Townsend's own admission, Townsend had spent $440,000 in six years.

conservator, MCL 700.5401(3)(a), it noted that Townsend had not disappeared and was not confined or detained by a foreign power. It further noted that there was no evidence that Townsend suffered from a mental illness or deficiency, a physical illness or disability, or a chronic use of drugs or alcohol. Nonetheless, it held that the phrase "such as" in MCL 700.5401(3)(a) did not limit the reasons for the appointment of a conservator to those listed in the statute. The probate court then proceeded to hold that Townsend was a "vulnerable adult" because she could not manage her own financial affairs; the probate court was concerned with Townsend's inability to say no. It explained that Townsend "will give money to any child who asks for it whether it is in her best interests or not."[2] Consequently, the probate court granted appellee's petition to appoint a conservator. This appeal ensued.

On appeal, Townsend argues that while the appointment of a conservator for a vulnerable adult may be appropriate in certain circumstances, the probate court erred by appointing a conservator for her on the basis that she was a vulnerable adult. We agree.

We review a probate court's factual findings under the "clearly erroneous" standard. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id.* We review de novo issues of statutory interpretation. *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007).

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[2] The record shows that the parties themselves did not raise the issue whether a conservator may be appointed for a reason not listed in MCL 700.5401(3)(a), nor did appellee argue that Townsend was a vulnerable adult.

Resolution of the issue requires us to interpret MCL 700.5401, which provides in pertinent part:

> (1) Upon petition and after notice and hearing in accordance with this part, the court may appoint a conservator or make another protective order for cause as provided in this section.
>
> * * *
>
> (3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:
>
> (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
>
> (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.

The goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009). If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and a court must enforce the statute as written. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008). Words and phrases in a statute shall be construed and understood according to the common and approved usage of the language. *Henry Ford Health Sys v Esurance Ins Co*, 288 Mich App 593, 600; 808 NW2d 1 (2010), quoting MCL 8.3a.

Pursuant to MCL 700.5401(3)(a), a court may appoint a conservator if "[t]he individual is unable to manage property and business affairs effectively . . . ." The statute further requires that the petitioning party establish that the individual's inability to manage his or her property and business affairs effectively is caused by a condition that the individual exhibits. In this regard, MCL 700.5401(3)(a) specifically identifies eight conditions that may affect an individual's ability to manage his or her property and business affairs effectively: "mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance."

However, as noted by the probate court, the phrase "for reasons such as" precedes the listing of these eight conditions. The phrase "for reasons such as" appears in only two statutes, MCL 700.5401(3)(a) and MCL 722.954b(1), and has never been construed by this Court. Applying the common usage and understanding of the phrase, *Henry Ford Health Sys*, 288 Mich App at 600, we hold that the phrase "for reasons such as" is one of enlargement rather than limitation. In other words, the use of the phrase "for reasons such as" in MCL 700.5401(3)(a) does not limit the appointment of conservators only for individuals who have disappeared, been detained by a foreign power or confined, or suffer from mental illness or deficiency, a physical illness or disability, or chronic use of drugs or alcohol. Consequently, in light of the statutory language, we agree with the probate court that the appointment of a conservator for an individual may be appropriate even if the individual does not suffer from one of the conditions listed in MCL 700.5401(3)(a).

But not any condition suffered by an individual will justify the appointment of a conservator. "It is a famil-

iar principle of statutory construction that words grouped in a list should be given related meaning." *Manuel v Gill*, 481 Mich 637, 650; 753 NW2d 48 (2008) (quotation marks and citations omitted). On the basis of this well-established rule of statutory construction, we also hold that any circumstance not listed in MCL 700.5401(3)(a) that prohibits an individual from effectively managing his or her property and business affairs must be of a similar nature and quality as the eight conditions listed in the statute to justify the appointment of a conservator.

In this case, the probate court found that although there was no evidence to suggest that Townsend suffered from any of the eight conditions listed in MCL 700.5401(3)(a), Townsend was unable to manage her property and business affairs because she was a "vulnerable adult." It concluded that Townsend was a vulnerable adult because of her inability to say no, noting that she would give money to any child who asked for it regardless of her best interests. Because we have construed MCL 700.5401(3)(a) as permitting courts to consider additional conditions when evaluating whether a conservator should be appointed, the next question before us in this case is whether Townsend's condition of being a vulnerable adult, as found by the probate court, is a condition of a similar nature or quality as the eight conditions listed in MCL 700.5401(3)(a).

Having conceded that the list of conditions in MCL 700.5401(3)(a) can be enlarged to include similar conditions, Townsend argues that under a proper definition, the probate court erred by finding that she is a vulnerable adult. In making this argument, she urges us to adopt the definition of "vulnerable adult" found in the Social Welfare Act (SWA), MCL 400.1 *et seq.*, and

claims that under the SWA definition, she is not a vulnerable adult because the evidence did not establish that she has a mental, physical, or age-related condition that causes her to be unable to manage her property and business affairs effectively.[3]

The SWA uses the term "vulnerable adult"[4] and defines those words. "Vulnerable" is defined as "a condition in which an adult is unable to protect himself or herself from abuse, neglect, or exploitation because of a mental or physical impairment or because of advanced age." MCL 400.11(f). "Adult" is defined as "a vulnerable person not less than 18 years of age who is suspected of being or believed to be abused, neglected, or exploited." MCL 400.11(b). And "exploitation" is defined as "an action that involves the misuse of an adult's funds, property, or personal dignity by another person." MCL 400.11(c). We conclude that the condition of being a vulnerable adult under the SWA is a condition that is of a similar nature and quality as those listed in MCL 700.5401(3)(a). In particular, to establish vulnerability under the SWA, the individual must have a mental, physical, or advanced-age-related impairment. These components of vulnerability are sufficiently similar to the mental and physical conditions listed in MCL 700.5401(3)(a) to allow the SWA defini-

[3] At oral argument, appellee urged us to adopt a dictionary definition of "vulnerable" and argued that the facts supported the probate court's decision if such a definition were controlling. *Random House Webster's College Dictionary* (1995) defines "vulnerable," in part, as "capable of or susceptible to being wounded . . . ." Even if we were to assume that Townsend was vulnerable under this definition, we would conclude that the definition does not provide a proper basis for the appointment of a conservator because it does not require a condition that is of a similar nature or quality as the conditions listed in MCL 700.5401(3)(a).

[4] The SWA permits what is now referred to as a county department of human services to petition for the appointment of a conservator for a vulnerable adult. MCL 400.11b(6).

tion of "vulnerable adult" to be categorized as being of a similar nature or quality. Consequently, we will use the SWA definition to determine whether the probate court properly found that Townsend was a vulnerable adult in need of a conservator.

Appellee argues that under the SWA definition Townsend was a vulnerable adult because, as found by the probate court, other family members exploited her inability to say no. But even assuming that the evidence supported a finding of exploitation, the evidence did not show that Townsend was vulnerable because, as found by the probate court, she did not have a mental or physical impairment and there was no evidence from which to conclude that her inability to say no was related to her age. Consequently, for the same reasons the probate court did not find grounds for appointment of a conservator under the conditions listed in MCL 700.5401(3), there are no grounds to find that Townsend is a "vulnerable adult" as defined by the SWA.[5] Accordingly, we reverse the probate court's order appointing a conservator over Townsend's estate.

Reversed.

HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ., concurred.

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[5] Because of this conclusion, we need not address Townsend's argument that the probate court clearly erred by finding that she has property that will be wasted or dissipated.

PEOPLE v ANTWINE

Docket No. 297287. Submitted June 15, 2011, at Detroit. Decided June 28, 2011 at 9:00 a.m.

Lonnell Antwine was charged in Wayne Circuit Court, with possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), possession of 25 grams or more, but less than 50 grams, of cocaine, MCL 333.7403(2)(a)(*iv*), and possession of a firearm during the commission of a felony, MCL 750.227b, as a second-offense habitual offender, MCL 769.10. The police had investigated a complaint that an unknown person was inside a condemned house. Defendant, the owner of the house, invited the police inside while he retrieved his car keys in order to get paperwork confirming his ownership of the house. Defendant was in the home during a time prohibited by the notice of condemnation. After observing children's clothing in a bedroom, the officers searched the remainder of the home to determine whether additional people were present. During the search, the officers saw a box with suspected crack cocaine and subsequently obtained a search warrant, pursuant to which they discovered further evidence. Defendant moved to quash his bindover, suppress seized evidence, and dismiss the charges, arguing in part that his Fourth Amendment rights and rights under Const 1963, art 1, § 11, had been violated because the police should not have conducted the initial search of his home absent a warrant or exigent circumstances. The court, Vonda R. Evans, J., determined that the owner of a condemned house retains a property right to possess it and that the search and seizure was illegal under a totality of the circumstances, suppressed the evidence, and dismissed the charges. The prosecution appealed.

The Court of Appeals *held*:

The police officers' search of the condemned house to secure it and ensure the presence of no other people did not violate the Fourth Amendment. For purposes of the search-and-seizure analysis regarding a person's reasonable expectation of privacy in a dwelling that he or she unlawfully occupies, two points were relevant: first, an overall reasonable expectation of privacy, not the existence (or lack thereof) of a property right, controls the analysis

and, second, wrongful presence weighs against a reasonable expectation of privacy. Public officials have a right to access condemned structures for a variety of reasons. The officers reasonably visited defendant's condemned home in response to a report that someone was unlawfully occupying it. When they arrived at 6:00 a.m., defendant allowed them entry and admitted he unlawfully tore down the condemnation notice stating that he could only be in the house between 8:00 a.m. and 8:00 p.m. Once the officers confirmed that defendant resided in the condemned house illegally, it was objectively reasonable for them to secure the home and look for other individuals unlawfully present. Contrary to the trial court's conclusion that the officers wanted to take advantage of the opportunity to search beyond a lawful scope, the officers' subjective intentions with respect to their motivation for searching the house was irrelevant to a proper Fourth Amendment analysis. Finally, the officers observed drugs in plain view during the initial search while lawfully securing the building; they did not exceed the scope of the initial, lawful search. Accordingly, defendant had no reasonable expectation of privacy that precluded the police from conducting the initial search of his house during which drugs were discovered in plain view. The trial court erred by granting defendant's motion to suppress and dismissing the charges.

Reversed and remanded for proceedings.

1. SEARCHES AND SEIZURES — FOURTH AMENDMENT — EXPECTATION OF PRIVACY — CONDEMNED HOUSES.

An overall reasonable expectation of privacy, not the existence (or the lack) of a property right, controls the Fourth Amendment analysis for purposes of an unreasonable search and seizure claim, and a defendant's wrongful presence weighs against a reasonable expectation of privacy; once police officers confirm that a defendant resides in a condemned house illegally, it is reasonable for them to secure the building and look for other illegal residents, and the defendant has no reasonable expectation of privacy that precludes the search.

2. SEARCHES AND SEIZURES — FOURTH AMENDMENT — SUBJECTIVE INTENT OF POLICE OFFICERS.

As long as he or she has probable cause, a police officer's subjective intention when conducting a search is irrelevant in an ordinary Fourth Amendment analysis.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attor-

ney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *David A. McCreedy*, Assistant Prosecuting Attorney, for the people.

Daniel J. Rust for defendant.

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

PER CURIAM. The prosecution appeals as of right orders suppressing evidence seized from defendant's home and the resultant dismissal of the drug and weapons charges against defendant. The prosecution argues that the trial court erred when it concluded that defendant's Fourth Amendment right to be free from unreasonable searches and seizures was violated because police officers conducted a warrantless search of defendant's condemned home that he was unlawfully occupying. We agree with the prosecution and reverse the trial court's rulings.

We review de novo questions of law underlying a trial court's decision whether to suppress evidence. *People v Gadomski*, 274 Mich App 174, 178; 731 NW2d 466 (2007). We review for clear error findings of fact necessary to the court's decision. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004); MCR 2.613(C). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996).

The Fourth Amendment of the United Stated Constitution, US Const, Am IV, and article 1, § 11 of the Michigan Constitution, Const 1963, art 1, § 11, prohibit unreasonable searches and seizures. *Bolduc*, 263 Mich App at 437. The Michigan constitutional provision is

generally construed to afford the same protections as the Fourth Amendment. *Id*. at 437 n 9. "[T]he Fourth Amendment protects people, as opposed to places or areas . . . ." *People v Taylor*, 253 Mich App 399, 404; 655 NW2d 291 (2002). Accordingly, "a search for purposes of the Fourth Amendment occurs when the government intrudes on an individual's reasonable, or justifiable, expectation of privacy." *Id*. Whether an expectation of privacy is reasonable depends on two questions. *Id*. at 404-405, citing *Bond v United States*, 529 US 334, 338; 120 S Ct 1462; 146 L Ed 2d 365 (2000). First, did the individual exhibit "an actual, subjective expectation of privacy"? *Taylor*, 253 Mich App at 404. Second, was the actual expectation "one that society recognizes as reasonable"? *Id*. "Whether the expectation exists, both subjectively and objectively, depends on the totality of the circumstances surrounding the intrusion." *Id*. at 405.[1]

This case arises from a police search of a house located in the city of Hamtramck. Defendant owned the house, which had been condemned as "unfit for human occupancy or use" because it lacked water service and a sanitary facility. A notice originally posted at the house stated in part, "IT IS UNLAWFUL FOR ANY PERSON TO USE OR OCCUPY THIS BUILDING AFTER 10/15/09" and "*ANY UNAUTHORIZED PERSON REMOVING THIS SIGN WILL* [*BE*] *PROSECUTED.*

[1] The prosecution in part phrases its argument in terms of whether defendant had standing to challenge the search. This Court has similarly addressed Fourth Amendment issues in terms of "standing." See, e.g., *Gadomski*, 274 Mich App at 178. But the central legal question remains whether, under Fourth Amendment jurisprudence, defendant could assert a privacy right under the circumstances. See *Rakas v Illinois*, 439 US 128, 139; 99 S Ct 421; 58 L Ed 2d 387 (1978) ("[W]e think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.").

ENTRY ALLOWED FROM 8:00 A.M. TO 8:00 P.M. FOR CLEAN UP AND REPAIR ONLY[.]" The police were notified that an unknown person was inside the house. Accordingly, at approximately 6:00 a.m. on November 3, 2009, Hamtramck police officers arrived at the house and went to the front door, which was padlocked. They observed lights and a television on inside. They knocked, announced themselves as police officers, and stated that they needed to speak to the person inside. A man inside answered, "Okay, I'll meet you in the back of the house." Defendant met them at the back door, explained that he owned the house, and stated that he had proof of ownership in his car and would get the keys to the car from inside the house. He allowed the officers to enter the house while he retrieved the keys.

The officers accompanied defendant to the northeast room of the house, where defendant retrieved his car keys. An officer went to the car and found paperwork confirming that defendant owned the house. The officers observed the condemnation notice on the floor of the house. Defendant admitted tearing down the notice and living in the house. The officers also observed several Ziploc baggies and a scale that appeared to have cocaine residue on it on the floor of the room from which defendant had retrieved his car keys.

The officers proceeded to search the house—including the attic and side bedrooms—to "find out if there was anybody else inside the residence." Officer Daniel Kruse testified that, although defendant told them no one else was in the house, Kruse saw children's clothing and shoes in a side bedroom. Kruse "couldn't leave the residence unsecured." They found no one, and the attic was empty. As the officers walked back down the dark attic stairs, however, Kruse shone his flash-

light onto a loose step and saw that it had "separated so that there was a hole." Kruse saw "a box, with a yellow baggie of what appeared to be crack cocaine" in the hole. On the basis of these observations, the officers obtained a search warrant for the house and executed the warrant later that day. They confiscated the scale and two or three baggies of cocaine. They also confiscated a loaded rifle from the enclosed back porch.

The prosecutor charged defendant with possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), possession of 25 grams or more, but less than 50 grams of cocaine, MCL 333.7403(2)(a)(*iv*), and possession of a firearm during the commission of a felony, MCL 750.227b, as a second-offense habitual offender, MCL 769.10. Defendant moved to quash the bindover, suppress the seized evidence, and dismiss the charges. Most relevant to this appeal, he argued that his Fourth Amendment rights had been violated because the police should not have conducted the initial search of his home absent a warrant or exigent circumstances.

The trial court granted the motion to suppress and, because of the resulting lack of evidence, dismissed the case. The court concluded that the owner of a condemned house retains a property right to possess it and that this right to possession must be acknowledged in some way. The court focused on the officers' decision to go upstairs, finding that this "clearly went beyond the scope of why they were there." The court declined to believe their testimony that they were looking for other individuals unlawfully present. Rather, "they wanted to take advantage of it, and they wanted to search upstairs," although defendant had not given them permission to do so. The court concluded, "[T]here was no reason that they had to be upstairs, no exigent circum-

stances, nothing." Accordingly, the court held that the defense had shown by a preponderance of evidence that the resulting search and seizure was illegal under a totality of the circumstances and that the evidence should be suppressed.

The prosecution argues that a person can have no reasonable expectation of privacy in a dwelling that he or she unlawfully occupies. The prosecution cites cases that include *Rakas v Illinois*, 439 US 128; 99 S Ct 421; 58 L Ed 2d 387 (1978). *Rakas* is factually distinguishable because the defendants in that case neither owned nor asserted a possessory right in the car searched or the items seized from it. *Id*. at 148. But some of the *Rakas* Court's reasoning is helpful. First, *Rakas* reaffirmed that, even under a prior threshold for challenging a search described in *Jones v United States*, 362 US 257; 80 S Ct 725; 4 L Ed 2d 697 (1960), " 'wrongful' presence at the scene of a search would not enable a defendant to object to the legality of the search." *Rakas*, 439 US at 141 n 9. *Rakas* also drew upon *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967), which held that "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas*, 439 US at 143, citing *Katz*, 389 US at 353. *Rakas* and the cases cited therein thus suggest two relevant points: first, an overall reasonable expectation of privacy—not the existence (or the lack) of a property right—controls the analysis and, second, wrongful presence weighs against a reasonable expectation of privacy.

The prosecution also persuasively cites *Cross v Mokwa*, 547 F3d 890 (CA 8, 2008). There, the court upheld a warrantless police search of a condemned

home, as well as the arrest of the five people present for occupying a condemned building, even though the occupants were staying at the home with the owner's permission. *Id*. at 893-894. The court concluded that the warrantless entry was justified in light of the nature of condemned buildings and the duty of public officials to access such buildings for various reasons. It observed:

> When a building has been condemned as unsafe for human occupation, it becomes, at least from the government's perspective, an abandoned structure. Public health and safety require that police officers, as well as building inspectors, have the right to access such structures at any time for a variety of reasons—to evict illegal occupants, to seek out and seize contraband and hazardous substances that may be illegally hidden there, to eliminate dangerous conditions that might injure adventurous trespassers such as children, and to prepare the premises for safe demolition. [*Id*. at 895.]

The court reasoned that, even if the defendants had standing to challenge the search and seizure because they were invitees, "their limited standing as illegal occupants did not outweigh the authority of the police to enter the premises, when consent to enter was refused, for the purpose of evicting occupants of a building condemned as unsafe for human occupancy." *Id*. The court also specified that "the actions of the officers in entering without a warrant to arrest the illegal occupants was not constitutionally unreasonable," whether the entry was viewed as justified by exigent circumstances "or by the government's ongoing interest in controlling condemned buildings in the interest of public health and safety." *Id*. at 895-896.

We find the *Cross* court's reasoning persuasive. The officers reasonably visited defendant's condemned home in response to a report that someone was unlaw-

fully occupying it. When they arrived at about 6:00 a.m., defendant allowed them inside, where they confirmed that he had unlawfully torn down the notice stating that he could only be in the home between 8:00 a.m. and 8:00 p.m. Officer Andy Mileski testified that defendant "stated that he lives there, but . . . knew it was condemned" and "had ripped [the condemnation notice] down, himself." The officers also observed that defendant had "rigged" electric service "from the back" of the house. Critically, the defense admitted there was "no dispute" that defendant "should not have been in that house" and was "in fact in violation of the Hamtramck ordinance." The defense also expressly agreed that defendant "asked [the officers] to come in while he obtained the proof of the ownership of the house." Defendant's sole argument was that defendant did not expressly consent to the initial search and that his propriety interest in the house afforded him an expectation of privacy.

But once the officers confirmed that defendant resided in the condemned house illegally, it was reasonable for them to secure the home and look for other illegal residents; indeed, they were at the house precisely to investigate a report of illegal occupancy of a condemned home unfit for habitation. Further, once the officers saw children's clothing, this confirmed the reasonableness of their decision to search other areas of the house where individuals might be hidden.

Most significantly, the trial court's conclusion that the officers were not actually motivated to look for other individuals—but wished to take advantage of their presence for other purposes—is irrelevant to the Fourth Amendment analysis. Police officers' "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v United States*,

517 US 806, 813; 116 S Ct 1769; 135 L Ed 2d 89 (1996); see also *Cross*, 547 F3d at 895 (relying on *Whren* in the context of a search of a condemned building); *United States v Freeman*, 209 F3d 464, 467 (CA 6, 2000) (stating that a police officer may stop a vehicle for a traffic offense although the officer's actual motivation is to search for contraband as long as he or she has probable cause to make the initial stop). Here it was objectively reasonable for officers in their circumstances to secure the home and search for other unlawfully present individuals. Neither the trial court nor defendant cite any law to support their vague assertions that defendant's mere ownership of the house created a reasonable expectation of privacy that was wrongfully invaded under these circumstances. Put otherwise, society does not recognize defendant's right to privacy in the areas searched under these particular circumstances.

Finally, the officers observed the drugs in plain view while lawfully securing the house and searching it for other illegal occupants. Accordingly, they did not exceed the scope of the initial, lawful search when they discovered the drugs and used the discovery to obtain a search warrant. See *People v Galloway*, 259 Mich App 634, 639; 675 NW2d 883 (2003) ("The plain view exception to the warrant requirement allows a police officer to seize items in plain view if the officer is lawfully in the position to have that view and the evidence is obviously incriminatory."); cf *People v Wilkens*, 267 Mich App 728, 733-734; 705 NW2d 728 (2005) (holding that officers with owner's consent to search for a weapon did not exceed the scope of a lawful search—and properly obtained a warrant to seize a video camera placed in female tenants' shower—because the camera equipment was suspicious and in plain view during the initial search for a weapon).

For these reasons, defendant had no reasonable expectation of privacy that precluded the police from conducting the initial search of his house during which they discovered drugs in plain view. Accordingly, we reverse the trial court's March 3, 2010, orders suppressing the evidence seized and dismissing the case.

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

FITZGERALD, P.J., and SAWYER and BECKERING, JJ., concurred.

CARLSON v CARLSON

Docket No. 292536. Submitted October 7, 2010, at Detroit. Decided June 28, 2011, at 9:05 a.m.

Plaintiff, Sandra Carlson, was granted a judgment of divorce from defendant, Kim Carlson, in the Genesee Circuit Court, Family Division. The parties were awarded joint legal and physical custody of their minor children and defendant was ordered to pay child support. Defendant thereafter filed a motion to reduce his child-support obligation, citing his reduction in income to $250 a week. A friend of the court hearing referee determined that defendant had voluntarily reduced his income and recommended that child support be based on the $95,000 average income that defendant had received in the prior two years. The court, Duncan M. Beagle, J., adopted the hearing referee's recommendation to set child support by imputing an income of $95,000 to defendant. The Court of Appeals granted defendant's delayed application for leave to appeal.

The Court of Appeals *held*:

The trial court did not clearly err by determining that defendant's reduction in income was voluntary. However, neither the hearing referee nor the trial court evaluated the mandatory factors set forth in the 2004 Michigan Child Support Formula Manual, 2004 MCSF 2.10(E) for the imputation of income, and the trial court failed to assess whether defendant possessed an actual ability and likelihood of earning the $95,000 imputed income. There was no evidence to suggest that defendant could earn the amount of income imputed to him. The trial court abused its discretion when it adopted the hearing referee's recommendation to impute $95,000 in income to defendant.

Vacated and remanded for further proceedings with respect to defendant's motion to reduce support.

1. PARENT AND CHILD — CHILD SUPPORT — IMPUTED INCOME — MICHIGAN CHILD SUPPORT FORMULA.

A trial court must presumptively follow the Michigan Child Support Formula in determining an appropriate amount of child support;

the first step in determining a child-support award is to ascertain each parent's net income by considering all sources of income; this calculation not only includes a parent's actual income, but can include imputed income (2004 MCSF 2.10[A]).

2. PARENT AND CHILD — CHILD SUPPORT — IMPUTED INCOME — MICHIGAN CHILD SUPPORT FORMULA.

The Michigan Child Support Formula allows a trial court discretion to impute income when a parent voluntarily reduces or eliminates income or when it finds that the parent has a voluntarily unexercised ability to earn; the decision to impute income must be supported by adequate fact-finding that the parent has the actual ability and likelihood of earning the imputed income; the formula sets forth a number of equitable criteria that must be considered when determining whether to impute income, including prior employment experience, educational level, physical and mental disabilities, the presence of the parties' children in the individual's home and its effect on the earnings, availability of employment in the local geographical area, the prevailing wage rates in the local geographical area, special skill and training, and whether there is any evidence that the individual in question is able to earn the imputed income (2004 MCSF 2.10[A], [B], and [E]).

Neil C. Szabo for plaintiff.

Katherine Wainright Shensky for defendant.

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

WILDER, P.J. We granted defendant's delayed application for leave to appeal the trial court's order, entered after an evidentiary hearing, which adopted a friend of the court (FOC) hearing referee's recommendation modifying defendant's child-support obligation. We vacate and remand.

On appeal, defendant argues that his reduction in income was involuntary, and he further argues that, even if the reduction was voluntary, it was an abuse of discretion to impute income to him for the purposes of setting his child-support obligation. We find that the

reduction was voluntary but agree that the trial court abused its discretion by imputing an income of $95,000 to defendant.

In determining the appropriate amount of child support, "a trial court must presumptively follow the Michigan Child Support Formula (MCSF)." *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). We review a trial court's finding of facts underlying an award of child support for clear error. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). "A finding is clearly erroneous if this Court, on all the evidence, is left with a definite and firm conviction that a mistake was made . . . ." *Stallworth*, 275 Mich App at 284. Finally, we review a trial court's discretionary rulings, such as the decision to impute income to a party, for an abuse of discretion. *Rohloff v Rohloff*, 161 Mich App 766, 776; 411 NW2d 484 (1987). An abuse of discretion occurs when a court selects an outcome that is not within the range of reasonable and principled outcomes. *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007).

"According to the 2004 Michigan Child Support Formula Manual,[1] the first step in determining a child-support award is to ascertain each parent's net income by considering all sources of income." *Stallworth*, 275 Mich App at 284. This calculation not only includes a party's actual income, but it can include imputed income. In other words, a party can be treated "as having income or resources that the individual does not actually have." 2004 MCSF 2.10(A). "A trial court has the discretion to impute income when a parent voluntarily reduces or eliminates income or when it finds that the parent has a

[1] Both the FOC evidentiary hearing (June 6, 2008) and the trial court hearing (September 15, 2008) took place when the 2004 MCSF was in effect. The 2008 MCSF did not take effect until October 1, 2008.

voluntarily unexercised ability to earn." *Stallworth*, 275 Mich App at 286-287, citing 2004 MCSF 2.10(A) and (B). However, a court's decision to impute income must be "supported by adequate fact-finding that the parent has an actual ability and likelihood of earning the imputed income." *Stallworth*, 275 Mich App at 285.

The 2004 MCSF sets forth a number of equitable criteria that *must* be considered when determining whether to impute income:

> (1) Prior employment experience;
>
> (2) Educational level;
>
> (3) Physical and mental disabilities;
>
> (4) The presence of the parties' children in the individual's home and its impact on the earnings;
>
> (5) Availability of employment in the local geographical area;
>
> (6) The prevailing wage rates in the local geographical area;
>
> (7) Special skills and training; or
>
> (8) Whether there is any evidence that the individual in question is able to earn the imputed income. [2004 MCSF 2.10(E).]

See also *Stallworth*, 275 Mich App at 286. The 2004 MCSF also contemplates the difficulties in ascertaining an individual's ability and likelihood of earning imputed income where the individual is a business owner:

> There are special difficulties in determining the income of certain individuals . . . [because] persons who have significant control over the form and manner of their own compensation may be able to arrange that compensation so as to be able to minimize the amount visible to friends of the court and others. [2004 MCSF 2.11(A).]

In these instances, the MCSF directs that the court give special attention to factors such as unusual forms of income (e.g., profit sharing); in-kind income; redirected income; deferred income; fringe benefits; and certain tax deductions. 2004 MCSF 2.11(D).

Defendant testified that he is an engineer and president of Flint Surveying and Engineering Co. Inc. (FSE). Defendant and his brother, Curt Carlson, purchased FSE from their father in 1995. In 2006, FSE had gross receipts of $1,198,860 and paid defendant $123,209 in compensation and $11,700 as reimbursement for the previous year's tax liability. In 2007, FSE had gross receipts of $608,226 and paid defendant $67,591 in compensation and $12,500 as reimbursement for defendant's tax liability. Defendant also drove, and still drives, a company car for business use, but he is required to repay FSE for any private use. In addition, defendant earned $12,000 each year as a county surveyor.

Defendant testified that in 2008, FSE's income declined significantly as a result of the slumping economy. As of June 2008, approximately 20 employees had left or had been laid off from FSE, leaving only six employees. FSE took out a $50,000 line of credit from Citizens Bank in order to "stay afloat" and paid employee salaries with loan funds. Defendant testified that he is personally liable for that loan. When over half of FSE's $50,000 line of credit had been expended, defendant, his brother, and his father elected to reduce defendant's income to $250 a week and lay off additional employees.

The trial court determined that defendant's reduction in income was voluntary, and on the record before us, we conclude that this finding was not clearly erroneous. The record shows that defendant's decision to reduce his income to $250 a week was a voluntary and strategic decision to keep FSE afloat and to maintain

health insurance for him and his children until the economy could turn around. In its report regarding defendant's motion to reduce his child-support obligation, the FOC noted the following:

> This court is sympathetic with hard working people like the Defendant who experience a loss of income. In the normal case the employee has no control over the wage he receives[;] it is dictated by contract or the whim of the employer. This is not the case here. Mr. Carlson has voluntarily reduced his income because he believes the company earnings have declined[,] and that may be true[,] however he has taken a "salary hit" way beyond that which is believed to be reasonable. He is now the lowest paid employee in the company.
>
> A review of the testimony and evidence presented has convinced this court that some accommodation must be made in terms of child support. The court will set child support based upon an average of the Defendants [sic] last two (2) years of income and calculate child support using $95,000.00 as his gross income.

The trial court found that the FOC's decision was fair and accurate. But neither the FOC nor the trial court ever evaluated the factors set forth in the MCSF for the imputation of income. More importantly, the trial court failed to assess whether defendant possessed an actual ability and likelihood of earning the $95,000 imputed income. The fact that FSE could afford to pay defendant an average salary of $95,000 in 2006 and 2007 does not mean that FSE could continue to pay defendant that amount in the then existing economic climate. In fact, the evidence clearly established that FSE's revenues precipitously dropped 50 percent from 2006 to 2007, and by 2008, the company had lost 70 percent of its employees and had to take a line of credit in order to pay salaries. Thus, there was no evidence to suggest that defendant could remain at FSE and earn the same

amount of income that he earned in 2006 or 2007.[2]

Likewise, there was no evidence presented at the evidentiary hearing that defendant could have gained outside employment earning $95,000. While defendant's brother, who is also a civil engineer, obtained employment at a different company in August 2007, neither plaintiff nor the FOC provided the trial court with any evidence[3] that similar, outside positions, particularly positions that were paying $95,000 a year, were available nearly one year later when modification of child support was at issue.

Because the trial court failed to consider the enumerated factors in 2004 MCSF 2.10(E), including whether defendant possessed an actual ability and likelihood of earning the $95,000 imputed income, we conclude that the trial court abused its discretion when it adopted the FOC's recommendation to impute that income to defendant.

We vacate and remand for further proceedings with respect to defendant's motion to reduce his child-support obligation. We do not retain jurisdiction.

Defendant, having prevailed on appeal, is entitled to costs. MCR 7.219(A).

SERVITTO and SHAPIRO, JJ., concurred with WILDER, P.J.

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[2] We note also that while defendant owned an aircraft, which he repaired in 2006 by taking a $25,000 loan, there was no evidence presented to either the FOC or the trial court regarding whether the aircraft had any value that could have been imputed to defendant's income.

[3] Although the record was lacking at the time of the evidentiary hearing, we do note that in support of his motion for reconsideration filed after the trial court issued its ruling, defendant submitted an affidavit in which he asserted that, after conducting a nationwide search, the only available civil engineering position he could find was in Alaska. The affidavit does not state, however, the amount of salary this position paid.

TRADER v COMERICA BANK

Docket No. 296129. Submitted April 12, 2011, at Grand Rapids. Decided June 30, 2011, at 9:00 a.m. Leave to appeal denied, 491 Mich 897.

Vella Trader brought an action in the Kalamazoo Circuit Court as personal representative of the estate of Thelma DeGoede against Comerica Bank, alleging breach of contract after defendant refused to honor three certificates of deposit (CDs) that were found in a safety deposit box that had belonged to DeGoede. The CDs were purchased in the early 1980s and had initial six-month maturity dates. After a bench trial, the court, Gary C. Giguere, J., issued an opinion and order, finding no cause of action because the statute of limitations contained in MCL 600.5807(8) barred plaintiff's action. Plaintiff appealed.

The Court of Appeals *held*:

The CDs at issue all contained conspicuous statements indicating that they were nonnegotiable. Accordingly, the trial court properly concluded that the CDs were not governed by article 3 of the Uniform Commercial Code, but instead were governed by contract law. Thus, the applicable period of limitations was six years from the date the claim accrued as set forth in MCL 600.5807(8). The CDs at issue were of a type that was subject to automatic renewal and two of the CDs contained language indicating that the parties intended multiple renewal periods. CDs are not due and payable until a demand for payment is made, which is when the period of limitations begins to run on an action for payment on a CD. Demand for payment in this case occurred in 2005 and the case was brought in 2008, within the period of limitations. The trial court erred when it concluded that plaintiff's action was time-barred.

Reversed and remanded for a new trial.

LIMITATION OF ACTIONS — BANKS AND BANKING — NONNEGOTIABLE CERTIFICATES OF DEPOSIT — STATUTE OF LIMITATIONS — CONTRACT LAW — ACCRUAL — DEMAND FOR PAYMENT.

Nonnegotiable certificates of deposit are governed by contract law rather than the Uniform Commercial Code; the applicable period of limitations for a nonnegotiable certificate of deposit is six years

> from the date the claim accrued; the period of limitations begins to run on an action for payment on a nonnegotiable certificate of deposit when a demand for payment is made (MCL 440.3104[4]; MCL 600.5807[8]).

Ford, Kriekard, Soltis & Wise, P.C. (by *Robert A. Soltis*), for plaintiff.

Simon, Galasso & Frantz, PLC (by *Henry Stancato*), for defendant.

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

PER CURIAM. Plaintiff Vella Trader,[1] the personal representative of the estate of Thelma L. DeGoede, brought this suit, alleging breach of contract against defendant, Comerica Bank, formerly known as Industrial State Bank & Trust Company,[2] for its failure to honor three certificates of deposit (CDs). After a bench trial, the trial court issued an opinion and order finding no cause of action because the statute of limitations contained in MCL 600.5807(8) barred plaintiff's claim. Plaintiff appeals as of right. We reverse and remand.

On December 22, 1980, Industrial State Bank & Trust issued a CD payable to Thelma in the amount of $10,000. The CD had a maturity date of June 22, 1981, and a stated interest rate of 15.673 percent, payable at maturity. The CD indicates that it is "Non-Transferable" and is "TYPE 20." The front of the CD contains the following language:

> At maturity and upon presentation of this Certificate properly endorsed payment of this deposit will be made by

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[1] Plaintiff is the daughter of Thelma L. DeGoede.

[2] Industrial State Bank & Trust Company was acquired by Comerica Bank in November 1992.

> Industrial State Bank & Trust Company. . . . Upon written notice, the Bank reserves the right to redeem this Certificate on the original or any subsequent maturity date and further reserves the right to change the interest rate payable for any renewal period. This Certificate is designated by type above with special provisions by type as set forth on the reverse of this Certificate.

The back of the certificate contains three boxes. The first box is titled, "CERTIFICATE DESCRIPTION BY TYPE" and lists four different types of certificates. A "Type 20" certificate is described as follows: "MONEY MARKET CERTIFICATE: The Certificate will be **automatically renewed** for a like period unless presented for payment. Renewal rates are based on the Treasury Bill Rates as defined by the Federal Deposit Insurance Corporation in effect the week of renewal. This Certificate is non-negotiable." The second box is titled "FINAL PAYMENT INFORMATION" and has blanks for payment information that have not been filled in. The third box is titled "Show Payment method" and also has blanks that have not been filled in. Underneath the last box are the words "Customer endorsement," and no endorsement has been made.

On June 26, 1981, Industrial State Bank & Trust issued a CD payable to Thelma in the amount of $10,000. The CD had a maturity date of December 25, 1981, and a stated interest rate of 14.189 percent, payable at maturity. The remaining terms and conditions on the front and back of the certificate are identical to those contained on the CD issued on December 22, 1980, with one exception: the front of the CD does not state that it is nontransferable. There are no signatures or notations on the back of the certificate indicating final payment.

On July 13, 1982, Industrial State Bank & Trust issued a CD payable to Thelma in the amount of

$10,000. The CD had a maturity date of January 11, 1983, and a stated interest rate of 13.098 percent, payable at maturity. The terms and conditions on the front of the certificate are identical to those of the first two, with two exceptions: First, along with the term "NON-TRANSFERABLE" on the front, the CD also states that it is "Non-Negotiable." Second, instead of stating that the reverse side of the certificate states provisions regarding the types of certificates, the certificate states, "This Certificate is designated by type and the description and provisions thereof are set forth on separate literature." Accordingly, the back of the certificate is somewhat different from the other two. The first box is titled "CERTIFICATE TYPE KEY" but does not contain language describing the certificate types; it does not contain language discussing the renewability of type 20 money market certificates. As with the other two CDs, the back of this certificate also contains the boxes for final payment information and payment method and also an area for customer endorsement. Similarly, there are no signatures or notations on the back indicating that final payment was made.

Thelma died on May 6, 2005. At that time, both plaintiff and Thelma's son, John DeGoede, were aware that that Thelma had a safety deposit box and that the box contained CDs. According to plaintiff, Thelma told her in 2004 that the safety deposit box contained three CDs, one for each of Thelma's three children with John DeGoede. Thelma told plaintiff at that time that she had recently attempted to present the CDs for payment but that defendant had refused to pay. Between 45 and 60 days after Thelma's death, John retrieved the CDs from Thelma's safety deposit box.

John presented the CDs to Comerica Bank for payment. Comerica Bank denied the request to redeem the

CDs because the bank had no record of the CDs. Plaintiff filed the present suit to recover the value of the CDs, including interest accumulated from the date of their issue.

Following a bench trial,[3] the court issued an opinion and order finding no cause of action and entered judgment for defendant. The court interpreted the language of the 1980 and 1981 CDs to mean that the deposit period of the two CDs would be six months and that the CDs would be automatically renewed for only one additional six-month period if the CDs were not presented for payment once they matured. With regard to the 1982 CD, the court determined that it contained no renewal language and, therefore, the court declined to read such language into the certificate. As a result, the court determined that the CDs reached their maturity dates, at the latest, by December 22, 1981, in the case of the 1980 CD, by June 25, 1982, in the case of the 1981 CD, and January 11, 1983, in the case of the 1982 CD. Thus, the court concluded that plaintiff's suit was barred as of January 11, 1989, by the six-year period of limitations in MCL 600.5807(8) for breach of contract actions.

The sole issue for our consideration is whether the trial court erred by finding that the suit is time-barred. Plaintiff argues that the cause of action did not accrue until John presented the CDs to the bank in demand for payment in 2005 and, therefore, that the complaint filed in 2008 was timely. The bank contends that the trial court correctly concluded that the period of limi-

[3] Evidence was presented at trial regarding the bank's recordkeeping practices and the lack of any 1099 interest reporting records for Thelma from 1985 through 2003. This evidence is not relevant to the issue presented on appeal and, therefore, the evidence is not discussed in this opinion.

tations began to run at the end of the six-month renewal period for the 1980 and 1981 CDs and on the maturity date of the 1982 CD. It asserts that the contention that a nonnegotiable CD containing a specific maturity date never accrues unless and until the descendants of the original depositor make a formal demand for payment does not accurately reflect Michigan law.

This Court reviews a trial court's findings of fact following a bench trial for clear error and reviews de novo the trial court's conclusions of law. *Heeringa v Petroelje*, 279 Mich App 444, 448; 760 NW2d 538 (2008). This Court also reviews de novo issues of contractual interpretation. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008).

The Uniform Commercial Code (UCC) defines a certificate of deposit as "an instrument containing an acknowledgement by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money." MCL 440.3104(10). However, a written promise to pay money is not a negotiable instrument if at the time it is issued "it contains a conspicuous statement . . . to the effect that the promise . . . is not negotiable . . . ." MCL 440.3104(4). The CDs in this case all contain conspicuous statements indicating that they are nonnegotiable. Thus, the trial court properly concluded that the CDs are, by their terms, nonnegotiable and not governed by article 3 of the UCC. Rather a nonnegotiable CD is a contract, see *Cohn-Goodman Co v People's Savings Bank of Grand Haven*, 203 Mich 307, 313; 168 NW 1042 (1918), and is governed by contract law.

When interpreting a contract, this Court's primary task is to determine the intent of the contracting parties. *AFSCME v Bank One, NA*, 267 Mich App 281,

283; 705 NW2d 355 (2005). If a contract's language is not ambiguous, this Court will construe the contract and enforce its terms as written. *Id*. A contract will be construed as a whole. *Associated Truck Lines, Inc v Baer*, 346 Mich 106, 110; 77 NW2d 384 (1956). This Court will "give effect to every word, phrase, and clause in a contract . . . ." *AFSCME*, 267 Mich App at 284 (quotation marks and citation omitted). "Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument." *Baer*, 346 Mich at 110 (quotation marks and citation omitted).

The 1980 and 1981 CDs clearly state the following on the back of the certificates: "The Certificate will be **automatically renewed** for a like period unless presented for payment." This language does not limit the number of successive periods of renewal. As a result of this provision, it cannot be said that the 1980 and 1981 CDs had a definite date of maturity. Indeed, a reading of each certificate as a whole indicates that the CDs are automatically renewable for multiple periods until they are redeemed by either Thelma or defendant. The back of the certificates state that "[r]enewal rates are based on the Treasury Bill Rates as defined by the Federal Deposit Insurance Corporation in effect the week of renewal." The certificates' use of the term "rates" as opposed to a single renewal rate indicates that the parties intended multiple renewal periods. Moreover, the front of the certificates provides the following language: "Upon written notice, the Bank reserves the right to redeem this Certificate on the original or any subsequent maturity date and further reserves the right to change the interest rate payable for any renewal period." The certificates' use of the terms "any

subsequent maturity date" and "any renewal period" as opposed to referring to a singular maturity date or singular renewal period also indicates that the parties intended multiple renewal periods.

With regard to the 1982 CD, the trial court concluded that it was not automatically renewable because the certificate does not contain any language regarding automatic renewal. However, the CD states that a description and the provisions of a type 20 certificate of deposit are "set forth on separate literature." As noted earlier in this opinion, a type 20 certificate of deposit automatically renews for a like period unless presented for payment.

The Michigan Supreme Court has traditionally held that a certificate of deposit is, in effect, a promissory note payable on demand. See, e.g., *Union Guardian Trust Co v Emery*, 292 Mich 394, 402-403; 290 NW 841 (1940); *White v Wadhams*, 204 Mich 381, 388; 170 NW 60 (1918). However, in *White*, the Court differentiated between certificates of deposit that expressly state that they are payable with interest and "those that do not and thus are payable on demand." *White*, 204 Mich at 389-390. The Court stated that when a certificate of deposit is expressly made payable with interest, the parties likely do not intend the certificate of deposit to be immediately presented for payment. *Id*. at 389. Rather, the inclusion of interest indicates that the parties intended that the holder of the certificate may demand payment immediately, but is not bound to do so. *Id*.

Later, in *In re McKeyes' Estate*, 315 Mich 369, 379; 24 NW2d 155 (1946), the Michigan Supreme Court considered the issue of when the period of limitations begins to run on an action against a certificate of deposit. The Court adopted the rule articulated by the Supreme

Court of Iowa in *Elliott v Capital City State Bank*, 128 Iowa 275; 103 NW 777 (1905), that the period of limitations does not begin to run until a demand for payment has been made. *McKeyes*, 315 Mich at 379.[4] The *McKeyes* Court approvingly quoted *Elliott*, which stated that a certificate of deposit is not due and payable until an actual demand for payment is made and that a certificate of deposit is neither a loan of money to a bank nor a bailment. *Id*. at 380. Rather, it is "a transaction peculiar to the banking business . . . ." *Id*. (quotation marks and citation omitted).

The applicable statute of limitations in this case is MCL 600.5807(8), which bars a cause of action for breach of contract brought six years after the claim accrued. As discussed earlier in this opinion, the trial

[4] Defendant argues that the Supreme Court's conclusion in *McKeyes* that the period of limitations begins to run on a claim against a certificate of deposit when a demand for payment is made is dictum. Dictum is not binding precedent under MCR 7.215(J)(1). *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 436-437; 751 NW2d 8 (2008). Our Supreme Court has defined "dictum" as "an incidental remark or opinion" or "a judicial opinion in a matter related but not essential to a case." *Id*. at 437 (quotation marks and citation omitted). In *McKeyes*, Frank H. McKeyes was the sole proprietor of a private bank. *McKeyes*, 315 Mich at 375. After McKeyes's death, the probate court allowed various claims against McKeyes's estate. *Id*. at 372, 379. These claims included claims against certificates of deposit. *Id*. at 374-375. In its defense, the estate argued, among other things, that the claims were barred by the statute of limitations. *Id*. at 372, 376-381. As the Supreme Court indicated, the estate's defense presented the Court with the novel issue of when the period of limitations begins to run against the rights of depositors to recover bank deposits. *Id*. at 379. The Court's consideration of the issue was not "an incidental remark" or an "opinion in a matter related but not essential to [the] case." *Allison*, 481 Mich at 437 (quotation marks and citation omitted). Rather, it was necessary to address the estate's statute of limitations defense. Thus, the Court's statement that the period of limitations does not begin to run on a claim against a certificate of deposit until a demand for payment has been made is a rule of law. See *id*. at 437-438.

court found Trader's testimony that Thelma presented the CDs to defendant for payment in 2004 not to be credible. Thus, the record indicates that a demand for payment for the three CDs was first made by John between 45 and 60 days after Thelma's death in 2005. The claim accrued on that date and the period of limitations began running. MCL 600.5827 (stating that a "claim accrues at the time provided in [MCL 600.5829] to [MCL 600.5838]," neither of which applies herein, or "*at the time the wrong upon which the claim is based was done*") (emphasis added); *Mich Millers Mut Ins Co v West Detroit Bldg Co, Inc*, 196 Mich App 367, 372 n 1; 494 NW2d 1 (1992) ("A breach of contract claim accrues on the date of the breach . . . ."). Plaintiff filed the complaint in this case on April 3, 2008. Therefore, plaintiff brought this action within the six-year period provided by the statute of limitations. The trial court erred when it concluded that MCL 600.5807(8) barred plaintiff's claim.

Aside from its statute of limitations defense, defendant presents a number of other defenses that it argues bar plaintiff's claim. However, we decline to address these issues as they have not been first decided by the trial court. Defendant is free to raise these defenses on remand.

Reversed and remanded for a new trial. Jurisdiction is not retained.

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

WHITMAN v CITY OF BURTON

Docket No. 294703. Submitted January 12, 2011, at Detroit. Decided July 5, 2011, at 9:00 a.m. Leave to appeal granted, 491 Mich 913.

Bruce Whitman brought an action in the Genesee Circuit Court against the city of Burton and the mayor of the city, Charles Smiley, alleging that defendants violated the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., when the mayor declined to reappoint plaintiff as police chief for the city in November 2007. Plaintiff alleged that he was not reappointed because, in early 2004, he had threatened to pursue criminal charges against the mayor if the city did not comply with a city ordinance and pay plaintiff for the unused sick, personal, and vacation leave time he had accumulated in 2003. Defendants maintained that plaintiff, along with other city administrators, had agreed to forgo any payout for accumulated leave in order to avoid a severe budgetary shortfall and that plaintiff was not reappointed because the mayor was dissatisfied with many aspects of plaintiff's performance as chief of police. A jury returned a verdict in favor of plaintiff. The court, Geoffrey L. Neithercut, J., entered a judgment consistent with the verdict and thereafter denied defendants' motion for judgment notwithstanding the verdict or a new trial. Defendants appealed.

The Court of Appeals *held*:

1. A plaintiff, to establish a prima facie case under the WPA, must show that the plaintiff was engaged in protected activity as defined by the WPA, the plaintiff was discharged or discriminated against, and a causal connection between the protected activity and the discharge or adverse employment action. The purpose of the WPA is to protect the public. When considering a retaliation claim under the WPA, a critical inquiry is whether the employee acted in good faith and with a desire to inform the public on matters of public concern. The WPA is not intended to be used as an offensive weapon by disgruntled employees.

2. It was in the public interest, in order to avoid a severe budgetary shortfall, for plaintiff and the other city administrators to forgo payment for unused leave in order to preserve essential public services. In demanding payment under the ordinance,

plaintiff was decidedly not acting in the public interest, but in the thoroughly personal and private interest of securing a monetary benefit in order to maintain his lifestyle. Plaintiff's claim is not actionable under the WPA because his complaint amounted to a private dispute over plaintiff's entitlement to a monetary employment benefit and he acted entirely on his own behalf. There is no indication that good faith or the interests of society as a whole played any part in plaintiff's threatened decision to go to the authorities. Plaintiff asserted his own entitlement to payment and he dropped his threat of legal action when he received his money. No reasonable juror could conclude that plaintiff threatened to prosecute defendants out of an altruistic motive of protecting the public.

3. An employee may not recover under the WPA when the employee acts in bad faith. Plaintiff attempted to use the WPA as an offensive weapon. There is no protection under the WPA for plaintiff's conduct. The denial of defendants' motion for judgment notwithstanding the verdict was reversed and the case is remanded to the trial court for further proceedings.

Reversed and remanded.

BECKERING, J., dissenting, stated that plaintiff engaged in protected activity, as defined by the WPA, by reporting the violation, or suspected violation, of the city ordinance. Plaintiff presented sufficient evidence of a causal connection between his protected activity and the decision not to reappoint him as the chief of police. The protected activity need not be the only reason, or even the main reason, for the employee's discharge or nonreappointment, but it does have to be one of the reasons that made a difference in the decision. There was sufficient evidence for a reasonable juror to conclude that plaintiff's reporting of the ordinance violation was a factor that made a difference in the mayor's decisions not to reappoint him. There was evidence that, while plaintiff's personal financial status was a concern for him in reporting the violation of the ordinance, he also acted in the public interest. Plaintiff did not use the WPA as an offensive weapon or a tool for extortion. There was no evidence of bad faith. By stating that he would treat the payout policy issued by the mayor as an ordinance violation, plaintiff was fulfilling his duty as a police officer to uphold the law, which was certainly in the public interest. Plaintiff was not barred from recovering under the WPA. Plaintiff's desire to be paid under the ordinance for the benefits to which he was legally entitled may not be considered an improper motive without evidence of extortion, vindictiveness, or bad faith. The special jury instruction

requested by defendants regarding an improper motive in reporting a violation did not apply to the facts of this case. The trial court did not abuse its discretion by denying defendants' motion for a new trial that alleged that the court improperly refused to give the special jury instruction. The trial court did not err by concluding that the mayor is not entitled to a setoff for the pension benefits paid to plaintiff by the city. The order awarding a judgment in favor of plaintiff should have been affirmed.

MASTER AND SERVANT — LABOR RELATIONS — WHISTLEBLOWERS' PROTECTION ACT.

The purpose of the Whistleblowers' Protection Act is to protect the public; a critical inquiry when considering a retaliation claim under the act is whether the employee acted in good faith and with a desire to inform the public on matters of public concern; the act is not intended to be used as an offensive weapon by disgruntled employees; an employee may not recover under the act when the employee has acted in bad faith (MCL 15.361 *et seq*.).

Tom R. Pabst and *Michael A. Kowalko* for plaintiff.

Plunkett Cooney (by *Ernest R. Bazzana*) for defendants.

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

SAAD, J. In this action under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., a jury returned a verdict in favor of plaintiff. For the reasons set forth below, we reverse the trial court's denial of defendants' motion for judgment notwithstanding the verdict (JNOV) and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

Plaintiff sued defendants under the WPA after defendant city of Burton Mayor Charles Smiley declined to reappoint plaintiff as the police chief for the city of Burton in November 2007. Plaintiff's complaint alleged that defendants terminated his employment because, in

January 2004, plaintiff complained to the mayor and a city attorney that it would be a violation of Burton City Ordinance 68-25C (Ordinance 68-C) if defendants failed to pay plaintiff for unused sick and personal leave time plaintiff accumulated in 2003. Ordinance 68-C, § 8(I) provides, in relevant part:

> Administrative Officers may accumulate unused sick/personal days until a 90 day accumulation has been created. Vacation days and unused holidays may also be credited for purposes of the accumulation. At the option of any administrative officer, any unused sick and/or personal, and/or vacation days may be paid in January in the year after which they are accumulated.

Defendants maintain that, when faced with significant budget problems in the city, plaintiff, along with other city administrators, agreed in March 2003 to forgo any payout for accumulated sick and personal time and to instead use their sick or personal time throughout the year. Plaintiff did not use much of his sick and personal time in 2003 and, after he demanded payment under the ordinance in early 2004 and threatened to pursue criminal charges against the mayor, defendants paid plaintiff $6,984 for his unused time. Defendants deny that Mayor Smiley decided to appoint another police chief in 2007 because of plaintiff's complaint involving Ordinance 68-C. Rather, defendants contend that the mayor was dissatisfied with many aspects of plaintiff's performance as chief of police. Following a four-day trial, the jury returned a verdict in favor of plaintiff and, thereafter, the trial court denied defendants' motion for JNOV or a new trial.

II. ANALYSIS

As discussed, plaintiff claims that defendants violated the WPA by terminating his employment three

years after he threatened to pursue criminal charges if the city did not pay for his 2003 unused sick and vacation time. Plaintiff took the position at trial that his complaint about the Ordinance 68-C violation was a factor in the mayor's decision not to reappoint him as chief of police in 2007.

Defendants argue that the trial court should have granted their motion for JNOV because plaintiff did not establish a prima facie case under the WPA. "We review de novo a trial court's decision regarding a motion for JNOV." *Campbell v Dep't of Human Servs*, 286 Mich App 230, 241; 780 NW2d 586 (2009). "When reviewing the denial of a motion for JNOV, the appellate court views the evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party to determine if a party was entitled to judgment as a matter of law." *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2009).

By 2003, due in part to changes in revenue sharing, the general fund for the city of Burton had lost approximately $50,000. Mayor Smiley testified that, in light of this significant budget shortfall, and to protect the jobs of city employees, he proposed that he and other city administrators agree to a wage freeze as well as a "use it or lose it" policy for sick and personal days, so that all administrators, including plaintiff, would not take a monetary payout for their unused time. At a meeting attended by plaintiff, but not the mayor, the administrators agreed to the mayor's proposal. Thereafter, the mayor announced the agreement in his state-of-the-city address, to the city council, and to the press.

Plaintiff maintained at trial that he did not agree to forfeit a payout for his sick and vacation hours. Shortly after the "agreement" was reached in March 2003,

plaintiff sent a letter to the mayor complaining that it was an unfair elimination of one of his benefits. Plaintiff wrote:

> Up to my appointment as Chief I was involved in the Police union and throughout my career attained benefits through collective bargaining as you well know. Historically we were given things in lieu of wage increases including additional holidays, vacation and sick and personal time as well as other fringe benefits. My current life style revolves around these very things that have been negotiated for me and in some cases protected several times over through binding arbitration (pension). My family looks forward to the financial benefits I receive by not missing time from work. I have always enjoyed my job and was raised with the ideal that hard work and dedication does come with rewards and although City Administrators across the board are underpaid, this compensation at the end of the year, to me, justifies it and rewards me for dedicated work.

Notwithstanding his dislike for the policy, plaintiff did not state in the letter that he would demand payment for his unused time and he did not state that the agreement to forgo the annual payout would violate any Burton ordinance.

Nonetheless, and despite his apparent understanding of the agreement, plaintiff did not use many of his sick or vacation days during the remainder of 2003 and, on January 9, 2004, plaintiff sent a letter to Mayor Smiley demanding payment:

> Please be advised that under section I of ordinance 68-25 "C" I am requesting to exercise my option as stated, that all of my unused sick/personal days and unused vacation days be paid to me in January as required in this ordinance.

* * *

> To ignore issues specified in that ordinance would be a direct overt violation of that ordinance and I fully intend to address the violation should it occur.

Plaintiff also sent a letter to city attorney Richard Hamilton on January 23, 2004, as a follow-up to a conversation they had earlier in the month. Plaintiff's letter provided, in relevant part:

> Having this use it or lose it proposal thrown on me I resorted to the very document that the mayor refers to, 68-c. It is very clear in that ordinance that administrators are entitled to and can receive their unused days as specified by ordinance. Following the letter of the law, I made a formal written request for my unused days to be paid to me in January as specified by ordinance, (copy attached).
>
> At a staff meeting with the Mayor on January 12, 2004 he referred to the fact that we "waived" our right to receive paid days. I completely disagree, this is wrong and I will not accept this as fact that the mayor can decide what I have waived when it comes to an ordinance protected benefit that is dictated by the council. Some will state they agreed to this and I find this quite interesting, especially in the manner it was delivered to us.
>
> My position is this, this is a violation of the ordinance, I told the mayor on the 12th it was an ordinance violation and that I had talked to you about this and I expected it to be addressed. Living by the letter of this ordinance, I will wait until January passes to pursue this. If I need to re address through the council I will, if you have any input on resolving this I would appreciate it or I will be forced to pursue this as a violation of the law and will address it as such.

The city attorney advised Mayor Smiley that a failure to pay plaintiff would be contrary to Ordinance 68-C, and, shortly thereafter, plaintiff received a check for his unused sick and vacation hours.

Mayor Smiley testified that he was upset about plaintiff's demand for payment as he viewed this as plaintiff "going back on his word" because all the administrators had agreed to forgo the payments, plaintiff did not abide by the agreement, and the mayor had already issued a press release about the agreement. Some other administrators were also angry with plaintiff because they had used their sick and vacation time during the year with the understanding that they would not receive any payment for it and they believed plaintiff "sandbagged" the city by making his claim only after the right to these payments ripened. Nonetheless, Mayor Smiley testified that he and plaintiff overcame their differences about the issue and he denied that this factored into his decision not to reappoint plaintiff in 2007. Rather, Mayor Smiley testified that there were numerous problems with plaintiff's performance as police chief over the next three years. In addition to various complaints from police officers about plaintiff and the low morale in the department, Mayor Smiley cited plaintiff's inadequate discipline of three officers who had followed the mayor's car in an unsuccessful attempt to arrest the mayor for a driving offense after he visited a local pub, a lack of communication from plaintiff about the police department's operations and activities, numerous sexually explicit e-mails plaintiff sent on his city computer in clear violation of city policy, plaintiff's failure to inform the mayor about the failure to discipline an intoxicated, off-duty police officer who shot someone in the chest with a Simunition nonlethal training gun, plaintiff's involvement in denying employment to a qualified police department applicant, his retention of an officer who was deemed unqualified by her supervising officers, his issuance of a retirement identification card that allowed an unqualified former police officer to carry a gun, plaintiff's failure to act on

the complaint of a local business owner about harassment by Flint police officers, and a misleading budget report plaintiff made to the city council.

Mayor Smiley informed plaintiff that he did not intend to reappoint him as police chief on November 27, 2007. Plaintiff took the position at trial that his complaint about the Ordinance 68-C violation was causally connected to the mayor's decision because the mayor raised it as an example of his problems with plaintiff both before and after plaintiff's termination. Plaintiff specifically alleged that, by failing to reappoint him as the chief of police, defendants violated § 2 of the WPA, MCL 15.362, which states:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

"To establish a prima facie case under [the WPA], a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003).

We hold that, as a matter of law, plaintiff could not recover damages under the WPA for the mayor's decision not to reappoint him because, in threatening to

inform the city council or prosecute the mayor for a violation of Ordinance 68-C, plaintiff clearly intended to advance his own financial interests. He did not pursue the matter to inform the public on a matter of public concern.

"[T]he purpose of the WPA is to protect the public." *Henry v Detroit*, 234 Mich App 405, 413 n 1; 594 NW2d 107 (1999). As our Supreme Court explained in *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378-379; 563 NW2d 23 (1997):

> Michigan's Whistleblowers' Protection Act was first enacted in 1981, largely in response to the accidental PBB-contamination of livestock feed. The act "encourage[s] employees to assist in law enforcement and . . . protect[s] those employees who engage in whistleblowing activities." [*Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 83; 503 NW2d 645 (1993) (BOYLE, J., dissenting), overruled in part on other grounds by *Brown v Detroit Mayor*, 478 Mich 589, 594 n 2; 734 NW2d 514 (2007).] It does so with an eye toward promoting public health and safety. The underlying purpose of the act is protection of the public. The act meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law. Without employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses.

Accordingly, by enacting the statute, the Legislature sought "to alleviate 'the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large businesses.' " *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 612; 566 NW2d 571 (1997), quoting *Dudewicz*, 443 Mich at 75. To encourage employees to expose corruption or criminal conduct, the WPA "prohibits future employer re-

prisals" when an employee reports or is about to report such conduct. *Shallal*, 455 Mich at 612.

In order to effectuate the purpose of the WPA, our courts have ruled that, when considering a retaliation claim under the act, a critical inquiry is whether the employee acted in good faith and with " 'a desire to inform the public on matters of public concern . . . .' " *Id*. at 621, quoting *Wolcott v Champion Int'l Corp*, 691 F Supp 1052, 1065 (WD Mich, 1987). To that end, it is well settled that the Legislature did not intend " 'the Whistleblowers Act to be used as an offensive weapon by disgruntled employees.' " *Shallal*, 455 Mich at 622, quoting *Wolcott*, 691 F Supp at 1066.

The mayor of Burton agreed with his administrators to forgo cash payouts to save money and to demonstrate to the public that the administration was taking fiscally responsible action to save public funds while retaining needed city services. There is no dispute that the decision and subsequent agreement by the administrators to avoid thousands of dollars in cash payouts was a strategy to counteract a severe budgetary shortfall that, without some corrective measure, would likely have resulted in the termination of other public-service employees. Thus, it was in the public interest for plaintiff and the other administrators to forgo this administrative perk, in order to preserve essential public services.

In demanding payment under the ordinance for his sick and personal hours—a payment the cash-strapped city could ill afford—plaintiff was decidedly *not* acting in the public interest, but in the thoroughly personal and private interest of securing a monetary benefit in order to maintain his "life style." Plaintiff's claim is not actionable under the WPA because his complaint amounted to a private dispute over plaintiff's entitle-

ment to a monetary employment benefit. Moreover, plaintiff acted entirely on his own behalf. Indeed, nowhere in the voluminous record "is there any indication that good faith or the interests of society as a whole played any part in plaintiff's [threatened] decision to go to the authorities." *Wolcott*, 691 F Supp at 1063. To the contrary, plaintiff asserted his own entitlement to payment and he dropped his threat of legal action when he received his money. Under these facts, no reasonable juror could conclude that plaintiff threatened to prosecute defendants "out of an altruistic motive of protecting the public." *Shallal*, 455 Mich at 622.

Moreover, an employee also may not recover under the WPA when the employee acts in bad faith. *Id*. at 621. Here, as noted earlier in this opinion, plaintiff withheld his accusation of a legal violation until after he accumulated thousands of dollars' worth of sick and vacation time. Once the mayor reported the agreement to the city council and the public, plaintiff spent the next several months stockpiling his hours and, when most personally advantageous, threatened legal action if defendants did not pay plaintiff for them. While this case differs factually from *Shallal* because the plaintiff in *Shallal* withheld her threat to report until her termination was imminent, we believe this case amounts to a similar, and prohibited, attempt to use the WPA " 'as an offensive weapon by [a] disgruntled employee[].' " *Id*. at 622, quoting *Wolcott*, 691 F Supp at 1066. Plaintiff expressed personal displeasure with the agreement to forgo his lump-sum payment, he remained silent about the claimed wrong for months, and then raised it as a legal issue—not for the purpose of preventing injury to the public, but for personal reasons and only when most personally beneficial. There is no protection afforded under the WPA for such conduct. *Id*.; *Wolcott*, 691 F Supp at 1065.

Because no juror could legally find in favor of plaintiff on his claim under the WPA, we reverse the trial court's denial of defendants' motion for JNOV, and remand for further proceedings consistent with this opinion.[1] We do not retain jurisdiction.

O'CONNELL, P.J., concurred with SAAD, J.

BECKERING, J. (*dissenting*). I respectfully dissent. Defendants, the city of Burton (the city) and Charles Smiley, appeal as of right the judgment entered in favor of plaintiff, Bruce Whitman, following a jury trial in this action brought under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. I would affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In March 2002, Smiley, the mayor of the city, appointed plaintiff as police chief. The city charter provides, at § 6.2(b), that mayoral appointees "serve at the pleasure of the Mayor for indefinite terms, except that the Mayor shall reaffirm or appoint those administrative officers and other appointive officers provided in this charter within thirty (30) days from his election . . . ." Plaintiff remained police chief until November 2007, when, after an election, Smiley declined to reappoint plaintiff to the position.

According to plaintiff, Smiley's decision not to reappoint him was causally connected to previous incidents when plaintiff reported a policy issued by Smiley as a violation of a city ordinance. Burton City Ordinance No.

[1] In light of this ruling, we need not address defendants' remaining arguments on appeal, but note on the causation issue that even if plaintiff could be viewed as stating a cause of action under the WPA, there is overwhelming evidence of plaintiff's misconduct in office that more than justified the mayor's decision not to reappoint plaintiff as police chief.

68-25C, § 8(I) (Ordinance 68C), which permitted unelected city officers to be paid for unused sick, personal, and vacation days, stated, in part:

> Administrative officers [meaning unelected officers] may accumulate unused sick/personal days until a 90 day accumulation has been created. Vacation days and unused holidays may also be credited for purposes of the accumulation. *At the option of any administrative officer, any unused sick and/or personal, and/or vacation days may be paid* in January in the year after which they are accumulated. [Emphasis added.]

In early 2003, an election year, Smiley held a meeting with the city department heads regarding the city's worsening financial situation. Smiley, stating that all possible measures should be taken to keep city employees working, noted that the city paid a large amount of money each year for employees' unused vacation days. At a later meeting, which Smiley did not attend, the department heads agreed to a pay freeze and that all vacation days had to be used within the calendar year, with no employee payouts for unused days. Smiley prepared a memorandum of this "gentlemen's agreement" and distributed it to administrators, including plaintiff, on March 18, 2003.

On March 20, 2003, plaintiff sent Smiley a letter objecting to the plan in Smiley's memorandum. He stated that his lifestyle revolved around "these very things that have been negotiated for me . . . . My family looks forward to the financial benefits I receive by not missing time from work."

In the 2003 election, Smiley was reelected, and he subsequently reappointed plaintiff as police chief. On January 9, 2004, plaintiff sent a letter to Smiley requesting a payout for his unused days in 2003 under Ordinance 68C. The letter further stated:

> Although I have a great deal of respect for you as a person and as our mayor, I do not feel that issuing a confidential memo that affects ones [sic] wages and benefits that are set by ordinance, can supersede that very ordinance.
>
> *To ignore issues specified in that ordinance would be a direct overt violation of that ordinance* and I fully intend to address the violation should it occur. [Emphasis added.]

On January 12, 2004, Smiley held a staff meeting. Smiley stated, according to plaintiff, that there would be no payouts for unused vacation days, arguing that the administrators had waived their right to receive such payouts. Plaintiff told Smiley that he had talked to a city attorney about this issue, that refusing to pay employees for unused days was an ordinance violation, and that he expected the violation to be addressed.

On January 15, 2004, plaintiff wrote a letter to Dennis Lowthian, an administrative officer for the city who had been acting as a spokesperson for all the administrative officers. In the letter, plaintiff stated: "I cannot allow them to violate the ordinance by 'forcing waivers' of ordinance[-]given rights. *I believe it is my job as a police officer to point the violation out* and I will pursue it as far as it needs to go." (Emphasis added.) On January 23, 2004, plaintiff wrote a letter to Richard Hamilton, a city attorney for matters other than labor and employment. Plaintiff, asserting that the failure of the city to pay him for unused vacation days was a violation of Ordinance 68C, stated:

> My position is this, this *is a violation of the ordinance* [*and*] *I told the mayor on the 12th it was an ordinance violation* . . . . If I need to re address [the issue] through the council I will, if you have any input on resolving this I would appreciate it or *I will be forced to pursue this as a violation of the law and will address it as such.* [Emphasis added.]

Plaintiff also stated that "[t]his ordinance was not re addressed in regards to these benefits during the past year and the Mayor and council clearly had ample time to bring this up and I expected them to [do so] after the memo of March 03." Defense counsel admitted at trial that Smiley was told about the January 23, 2004, letter, and Hamilton testified that he told Smiley about the letter. But Smiley denied that Hamilton talked with him about it.

Thereafter, the city's labor and employment attorney, Dennis Dubay, advised the city that the payouts for unused days had to be made because Ordinance 68C had not been amended to reflect the "gentlemen's agreement" not to make the payouts. According to Smiley's testimony, Dubay told him, "Chuck, you can't make a gentlemen's agreement to drive 55 [miles per hour] when the speed limit is posted at 45 . . . ." On January 29, 2004, the city authorized monetary payouts for unused vacation and sick days to all officers who had requested it, including plaintiff.

Smiley testified that on March 28, 2004, he had a couple of alcoholic drinks at a local bar. The owner of the bar, Bob Lindsey, offered to drive Smiley home. Lindsey drove Smiley in Smiley's city-issued vehicle. Right after they left the parking lot, city police officers in three cruisers stopped them. One of the officers was slated to be laid off. Plaintiff conducted an investigation of the incident and disciplined the officers in May 2004. But Smiley allegedly felt that the discipline was too mild and was unhappy with the way plaintiff handled the matter.

On June 7, 2004, Smiley issued a letter to plaintiff, indicating that he was considering removing plaintiff as police chief. Later that day, Smiley met with plaintiff and city employee Mark Udell. According to plaintiff,

Smiley angrily pointed his finger in plaintiff's face and yelled, "You threatened to have me prosecuted over the 68C vacation pay issue." Udell took notes, which stated: "Mayor — no trust — 68-C (vacation) — lack of communication . . . ."

Plaintiff asserts that his performance as police chief was good. Morale was high, he received awards, and there were no disciplinary actions against him. In April 2004 he received an award as police administrator of the year, a statewide award. Plaintiff again received a statewide award in October 2004. Plaintiff did, however, admit to exchanging sexually explicit e-mails during work hours.

Smiley was reelected as mayor in November 2007. Following his reelection, Smiley directed each department head, including plaintiff, to submit a resume to him, if he or she wanted to be reappointed. Later that month, Smiley declined to reappoint plaintiff as police chief. Smiley publicly stated that he wanted the police department to go in a new direction and to have more discipline in the department. But Smiley testified that the actual reasons he did not reappoint plaintiff were unnecessary for the public to know and that he was trying to protect plaintiff and the police department from embarrassment. On December 1, 2007, plaintiff began receiving pension benefits.

Later in December 2007, Smiley met with lieutenants and sergeants in the police department to discuss a possible replacement for plaintiff. At the meeting, Smiley mentioned that he and plaintiff "got off on the wrong foot" because of the Ordinance 68C issue. Sergeant Michael Odette testified that Smiley brought up the issue. Similarly, according to Lieutenant Thomas Osterholzer's testimony, Smiley acknowledged that

plaintiff's conduct related to the ordinance got them off to "a rocky start" and "on the wrong foot."

Plaintiff filed suit against defendants in February 2008, alleging a violation of the WPA. At trial, the jury found in plaintiff's favor, answering special interrogatories on the verdict form, finding that plaintiff engaged in protected conduct and that his protected conduct made a difference in Smiley's failure to reappoint plaintiff. The jury found plaintiff's past economic damages to be $97,500 for 2007 and 2008, future economic damages of $130,000 ($65,000 for each of the years 2009 and 2010), and noneconomic damages of $5,000, for a grand total of $232,500. The verdict form did not provide separate awards against each of the two defendants.

The trial court subsequently entered judgment for plaintiff.[1] Thereafter, defendants moved for judgment notwithstanding the verdict (JNOV) or a new trial. The trial court denied defendants' motion.

Defendants now appeal as of right.

II. DEFENDANTS' MOTION FOR JNOV

Defendants first argue on appeal that the trial court erred by denying their motion for JNOV. A trial court's ruling on a motion for JNOV is reviewed de novo on appeal. *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 272; 696 NW2d 646 (2005). When

[1] In the judgment, the trial court stated that the verdict amount of $232,500 stood, unchanged, vis-à-vis Smiley (plus attorney fees of $64,874.25, for a total of $297,374.25), but that the city only owed plaintiff $53,981.78, because the court held that the pension benefits received by plaintiff would be an offset against the liability of the city, but not against the liability of Smiley. The judgment also stated that any money paid by the city "shall correspondingly reduce the judgment amount owed by . . . Smiley."

ruling on a motion for JNOV, a trial court should consider the evidence and all legitimate inferences arising therefrom in the light most favorable to the nonmoving party. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005) (opinion by TAYLOR, C.J.). "A trial court should grant a motion for JNOV only when there was insufficient evidence presented to create an issue for the jury." *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). If the evidence is such that reasonable jurors could disagree, JNOV is not properly granted. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005).

The WPA, which imposes a duty on employers not to fire whistleblowers for reporting a violation of law, states, in part:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment *because the employee . . . reports or is about to report*, verbally or in writing, *a violation or a suspected violation* of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false . . . . [MCL 15.362 (emphasis added).]

As noted by the majority, "[t]o establish a prima facie case under this statute, a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act [i.e., reporting or being about to report a violation or suspected violation of law], (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003).

A. PROTECTED ACTIVITY

Defendants assert that plaintiff failed to establish that he engaged in a protected activity. I disagree.

Plaintiff engaged in a protected activity, as defined by the WPA, by reporting the violation, or what was at least suspected to be a violation, of ordinance 68C to the city. Smiley's March 18, 2003, memorandum stated that there would be no payouts for officers' unused vacation days, effective immediately. Smiley's policy to discontinue payouts was contrary to Ordinance 68C, which permitted unelected city officers to be paid for unused sick, personal, and vacation days. Plaintiff believed that Smiley was committing an ordinance violation, and he reported it as such to Smiley himself, city administrative officer Lowthian, and city attorney Hamilton.

According to defendants, plaintiff did not engage in protected activity because he acted in his own financial interest, not in the public interest. Defendants cite *Wolcott v Champion Int'l Corp*, 691 F Supp 1052 (WD Mich, 1987), *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604; 566 NW2d 571 (1997), and *Robinson v Radian, Inc*, 624 F Supp 2d 617 (ED Mich, 2008), in support of this assertion. But those cases do not stand for the proposition that "where the primary motivation of an employee is personal gain, the employee necessarily fails to establish the requisite 'protected activity,' " as suggested by defendants. Rather, as will be discussed below, those cases address an employee's motivation in reporting a violation of law in regard to the question of causation. Here, plaintiff engaged in a protected activity by reporting a violation of Ordinance 68C to the city, and there is no dispute that he was later discharged from his position through Smiley's decision not to reappoint him.

B. CAUSAL CONNECTION

Defendants next assert that plaintiff failed to establish a causal connection between his protected activity and his subsequent discharge. Again, I disagree. I would hold that plaintiff presented sufficient evidence of causation to create an issue for the jury.

1. SMILEY'S DECISION NOT TO REAPPOINT PLAINTIFF

The model civil jury instruction regarding causation in WPA claims states that the protected activity need not be the only reason, or even the main reason, for the employee's discharge, but it does have to be *one of the reasons that made a difference* in the decision to discharge. M Civ JI 107.03. Thus, to establish a prima facie claim under the WPA, plaintiff was required to show that one of the reasons that made a difference in Smiley's decision not to reappoint him was the fact that plaintiff had reported the violation of Ordinance 68C.

Viewing the evidence presented at trial in the light most favorable to plaintiff, there was sufficient evidence for a reasonable juror to conclude that plaintiff's reporting of the ordinance violation made a difference in Smiley's decision not to reappoint him. First, there was evidence that Smiley was aware that plaintiff reported the ordinance violation. In his January 9, 2004, letter to Smiley, plaintiff stated: "I do not feel that issuing a confidential memo that affects ones [sic] wages and benefits that are set by ordinance, can supersede that very ordinance. To ignore issues specified in that ordinance would be a direct overt violation of that ordinance and I fully intend to address the violation should it occur." At the January 12, 2004, staff meeting, plaintiff told Smiley that he had talked to a city attorney about the payout issue, that refusing to pay em-

ployees for unused days was an ordinance violation, and that he expected the violation to be addressed. There was also testimony that Smiley was aware of plaintiff's January 23, 2004, letter to Hamilton, wherein plaintiff reported the violation. Although Smiley testified that he did not discuss the letter with Hamilton, Hamilton testified that he did, in fact, tell Smiley about the letter. It is the fact-finder's responsibility to determine the credibility and weight of the testimony. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

Further, although there was evidence that there may have been a variety of reasons for Smiley's decision not to reappoint plaintiff, such as plaintiff's allegedly inadequate discipline of the officers who stopped Smiley after his visit to the local bar, sexually explicit e-mails sent by plaintiff, and other reasons described by the majority, there was also evidence that plaintiff's reporting of the ordinance violation was another reason that made a difference in Smiley's decision. On June 7, 2004, Smiley sent plaintiff a letter stating that he was considering removing plaintiff as police chief. Plaintiff testified that at their meeting later that day, Smiley angrily pointed at his face and yelled, "You threatened to have me prosecuted over the 68C vacation pay issue." Udell's meeting notes stated: "Mayor — no trust — 68-C (vacation) — lack of communication . . . ." While Smiley did not immediately fire plaintiff as threatened, and plaintiff remained police chief through November 2007, a reasonable juror could have concluded that the Ordinance 68C issue was still on Smiley's mind when he decided not to reappoint plaintiff. The incident when plaintiff allegedly failed to adequately discipline the police officers who had stopped Smiley's vehicle after he left the bar, which was one of Smiley's purported reasons for not reappointing plaintiff, occurred in

March 2004. Thus, by Smiley's own admission, there were incidents going back as far as 2004 that made a difference in his decision-making in 2007. Moreover, at the December 2007 meeting of city police lieutenants and sergeants, just after plaintiff's discharge, Smiley mentioned that he and plaintiff "got off on the wrong foot" because of the Ordinance 68C issue. Plaintiff testified that after the meeting, which he had not attended, he asked two sergeants and a lieutenant whether the reason for his discharge had been discussed. They all said that the reason had been discussed and that "it all goes back to" the Ordinance 68C issue. Sergeant Odette testified that Smiley said that he had not been happy with plaintiff since early after his appointment, citing the payout issue. Viewing this evidence in the light most favorable to plaintiff, there was sufficient evidence for a reasonable juror to find that plaintiff's protected activity was *a* factor that made a difference in his discharge.

2. PLAINTIFF'S MOTIVATION FOR "BLOWING THE WHISTLE"

The majority concludes that plaintiff cannot recover under the WPA because he "intended to advance his own financial interests," "not [to] pursue the matter to inform the public on a matter of public concern." I would hold, however, that while plaintiff's personal financial status was a concern for him in reporting the violation of Ordinance 68C, there was evidence that he acted in the public interest. This case is factually distinguishable from the cases relied on by defendants and the majority, i.e., *Wolcott*, *Shallal*, and *Robinson*, in which the plaintiffs refrained from "blowing the whistle" until it was most advantageous to themselves, using the WPA as a tool of extortion.

In *Robinson*, the United States District Court for the Eastern District of Michigan summarized the facts and holdings in *Wolcott* and *Shallal*, stating:

> In *Wolcott*, the plaintiff was a mechanic at one of defendant's shops. On April 12, 1985, defendant held a meeting at which plaintiff was present. The main focus of the meeting was defendant's reduction of operations, including closing some offices. Plaintiff, who did not agree with defendant's planned cutbacks, mailed a threatening letter to defendant following the meeting. The letter laid out numerous grievances and threatened, among other things, to report alleged violations to the [Department of Natural Resources (DNR)] and [Environmental Protection Agency] if defendant did not engage in discussions with plaintiff and his co-workers and consider giving certain laid off employees their jobs back.
>
> After defendant received the letter, it initially suspended defendant [sic]. A week later, on June 14, 1985, defendant recommended that the mechanic's position at plaintiff's shop be eliminated based on the proposed cutbacks in ownership of heavy equipment.
>
> On June 17, 1985, plaintiff filed a complaint with the Michigan Department of Public Health. Thereafter, plaintiff filed reports with the DNR and the Michigan Department of Labor.
>
> On July 31, 1985, plaintiff was notified that his position had been eliminated. Plaintiff then filed suit against his employer and his complaint included a retaliation claim under the WPA.
>
> The trial court concluded that plaintiff had not established a prima facie case of retaliation under the WPA because he could not establish a causal connection. The court explained that Plaintiff was aware of the planned scaling down of defendant's equipment operations for several months prior to his whistleblower activities and had been aware of the alleged problems at the shop for several years prior to notifying authorities. "Yet, Plaintiff did not exercise his civil duty by reporting these violations, as envisioned in the Act, until it became apparent that he

and others might lose their jobs due to circumstances unrelated to the violations." [*Wolcott*, 691 F Supp] at 1059.

The court noted that the WPA "was not intended to serve as a tool for extortion." Rather, the primary motivation of an employee availing himself of whistleblower protection must be a desire to inform the public on matters of public concern, not personal vindictiveness. *Id*. at 1065. It concluded that plaintiff "clearly did not have the public interest in mind while threatening to report defendant unless jobs at the [shop where plaintiff was employed] were forthcoming." *Id*.

The court concluded that if it countenanced plaintiff's conduct, it would encourage other employees to hold off blowing the whistle until it becomes most advantageous for them to do so. Plaintiff has offered no evidence which suggests that the Michigan legislature intended the [WPA] to be used as an offensive weapon by disgruntled employees and the Court therefore concluded that Plaintiff's WPA claim failed.

In *Shallal*, the plaintiff was an adoption department supervisor for defendant. About a year into his tenure, allegations arose that plaintiff's supervisor was drinking on the job and misusing agency funds. Plaintiff discussed the need to report her supervisor over the next year, but never took any action while employed with defendant. After an incident occurred in which plaintiff was criticized, via a written report from [the] Department of Social Services [DSS], for her inadequate actions relating to reports of abuse to child [sic] whose placement she supervised, plaintiff was called into her supervisor's office. The ensuing discussion became heated, and plaintiff threatened to report her supervisor's abuses of alcohol and agency funds if he failed to "straighten up." Nevertheless, Plaintiff was discharged based on the DSS report. Plaintiff never reported her supervisor, but rather, filed suit against Defendant asserting a retaliation claim under the WPA.

Citing *Wolcott* with approval, in *Shallal* the Michigan Supreme Court held that the "**primary motivation** of an employee pursuing a whistleblower claim 'must be a desire

> to inform the public on matters of public concern, and not personal vindictiveness.' " *Shallal*, 455 Mich [at 621]. (Emphasis added). The court also cited with approval the following passage from [*Wolcott*]:
>
> "Where, however, an employee . . . keeps the matter quiet for more than a year, eventually revealing it not [to] the appropriate authorities or even to others for the purpose of preventing public injury, but rather for some other limited and private purpose, however, [sic] laudable that purpose may appear to the employee, no such protection is afforded. [Otherwise] we would be discouraging disclosure and correction or [sic] unlawful or improper acts by encouraging employees to 'go along' and then keep quiet reserving comment or disclosure until a time best suited to the advancement of their own interests." [*Id*.]
>
> The court concluded that, like *Wolcott*, plaintiff used her own situation to extort defendant not to fire her and that under the facts at hand, "no reasonable juror could conclude that plaintiff threatened to report [defendant] out an [sic] altruistic motive of protecting the public. Furthermore, it is clear that the decision to fire plaintiff was made before her threat to Quinn and that plaintiff knew of this decision as evidenced by her calendar entry." *Id*. Because plaintiff used the threat of reporting defendant to force him to allow her to keep her job, no reasonable juror could conclude there was a causal connection between her firing and the protected activity. "To hold otherwise 'would encourage other employees to hold off blowing the whistle until it becomes most advantageous for them to do so.' " *Id*. [at 622]. [*Robinson*, 624 F Supp 2d at 632-633.]

The *Robinson* court held that the plaintiff in that case, like the plaintiffs in *Wolcott* and *Shallal*, "was aware of the alleged violations for a considerable period of time, yet only threatened to report such violations to a public body when it was apparent that his job performance was being questioned." *Id*. at 634. The court continued:

> Furthermore, like the situation seen in *Shallal* . . . , the evidence indicates that the challenged employment action [the defendant's decision to eliminate the plaintiff's position and transfer him to another office] had already been contemplated, *and that Plaintiff knew such actions were being contemplated*, before he made his threat . . . . In addition, Plaintiff made a *conditional threat* to report his allegations only if the criticisms of his work performance did not end. Finally, Plaintiff never made a report to the [Office of Federal Contracts Compliance Programs], or any other public body, even after he stopped working for Defendant.
>
> Under these facts, a reasonable jury could not conclude that Plaintiff's "primary motivation" was a desire to inform the public. To allow Plaintiff's WPA claim to proceed under these facts would be to discourage disclosure by encouraging employees [to] hold off blowing the whistle, or threatening to do so, until it becomes most advantageous for them to do so. [*Id.*]

Unlike the plaintiffs in the above cases, plaintiff did not use the WPA as an offensive weapon or tool for extortion. The majority concludes that plaintiff acted in bad faith, in a manner similar to the plaintiff in *Shallal*, by withholding "his accusation of a legal violation until after he accumulated thousands of dollars' worth of sick and vacation time." I disagree. Plaintiff first informed Smiley of his disagreement with the payout policy in March 2003, immediately after the mayor issued the memorandum stating that there would be no payouts for unused vacation days. Although plaintiff did not make another formal complaint to Smiley until January 2004, when he requested a payout for his unused days in 2003 and identified the policy as a violation of Ordinance 68C, his actions cannot be considered extortion. In his January 23, 2004, letter to Hamilton, plaintiff explained that he was "in no position to take vacation time" in 2003 because of staffing changes that year and that the "ordinance was not re addressed in

regards to [vacation] benefits during the past year and the Mayor and council clearly had ample time to bring this up and I expected them to [do so] after the memo of March 03." Because Smiley and the city council failed to address the violation of Ordinance 68C as plaintiff expected they would, plaintiff requested a payout in January 2004. He was legally entitled to a payout for his unused days in 2003 under Ordinance 68C, and the ordinance itself stated that such payouts were to be made "in January in the year after which [the days] are accumulated." Thus, plaintiff waited to request a payout for his unused days until he was legally entitled to such payout, pursuant to the ordinance. In *Wolcott*, *Shallal*, and *Robinson*, the plaintiffs were aware of alleged violations of law by their employers for significant periods—up to several years—and only threatened to report those violations after their own job performances or positions came in jeopardy. The alleged violations of law they threatened to report were completely unrelated to the reasons their job performances or positions were jeopardized. Plaintiff's actions cannot be equated to the actions of the plaintiffs in those cases. There was no evidence of bad faith in this case.

Moreover, contrary to the majority's conclusion that "plaintiff was decidedly *not* acting in the public interest, but in the thoroughly personal and private interest of securing a monetary benefit," there was evidence that he acted, at least in part, in the public interest. Plaintiff, the city's police chief, stated in his January 9, 2004, letter to Smiley that ignoring the content of Ordinance 68C "would be a direct overt violation of that ordinance and I fully intend to address the violation should it occur." He reiterated the same at the January 12, 2004, staff meeting. In his January 15, 2004, letter to Lowthian, plaintiff stated: "I cannot allow them to violate the ordinance by 'forcing waivers' of ordinance[-]given rights. *I believe it is my job*

as a police officer to point the violation out and I will pursue it as far as it needs to go." (Emphasis added.) In his January 23, 2004, letter to Hamilton, plaintiff stated:

> My position is this, this is a violation of the ordinance [and] I told the mayor on the 12th it was an ordinance violation . . . . If I need to re address [the issue] through the council I will, if you have any input on resolving this I would appreciate it or I will be forced to pursue this as a violation of the law and will address it as such.

Given this evidence, plaintiff clearly intended to treat Smiley's payout policy as an ordinance violation and believed that it was his duty as an officer of the law to do so. The majority suggests that Smiley and his administration were acting in the public interest by withholding payouts, thereby counteracting a severe budgetary shortfall, and that plaintiff acted in opposition to that interest by requesting a payout under the ordinance. While I agree that it may be necessary for a city to adjust its budget to preserve essential public services and avoid terminating its employees, balancing the budget through violating one of its own ordinances hardly seems to serve the public interest. Rather than amending Ordinance 68C, the city's department heads reached a "gentlemen's agreement" that all vacation days had to be used within the calendar year, with no payouts for unused days. Thereafter, Smiley issued a memorandum of this agreement. But city attorney Dubay later advised the city that payouts had to be made because Ordinance 68C had not been amended to reflect the "gentlemen's agreement." According to Smiley's testimony, Dubay told him, "Chuck, you can't make a gentlemen's agreement to drive 55 [miles an hour] when the speed limit is posted at 45 . . . ." By stating that he would treat the payout policy issued by

Smiley as an ordinance violation, plaintiff was fulfilling his duty as police chief to uphold the law, which was certainly in the public interest.

In *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 580-581; 649 NW2d 754 (2002), the plaintiff requested a personal protection order (PPO) against one of his coworkers because of the coworker's harassment of him outside of work. After he was discharged, the plaintiff filed suit against the defendant employer, asserting that the defendant violated the WPA by discharging him, in part, because he sought a PPO against his coworker. *Id*. at 581-582. The trial court denied the defendant summary disposition of the plaintiff's WPA claim. *Id*. at 582. This Court affirmed, holding that the facts of the case were "clearly distinguishable" from those in *Shallal*. The Court stated, in part:

> Although plaintiff's decision in this case to obtain a PPO may have been motivated by personal reasons, plaintiff did not use his protected activity to extort his employer, as did the plaintiff in *Shallal*. Further, although plaintiff's primary purpose may have been to protect himself and his girlfriend from harassment, reasonable jurors could conclude that plaintiff was acting in the public's interest, in addition to his own. Assuming the truth of plaintiff's assertions, [the coworker's] threatening telephone calls could constitute aggravated stalking, a felony and a serious public safety issue. See MCL 750.411i. [*Id*. at 587-588.]

Similarly, in this case, although plaintiff had personal reasons for desiring Ordinance 68C to be enforced, i.e., his own financial status, a reasonable juror could have concluded that he also acted as an officer of the law attempting to have the ordinance enforced as written, which was in the public interest.[2] Plaintiff did not use

[2] Nowhere in the WPA does it state that a whistleblower must not have *any* selfish motives. The underlying purpose of whistleblower protection

the WPA as a tool to extort the city. Accordingly, I would hold that plaintiff was not barred from recovering under the WPA.

Because there was sufficient evidence to conclude that plaintiff engaged in a protected activity and that there was a causal connection between his protected activity and subsequent discharge, I would affirm the trial court's denial of defendants' motion for JNOV.

III. DEFENDANTS' REMAINING ISSUES ON APPEAL

I will briefly address the two remaining issues raised by defendants on appeal.

A. JURY INSTRUCTIONS

Defendants argue that the trial court abused its discretion by denying their motion for a new trial, which was premised on the argument that the court improperly refused to give a jury instruction on improper motives of a whistleblower. I would disagree.

Rulings on motions for a new trial are reviewed for an abuse of discretion. *McManamon v Redford Charter Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006). " 'The determination whether a jury instruction is applicable and accurately states the law is within the discretion of the trial court.' " *Bordeaux v Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993) (citations omitted).

Jury instructions are examined as a whole. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Instructions "should not omit material issues, defenses, or theories if the evidence supports them." *Id*.

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laws is to encourage disclosure of, and to prevent against, violations of the law. In the federal analogue, a qui tam action specifically allows the whistleblower to receive a share of the recovery as his or her reward.

If an instruction is applicable to the case, accurately states the law, and was requested, the trial court must give it. MCR 2.516(D)(2); *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003).

The special jury instruction drafted by defense counsel and requested by defendants in this case stated:

> A plaintiff cannot recover under a whistleblower statute when the employee acts in bad faith. The primary motivation of an employee pursuing a whistleblower claim must be a desire to inform the public on matters of public concern. An employee cannot keep a matter quiet and then eventually reveal it to others not for the purpose of preventing public injury, but rather for some limited or private purpose at a time best suited to the advancement of their [sic] own interests.

The instruction also cited *Wolcott* and *Shallal*.

The use note for the model civil jury instruction relating to the causation element of a WPA claim states that "[i]f there is an issue of improper motive in reporting or threatening to report a violation, an additional instruction *may* be required." M Civ JI 107.03 (emphasis added). The use of the word "may" indicates discretionary action. See *In re Humphrey Estate*, 141 Mich App 412, 422-423; 367 NW2d 873 (1985).

The special jury instruction requested by defendants did not apply to the facts of this case, nor did it find adequate support in *Wolcott* and *Shallal*. While the instruction's language was similar to the language in *Wolcott* and *Shallal*, the context of those cases was different. As explained above, there was no evidence of extortion, personal vindictiveness, or bad faith in this case, as there was in *Wolcott* and *Shallal*. Plaintiff did not use a threat of reporting the ordinance violation as an attempt to force Smiley to reappoint him. Rather, plaintiff acted to uphold the law. While plaintiff was also

motivated by his personal desire to be paid under Ordinance 68C, such a motive must not be considered *improper*, unless, as in *Shallal*, there truly is evidence of extortion, vindictiveness, or bad faith. It would be illogical to label a plaintiff's desire to be paid benefits to which he or she is legally entitled an *improper* motive.

Because no reasonable juror could have concluded that plaintiff had an improper motive for "blowing the whistle," the special instruction requested by defendants was inapplicable, and the trial court did not abuse its discretion by denying their motion for a new trial.

B. SETOFF

Defendants also argue that the trial court erred by concluding that Smiley is not entitled to a setoff for the pension benefits paid to plaintiff by the city. I would disagree.

Whether defendants are entitled to a setoff is a question of law reviewed de novo on appeal. See *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 249; 660 NW2d 344 (2003).

Defendants cite MCL 600.6303, which is inapplicable here because this is not a personal-injury action. Furthermore, I note that all the cases relied on by defendants are breach-of-contract cases. As such, the cases are inapposite. It is undisputed that plaintiff did not have an employment contract. Rather, a whistleblower claim is analogous to claims under antiretaliation provisions of other employment-discrimination statutes, such as statutes protecting handicapped persons from discrimination. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 453; 750 NW2d 615 (2008).

Plaintiff relies on *Hamlin v Flint Charter Twp*, 165 F3d 426 (CA 6, 1999), and I find *Hamlin* persuasive. In

Hamlin, a handicapped-person discrimination case, the United States Court of Appeals for the Sixth Circuit held that, in general, pension payments from a collateral source should not be deducted from the damage award. *Id*. at 433-435. Because the victim, rather than the perpetrator, of discrimination should profit, payments from a collateral source should not be deducted from the award. *Id*. at 433-434. The court reasoned that "[a]pplying the collateral source rule in the employment discrimination context prevents the discriminatory employer from avoiding liability and experiencing a windfall, and also promotes the deterrence functions of discrimination statutes." *Id*. at 434.

Plaintiff argues that this Court should reverse the trial court's decision that the city is entitled to a setoff. But because plaintiff did not cross-appeal, such relief cannot be granted. See *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993).

I would affirm the trial court's order awarding judgment to plaintiff.

In re REVIEW OF CONSUMERS ENERGY COMPANY RENEWABLE ENERGY PLAN

Docket No. 292659. Submitted May 11, 2011, at Lansing. Decided July 12, 2011, at 9:00 a.m. Amended, 293 Mich App 801. Leave to appeal denied, 490 Mich 1001.

The Public Service Commission (PSC) opened two cases related to the implementation of the Clean, Renewable, and Efficient Energy Act, MCL 460.1001 *et seq*., by Consumers Energy Company. Those cases were subsequently consolidated by the PSC. In the consolidated cases, Consumers Energy applied for approval of its energy-optimization and renewable-energy plans as required by the act. The Association of Businesses Advocating Tariff Equity (ABATE) intervened, arguing that the PSC should not approve Consumers Energy's renewable-energy plan because the viability and cost of the plan was speculative and it included surcharges that would result in revenues significantly exceeding costs in the early years of the plan. ABATE further argued that natural gas transportation customers, i.e., those customers who only purchase gas transportation services from the utility and not the commodity itself, should be excluded from the energy-optimization plan. The PSC approved Consumers Energy's renewable-energy plan but did not approve any actual costs in the plan and noted that Consumers Energy's costs would be subject to further review. The PSC also reduced the initial surcharges to residential customers proposed in the plan. The PSC approved Consumers Energy's proposed energy-optimization plan charges. ABATE appealed.

The Court of Appeals *held*:

1. Under MCL 460.1089(1), a provider whose rates are regulated is entitled to recover the actual costs of implementing its approved energy-optimization plan. And under MCL 460.1089(2), such costs shall be recovered from all natural gas customers. The PSC's conclusion that natural gas transportation customers are "natural gas customers" under MCL 460.1089(2) was not unlawful or unreasonable given that it comported with the language of the act and its purpose.

2. MCL 460.1093(1) provides that eligible electric customers are exempt from charges that the customer would otherwise incur under MCL 460.1089 and MCL 460.1091 if the customer files a

self-directed energy-optimization plan with its electric provider and implements the plan. The PSC correctly determined that the charges referenced in MCL 460.1093(1) are limited to the charges for electric service that would otherwise be applicable, and do not include the charges for the gas providers' optimization plans, given that the self-directed plan effectively replaces participation in the electric providers' optimization plans and because that interpretation otherwise comports with the language of the act.

3. ABATE failed to establish that the act's requirement that the PSC approve Consumers Energy's energy-optimization and renewable-energy plans within 90 days after the utility filed its application violated ABATE's right to due process and its right to a reasonable opportunity for a full and complete hearing. ABATE failed to offer any evidence that the time limit prejudiced it or its members.

4. ABATE failed to demonstrate that the PSC's approval of Consumers Energy's renewable-energy plan was unreasonable or unlawful in light of the statutory framework and the evidence presented to the PSC.

Affirmed.

1. PUBLIC UTILITIES — ENERGY-OPTIMIZATION PLANS — COST RECOVERY — NATURAL GAS CUSTOMERS.

Under the Clean, Renewable, and Efficient Energy Act, a provider whose rates are regulated is entitled to recover the actual costs of implementing its approved energy-optimization plan from all natural gas customers, including those customers who only purchase gas transportation services from the provider (MCL 460.1089).

2. PUBLIC UTILITIES — ENERGY-OPTIMIZATION PLANS — COST RECOVERY — EXEMPTION FOR ELIGIBLE ELECTRIC CUSTOMERS.

Eligible electric customers are exempt from charges that the customer would otherwise incur under the cost-recovery provisions of the Clean, Renewable, and Efficient Energy Act if the customer files a self-directed energy-optimization plan with its electric provider and implements the plan; the charges the customer would otherwise incur as part of the cost-recovery plan refers to the customer's electric-optimization plan costs (MCL 460.1093[1]).

Clark Hill PLC (by *Roderick S. Coy* and *Robert A. W. Strong*) for the Association of Businesses Advocating Tariff Equity.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Steven D. Hughey* and *Kristin M. Smith*, Assistant Attorneys General, for the Public Service Commission.

Jon R. Robinson and *Raymond E. McQuillan* for Consumers Energy Company.

Olson, Bzdok & Howard, P.C. (by *Christopher M. Bzdok*), for the Michigan Environmental Council and the Natural Resources Defense Council.

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

MARKEY, P.J. Appellant, the Association of Businesses Advocating Tariff Equity (ABATE), appeals by right a May 26, 2009, order of the Michigan Public Service Commission (PSC), issued in *In re Review of Consumers Energy Company Renewable Energy Plan* (PSC Case Nos. U-15805 and U-15889), approving the energy optimization (EO) plan and renewable energy (RE) plan submitted by Consumers Energy Company pursuant to Michigan's Clean, Renewable, and Efficient Energy Act, 2008 PA 295, MCL 460.1001 *et seq*. (the Act).[1] We affirm.

I. BACKGROUND

A. GENERAL PROVISIONS

The Act became effective on October 6, 2008. MCL 460.1191 provides that the PSC was to issue a temporary order implementing the Act within 60 days of its passage. Among the Act's other provisions, part 2(A)

[1] PSC Case No. U-15805 concerns Consumers Energy's EO and RE plans for its electric division, while PSC Case No. U-15889 concerns Consumers Energy's EO plan for its gas division.

requires regulated electric utilities to adopt "renewable energy plans" in which the electric companies are required to demonstrate how they will achieve compliance with the Act's requirements for obtaining electric capacity and energy production from "renewable energy resources" as defined in the Act. See MCL 460.1011(h) and (i); MCL 460.1021 to MCL 460.1053. The Act requires Consumers Energy to meet: (1) a standard for new renewable energy capacity, and (2) a standard for its renewable energy credit portfolio. MCL 460.1027. The renewable energy capacity standard for Consumers Energy is 500 megawatts (MW) by December 31, 2015.[2] MCL 460.1027(1)(a). The renewable energy credit portfolio standard will, by 2015, result in 10 percent of the total megawatt hours (MWh) sold to retail customers being obtained from renewable energy resources. MCL 460.1027(3) through (5). To meet their goals, companies may use and trade "renewable energy credits" (REC).[3] MCL 460.1011(d). Consumers Energy and other companies may build or own up to 50 percent of the renewable energy systems necessary to meet their REC requirements and are required to purchase at least 50 percent of their required RECs through power purchase agreements (PPAs) with independent energy developers. See MCL 460.1033(1)(a). Utilities are allowed to recover the cost of the renewable energy program in two ways. First, they will receive a price that represents what the same amount of energy would have cost (in MWh) had it been acquired from conventional sources through a proceeding similar to the utilities' general power supply cost recovery process. See MCL 460.1049(3)(c) and MCL 460.6j. Utilities will

[2] A megawatt is one million watts. A kilowatt (kW) is one thousand watts.

[3] One REC is equal to 1 MW of electricity generated from renewable energy. MCL 460.1039.

then pass on to their customers the rest of the cost of renewable energy through an "incremental cost of compliance" surcharge that represents the additional cost of complying with the renewable energy program. MCL 460.1011(*l*). This surcharge is assessed on a per meter or "nonvolumetric mechanism" basis and is capped at $3 a month for residential customers, $16.58 a month for commercial customers and $187.50 a month for industrial customers. MCL 460.1021(3); MCL 460.1045. The surcharge will be assessed for the 20-year life of the program and can be front-loaded so that the utility can build up a balance from excess revenues during early years of the program and use that balance to fund revenue shortfalls during the program's later years. MCL 460.1047(3). The company's renewable energy plan, outlining how it will meet the REC requirements, the projected costs of doing so, and its proposed cost recovery mechanisms, including the transfer price and the 20-year levelized surcharge for the incremental cost of compliance, is reviewed through a contested case proceeding. The PSC cannot approve the plan unless it is reasonable and prudent and the company demonstrates that the incremental cost of developing clean energy sources—minus the energy saved in the company's energy optimization plan—is less, over the projected life cycle of the source, than the incremental cost of developing new coal-fired power plants. MCL 460.1021(6).

Part 2(B) of the Act requires, among other things, that regulated electric and natural gas providers adopt "energy optimization" plans. MCL 460.1005(e). Broadly speaking, an energy optimization plan is designed to reduce the demand for energy and provide for load management, thereby reducing the future costs of providing service to customers, "[i]n particular . . . to delay the need for constructing new electric generating facili-

ties and thereby protect consumers from incurring the costs of such construction." MCL 460.1071(2). See also MCL 460.1001(2). Combination utilities, such as Consumers Energy, are to adopt both electric and natural gas energy optimization plans. The Act provides companies with the option of enacting their own energy optimization plans, with PSC approval, MCL 460.1071 to MCL 460.1089, or of turning to an "independent energy optimization program administrator," a nonprofit organization selected by the PSC through a competitive bid process. MCL 460.1091. Certain electric customers can also opt to enact a self-directed energy optimization plan. MCL 460.1093. Pertinent to this appeal, gas or electric companies are permitted to recover certain costs for the energy optimization plans from their customers, MCL 460.1089; MCL 460.1091, while electrical customers who have a self-directed plan would be exempt from some of the utilities' plan costs. MCL 460.1093(1).

B. INSTANT CASES

After the enactment of the Act, the PSC conducted meetings and discussions on a proposed order and released its temporary order on December 4, 2008, followed by amendatory orders on December 23, 2008, and January 13, 2009. *In re Temporary Order to Implement 2008 PA 295* (PSC Case No. U-15800).[4] At the same time, to comply with the strict time limits placed on the PSC to complete the initial phases of the

[4] According to the temporary order, the temporary order was to last only for a year while the PSC promulgated administrative rules to administer the Act in *In re Rules Governing Renewable Energy Plans* (PSC Case No. U-15900). But to date, the PSC has only proposed a number of rules to administer the Act and is in the process of seeking public comment. *In re Rules Governing Renewable Energy Plans*, order entered April 27, 2010 (PSC Case No. U-15900).

implementation process, see MCL 460.1021; MCL 460.1073, the PSC opened cases for all rate regulated electric and natural gas distribution companies, including two for Consumers Energy.

While the two cases in the instant appeal began separately, they were subsequently consolidated at the request of Consumers Energy. Consumers Energy then filed a Notice of Intent to File Applications to seek review and approval of its energy optimization and renewable energy plans. Seventeen entities, including ABATE, the Michigan Environmental Council (MEC), the Natural Resources Defense Council (NRDC), the Michigan Cable Telecommunications Association, and the Michigan Sustainable Energy Coalition petitioned to intervene.[5] On February 17, 2009, Consumers Energy filed its application for approval of both plans.

With respect to its renewable energy plan, Consumers Energy proposed that to meet its goal that 10 percent of its retail sales consist of energy generation from qualifying renewable energy sources, see MCL 460.1027(3), it intended to add 200 MW of renewable energy capacity by the end of 2013, 500 MW of renewable energy capacity by the end of 2015, and 900 MW of renewable energy capacity by 2017. Consumers Energy planned that wind generation sources would provide most of the capacity and that it would build approximately half of its wind capacity (450 MW) itself and buy the other half through PPAs with other companies. Consumers Energy also proposed an experimental plan to partner with retail customers to derive some capacity

[5] Given this fact, we reject the challenge to ABATE's standing to dispute the rights of customers who choose to establish self-directed energy optimization plans. The PSC had discretion to allow intervention, Mich Admin Code, R 460.17201, and permitted ABATE's intervention without limitation, Mich Admin Code, R 460.17205.

from their wind and other renewable electricity generation systems. Consumers Energy estimated the cost of its plan at approximately $5.3 billion, with an offset of $3.5 billion for the transfer price. The remaining $1.8 billion for the incremental cost of compliance would be surcharged to Consumers Energy's customers over a 20-year period.

In addition to this proposal concerning its renewable energy plan, Consumers Energy presented its proposed energy optimization plan. With respect to the issues on appeal, Consumers Energy proposed various energy optimization plan surcharges for its different customer classes. Among other surcharges it sought to impose on customers for implementation of the plan was a surcharge of $0.1588/Mcf[6] on its natural gas "gas transportation only" customers[7] who used from zero to 100,000 Mcf the previous year, and a surcharge of $0.0053/Mcf for transportation only customers who used over 100,000 Mcf the previous year.

From April 13, 2009, to April 16, 2009, a hearing was conducted on Consumers Energy's application. For purposes of this appeal, the dispute with respect to Consumers Energy's renewable energy plan involves its projected costs of wind energy, in particular its proposal to build 450 MW of wind generation facilities. Consumers Energy presented the testimony of Thomas Swartz, a principal analyst in the company's Risk, Strategy, and

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[6] Mcf refers to 1,000 cubic feet of natural gas.

[7] These customers are individuals and entities who purchase only transportation services from the gas utility, as opposed to customers who purchase both gas as a commodity and gas transportation (i.e., direct or gas cost recovery customers) from Consumers Energy. In its appellate brief, ABATE refers to these customers as "gas transportation only customers." No party uses the statute's nomenclature of "distribution customers," see MCL 460.1089(5), but we conclude that these terms are synonymous.

Financial Advisory Services group, concerning Consumers Energy's decision to build its own generation facilities. He testified that Consumers Energy had decided to do so for several reasons, including: (1) substantial savings that could be generated by "gaining economies of scale," providing the chance to negotiate favorable contracts for the purchase of turbines and other equipment, (2) to balance the risks of complying with the Act, in particular the availability and pricing risks of purchasing adequate capacity through PPAs with the development risks of building its own facilities, (3) to decrease the risk of REC unavailability through the purchasing of power from independent power companies because of the limited credit available or high interest rates that might prevent those companies from starting new projects, and (4) to provide competition for independent providers to pressure such providers to lower the prices of PPA contracts. Swartz also explained that while the company would not need the 400 MW of capacity planned for 2017 until 2022, it could sell the RECs to other companies and the accelerated development of capacity would create new jobs and benefit the landowners involved. Swartz further testified that the risks associated with Consumers Energy's development of its own capacity would include: (1) the ability to obtain sufficient land for construction, (2) the ability to obtain permits for construction, (3) the actual output from the proposed sites, (4) the potential for reduced availability of turbine and other equipment, especially if the needed equipment becomes scarcer as a result of increased demand caused by federal renewable energy policies, and (5) the ability to connect the new facilities to the existing infrastructure. Swartz explained what steps Consumers Energy was taking to address the risks, such as acquiring land, collecting wind data to

select the proper wind turbines, and hiring consultants to assist with the permit process and address other concerns.

Regarding the incremental cost of compliance predictions, Swartz testified that Consumers Energy projected the cost of building 450 MW of wind capacity at $2,500 a kW, that he expected the costs to increase three percent annually, and that the company would incur between $70,000 and $100,000 a year in operating and maintenance costs. Consumers Energy expected to recover its investment using a 20-year straight line depreciation rate. Swartz then provided details concerning how Consumers Energy arrived at the proposed costs listed in its accompanying summary of projected costs.

David Ronk, Jr., Director for Electric Transactions and Resource Planning for Consumers Energy, provided an overview of the company's projected needs for RECs and explained how the company planned to acquire them. He outlined the proposal to build generating facilities and to purchase power through PPAs and noted that Consumers Energy did not presently plan to purchase generating facilities established by other companies. He further testified that the company would sell surplus RECs at market price and use the proceeds to reduce the incremental cost of compliance. Ronk also testified about Consumers Energy's "life-cycle" cost comparison in $/MWh[8] between the proposed renewable energy generating facilities and that of a new coal-fired power plant. He maintained that when coupled with the

[8] The parties apparently agree that Consumers Energy's cost projection of $2,500 a kilowatt translates into a projected 20-year levelized cost of $174.20/MWh for power purchased under PPA agreements, and of $172/MWh for wind energy from the generators built by Consumers. Because the parties use the comparisons from other companies using $/MWh, we will use this terminology as well.

amount Consumers Energy calculated would be saved under its EO plan, the numbers were more favorable than the life-cycle cost of a new conventional coal-fired facility.[9] Ronk also provided alternative life-cycle calculations, which showed a savings of $232 million over building a new coal-fired facility. In his rebuttal testimony, Ronk defended the calculated 20-year cost of $174.20/MWh for purchased power, and stated that the lower costs estimated by other witnesses were unreasonable and understated the true cost of compliance. He further defended Consumers Energy's use of a 28 percent capacity factor for wind generation, provided the basis for this figure,[10] and maintained that this capacity was realistic for wind generation in Michigan. He recognized that other witnesses had advocated the use of higher—mid-30 percent—capacity factors, but stated that they had arrived at this figure by referring to data from multiple sites and regions outside of Michigan.

According to other witnesses, however, Consumers Energy's projected costs were too high. Among the concerns raised by MEC's witness was the alleged failure of Consumers Energy to account for possible reductions in costs resulting from economies of scale and that other companies such as Detroit Edison had proposed much lower 20-year levelized costs. He testified that a more appropriate 20-year levelized budget would be between $120/MWh and $124/MWh. ABATE's witness, James Selecky, testified that it was his opinion that the PSC should not approve Consumers Energy's

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[9] Pamela G. Lesh, testifying on behalf of NRDC, stated that she agreed with this assertion and that the plan thus met the life-cycle test under MCL 460.1021(6)(b).

[10] Ronk testified that it was developed during a 2006-2007 collaborative sponsored by the PSC to develop a "Capacity Needs Forum Report and a 21st Century Michigan Energy Plan."

RE plan. He argued that Swartz's testimony showed that there existed "significant uncertainties as to the cost effectiveness of wind generation," including concern over the possible escalating cost of the equipment and engineering involved especially if demand rose as a result of the enactment of federal renewable energy requirements. He also expressed concern that the turbines could not provide system capacity at the time of system peak demand. He maintained that the PSC should have a separate hearing to evaluate the total cost to ratepayers of meeting the renewable requirements and recommended reducing the surcharges by 50 percent because Consumers Energy's plan was "speculative." He also argued for ABATE's position, set out further in their brief below, that the amount of early over-recovery Consumers Energy sought was unreasonable and amounted to an "exorbitant" low interest loan to Consumers Energy from its ratepayers in hard economic times.

PSC staff (Staff) witness Thomas Stanton testified that he recommended that the PSC approve Consumers Energy's renewable energy plan, albeit with modifications, on the basis that Staff had reviewed the plan and had not identified any reason for the PSC not to approve it. Staff instead recommended refinements to Consumers Energy's proposal for procuring energy power from smaller providers, including in the experimental program, to support small-scale production through the use of renewable energy pricing (REP) rather than the proposed "request for proposals" (RFP) bidding process. Staff also had concerns about some of the pricing, eligibility, and fees associated with Consumers Energy's experimental program and further recommended changes to Consumers Energy's transfer price for solar generated power.

In its subsequent brief, Staff agreed with Stanton's testimony and recommended that the PSC approve the plan with proposed changes. Germane to this appeal, Staff acknowledged that Consumers Energy's cost estimates were "likely" to prove too high. Staff agreed with Selecky's recommendation that the PSC explore the costs in a future case, but also stated that the PSC would have the opportunity to revisit this and other issues in the renewable cost reconciliation case, in Consumers Energy's next renewable energy plan case, or in a special-purpose case initiated by the PSC. Staff further recommended that the PSC adopt Consumers Energy's proposed renewable energy surcharges, stating that the goals of the Act are best served by collecting revenues at or near the maximum in the near term, and noting that Consumers Energy has forecast that in order to meet the statutory requirements, it needed to collect the maximum surcharge up front. In its reply brief, Staff noted that PSC approval of Consumers Energy's plan was not synonymous with approval of the costs associated with the plan's implementation and that the costs would be addressed in annual reconciliations and each time a contract to procure renewable energy was submitted for PSC approval.

In its opinion and order, after discussing the parties' objections and evidence, the PSC approved Consumers Energy's renewable energy plan, with modifications. As discussed further later in this opinion, it agreed with Staff that, while the plan was "flawed" and that the estimates for the cost of wind power "may be too high," the problems with the overall framework did not rise to the level that it should be considered unreasonable or imprudent. Among other requirements it imposed, the PSC made clear that, while it was approving the plan, it was "not approving any actual costs" and that all actual costs incurred either for PPAs or for self-generated

wind facilities would be subject to further PSC review for reasonableness and prudence. The PSC further agreed with the recommendation by Staff that a future case should be opened to track costs of various renewable energy systems and components to obtain information to help the PSC determine reasonable and prudent expenditures. In addition, the PSC reduced the initial surcharges to residential customers to $2.50 a month from the proposed $3 a month, finding the concerns about the size of Consumers Energy's reserve fund justified, and noting various other rate increases proposed by Consumers Energy and the difficult economic circumstances faced by Consumers Energy's ratepayers.

The PSC also approved Consumers Energy's proposed energy optimization plan charges.

II. GAS TRANSPORTATION CUSTOMERS' INCLUSION IN CONSUMERS ENERGY'S ENERGY OPTIMIZATION PLANS

ABATE argues that the PSC erroneously interpreted the language of MCL 460.1089(2) to find that "gas transportation only customers" were "natural gas customers" subject to a surcharge to fund Consumers Energy's energy optimization plan.

As explained in *In re Application of Detroit Edison Co*, 276 Mich App 216, 224; 740 NW2d 685 (2007), rev'd in part 483 Mich 993 (2009):

> The 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. *Michigan Consolidated Gas Co v Public Service 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 unrea-

> sonable. 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). And, of course, an order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Pub Service Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966). In sum, a final order of the PSC must be authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Pub Service Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

"An agency's interpretation of a statute, while entitled to 'respectful consideration,' 'is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue.' " *In re Application of Consumers Energy Co*, 281 Mich App 352, 357; 761 NW2d 346 (2008) (quotation marks omitted), quoting *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 93, 103; 754 NW2d 259 (2008).

With respect to this Court's review of the PSC's factual determinations:

> Judicial review of administrative agency decisions must "not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views." *Employment Relations Comm v Detroit Symphony Orchestra*, 393 Mich 116, 124 [223 NW2d 283] (1974); see also *In re Payne*, 444 Mich 679, 692-693 [514 NW2d 121] (1994) ("When reviewing the decision of an administrative agency for substantial evidence, a court should accept the agency's findings of fact, if they are supported by that quantum of evidence. A court will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record."). [*In re Application of Detroit Edison Co*, 483 Mich 993 (2009).]

With regard to the question of whether natural gas transportation customers should not be subject to a surcharge to fund Consumers Energy's energy optimization plan, we find ABATE's arguments unpersuasive. Gas transportation customers are "natural gas customers" under MCL 460.1089(2). In resolving this issue we find persuasive and adopt this Court's previous analysis in *In re Temporary Order to Implement 2008 PA 295*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2010 (Docket No. 290640), pp 4-7:

> When interpreting statutory language, this Court's primary goal is to give effect to the intent of the Legislature. "The first step is to review the language of the statute. If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute." *Briggs Tax Serv, LLC v Detroit Pub Schools*, 485 Mich 69, 76; 780 NW2d 753 (2010) . . . . This Court accords to every word or phrase of a statute its plain and ordinary meaning, unless a term has a special, technical meaning, or is defined in the statute. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999); *Stocker v Tri-Mount/Bay Harbor Bldg Co, Inc*, 268 Mich App 194, 199; 706 NW2d 878 (2005). See also MCL 8.3a; *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 189-190; 740 NW2d 678 (2007). Furthermore, statutory language is to be read in context, and "statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) . . . .
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> Under MCL 460.1089(1), a provider whose rates are regulated by the PSC is entitled to recover "the actual costs of implementing its approved energy optimization plan."[4] Pursuant to MCL 460.1089(2), the utility is entitled to recover those costs from customers:
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> "Under subsection (1), costs shall be recovered from *all natural gas customers* and from residential electric customers by volumetric charges, from all other metered electric

customers by per-meter charges, and from unmetered electric customers by an appropriate charge, applied to utility bills as an itemized charge." [Emphasis added.]

In the instant case, ABATE argues that individuals and entities who purchase only "transportation services" from the gas utility, i.e. natural gas transportation customers, are not "natural gas customers" of the utility and thus cannot be assessed the surcharge to fund the gas distribution utilities' energy optimization plans which ABATE maintains the "transportation only customers" cannot use.

The phrase "natural gas customers" is not specifically defined in the Act. The PSC noted this, but found that the Legislature intended the definition to include transportation customers. It based its decision on the fact that gas transportation customers were not explicitly excluded or distinguished in MCL 460.1089(1), that the transportation customers would receive benefits from inclusion in the providers' energy optimization plans, that the additional provisions of the Act include the revenues generated by sales to transportation customers, and that inclusion of these customers was consistent with the stated goals of the energy optimization provisions of the Act, as well as the stated goals of the Act itself.

Reading MCL 460.1089(2) in context with the other subsections of that statute, and in connection with the remaining provisions of the Act and the stated purpose of the Act in MCL 460.1001(2), *Robinson*, 486 Mich at 15, we hold that the PSC correctly found that a portion of the natural gas providers' energy optimization plan costs could be charged back to the providers' gas transportation customers. Gas transportation customers take their service from the providers pursuant to PSC-approved terms and rate schedules. The services they are provided by the regulated utility are "natural gas" services. And in the absence of even an assertion to the contrary, we find no error in the PSC's finding that all of ABATE's members do purchase natural gas commodity, albeit from another provider. Thus, in light of the specific language that costs shall be recovered from "*all* natural gas customers" (emphasis added), the PSC's interpretation does not "conflict with the

Legislature's intent as expressed in the language of the statute at issue." *In re Application of Consumers Energy Co*, 281 Mich App at 357.

The language of MCL 460.1089(6), MCL 460.1089(7) and MCL 460.1091(1) provides further support for the PSC's decision. In pertinent part, MCL 460.1089(6) provides:

"The commission shall authorize a natural gas provider that spends a minimum of 0.5% *of total natural gas retail sales revenues, including natural gas commodity costs*, in a year on commission-approved energy optimization programs to implement a symmetrical revenue decoupling true-up mechanism that adjusts for sales volumes that are above or below the projected levels that were used to determine the revenue requirement authorized in the natural gas provider's most recent rate case." [Emphasis added.][11]

MCL 460.1089(7) provides in pertinent part:

"A natural gas provider or an electric provider shall not spend more than the following percentage of *total utility retail sales revenues, including electricity or natural gas commodity costs*, in any year to comply with the energy optimization performance standard without specific approval from the commission. . . ." [Emphasis added.]

Similarly, MCL 460.1091(1) provides that, except for MCL 460.1089(6), the requirements under MCL 460.1071 through MCL 460.1089 do not apply "to a provider that pays the following percentage of *total utility sales revenues, including electricity or natural gas commodity costs*, each year to an independent energy optimization program administrator selected by the commission. . ." (emphasis added).

We agree with the PSC's determination that these provisions support a finding that the Legislature intended to include natural gas transportation customers in the providers' energy optimization plans (either administered

[11] We recognize the parties' agreement that "natural gas commodity costs" represents sales of the physical natural gas itself.

internally or run by the PSC's program administrator) and to count the transportation revenues for purposes of determining the size of the plans and the ability to implement the true-up mechanism. ABATE argues that Consumers' reading of the statutes improperly renders "including natural gas commodity costs" or "including electricity or natural gas commodity costs" surplusage. However, it ignores the contrary argument that, if the Legislature intended the inclusion of only commodity costs, it would not have added the language concerning total sales, or total retail sales, revenue and that ABATE's interpretation would thus in turn improperly render this language surplusage. We do not find ABATE's argument persuasive. The language used in these sections indicates an intention by the Legislature that the provider is to include all of its utility sales revenues in its calculations.[5] Thus, the provider is to include the costs of the gas to direct customers, transportation sales to direct (or bundled) customers, and transportation sales to unbundled customers. While ABATE states that the question of what sales are to be included is not directly related to the question of which customers have to pay for the optimization plan costs, we disagree. The provider's costs are passed on to the customers under MCL 460.1089(2). And as ABATE repeatedly points out on appeal, an energy optimization plan is supposed to "[e]nsure, to the extent feasible, that charges collected from a particular customer rate class are spent on energy optimization programs for that rate class." MCL 460.1071(3)(d). Thus, when the provisions of the Act are viewed as a whole, the scope of an energy optimization plan is related to the Legislature's intention concerning which customers should be responsible for the costs of implementing the plan.[6]

MCL 460.1089(5) further supports a finding that the Legislature intended to include gas transportation customers in the phrase "all natural gas customers." That statute provides:

"The established funding level for low income residential programs shall be provided from each customer rate class in proportion to that customer rate class's funding of

the provider's total energy optimization programs. Charges shall be applied to distribution customers regardless of the source of their electricity or natural gas supply."

The inclusion of "distribution customers" in this subsection provides support for the PSC's conclusion that the Legislature was aware of the existence of gas transportation customers and intended them to be included in "all natural gas customers" in MCL 460.1089(2). In addition, this subsection further supports the PSC's interpretation because it ties the customers' funding of the low income residential programs in "proportion to that customer rate class's funding of the provider's total energy optimization programs." In other words, the distribution customers' funding responsibilities for low income residential programs are to be proportionate to the distribution customers' funding of the total energy optimization program. This indicates an intent by the Legislature that the distribution customers, or gas transportation customers, share funding responsibility for the provider's total energy optimization program, and are thus included as "all natural gas customers" for recovery of energy optimization plan surcharges.[7]

In addition, the PSC reasonably found that the inclusion of gas transportation customers in the energy optimization programs of their transportation providers would have results consistent with the intentions of the Act as stated in MCL 460.1001(2). While MCL 460.1071(2) describes the goals of the energy optimization portion of the Act primarily in terms of reduction of electric usage, and of reducing the need to build more electric generating facilities, ultimately the Act is designed to promote electrical and natural gas energy efficiency. See e.g. MCL 460.1071(3)(f) and (4)(a). While reducing the gas transportation customer's gas usage does not directly result in increased future service capacity for the transportation provider, it could have the effect of increasing the future service capacity of the provider who sells the transportation customer its natural gas. These presumably could include municipal providers, who are not subject to regulation by the PSC. See MCL 460.6. A demand reduction in one of ABATE's member companies results in an increased ability for such

a utility to meet customer's [sic] future demands without investment in costly infrastructure. This is at least consistent with the goal of MCL 460.1001(2)(b) to provide greater energy security through the use of indigenous energy resources. This finding refutes ABATE's implicit argument that the natural gas transportation customers' gas usage is not relevant to the goals of the Act or of the creation of energy optimization plans.

For the above reasons, we hold that ABATE has not shown that the PSC's decision that natural gas transportation customers are responsible for energy optimization plan costs under MCL 460.1089(2) is unlawful or unreasonable.

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[4] Some caveats apply for costs that exceed the overall funding levels specified in the plan, and "costs for load management" are not recoverable under this section.

[5] While the Act does not define "retail" sale, ABATE does not argue that a sale of transportation services does not constitute a retail sale, nor does it explain what such a sale would otherwise be. In addition, because the language of MCL 460.1091 does not use the phrase "retail" but includes the same percentages of revenue as those included in MCL 460.1089(7), and the sales of transportation services are to end user customers, we conclude that these services are intended to be viewed as retail sales.

[6] A similar conclusion could be made regarding the savings targets outlined in MCL 460.1077. The PSC's December 23, 2008 order clarified that these targets include sales volumes that include both choice and transportation sales volumes.

[7] With regard to ABATE's argument that it will not be able to participate in any of the benefit programs, Consumers correctly notes that ABATE acknowledges that gas transportation customers will be eligible to participate in and receive benefits from the energy optimization programs developed by the utilities, a fact that the PSC recognized in its order. ABATE's assertion as to the amount of the benefits its members will receive, and

> whether these benefits would run afoul of the requirements in MCL 460.1071(3)(d), is speculative.

ABATE has raised nothing new in the instant appeal to challenge this analysis. Most pertinently, while ABATE continues to complain that gas transportation customers will not benefit from participation in the energy optimization plans, and in particular from Consumers Energy's plan, it has still failed to provide any underlying testimony or evidence to support this assertion. ABATE's expert testified only about the language of the relevant statutory provisions. In contrast, Terrence J. Mierzwa testified for Consumers Energy that the gas transportation customers would be able to participate in Consumers Energy's nonresidential programs and that their participation would be tracked:

> *Q*. How will the Company ensure, to the extent feasible, that charges collected from a particular customer rate class are spent on energy optimization programs for that rate class?
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> *A*. Each proposed EO program has a proposed individual budget. Customers of different classes are only eligible to participate in certain programs. Total spending on residential programs will be tracked and monitored to ensure it doesn't exceed what is collected from residential customers. Similarly, total spending on non-residential programs will be tracked and monitored by customer class (primary electric, secondary electric, *and transportation gas*) to ensure it doesn't exceed what is collected from non-residential customers. My understanding is that 2008 PA 295 requires all customer classes to fund a proportionate share of the cost of the residential low-income programs, and the Company has designed its plan accordingly. [Emphasis added.]

Those energy optimization programs were also described in considerable detail in Consumers Energy's

energy optimization plan, which Mierzwa sponsored. Especially given ABATE's acknowledgement on appeal that its members will receive some benefit for participation and its citation to testimony that these incentive programs will be available, we find ABATE's argument unpersuasive.

Accordingly, we concur with this Court's decision in *In re Temporary Order to Implement 2008 PA 295* and conclude that the Legislature intended gas transportation customers to participate in Consumers Energy's energy optimization plan.

III. EXEMPTION UNDER MCL 460.1093(1)

ABATE next argues that the PSC erroneously construed former MCL 460.1093(1), which provided that "an eligible primary or secondary electric customer" is exempt from charges that the customer would otherwise incur under MCL 460.1089 and MCL 460.1091 if the customer files a self-directed energy optimization plan with its electric provider and implements the plan.[12] ABATE contends that the PSC improperly found that this exemption only applies to surcharges from electric providers, despite the fact that MCL 460.1089 and MCL 460.1091 provide for electric and gas utilities to collect gas and energy optimization program costs. But because ABATE did not raise this issue in its initial brief or in its reply brief below in this case, it is not preserved for appeal. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). Nevertheless, because we agree with it, we reiterate the following analysis from *In re Temporary Order to Implement 2008 PA 295*:

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[12] As discussed further later in this opinion, this provision was amended by 2010 PA 269, effective December 14, 2010.

ABATE next argues that the PSC erroneously construed the language of MCL 460.1093(1), when it determined that an "eligible electric customer" could still be responsible for surcharges relating to the customer's natural gas provider's energy optimization plan, even if it filed a self-directed electrical energy optimization plan with its electric provider. We disagree.

As a counterpart to MCL 460.1089 and MCL 460.1091, MCL 460.1093 provides an opportunity for certain electric customers to file a self-directed electric optimization plan. MCL 460.1093(2) defines eligibility based on the peak demand of the customer's facility or facilities. MCL 460.1093(1), the subject of the instant dispute, provides for exemption of the requirements and responsibilities the customer would otherwise have under the energy optimization plan of its provider, or as ABATE argues providers, under MCL 460.1089, or the provider or providers' "independent energy optimization program administrator" under MCL 460.1091. [Former] MCL 460.1093(1) provide[d]:

"An eligible primary or secondary electric customer is exempt from charges the customer would otherwise incur under section 89 or 91 if the customer files with its electric provider and implements a self-directed energy optimization plan as provided in this section."

At issue is whether an eligible electric customer, who files a self-directed energy optimization plan with its electric provider is exempt from the surcharges of only its electric provider under MCL 460.1089 or MCL 460.1091 or from both its gas and electric providers under those subsections.

The PSC found that the Legislature did not have this intent, holding that it was highly unlikely that the Legislature would have, in a section of the Act dealing explicitly with electric customers who file self-directed electric energy optimization plans, provided a loophole by which an electric sales customer who elects to do a self-directed electric program can avoid not only the electric surcharge, but also any gas surcharges assessed to gas sales customers. In holding that a customer is an electric customer only

when purchasing electric service, the PSC determined that the charges referenced in MCL 460.1093(1) are therefore limited to charges for electric service that would otherwise be applicable.

We find the PSC's rationale persuasive. The phrase "is exempt from charges the customer would otherwise incur under section 89 or 91" is to be read in context with the remaining portions of MCL 460.1093, as well as the remaining portions of the Act. *Robinson*, 486 Mich at 15. The purpose of MCL 460.1089 and MCL 460.1091 is to provide alternative forms of provider-based energy optimization plans, and provide coverage for the cost of funding the plans. A self-directed energy plan obviates the need for the customer to participate in its electric provider's optimization plan, and effectively replaces it. See MCL 460.1093(7).[8] Thus, the "charges the customer would otherwise incur under [MCL 460.1089 or MCL 460.1091]" in this situation refers to the customer's electric optimization plan costs. Or, as stated by the PSC, a customer is an electric customer with respect to electric charges, and a gas customer with respect to gas charges.

The PSC's decision that the Legislature did not intend MCL 460.1093(1) to exempt the customers who file a self-directed energy optimization plan from all surcharges, whether gas or electric-related, they would otherwise incur under MCL 460.1089 or MCL 460.1091 is further supported by the language of [former] MCL 460.1093(4)(c).[13] This provision, which also pertains to customers who file a self-directed energy optimization plan, requires the PSC to "[p]rovide a mechanism to cover the costs of the low income energy optimization program under [MCL 460.1089]." This program is found in MCL 460.1089(5), discussed above. Thus, reading MCL 460.1093(1) in conjunction with [former] MCL 460.1093(4)(c), we conclude that the Legislature did not intend for the filing of an electric self-directed energy optimization plan to serve as a blanket exemption from all of the other surcharges in MCL 460.1089 or MCL 460.1091. Notably, ABATE does not

[13] This language is now contained in MCL 460.1093(5)(c).

challenge on appeal the PSC's imposition of the "cost associated with the allocated portion for the provider's low income residential energy optimization program" on self-directed optimization plan customers. Accordingly, reading the language of MCL 460.1093(1) as a whole in conjunction with the remainder of MCL 460.1093, and the other provisions of the Act, we hold that ABATE has failed to show that the PSC's decision was unlawful or unreasonable.

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[8] This section[14] provides:

"Once a customer begins to implement a self-directed plan at a site covered by the self-directed plan, that site is exempt from energy optimization program charges under section 89 or 91 and is not eligible to participate in the relevant electric provider's energy optimization programs."

[*In re Temporary Order to Implement 2008 PA 295*, unpub op at 7-9 (second and fourth alterations in original).]

Moreover, we also note that, in addition to other amendments to MCL 460.1093, the Legislature has since amended MCL 460.1093(1), which now provides, in pertinent part, "An eligible electric customer is exempt from charges the customer would otherwise incur *as an electric customer* under section 89 or 91 if the customer files with its electric provider and implements a self-directed energy optimization plan as provided in this section." (Emphasis added.) This amendment supports the above analysis concerning the Legislature's intent.

Accordingly, the PSC correctly decided that former MCL 460.1093(1) only allows exemption for eligible electric customers from their electric providers' energy optimization plan charges but not their gas providers' optimization plan charges.

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[14] This language is now contained in MCL 460.1093(8).

IV. NINETY-DAY REVIEW PERIOD

The Act requires that the PSC approve energy optimization plans, and renewable energy plans, within 90 days after the utility/provider files its application. As it argued in *In re Temporary Order to Implement 2008 PA 295*, ABATE maintains that this tight time frame and the orders of the PSC setting the schedules for this and other cases violated customers' rights under the Michigan Administrative Procedures Act (APA) and the Michigan Constitution. While we note that ABATE failed to raise this issue below, we will address it. We again find the previous analysis this Court applied in *In re Temporary Order to Implement 2008 PA 295* persuasive and adopt it:

> MCL 460.1021(5) provides:
>
> "The commission shall conduct a contested case hearing on the proposed plan filed under subsection (2),[15] pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. If a renewable energy generator files a petition to intervene in the contested case in the manner prescribed by the commission's rules for interventions generally, the commission shall grant the petition. Subject to subsections (6) and (10), after the hearing and within 90 days after the proposed plan is filed with the commission, the commission shall approve, with any changes consented to by the electric provider, or reject the plan."
>
> As noted by ABATE, MCL 460.6a(1) provides in pertinent part that, in certain proceedings before the PSC, "the effect of which will be to increase the cost of services to [the

[15] MCL 460.1021(2) provides that each electric provider shall file a proposed renewable energy plan within 90 days after the PSC issues its temporary order. MCL 460.1073(1) in turn provides, "A provider's energy optimization plan shall be filed, reviewed and approved or rejected by the [PSC] and enforced subject to the same procedures that apply to a renewable energy plan."

gas or electric utility] customers," interested parties are entitled to notice and a [sic] "a reasonable opportunity for a full and complete hearing." Pursuant to MCL 460.6a(2)(a), a " '[f]ull and complete hearing' means a hearing that provides interested parties a reasonable opportunity to present and cross-examine evidence and present arguments relevant to the specific element or elements of the request that are the subject of the hearing."

Here, even to the extent that ABATE is correct in its assertion that it, or other customers, are entitled to this procedure, it cannot show that the PSC's actions were improper. ABATE notes that our Supreme Court has held that the PSC should provide for a "full and complete hearing" to even procedures for interim rate relief, see *ABATE v Mich Public Service Comm*, 430 Mich 33, 36, 42-43; 420 NW2d 81 (1988), and argues that parties are entitled to these procedures in energy optimization plan proceedings. However, it ignores the Supreme Court's concurrent holding that, even in such a case, "[t]he PSC also retains discretion to define the standards upon which it bases a grant of interim relief, to define what issues and factors, in a given case, are relevant to those standards as opposed to the standards for final relief, and to limit evidence to the written form." *Id*. at 36. See also *id*. at 43-44. Thus, the PSC retains the ability to narrow the issues in rate optimization plan proceedings, and the relevant evidence, accordingly.

In its denial of ABATE's motion for rehearing or reconsideration, the PSC stated the Legislature intended to expedite energy optimization plan cases and thus only issues that are germane to the questions before the PSC should be entertained at the hearing. It further found that following the procedures set forth in the orders would not violate any party's rights because they provide for notice, opportunity for intervention, offering evidence, cross-examining evidence presented by others, and presenting arguments.

ABATE has not offered evidence to show that the PSC's decision was unreasonable or unlawful, or that it has failed

to provide a reasonable opportunity for a full hearing in energy optimization plan cases. ABATE's argument minimizes the fact that the Legislature, not the PSC, set forth the ninety-day plan review timeframe here. Essentially, through the language of MCL 460.1021(5), the Legislature has determined that, as to the review of energy optimization or renewable energy plans, ninety days presents a "reasonable opportunity to present and cross[-]examine evidence and present arguments relevant to the specific element or elements of the requests that are subject to the hearing" under MCL 460.6a(2). And while ABATE argues that the PSC improperly informed the Legislature that such a timeframe was feasible, or at least did not inform the Legislature that the timeframe would present a problem, it does not provide support for this assertion.

As to ABATE's claims that the ninety-day window violates customers' due process rights under the Michigan Constitution, ABATE cites solely to Const 1963, art 6, § 28. It provides no analysis of its claims that the Legislature's actions violated its members' constitutional rights and no case law to support its assertions. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.' " *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). "Failure to brief a question on appeal is tantamount to abandoning it." *Mitcham*, 355 Mich at 203.

In addition, ABATE essentially seeks declaratory relief concerning an alleged due process violation that has not yet occurred. ABATE asserts that the ninety-day window is insufficient to present and cross-examine evidence, but has not demonstrated this to be the case by providing particulars concerning what, if any, evidence, testimony, argument or other matter it was not permitted to introduce or cross-examine in optimization plan cases as a result of the ninety-day period.

> . . . We thus hold that ABATE has failed to demonstrate that the PSC's decision to adopt procedures consistent with the time frame set forth in MCL 460.1021(5) was unreasonable or unlawful. [*In re Temporary Order to Implement 2008 PA 295*, unpub op at 10-12 (alterations in original).]

ABATE's arguments in this case are essentially the same as those raised in its appeal from the initial temporary order. It again cites Const 1963, art 6, § 28, without any further discussion. And while it now has at least participated in a number of energy optimization cases, it provides nothing to show that the time limits imposed by MCL 460.1021(5) have actually prejudiced it or its members. ABATE has not, for example, cited any expert testimony it could not procure in time or any discovery it tried to engage in that it could not. As the PSC notes, ABATE did participate in these cases and filed both an initial brief and a reply brief. In addition to the claims raised in this appeal, ABATE specifically challenged the prudence of Consumers Energy's plan to construct additional wind power capacity as discussed below, argued that Consumers Energy's energy optimization plan charges were too high in general considering that Consumers Energy would not spend the front-loaded surcharges until years later when the expenditures would actually exceed the surcharges for the particular year, and argued that the PSC should reject Consumers Energy's proposed incentive plan whereby the PSC would pay Consumers Energy an annual incentive payment based on excess energy savings over the Act's mandatory statutory targets. ABATE has not yet produced anything concrete to show that it or its members lost protections under the APA or the Constitution.

In summary, we conclude that ABATE has not met its burden of showing that the PSC's adoption of the time frame set out in MCL 460.1021(5) was unlawful or unreasonable.

V. APPROVAL OF CONSUMERS ENERGY'S RENEWABLE ENERGY PLAN

ABATE next challenges the PSC's approval of Consumers Energy's renewable energy plan. Specifically, ABATE continues its arguments raised during the proceeding below that Consumers Energy's calculated costs for building 450 MW of wind capacity and purchasing additional wind capacity were speculative and inflated. Challenging both Consumers Energy's wind capacity factor and the lack of actual data to support a finding that the plants could contribute to Consumers Energy's capacity during peak demand times, ABATE urges us to find that the record does not support the PSC's decision to approve Consumers Energy's plan and that the PSC's decision is thus improper because it is not supported by competent, material, and substantial evidence on the whole record. We decline to do so.

In general, the PSC has wide latitude when choosing whether to credit expert witness testimony in a PSC case. " 'It is for the PSC to weigh conflicting opinion testimony of the qualified ("competent") experts to determine how the evidence preponderated. Expert opinion testimony is "substantial" if offered by a qualified expert who has a rational basis for his views, whether or not other experts disagree.' " *North Mich Land & Oil Corp v Pub Serv Comm*, 211 Mich App 424, 439; 536 NW2d 259 (1995), quoting *Antrim Resources v Pub Serv Comm*, 179 Mich App 603, 620; 446 NW2d 515 (1989). Substantial evidence is more than a mere scintilla of evidence, but may be less than a preponderance of the evidence. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 685; 658 NW2d 849 (2003), citing *Mich Ed Ass'n Political Action Comm v Secretary of State*, 241 Mich App 432, 444; 616 NW2d 234 (2000). "The testimony of even one expert can be 'substantial' evidence in a PSC case." *Lansing Mayor v Pub Serv Comm*, 257 Mich App 1, 21; 666 NW2d 298

(2003), citing *Mich Intra-State Motor Tariff Bureau, Inc v Pub Serv Comm*, 200 Mich App 381, 388; 504 NW2d 677 (1993).

MCL 460.1021(6) provides, in pertinent part:

> The commission shall not approve an electric provider's [proposed renewable energy plan] unless the commission determines both of the following:
>
> (a) That the plan is reasonable and prudent. In making this determination, the commission shall take into consideration projected costs and whether or not projected costs included in prior plans were exceeded.
>
> (b) That the life-cycle cost of renewable energy acquired or generated under the plan less the projected life-cycle net savings associated with the provider's energy optimization plan does not exceed the expected life-cycle cost of electricity generated by a new conventional coal-fired facility.

In this case, with respect to approval of Consumers Energy's renewable energy plan involving the proposed construction of self-generation wind-power facilities, the PSC made the following findings:

> Most parties in the case contend that Consumers' cost projections are significantly inflated, pointing to Detroit Edison's projected cost of $108 per MWh submitted in that company's REP in Case No. U-15806 and noting that providers in other states have paid less than $100 per MWh for wind energy. The Environmental Coalition asserts that these high costs result from Consumers' estimated capacity factor of 28% and capacity credit of 12.5%, which it contends are far too low.
>
> The Commission agrees that Consumers' estimate for the cost of wind power may be too high, but notes that the components Consumers used to calculate the cost—such as the wind capacity factor—are derived from reasonable sources. The Commission observes that Detroit Edison used a different method for establishing its cost estimate and made different assumptions in its plan. For example,

> Detroit Edison made the reasonable assumption that the federal production tax credit (PTC) will be renewed thus lowering the estimated cost of renewable energy by $30-$40 per MWh from Consumers' estimate. Conversely, Consumers made the also reasonable assumption that the PTC will not continue beyond 2012, thus deriving a higher estimated cost for renewable energy. Detroit Edison used a higher capacity factor than Consumers in its calculations, reducing its estimated costs an additional $15-$20 per MWh below Consumers' estimate. But as Consumers points out, as more data, particularly site-specific data, on wind capacity is acquired the company will be required to adjust the estimates in its EOP. Likewise, if the PTC is renewed in 2012, Consumers' REP will be adjusted to reflect this incentive.

In discussing the concerns raised by ABATE and the other parties, the PSC further held:

> The Commission agrees that many of these concerns are compelling and that it would be prudent for Consumers to take the concerns of, and recommendations by, the intervenors into consideration in designing its RFP and bidding process. *The Commission reiterates that in approving this plan, it is not approving any actual costs.* All actual costs incurred for PPAs or self-build renewable generation are subject to Commission review for reasonableness and prudence. Moreover, the Commission will have the advantage of knowing not only what Consumers proposes to spend, but also what other Michigan utilities are proposing to pay for renewable generation equipment and PPAs. Detroit Edison's recently approved contract is a case in point. Detroit Edison received Commission approval to pay $115 per MWh for 20 years for wind energy, capacity, and RECs. *A PPA that proposes a substantially higher price may not be approved by the Commission on grounds that it is unreasonable. Likewise, cost recovery for self-build renewable generation will be carefully reviewed in a contested case before Commission approval.*
>
> The Commission agrees with the Staff's recommendation that a future docket should be opened to track costs of

> various renewable energy systems and components, to provide information for determining reasonable and prudent expenditures. The Commission also directs the Staff to provide oversight and consultation during the RFP development and design process, including proposal evaluation, to ensure that the RFP process is competitive and fair and that the process generates optimal results. [Emphasis added.]

The PSC further expressed concerns with the depreciation schedule that Consumers Energy had proposed for its wind generation facilities and stated that it would open a depreciation case to specifically address depreciation of renewable energy facilities and that the case would be completed before Consumers Energy submitted its next renewable energy plan.

We conclude that the PSC's findings are supported by testimony and exhibits contained in the record and that appellant has thus failed to demonstrate that the decision to allow Consumers Energy to proceed with its renewable energy plan was unreasonable or unlawful. As discussed above, as part of the Act, Consumers Energy and other energy companies were required to enact renewable energy plans, and the PSC was expressly given the responsibility of reviewing those plans. MCL 460.1021; MCL 460.1027(3). The Act also specifically allows, as a part of a renewable energy plan, that the company can meet up to 50 percent of its renewable energy obligation by constructing its own renewable energy facilities. MCL 460.1033(1)(a). The surcharges sought by Consumers Energy, and the lower ones actually approved by the PSC, fall under the maximum allowable under the Act. MCL 460.1021(3); MCL 460.1045. Contrary to ABATE's expert's contention below that Consumers Energy's plan improperly allowed the company to hold initially over-collected revenue, the Act provides for this action, MCL

460.1047(3), and Staff argued that an early collection of revenue best furthered the purposes of the act. The PSC properly took into account various concerns about the size of Consumers Energy's initial reserve fund, among other considerations including the respective burden on residential ratepayers, and modified the initial surcharge on the residential ratepayers. Thus, subject to satisfying the requirements of MCL 460.1021(6), the PSC's approval of Consumers Energy's plan is otherwise reasonable, lawful, and prudent.

Expert witnesses testifying on behalf of Consumers Energy and the National Resources Defense Council testified that Consumers Energy's plan met the requirements in MCL 460.1021(6)(b). Thus, record evidence supports the PSC's decision with respect to the requirements of that subdivision.

With respect to reasonableness and prudence under MCL 460.1021(6)(a), even setting aside the apparent inconsistency in ABATE's position on appeal to challenge only the PSC's decision concerning the self-generation portion of Consumers Energy's plan, which has a lower estimated $/MWh than the PPA portion of the plan, we find sufficient evidence supported the PSC's decision to approve the plan with conditions designed to enable continued review of actual costs in such a manner as to make sure they were reasonable. Consumers Energy's witnesses David Ronk, Jr., and Thomas Swartz testified concerning both Consumers Energy's calculated REC requirements and the reasons for its proposal to build capacity and enter into PPAs with other companies. Both testified that although Consumers Energy did not initially need all of the power capacity it planned to build, it could sell the RECs to other companies.[16] In addition, Swartz

[16] Regarding late-filed objections that the calculation of monies generated by Consumers Energy's sale of RECs was overstated, the PSC found

testified about the other reasons for Consumers Energy's decision to build its own facilities, including concerns about the risk of REC unavailability and the downward pressure on pricing as a result of competition. The PSC was free to credit this testimony as rational and valid irrespective of whether other experts disagreed. *North Mich Land & Oil Corp*, 211 Mich App at 439.

With regard to the actual cost estimates that Consumers Energy produced, the PSC was well within its discretion to find that, while some of Consumers Energy's estimates would likely be inaccurate, the plan should still be approved. Staff witness Stanton testified that he found no basis not to approve the plan. Staff agreed with Selecky's recommendation that the PSC use a future docket to explore the reasonableness of costs. The PSC took these concerns into account in ordering the opening of a separate case to address the proper rate of depreciation, and another case to track the costs of "various renewable energy systems and components, to provide information for determining reasonable and prudent expenditures."

Contrary to its argument on appeal, ABATE has not shown that the PSC's order improperly amounted to an abrogation of its present duties under the Act to review Consumers Energy's renewable energy plan for reasonableness. Instead, the PSC recognized that certain of the calculated cost values, including the amount of percentage capacity that the turbines would realize, were necessarily preliminary ones given the nature of the variables. The PSC addressed this uncertainty by

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that there was insufficient evidence in the record to demonstrate that Consumers Energy's estimate was incorrect, declined to address the issue further, and stated that it expected the estimate would be more precisely determined in Consumers Energy's next REP filing in two years. ABATE does not specifically challenge this decision.

the opening of the "depreciation" and "costs" dockets as noted earlier. In addition, apparently in response to other criticisms by Staff and others concerning Consumers Energy's motives for artificially inflating the proposed costs, and its process for obtaining requests for proposals (i.e., bids) from its suppliers, the PSC ordered Staff to provide oversight and consultation during the development process and over Consumers Energy's bidding process "to ensure that the RFP process is competitive and fair and that the process generates optimal results." Finally, as noted by Staff, the PSC did not approve Consumers Energy's actual costs, but instead required Consumers Energy to return to the PSC when it actually sought to have a contract to procure renewable energy approved, and in annual reconciliations.[17] Thus, contrary to ABATE's arguments, the PSC's review of Consumers Energy's plan, and its enactment, are ongoing. The PSC is not sitting on its hands waiting to approve whatever costs Consumers Energy reports during the later review period.[18]

In contrast, we find ABATE's position unreasonable. ABATE essentially would require Consumers Energy to rely on historical data, such as line loss, an actual measured wind capacity factor, and actual peak and off-peak capacity data, for a project that is not yet built, in order to arrive at a more accurate cost estimate for the project before it can be approved.

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[17] While not strictly before this Court because the actions occurred after the order complained of in the instant case, on this point we note that the PSC has issued subsequent orders approving PPA and self-generation wind power contracts, for less than Consumers Energy's estimated $/MWh, which demonstrates the PSC's intent to continue to review the actual costs contained in these contracts to ensure that they are reasonable.

[18] We note that the PSC ordered Consumers Energy to file its first reconciliation case on or before March 31, 2010.

In light of the evidence presented, we conclude that ABATE has not demonstrated by clear and satisfactory evidence that the PSC's decision to approve the portion of Consumers Energy's renewable energy plan allowing it to self-build 450 MW of wind generation facilities was unlawful or unreasonable. MCL 462.26(8).

We affirm.

FITZGERALD and SHAPIRO, JJ., concurred with MARKEY, P.J.

PEOPLE v McDONALD

Docket No. 297889. Submitted June 7, 2011, at Detroit. Decided July 12, 2011, at 9:05 a.m. Leave to appeal denied, 491 Mich 851.

A jury in the Wayne Circuit Court, David J. Allen, J., convicted Deandre M. McDonald of kidnapping, armed robbery, and first-degree criminal sexual conduct. Defendant appealed, arguing in part that testimony of the emergency room attending physician (who was present in the emergency room but did not perform the sexual-assault examination) constituted inadmissible hearsay and deprived defendant of his right to confront the witnesses against him. In addition, defendant challenged the scoring of three offense variables under the sentencing guidelines.

The Court of Appeals *held*:

1. Defendant failed to object to the testimony of Dr. Patrick Loeckner regarding the sexual-assault examination. Dr. Saiyeda Abbas, the physician who performed the examination, did not testify at trial, and defense counsel affirmatively stated that he had no objection to Abbas's notes being admitted. Even if Loeckner's testimony constituted inadmissible hearsay, reversal was not warranted because defendant was unable to demonstrate that he was prejudiced by the testimony. The gravamen of defendant's argument was that the examination was mishandled and the rape kit contaminated, but independent forensic scientists also matched defendant's DNA to evidence from the crime. Moreover, given defendant's partial reliance during closing argument on Loeckner's testimony that no sperm was observed during the examination, any error did not affect the fairness, integrity, or public reputation of the proceedings.

2. The trial court did not deprive defendant of due process or violate MCR 6.414(J) by asking the jury to rely on its collective memory instead of granting its request to review the transcripts of certain testimony. The trial court denied the request "at this time," and defendant agreed to the denial given that deliberations had only lasted one hour. It might have been better practice to have expressly informed the jury that they could make another

transcript request in the future, but the trial court did not foreclose the possibility of the jury obtaining transcripts in the future.

3. The trial court properly assessed 10 points for OV 3, MCL 777.33 (physical injury to victim). An infection the victim suffered as the result of the sexual assault constituted a "bodily injury requiring medical treatment" under MCL 777.33(2)(d).

4. The trial court properly assessed 50 points for OV 7, MCL 777.37 (aggravated physical abuse). Defendant ordered the victim to keep her eyes closed and stated that he and what he implied were accomplices had watched her and knew where she lived. This was sufficient to establish that defendant engaged in "conduct designed to substantially increase [her] fear and anxiety" and supported the assessment of 50 points under MCL 777.37(1)(a).

5. The trial court assessed 10 points for OV 19, MCL 777.49 (interference with the administration of justice). The court did not err by considering postoffense conduct. Defendant's threats that he knew the victim's identity and where she lived implied that she could be found in the future. Defendant was convicted of a criminal sexual conduct offense that involved the commission of an ongoing felony. In this case, the victim was not free from restraint until she was out of the car and out of range for being shot by the gun defendant had trained on her. Moreover, even though the trial court only assessed 10 points for OV 19, defendant's threats were in fact sufficient to have supported an even higher assessment of 15 points.

Affirmed.

1. CRIMINAL LAW — DUE PROCESS — JURY — REQUEST TO REVIEW TRANSCRIPTS.

A trial court's denial of an initial jury request to review transcripts of certain testimony without foreclosing the possibility of future requests being granted does not deprive the defendant of due process or violate MCR 6.414(J), which governs jury requests to review evidence.

2. SENTENCES — SENTENCING GUIDELINES — CALCULATIONS — OFFENSE VARIABLE 3.

An infection suffered by the victim as the result of a sexual assault constitutes a "bodily injury requiring medical treatment" that justifies the assessment of 10 points under offense variable 3 of the sentencing guidelines (physical injury to victim) (MCL 777.33[1][d]).

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

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

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Defendant appeals by right his convictions by a jury of kidnapping, MCL 750.349, armed robbery, MCL 750.529, and first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c). Defendant was acquitted of felony-firearm, MCL 750.227b, and two counts of second-degree criminal sexual conduct, (CSC-II), MCL 750.520c(1)(c). Defendant also appeals his sentences of 225 months' to 60 years' imprisonment on each of his three convictions. The kidnapping and armed robbery sentences were to be served concurrently but, pursuant to MCL 750.520b(3), were to be served consecutively to his CSC-I sentence. The evidence supporting defendant's convictions was largely, although not exclusively, based on DNA evidence collected at a hospital. We affirm.

While walking home from work in Detroit, the victim was accosted, ordered into a car, robbed, and raped at gunpoint by a man. She got a good look at the man's face before he ordered her not to look at him. Among other things, the man took her cell phone. She almost immediately happened across an ambulance when he finally let her go and was taken to the hospital. A sexual-assault examination was performed after some delay; numerous swabs and samples were taken and

packaged into a "rape kit," a sealed container for sexual-assault evidence. Meanwhile, the police tracked the victim's cell phone to a barbershop, then to a person who was in a relationship with defendant's brother, and finally to defendant. DNA evidence was obtained from defendant. The victim was unable to select a photograph of defendant out of a photographic lineup, although the quality of the photographs was apparently very poor. Defendant refused to participate in a corporeal or voice lineup, but the victim was able to identify defendant as the rapist in court and from a photograph she found of him on the Internet through independent research. Two different forensic scientists in unrelated crime laboratories analyzed actual sperm cells found in the rape kit and matched them to defendant's DNA. It was established that at no time was a "sperm sample" obtained from defendant.

Defendant first argues that it was error to permit the emergency room attending physician, Dr. Patrick Loeckner, to testify about the sexual-assault examination because he did not administer it himself. The doctor who personally performed the examination, Dr. Saiyeda Abbas, did not testify at trial. Defendant argues that this constituted inadmissible hearsay and was a violation of his right to confront the witnesses against him. We find no basis for reversal.

Defendant did not object to Dr. Loeckner's testimony and affirmatively stated that he had no objection to the admission of Dr. Abbas's notes. The former failure to object constituted mere forfeiture of an error, while the latter affirmative approval constituted a waiver. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Unpreserved claims of error that are not waived are reviewed for "plain error," meaning that there must be obvious error that caused a defendant actual prejudice.

Reversal is not warranted unless the defendant was actually innocent or the error fundamentally undermined the integrity of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This same standard of review applies to unpreserved claims of both nonconstitutional and constitutional error. *Id*. at 761-767.

Even if we were to presume that Dr. Loeckner's testimony constituted inadmissible hearsay, there was no prejudice. Dr. Loeckner's testimony helped defendant, if anything. Dr. Loeckner admitted that he did not know whether Dr. Abbas had really followed the proper protocols. Furthermore, Dr. Loeckner's testimony brought out the fact that no semen was observed during the examination, a fact that defendant made use of during closing argument.

Moreover, the gravamen of defendant's argument regarding Dr. Loeckner's testimony has less to do with who testified than with the implication that the sexual-assault examination was mishandled and the rape kit contaminated, thereby undermining the reliability of both. However, the rest of the evidence overwhelmingly shows that no such thing was possible. Even if Dr. Abbas hypothetically had not fully followed proper protocols, two separate forensic scientists in two different accredited crime laboratories matched defendant to the sperm cells found during the sexual-assault examination, and they did so without consulting each other. Because the victim's DNA was also found on the items in that particular rape kit, it had clearly not become intermingled with evidence from another investigation. Defendant implies that the rape kit at the hospital could have been mishandled in such a way that his sperm could have gotten into it, but there is absolutely no evidence in the record from which such an extraordi-

nary conclusion could be drawn. Indeed, it is a patently ridiculous implication because the forensic scientists explicitly analyzed *actual sperm cells* that were found to contain defendant's DNA. The only way the rape kit could have been contaminated would be if the police or the doctors had somehow *obtained a sperm sample* from defendant, which they did not. The DNA samples they took from defendant came from his *mouth*. Finally, old-fashioned detective work led the police to defendant, and the victim identified defendant as the rapist in court and from a photograph she found.

Even if error occurred, reversal is not warranted because defendant is *not* actually innocent. Given defendant's partial reliance on Dr. Loekner's testimony, to which he did not object, the error did not affect the fairness, integrity, or public reputation of the proceedings. *Carines*, 460 Mich at 763.

Defendant next argues that the trial court deprived him of due process and violated MCR 6.414(J) because of the way in which it asked the jury to rely on its collective memory instead of granting its request to review transcripts of certain testimony. We disagree. It might have been better practice to have told the jury explicitly that if they continued to feel a need for a transcript in the future, they could make another request. However, the trial court emphasized that it was merely denying their request "at this time," and given that it was only an hour into deliberations, defendant agreed that for the time being the request should be denied. The trial court did not tell the jury that transcripts would be unavailable for weeks or months or not available at all. See *People v Smith*, 396 Mich 109, 110-111; 240 NW2d 202 (1976). Because the trial court did not foreclose the possibility of the jury obtaining transcripts in the future it did not violate MCR 6.414(J).

Finally, defendant argues that the trial court misscored three offense variables when calculating his recommended minimum sentence range under the sentencing guidelines. We disagree and in addition conclude that the trial court in fact assessed too few points for one of his offense variables.

We review the interpretation and application of the sentencing guidelines de novo. *People v Smith*, 488 Mich 193, 198; 793 NW2d 666 (2010)

Ten points should be assessed for offense variable (OV) 3 if "[b]odily injury requiring medical treatment occurred to a victim[.]" MCL 777.33(1)(d). The victim did not suffer any acute physical trauma or injury as a result of the rape and most of the medical treatment she received was precautionary. However, "bodily injury" encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence. See *People v Cathey*, 261 Mich App 506, 513-517; 681 NW2d 661 (2004). In that case, this Court held that *in the context of a criminal sexual conduct offense*, a resulting pregnancy constituted bodily injury, even though in most other contexts it would be considered quite the opposite. See *id*. at 514 n 5. The evidence here established that the victim suffered an infection as a consequence of the rape. This is sufficient to constitute "bodily injury requiring medical treatment" within the meaning of OV 3.

Fifty points should be assessed for OV 7 if a "victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]" MCL 777.37(1)(a). Defendant ordered the victim to keep her eyes closed and indicated that he and what he implied were accomplices knew who she was and had been watching her. He also made threats that clearly

indicated that he could find her again in the future, thereby suggesting not only that she was suffering a horrific assault but that there might never be any escape, either. Defendant argues 50 points should not have been assessed for OV 7 because there was no evidence of overt sadism, torture, or physical brutality beyond what was technically necessary to accomplish the charged offenses. However, even though the victim eventually concluded that defendant really did not know her identity there was ample evidence that defendant engaged in "conduct designed to substantially increase [her] fear and anxiety . . . ." Therefore, OV 7 was properly scored at 50 points.

Fifteen points should be assessed for OV 19 if a defendant "used force or the threat of force . . . to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services[.]" MCL 777.49(b). Ten points should be assessed if the defendant "otherwise interfered with or attempted to interfere with the administration of justice[.]" MCL 777.49(c). The trial court assessed 10 points for OV 19.

Defendant asserts that the trial court impermissibly scored OV 19 on the basis of conduct that occurred after the completion of the charged offenses because the offense variable does not explicitly permit the court to do so. See *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009). However, our Supreme Court has explained that OV 19 contemplates post-offense conduct by necessary implication. *Smith*, 488 Mich at 200. Even if it did not, defendant's statements that he knew who the victim was and that his "boys" had been watching her were obvious threats that transpired *during* the kidnapping. Any person would interpret that as an implication that she or he could be found

again in the future. Furthermore, defendant required the victim to promise not to contact the police *as a condition of releasing her*. Defendant accurately notes that the victim only gave this testimony at the preliminary examination. However, the trial court properly considered testimony from the preliminary examination at sentencing. See *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). And a threat to kill a victim to prevent that victim from reporting a crime would warrant assessing 15 points for OV 19. *People v Endres*, 269 Mich App 414, 420-422; 711 NW2d 398 (2006).

Finally we note the specific criminal sexual conduct offense for which defendant was charged and convicted was sexual penetration involving the commission of another felony. MCL 750.520b(1)(c). The underlying felony is therefore part of the criminal sexual conduct offense itself. Armed robbery, MCL 750.529, proscribes conduct that includes an assault and a felonious taking of property from the victim's presence or person while the defendant is armed with a weapon, *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007), and as such includes flight or attempted flight after the commission of the larceny, or attempts to retain possession of the stolen items, see MCL 750.530(2). Kidnapping is defined as restraining another person, meaning restricting or confining their liberty, and thus necessarily is an ongoing offense until the victim is released. MCL 750.349(2); see also *People v Behm*, 45 Mich App 614, 620-621; 207 NW2d 200 (1973). In this case the victim's liberty was not free from restraint until she was not only out of defendant's car, but out of shooting range—after all, the defendant had a gun trained on her even after she exited the car. Therefore, even if defendant had not made the threat to the victim until she was already walking away, none of defendant's charged

offenses were complete until it was clear that he could no longer change his mind and order her back into the car and OV 19 should be scored.

If there is any error at all in this matter, it is that defendant received a lower score for OV 19 than was actually justified. We will not, however, require that score changed because no cross-appeal has been filed.

Affirmed.

FORT HOOD, P.J., and DONOFRIO, J., concurred with RONAYNE KRAUSE, J.

SHANN v SHANN

Docket No. 301113. Submitted June 10, 2011, at Lansing. Decided July 12, 2011, at 9:10 a.m.

Casey William Shann brought an action in the Ingham Circuit Court against Cary Ann Shann, also known as Cary Ann Wenzel, seeking a change of custody of the parties' minor son. The court, Laura L. Baird, J., granted plaintiff's motion. It determined that plaintiff had established proper cause or a change in circumstances sufficient to consider a change of custody. The court concluded that clear and convincing evidence at trial established that a change of custody was in the minor son's best interests. Defendant appealed.

The Court of Appeals *held*:

1. A trial court may only consider a change of custody if the movant establishes proper cause or a change in circumstances. To show a change of circumstances, a party must prove that conditions surrounding custody of the minor child that had or could have a significant effect on the child's well-being have materially changed. The removal of the child from defendant's home by Children's Protective Services after an abuse and neglect case was filed against defendant's current spouse was in and of itself sufficient evidence of a change of circumstances to warrant the trial court considering a change of custody under MCL 722.27(1)(c). After assessing the credibility of the witnesses, the trial court concluded that there was evidence of additional circumstances that were not normal life changes and were likely to have significant effect on the child. The trial court did not err by ordering a new custody hearing on the basis of a change of circumstances.

2. Because there was an established custodial environment with defendant, plaintiff could only be awarded custody if the facts at trial proved by clear and convincing evidence that the change of custody was in the minor son's best interests. After it analyzed the best interest factors of MCL 722.23, the trial court concluded that the parties were equal with respect to best interest factor (a), MCL 722.23(a), but that all other factors either favored plaintiff or were not relevant. While defendant argued that the trial court should have believed her witnesses rather than plaintiff's, the Court of

Appeals deferred to the trial court's credibility determinations given that court's superior position to make those judgments.

Affirmed.

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

A trial court may only consider a change of custody if the movant establishes proper cause or a change in circumstances; to establish proper cause, the movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court; appropriate grounds must be relevant to at least one of the twelve best-interest factors set forth in MCL 722.23, and have a significant effect on the child's well-being; to show a change of circumstances, the movant must prove a material change in the conditions surrounding custody that have or could have a significant effect on the child's well-being; the removal of a child from the custodial parent's home by Children's Protective Services may be sufficient evidence of a change in circumstances to allow the trial court to consider a change of custody.

2. PARENT AND CHILD — CHILD CUSTODY — BEST INTERESTS OF CHILD.

When there is an established custodial environment, a change in custody is appropriate only if the facts at trial prove by clear and convincing evidence that the change is in the minor child's best interests.

Mertens and Clement, P.C. (by *Thomas P. Clement*), for Casey W. Shann.

Barbara B. Herdus for Cary Ann Shann.

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

PER CURIAM. Plaintiff, Casey Shann, moved for a change of custody of the parties' minor son after the husband of defendant, Cary Wenzel (formerly Shann), was accused of sexually assaulting one of Cary Wenzel's stepdaughters. The trial court granted Shann's motion. Cary Wenzel now appeals, arguing that there was no proper cause or change of circumstances sufficient to consider altering custody and that the trial court incorrectly evaluated witness testimony. We affirm.

I. FACTS

Cary Wenzel retained sole physical custody of her minor son after she and Shann divorced. She subsequently married Jeremy Wenzel, who had five daughters from earlier relationships. Two of Jeremy Wenzel's daughters testified that Cary Wenzel and Jeremy Wenzel often fought and that Jeremy Wenzel called the minor son names. The minor son's babysitter testified that he reported to her that his stepfather regularly called him an idiot. However, another of Jeremy Wenzel's daughters contradicted this testimony, as did Cary Wenzel herself.

In March 2010, Jeremy Wenzel's eldest daughter informed the Michigan State Police that Jeremy Wenzel had sexually abused her several years earlier. When these allegations surfaced, Cary Wenzel did not remove the minor son from the home, nor did she inform Shann about the allegations. She claimed that Children's Protective Services (CPS) told her she did not need to pass the information on to Shann.

Saginaw County CPS worker Roshell Watley-Thomas became involved with the Wenzel family in June 2010 after Cary Wenzel called 911 because Jeremy Wenzel had threatened to kill himself, Cary Wenzel, and "everybody else." Jeremy Wenzel was taken to the hospital after the police responded to Cary Wenzel's 911 call, and Watley-Thomas found Cary Wenzel there. The children were removed from the home when CPS filed an abuse and neglect case against Jeremy Wenzel. Criminal charges were also filed, but were dismissed after the eldest daughter recanted her claims of sexual abuse. The CPS case was also dismissed, against CPS's wishes, because the prosecutor's office did not believe there was enough evidence to pursue it.

The trial court found that Shann, his wife, Watley-Thomas, two of Jeremy Wenzel's daughters, and the

minor son's babysitter were all credible witnesses. Conversely, the trial court found that Cary Wenzel and Jeremy Wenzel's eldest daughter were not credible, observing that Cary Wenzel's testimony was "not particularly well attached to reality." The trial court found that the minor son's interests would be best served by granting custody to Shann.

II. CUSTODY DETERMINATION

A. STANDARD OF REVIEW

In custody cases, this Court will affirm the trial court's findings of fact unless the evidence clearly preponderates in the opposite direction.[1] We defer to the trial court's credibility determinations given its superior position to make these judgments.[2] This Court reviews questions of law for clear legal error, which occurs when the trial court incorrectly chooses, interprets, or applies the law.[3] Finally, we consider the trial court's discretionary rulings, such as custody determinations, for an abuse of discretion.[4]

B. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

A trial court may only consider a change of custody if the movant establishes proper cause or a change in circumstances.[5]

> [T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate

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[1] *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004).

[2] *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009).

[3] *Id.* at 475; *Thompson*, 261 Mich App at 358.

[4] *McIntosh*, 282 Mich App at 475; *Thompson*, 261 Mich App at 358.

[5] *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994), citing MCL 722.27(1)(c).

> ground(s) should be relevant to at least one of the twelve statutory best interest factors,[6] and must be of such magnitude to have a significant effect on the child's well-being.[7]

To show a change of circumstances, the party must prove that "conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed."[8] These must be more than normal life changes, "and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child."[9]

Cary Wenzel argues only that the previous actions taken by CPS did not constitute a sufficient basis for finding proper cause or a change of circumstances. She points out that the CPS case had already been dismissed and contends that allowing the trial court's ruling to stand would be tantamount to declaring that any protective services action, no matter how unfounded, could be used as an excuse to revisit custody. However, the fact that CPS *removed* the child from the home is in and of itself sufficient evidence of a change in circumstances to warrant a trial court to consider a change of custody.[10] Moreover, in this instance, it is not clear that CPS's actions were unjustified. The trial court found, on the basis of its assessment of the witnesses' credibility, that Jeremy Wenzel's eldest daughter retracted her accusations for reasons other than their truth or falsity. The trial court further concluded that CPS worker Watley-Thomas was a cred-

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[6] MCL 722.23.

[7] *Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003).

[8] *Id.* at 513.

[9] *Id.* at 513-514.

[10] *Rossow*, 206 Mich App at 458, citing MCL 722.27(1)(c).

ible witness, and she testified that CPS thought the abuse or neglect case should not have been dismissed. There was evidence at trial, which the trial court also found to be credible, that the minor son had very poor hygiene habits and had been subjected directly or indirectly to verbal abuse. Any one of these additional circumstances was most certainly not a normal life change and was likely to have a significant effect on the minor son. Accordingly, the trial court did not err by ordering a new custody hearing on the basis of a change of circumstances.

C. BEST INTERESTS OF THE CHILD

The parties agree that an established custodial environment existed with Cary Wenzel. Given an established custodial environment, Shann could only be awarded custody of the minor son if the facts at trial proved by clear and convincing evidence that the change of custody was in the minor son's best interests.[11] The trial court concluded that the parties were equal with respect to best interest factor (a),[12] but that all other factors either favored Shann or were not relevant.

Cary Wenzel does not make specific arguments that the trial court erred in its determination of individual factors. Rather, Cary Wenzel complains that the trial court should have believed her witnesses rather than Shann's. As we have already observed, we respect the trial court's superior position to assess the credibility of the witnesses appearing before it and will not revisit those assessments in this forum.[13]

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[11] *Foskett v Foskett*, 247 Mich App 1, 6, 9; 634 NW2d 363 (2001).

[12] MCL 722.23(a).

[13] *McIntosh*, 282 Mich App at 474.

We affirm.

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

ILE v FOREMOST INSURANCE COMPANY

Docket No. 295685. Submitted May 10, 2011, at Detroit. Decided July 14, 2011, at 9:00 a.m. Leave to appeal granted, 490 Mich 1004.

Debra Ile, as the personal representative of the estate of Daryl Ile, deceased, and on behalf of herself and others, brought an action in the Wayne Circuit Court against Foremost Insurance Company, alleging breach of contract and misrepresentation. Foremost issued the decedent a motorcycle insurance policy that bundled uninsured-motorist (UM) and underinsured-motorist (UIM) coverage. The policy provided UM and UIM coverage in an amount equal to the minimum liability coverage limits permitted under Michigan law and the decedent paid a single unallocated premium for the coverage. The decedent was killed when he struck a parked vehicle while driving the motorcycle insured by Foremost. Ile recovered the policy limit of $20,000 from Titan Insurance Company, the insurer of the parked vehicle, but sought to recover an additional $20,000 from Foremost under the decedent's policy. Foremost denied the claim on the basis that Ile had already received from Titan the maximum amount payable under the decedent's policy. Foremost moved for summary disposition, but the court, Robert J. Colombo, Jr., J., denied the motion and instead granted summary disposition in favor of Ile, concluding that the UIM coverage under the policy was illusory because no circumstances existed under which Foremost would have to pay benefits. Foremost appealed by leave granted.

The Court of Appeals *held*:

1. An illusory contract is an agreement in which one party gives as consideration a promise so insubstantial that it imposes no obligation, which renders the agreement unenforceable. The doctrine of illusory coverage is a rule requiring courts to interpret an insurance policy so that it is not merely an illusion to the insured.

2. The UIM coverage provided by the decedent's motorcycle insurance policy in an amount equal to the minimum liability coverage limits permitted under Michigan law, was illusory because under the policy's definitions, full limits for both UM and UIM benefits could not be collected under the policy. Having

elected UIM coverage equal to the statutory minimum liability coverage, the decedent could never have collected UIM benefits. An insurer cannot charge a premium for two conceptually distinct types of coverage if both types of coverage do not actually exist. The fact that a single premium was charged for two types of coverage was not determinative.

3. The trial court properly determined that Ile was entitled to recover up to the $20,000 policy limit for UIM coverage, to the extent her damages exceed those recovered from Titan. That resolution was consistent with the policy's restrictive clauses because it did not require Foremost to remit a duplicate payment for damages already compensated by Titan.

4. The illusory nature of the UIM contract language constituted a valid defense to the general rule that a contract must be enforced as written.

Affirmed.

CAVANAGH, P.J., concurred in the result only.

1. INSURANCE — NO-FAULT — UNDERINSURED- AND UNINSURED-MOTORIST BENEFITS.

Underinsurance benefit clauses are construed without reference to the no-fault act because that insurance is not required under the act (MCL 500.3101 *et seq*.).

2. CONTRACTS — DEFENSES — ILLUSORY CONTRACTS.

An illusory contract is an agreement in which one party gives as consideration a promise that is so insubstantial that it imposes no obligation; this insubstantial promise renders the agreement unenforceable.

3. INSURANCE — CONTRACTS — INTERPRETATION — DOCTRINE OF ILLUSORY COVERAGE.

The doctrine of illusory coverage requires courts to interpret an insurance policy so that it is not merely an illusion to the insured; courts avoid interpreting insurance policies in such a way that the insured's coverage is never triggered and the insurer bears no risk.

Law Offices of Paul Zebrowski & Associates (by *Paul A. Zebrowski* and *Thomas A. Biscup*) for plaintiffs.

Warner Norcross & Judd LLP (by *Andrea J. Bernard*, *Michael G. Brady*, and *Jason L. Byrne*) for defendant.

Amicus Curiae:

Willingham & Coté, P.C. (by *John H. Yeager* and *Kimberlee A. Hillock*) for the Insurance Institute of Michigan.

Before: CAVANAGH, P.J., and TALBOT and STEPHENS, JJ.

TALBOT, J. Foremost Insurance Company challenges the trial court's grant of summary disposition in favor of Debra Ile (Ile), individually and as the personal representative of the estate of Darryl Ile (decedent), based on the trial court's determination that the underinsured-motorist (UIM) coverage in the motorcycle insurance policy purchased by the decedent from Foremost was an illusory contract and that Ile was entitled to recover up to a maximum $20,000 of underinsurance benefits for damages incurred exceeding the $20,000 already paid by another insurer. We affirm.

Foremost issued to the decedent a motorcycle insurance policy that included "bundled" uninsured-motorist (UM) and UIM coverage for the period of January 30, 2006, to January 30, 2007. The insurance policy provided UM and UIM coverage in an amount equal to the minimum liability coverage limits permitted under Michigan law of $20,000/$40,000.[1] Although Foremost offered higher limit options, the decedent selected this amount of coverage and paid a single, unallocated premium amount of $26 for UM/UIM coverage. Under the language of the policy, Foremost agreed to pay "compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'uninsured motor vehicle' because of 'bodily injury' " and "compensatory damages which an 'insured' is le-

[1] MCL 500.3009(1).

gally entitled to recover from the owner or operator of an 'underinsured motor vehicle' because of 'bodily injury.' "

The Foremost insurance policy in part defines an "uninsured motor vehicle" as

> a land motor vehicle or trailer of any type:
>
> 1. [t]o which no bodily injury liability bond or policy applies at the time of the accident.
>
> 2. [or] [t]o which a bodily injury liability bond or policy applies at the time of the accident. In this case its limit for bodily injury liability must be less than the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which 'your covered motorcycle' is principally garaged.

The policy language defines "underinsured motor vehicle" in relevant part as

> a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage.
>
> However, "underinsured motor vehicle" does not include any vehicle or equipment:
>
> 1. [t]o which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which "your covered auto" is principally garaged.

Foremost sought to further limit the extent of its liability for payment by reiterating throughout the policy that it "will not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible."

The factual circumstances leading up to this litigation are straightforward and undisputed. On June 18,

2006, the decedent was killed when he struck a parked vehicle while driving the motorcycle insured under the policy described above. Decedent's estate recovered the policy limit of $20,000 from Titan Insurance Company, the insurer of the parked vehicle.[2] Ile sought to recover an additional $20,000 from Foremost under the decedent's policy. Foremost denied the claim and declined any additional payment on the basis of Ile's already having received the maximum amount payable under the decedent's policy from the insurer of the parked vehicle. Ile initiated this litigation alleging breach of contract and misrepresentation. The trial court denied Foremost's motion for summary disposition, but granted summary disposition in favor of Ile.[3]

At the outset of its analysis, the trial court noted that because "it is undisputed that the language of the Policy is clear and unambiguous, the Court will focus solely on whether the underinsurance coverage is illusory." Citing caselaw from other jurisdictions, the trial court indicated with approval that those "courts have found underinsured motorist coverage to be illusory in scenarios where the injured person has the statutory minimum amount of underinsured motorist coverage and the tortfeasor, from the same state, has the statutory minimum amount of motor vehicle liability insurance coverage, and those two amounts are equal."[4]

The trial court found "that the underinsured motorists [sic] coverage under the Policy is illusory inasmuch as it provides no coverage whatsoever." Relying on the

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[2] We are offered no explanation regarding why this insurer incurred liability for a *parked* vehicle.

[3] MCR 2.116(C)(10) and (I)(2).

[4] The court cited *Drapak v Aetna Cas & Surety Co*, 137 Misc 2d 156; 520 NYS2d 303 (NY Sup Ct, 1987); *Glazewski v Allstate Ins Co*, 126 Ill App 3d 401; 466 NE2d 1151 (1984), rev'd on other grounds 108 Ill 2d 243; 483 NE2d 1263 (1985).

insurance policy's definition of "underinsured motor vehicle," the trial court reasoned as follows:

> [I]f an insured selects limits of liability for coverage under the Policy which are the same as the minimum permissible liability limits under Michigan law, i.e., $20,000/$40,000, no other vehicle registered in Michigan could ever qualify as an underinsured motor vehicle as defined in the Policy. Moreover, the Policy would never provide underinsured motorists coverage when vehicles from other states having lesser mandatory minimum coverages are involved insofar as the Policy expressly excludes from the definition of underinsured motor vehicle any vehicle covered by insurance liability limits that are less than the minimum limit for bodily injury liability specified by Michigan. Thus, under no circumstances would Foremost have to pay underinsured motorists coverage under the Policy.

The trial court further determined that, contrary to Foremost's contention,

> it is apparent that the insurance premium payment incorporated at least some charge for underinsurance as the declarations page indicates that the premium for underinsurance under the Policy was included, and in setting the base rate for the $20,000/$40,000 uninsured/underinsured coverage in the Policy, [Foremost] took into account the aggregate of all losses over the entire uninsured/underinsured coverage. . . . Therefore, decedent paid a premium for underinsured motorists coverage purporting to provide him with underinsured motorists coverage of $20,000/$40,000, which . . . could never be paid.

This Court granted Foremost leave to appeal.[5]

We review de novo a trial court's decision to grant or deny summary disposition.[6] Similarly, the interpretation of an insurance contract constitutes a question of

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[5] *Ile Estate v Foremost Ins Co*, unpublished order of the Court of Appeals, entered May 5, 2010 (Docket No. 295685).

[6] *Willis v Deerfield Twp*, 257 Mich App 541, 548; 669 NW2d 279 (2003).

law that we also review de novo.[7] "Uninsured motorist benefit clauses are construed without reference to the no-fault act because such insurance is not required under the act."[8]

The premise of Foremost's challenge to the trial court's holding is two-fold. First, Foremost contends that the UM/UIM policy coverage provided to decedent was not illusory because a policyholder is assured of receiving the benefits for which he or she paid. Foremost contends that numerous scenarios exist under which a policy holder having the $20,000/$40,000 liability coverage would receive benefits, precluding the trial court's determination that the contract was illusory. Second, Foremost argues that because the UM/UIM coverage was bundled it did not include a separate premium for UIM coverage. Because decedent was not charged an insurance premium that was attributable to UIM coverage, Foremost maintains that the trial court erred by concluding that decedent paid for coverage that will never result in the payment of benefits.

An "illusory contract" is defined as "[a]n agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation. The insubstantial promise renders the agreement unenforceable."[9] A similar, more specific concept exists in the realm of insurance. The "doctrine of illusory coverage" encompasses "[a] rule requiring an insurance policy to be interpreted so that it is not merely a delusion to the insured. Courts avoid interpreting insurance policies in

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[7] *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

[8] *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533; 676 NW2d 616 (2004), citing *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525; 502 NW2d 310 (1993).

[9] Black's Law Dictionary (9th ed), p 370.

such a way that an insured's coverage is never triggered and the insurer bears no risk."[10] We first address the trial court's determination that the UIM coverage in the Foremost policy was an illusory contract, which could not be enforced because it violated public policy.

"An insurance policy is enforced in accordance with its terms."[11] Because underinsured motorist benefits are not statutorily mandated in Michigan, we apply the general rules of contract interpretation in order to determine under what circumstances coverage must be provided.[12] To that end,

> [a]n insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. Accordingly, the court must look at the contract as a whole and give meaning to all terms. Further, "[a]ny clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy." This Court cannot create ambiguity where none exists.
>
> Exclusionary clauses in insurance policies are strictly construed in favor of the insured. However, coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume.[13]

Our starting point is, therefore, the actual language of the policy issued by Foremost to decedent and the applicability of any specific exclusions in the policy.

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[10] *Id*. at 554.

[11] *Twichel*, 469 Mich at 534, citing *Allstate Ins Co v McCarn*, 466 Mich 277, 280; 645 NW2d 20 (2002).

[12] *Auto-Owners Ins Co v Leefers*, 203 Mich App 5, 10-11; 512 NW2d 324 (1993).

[13] *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566-567; 489 NW2d 431 (1992) (citations omitted).

Within the policy, UIM coverage is tied to the definition of an "underinsured motor vehicle," which is in part

> a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage.
>
> However, "underinsured motor vehicle" does not include any vehicle or equipment
>
> 1. [t]o which a bodily liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which "your covered auto" is principally garaged.

Based on this definition, an underinsured motor vehicle cannot be one covered by a bond or policy for "bodily injury liability" at a value "less than the minimum limit . . . specified by the financial responsibility law of the state" in which the decedent maintained his vehicle. When the policy definition of an "underinsured motor vehicle" is read in conjunction with the policy's definition of an "uninsured motor vehicle" (UM), because Michigan mandates a minimum coverage for bodily injury equal to the amount of decedent's policy of $20,000/$40,000, there exists no possibility for decedent to collect UIM benefits at the selected level of coverage.

As published caselaw is particularly scarce on this issue in Michigan, we follow the trial court's lead and undertake a review of this issue as it has been addressed by courts in other jurisdictions. Consistent with the trial court's determination, courts in Wisconsin have concluded that underinsured motorist policies that are equal to a state's mandatory statutory minimum coverage are illusory.[14] Specifically,

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[14] Although the decisions of courts in other jurisdictions are not binding, they may serve as persuasive authority. *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 639 n 15; 732 NW2d 116 (2007).

> where a policy provides a definition of an underinsured motor vehicle that compares an insured's UIM policy limits to a tortfeasor's policy limits and the insured's policy limit is more than the statutory minimum . . ., then we will not review whether a reducing clause within the policy makes recovery of those UIM benefits illusory. However, we will examine whether a reducing clause makes recovery of those UIM benefits illusory when the insured's policy provides the same UIM benefits as the statutory minimum amount of liability insurance a driver may purchase in [the state]. In statutory minimum cases, a definition of underinsured motor vehicle which compares the insured's UIM limits with the tortfeasor's liability limits is against public policy because under those circumstances, the insured will have paid a premium for a type of coverage that will never be available, if the tortfeasor purchased insurance in [the state]. As a matter of law, that is a result contrary to the reasonable expectations of an insured.[15]

Simply stated, "[b]ecause the policy's limit is equal to the statutory minimum, . . . the policy will never provide excess coverage."[16] As such, courts have found that "[a] policy with UIM coverage 'under which no benefits will ever be paid' is illusory" because "it will never be triggered in practice."[17]

Like Michigan, the state of Montana does not have a statutory requirement regarding UIM coverage and has determined:

> Public policy considerations that favor adequate compensation for accident victims apply to UIM coverage in spite of the fact that UIM coverage is not mandatory . . . . The purpose of underinsured motorist coverage is to provide a source

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[15] *Taylor v Greatway Ins Co*, 233 Wis 2d 703, 715; 608 NW2d 722 (Wis App, 2000).

[16] *Janssen v State Farm Mut Auto Ins Co*, 266 Wis 2d 430, 437; 668 NW2d 820 (Wis App, 2003).

[17] *Ellifson v West Bend Mut Ins Co*, 312 Wis 2d 664, 672; 754 NW2d 197 (2008) (citations omitted).

> of indemnification when the tortfeasor does not provide adequate indemnification. . . . [T]he principle that the insurance consumer's reasonable expectation is that UIM insurance provides *additional* coverage when the insured's damages exceed what is available from the tortfeasor . . . .[18]

Foremost contends that the cases cited relied on the "reasonable expectations doctrine," which is inapplicable in Michigan, as our Supreme Court has rejected its use as a "special rule" of contract construction.[19] Abrogation of the reasonable-expectations doctrine is not as absolute as implied by Foremost. While the doctrine "clearly has no application when interpreting an unambiguous contract," it is tempered by recognition that "courts are to enforce . . . agreement[s] as written absent some highly unusual circumstance, such as a contract in violation of law or public policy."[20] The trial court's opinion and reasoning in determining that this contract was illusory neither contravened nor ignored the rule that

> [t]he judiciary may not rewrite contracts on the basis of discerned "reasonable expectations" of the parties because to do so "is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written . . . ."[21]

The trial court explicitly relied on the language of the contract when it determined that, under the contractual definitions governing UIM and UM coverage, no

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[18] *Hardy v Progressive Specialty Ins Co*, 315 Mont 107, 113-114; 67 P3d 892 (2003) (citations omitted).

[19] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62-63; 664 NW2d 776 (2003).

[20] *Id.* at 51, 63.

[21] *Burkhardt v Bailey*, 260 Mich App 636, 656-657; 680 NW2d 453 (2004), quoting *Wilkie*, 469 Mich at 51.

possible scenario could exist that would permit the decedent to collect UIM benefits with the specific level of coverage afforded by this policy. In reaching its decision, the trial court did not rely on the decedent's "reasonable expectation" when entering into the contract. Rather, it was the actual language of the contract that dictated the trial court's decision, which fully conformed to the rule of contract interpretation that a contract be enforced in accordance with its own written terms.[22] Further, a closer reading of the out-of-state cases cited reveals that the primary level of analysis was focused on the actual contract language presented. The concept of "reasonable expectation" was not addressed and did not come into play until a determination was made that the contract was illusory and violated public policy, which is not inconsistent with the ruling of our Supreme Court.[23]

In this instance, the declaration page of Foremost's policy with the decedent indicates "PART C — UNINSURED MOTORIST — UNINSRD/UNDERINSD MOTORIST $20,000 EA PERS/ $40,000 EA ACCIDENT $26.00." Such a provision is arguably deceptive because "[f]rom a consumer's point of view, a declarations page may be his or her only plain and simple source of information and, if misleading, is of no value. A declarations page which suggests coverage in an amount which is not actually available is misleading."[24] In accordance with the "doctrine of illusory coverage, '[l]iability insurance contracts should, if possible, be construed so as not to be a delusion to' the insured."[25] As such, the doctrine of

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[22] *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001).

[23] *Wilkie*, 469 Mich at 51.

[24] *Hardy*, 315 Mont at 114.

[25] *Jostens, Inc v Northfield Ins Co*, 527 NW2d 116, 118 (Minn App, 1995) (citation omitted).

illusory coverage is applicable "where part of the [insurance] premium is specifically allocated to a particular type or period of coverage and that coverage turns out to be functionally nonexistent."[26] Foremost's reliance on California caselaw to support its argument that the contract is not illusory is unavailing. Unlike Michigan, California has a statutory mandate requiring a minimum level of UIM coverage, which has led to the determination that "[w]hen an insurance company offers coverage mandated by law, in words which parallel the language of the statute, it is logically impossible to charge the insurance company with offering an illusory contract, when the contract offered is mandated."[27]

Foremost contends that the coverage is not illusory because situations exist that will permit the recovery of UM benefits, which are "bundled" with the UIM coverage. "UIM coverage is illusory only if there are no circumstances under which benefits will ever be paid under the policy."[28] In other words, according to Foremost, because the insured could potentially recover benefits based on the UM portion of the contractual provision, coverage cannot be construed to be illusory. Specifically, Foremost acknowledges that in Michigan, for policies equal to the statutory minimum of $20,000/$40,000, coverage is exclusively for UM benefits.[29] This argument is disingenuous. While "UIM coverage is not illusory where there are circumstances that can be reasonably foreseen in which the coverage

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[26] *Id.* at 119.

[27] *Fagundes v American Int'l Adjustment Co*, 2 Cal App 4th 1310, 1317; 3 Cal Rptr 2d 763 (1992).

[28] *Ellifson*, 312 Wis 2d at 674 (citation omitted).

[29] Foremost's employee, Randall C. Sellhorn, answered, "That's correct," at his deposition when asked, "All other things being equal, when a person purchases 20/40 UM/UIM limits . . . there is only a possibility to recover under -- uninsured motorist, is that fair to say?"

will pay,"[30] it is clear in this case that any payment under the policy, at the specified level of coverage, is solely for UM benefits. Contrary to Foremost's contention that bundling of the two types of insurance, UM and UIM, renders the coverage functionally equivalent, caselaw has found "the two types of coverage are conceptually distinct."[31] As a result,

> an insurer cannot charge a premium for two conceptually distinct types of coverage, at a presumably higher rate than would be charged for one type of coverage, if both types of coverage do not actually exist. Furthermore, the fact that a single premium is charged for two types of coverage is not determinative.[32]

Given the policy limits elected by the decedent, UIM coverage was illusory as the full limits for both UM and UIM benefits could not be collected under the policy. This is not, as implied by Foremost, a matter of overlapping coverage because under this policy the decedent could not ever have received or collected UIM benefits.

"We have defined an illusory contract as one where 'a premium was paid for coverage which would not pay benefits under any reasonably expected set of circumstances.' "[33] Foremost attempts here to superimpose factually distinguishable or separate situations recognized in caselaw and assert that they are interchangeable. Contrary to Foremost's position, an inherent distinction exists between those cases that recognize a possibility of recovering UIM benefits under a policy,

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[30] *Ellifson*, 312 Wis 2d at 674 (citation omitted).

[31] *Western Reserve Mut Cas Co v Holland*, 666 NE2d 966, 969 (Ind App, 1996).

[32] *Id.*

[33] *Gillund v Meridian Mut Ins Co*, 323 Wis 2d 1, 18; 778 NW2d 662 (Wis App, 2009), citing *Link v Gen Cas Co of Wisconsin*, 185 Wis 2d 394, 400; 518 NW2d 261 (Wis App, 1994).

albeit very slight,[34] and the situation here in which there is no possibility of recovering UIM benefits, only UM benefits. The trial court was not persuaded by Foremost's contention that as long as the policy guaranteed that the decedent would receive the contracted-for amount of protection (whether from Foremost or another insurer), it could not be interpreted as illusory. This argument is merely the use of smoke and mirrors. Caselaw does exist indicating that "[a] guarantee by [the insurer] of a minimum recovery is not an illusory protection, nor is it harsh to enforce a contract between an insurer and insured that guarantees [the] insured will recover, from some source, the amount of insured's damage up to the limit of UIM coverage."[35] Foremost ignores, however, that the insured is not, by the terms of its own policy, collecting UIM benefits, but is only eligible to receive UM benefits, making such cases factually distinguishable.

Foremost contends that the bundling of UM and UIM coverage in the policy with the payment of an unallocated premium is contrary to the trial court's finding that decedent was charged a separate amount within the premium for UIM coverage. Although the policy does not separate out specific premium amounts to reflect UM versus UIM coverage, the consideration and inclusion of both types of losses in determining the base rate to set premiums necessarily implies that some portion of the overall premium is influenced by and attributable to UIM coverage. This is consistent with the testimony of Foremost's employee, Randall C. Sellhorn, who described the process by which base rates and premiums are determined by considering the ag-

[34] For example, see *Vincent v Safeco Ins Co of America*, 136 Idaho 107, 112; 29 P3d 943 (2001).

[35] *Melton v Country Mut Ins Co*, 75 SW3d 321, 327 (Mo App, 2002).

gregation of losses incurred for both UM and UIM coverage pertaining to motorcycles in Michigan.

Further, whether the decedent "*actually* paid a premium for underinsurance is irrelevant."[36] Because the declarations page of the policy suggested that the premium encompassed UIM coverage in addition to or along with UM coverage, the decedent "could reasonably believe that his insurance premium payment included some charge for underinsurance."[37] As noted previously, "the fact that a single premium is charged for two types of coverage is not determinative."[38]

Foremost also takes issue with the trial court's award to Ile of an unspecified amount to a maximum of $20,000 of underinsurance for damages incurred exceeding the $20,000 already received from another insurer. There are two recognized, but conflicting, theories pertaining to "the purpose and function of UIM coverage."[39] Specifically,

> [u]nder the first theory, the purpose of UIM coverage is to compensate an insured accident victim when the insured's damages exceed the recovery from the at-fault driver (or other responsible party). According to this theory, UIM coverage operates as a separate fund, available for the payment of the insured's uncompensated damages. . . .
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> The second theory is that "the purpose of underinsured motorist coverage is solely to put the insured in the same position as he [or she] would have occupied had the tortfeasor's liability limits been the same as the underinsured motorist limits purchased by the insured." Under this theory, UIM coverage operates as a predetermined,

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[36] *Landis v American Interinsurance Exch*, 542 NE2d 1351, 1354 n 1 (Ind App, 1989).

[37] *Id.*

[38] *Western Reserve*, 666 NE2d at 969.

[39] *Badger Mut Ins Co v Schmitz*, 255 Wis 2d 61, 70; 647 NW2d 223 (2002).

> fixed level of insurance coverage including payment from both the at-fault driver's liability insurance and the insured's own UIM coverage.[40]

As a result,

> [n]ot surprisingly, in virtually every case, the insurer has asserted that UIM coverage functions as a predetermined, fixed level of insurance coverage including payment from both the at-fault driver's liability insurance and the insured's own UIM coverage, and the reducing clause reduces the limit of UIM liability. Correspondingly, in virtually every case, the insured has asserted that UIM coverage is intended as excess coverage available when an insured's damages exceed the recovery from the at-fault driver, and the reducing clause decreases the insured's covered damages.[41]

In similar cases, courts have fashioned a remedy consistent with that of this trial court premised on the concept that policy provisions should be enforced in order "to give effect to the reasonable expectation of the insured."[42] Because it would have been reasonable for the decedent to believe that he had $20,000 of UIM coverage under the policy, damages exceeding the amount remitted by the tortfeasor's policy, up to the $20,000 limit of the decedent's UIM coverage, "should be paid by the insurer."[43] This result does not run afoul of the disfavor of use of the reasonable-expectations doctrine given the violation of public policy by this insurance policy because it is illusory.

The trial court's resolution was not inconsistent with the restrictive clauses in the policy. Specifically, with regard to the UIM coverage, the policy provides:

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[40] *Id.* at 70-71 (citations omitted; alteration in original).

[41] *Id.* at 72.

[42] *Landis*, 542 NE2d at 1354.

[43] *Western Reserve*, 666 NE2d at 968, citing *Landis*, 542 NE2d at 1353-1354.

LIMIT OF LIABILITY

A. The limit of liability shown . . . is our maximum limit of liability for all damages . . . . sustained by any one person in any one accident . . . .

B. The limit of liability shall be reduced by all sums paid because of the 'bodily injury' by or on behalf of persons or organizations who may be legally responsible . . . .

C. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage . . . .

D. We will not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible.

In addition, the policy contains the following provision pertaining to UIM coverage:

OTHER INSURANCE

If there is other applicable insurance available under one or more policies or provisions of coverage that is similar to the insurance provided by this endorsement:

1. Any recovery for damages under all such policies or provisions of coverage may equal but not exceed the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.

* * *

3. If the coverage under this policy is provided:

a. On a primary basis, we will pay only our share of the loss that must be paid under insurance providing coverage on a primary basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage provided on a primary basis.

b. On an excess basis, we will pay only our share of the loss that must be paid under insurance providing coverage on an excess basis. Our share is the proportion that our

> limit of liability bears to the total of all applicable limits of liability for coverage provided on an excess basis.

The trial court's resolution was consistent with the policy language as the court did not require Foremost to remit a duplicate payment for damages already compensated by another insurer. Rather, the trial court treated the policy as only providing additional or excess coverage, dependent on Ile's proofs, that damages exceeded the payments already remitted by Titan and restricted to a possible maximum in accordance with the $20,000 limits of the policy. This was consistent with the policy language precluding duplicate payments for "any element of loss for which payment has been made under this coverage" and the imposition of liability only attributable to Foremost's "share of the loss," which is defined as "the proportion that our limit of liability bears to the total of all applicable limits."

Finally, we address the amicus curiae brief filed by the Insurance Institute of Michigan. The institute posits two issues for consideration: (a) that the determination that a policy is illusory does not constitute a basis for the imposition of the judicial remedy of contract reformation and (b) that the trial court could not rely on extrinsic evidence, such as the deposition statements of Foremost's agent, Sellhorn, to invalidate an unambiguous policy. At the outset, we can dispose of this second argument by noting the reasoning and language of the trial court in finding the contract at issue to be illusory. The written opinion of the trial court clearly delineated that the basis for its determination that the contract was illusory was premised solely on the actual language of the contract that served to preclude the possibility of any situation arising that would have permited the decedent, under this policy, to ever be eligible to receive UIM benefits. The trial court referred

to Sellhorn's testimony only to address Foremost's contention that the bundling of the UIM and UM coverage precluded a finding that the contract was illusory, not to actually determine the illusory nature of the contract.

With regard to the first argument, we note that the institute's primary premise contesting the trial court's ruling is that it constituted a reformation of the contract infringing on the authority of the Commissioner of the Office of Financial and Insurance Regulation to approve insurance contract language. To the extent that the institute is raising a jurisdictional issue, it is contrary to the Michigan Rules of Court governing appellate briefs.[44] This jurisdictional argument is precluded because an amicus curiae brief "is limited to the issues raised by the parties."[45] Since this argument was not raised by either Foremost or Ile, we need not address it as it improperly expands the scope of the appeal.

In its reply brief Foremost seeks to "agree[] . . . and incorporate[] by reference the two arguments advanced" by the institute. We find this to comprise both a lazy and sloppy effort on the part of Foremost's counsel because they never raised the argument themselves and made only a cursory attempt to discuss the issues presented by the institute. In effect, Foremost simply closes its eyes and hopes that the institute's aim is accurate. We also find it to be deceptive on the part of Foremost to so belatedly attempt to incorporate these arguments, particularly in this manner, as only Ile was permitted by this Court to submit a reply to the institute's brief.[46] Foremost's attempt to ride the coat-

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[44] MCR 7.212(H)(2).

[45] *Id.*

[46] *Ile Estate v Foremost Ins Co*, unpublished order of the Court of Appeals, entered December 15, 2010 (Docket No. 295685).

tails of the institute by inappropriately seeking to incorporate the contents of the amicus curiae brief, without either having raised those same issues or procuring permission to even respond to the institute's brief, is unacceptable to this Court.

Because of our concerns regarding the manner in which the issue was raised, we remanded the matter to the trial court for an opportunity to evaluate the position asserted by the institute.[47] Specifically, we afforded the trial court the opportunity to address the institute's argument that a recent holding of our Supreme Court[48] "requires enforcement of the insurance contract as written." Following supplemental briefing by the parties, the trial court engaged in additional fact finding and determined:

> [T]he underinsured motorist (UIM) provisions in the . . . deceased's policy were drafted and supplied for [Foremost's] use by the Insurance Services Office, Inc., (ISO) a professional consulting and supporting organization that serves insurers throughout the United States. [Foremost] used the UIM language only after it was informed that it had been submitted to the OFIR and had been authorized for use in Michigan automobile policies.

The trial court found recent decisions by our Supreme Court applicable and stated that caselaw required the court to "construe and apply an unambiguous contract provision as written unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract."[49] The trial court determined that the illusory nature of the contract constituted a valid de-

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[47] *Ile Estate v Foremost Ins Co*, unpublished order of the Court of Appeals, entered May 10, 2011 (Docket No. 295685).

[48] *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005).

[49] Citing *id.* at 461, 470; *McDonald v Farm Bureau Ins Co*, 480 Mich 191; 747 NW2d 811 (2008).

fense to its enforcement and that the defense was an exception to the requirement that an unambiguous contract be enforced as written. This Court concurs.

Addressing the enforceability of shortened limitations periods in insurance contracts, our Supreme Court noted:

> [I]nsurance policies *are* subject to the same contract construction principles that apply to any other species of contract. . . . [U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written.
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> * * *
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> [I]n addition to these traditional contract principles, . . . the Legislature has enacted a statute that permits insurance contract provisions to be evaluated and rejected on the basis of "reasonableness." The Legislature has explicitly assigned this task to the Commissioner of the Office of Financial and Insurance [Regulation] (Commissioner) rather than the judiciary. The Commissioner has allowed the . . . insurance policy form to be issued and used in Michigan.[50]

Specifically, the Court indicated "that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions."[51] The Court opined that any other outcome would be " 'contrary to the bedrock principle of American contract law that parties are free to con-

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[50] *Rory*, 473 Mich at 461.

[51] *Id.*

tract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy.' "[52] Yet while the Court determined that "[a] mere judicial assessment of 'reasonableness' " constituted "an invalid basis upon which to refuse to enforce contractual provisions," it continued to recognize that "traditional contract defenses may be used to avoid the enforcement of [a] contract provision."[53] This is the distinction on which the trial court relied. In ruling that the UIM coverage provision in this case was unenforceable, the trial court based its finding on its determination that the provision was subject to the traditional contract defense of constituting an illusory promise.

As discussed by our Supreme Court, we recognize that "the Legislature has assigned the responsibility of evaluating the 'reasonableness' of an insurance contract to the person within the executive branch charged with reviewing and approving insurance policies: the Commissioner of [the Office of Financial and] Insurance [Regulation]."[54] Consequently, "courts have a very limited scope of review concerning the decisions made by the Commissioner," and "the explicit 'public policy' of Michigan is that the reasonableness of insurance contracts is a matter for the executive, not judicial, branch of government."[55] But this preclusion is not relevant in this instance, as the trial court based its determination regarding enforceability not on the con-

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[52] *Id.* at 469, quoting *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

[53] *Rory*, 473 Mich at 470.

[54] *Id.* at 475; see also MCL 500.2236; *Ulrich v Farm Bureau Ins*, 288 Mich App 310, 317-318; 792 NW2d 408 (2010), citing *Rory*, 473 Mich at 468-469, 474-475.

[55] *Rory*, 473 Mich at 475-476.

cept of "reasonableness," but on the applicability of the contractual defense of an illusory promise. Recognized as an affirmative defense, "[a]n illusory promise is one where the promisor is 'not obligated to do anything in consideration of' the other party's promise or performance."[56] "With an illusory promise, a purported contract will lack the necessary mutual obligation."[57]

The institute's reliance on the cited decisions of our Supreme Court is misplaced and seeks to expand the actual holdings to permit the commissioner's determination to encompass or supersede all challenges to contract validity, not simply those premised on the concept of "reasonableness." As noted within the very case relied on by the institute, "[a] party may avoid enforcement of a[] . . . contract only by establishing one of the traditional contract defenses . . . ."[58] This distinction recognizes the lines drawn by the Legislature's assigning responsibility for evaluating the reasonableness of insurance contracts while balancing the obligation of the judiciary to adhere to the principles of law involving the freedom to contract and the enforceability of unambiguous contractual language. The trial court's reasoning and ruling do not violate this dichotomy.

Affirmed.

STEPHENS, J., concurred with TALBOT, J.

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

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[56] *Amerisure Mut Ins Co v Carey Transp, Inc*, 578 F Supp 2d 888, 921 (WD Mich, 2008); see also *Mastaw v Naiukow*, 105 Mich App 25, 29; 306 NW2d 378 (1981).

[57] *Amerisure Mut*, 578 F Supp 2d at 921, citing *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005).

[58] *Rory*, 473 Mich at 489.

EDW C LEVY CO v MARINE CITY ZONING BOARD OF APPEALS

Docket No. 296023. Submitted May 4, 2011, at Detroit. Decided July 19, 2011, at 9:00 a.m.

The St. Clair County Road Commission entered into a five-year lease of property it owns on the St. Clair River with Detroit Bulk Storage in August 2007. In 1999, Marine City had rezoned the property from I-2 to a waterfront recreation and marine classification. The property had retained its industrial status as a prior nonconforming use and the road commission had continued to use it for the storage and distribution of aggregate, rock salt, and calcium chloride. A condition of the lease required Detroit Bulk Storage to obtain a business license from Marine City. In order to obtain a license, the city manager was required to certify that the proposed use was allowed under the zoning ordinance or constituted a prior nonconforming use. The city manager certified that the proposed use was allowed and the Marine City Commission granted Detroit Bulk Storage a conditional business license. Edw. C. Levy Co. and Levy Indiana Slag Co., doing business as St. Clair Aggragates (collectively "SCA"), which had unsuccessfully sought to lease the property from the road commission, filed an appeal with the five-member Marine City Zoning Board of Appeals, seeking a review of the city manager's certification of the proposed use of the property. The zoning board of appeals, by a three-to-two vote, denied SCA's appeal and affirmed the city manager's decision in March 2008. SCA appealed the decision of the zoning board of appeals in the St. Clair Circuit Court. The court, Peter E. Deegan, J., allowed the road commission and Detroit Bulk Storage to intervene in the action. The court held that one of the members of the zoning board of appeals, who was also a member of the Marine City Commission, should have recused himself from voting. The court vacated the March 2008 decision of the zoning board of appeals and remanded the matter to the zoning board of appeals for a new vote based on the same record made before the board at its March 2008 hearing. A new hearing and vote occurred on June 3, 2009. Only three members were present at the meeting and the board voted two-to-one to reverse the city manager's decision and grant SCA's appeal. SCA filed an amended claim of appeal in the circuit court, incorporating the June 2009 ruling of the zoning

board of appeals. The court ruled that MCL 125.3603(2) required a majority of the members of the zoning board of appeals, not just a majority of those present when a vote is taken, to agree in order to overturn the city manager's decision. The court, noting that the June 2009 vote to overturn the city manager's decision had been by only two members of the zoning board of appeals, held that the city manager's decision was still effective. The court considered the record produced by the zoning board of appeals and affirmed the zoning board of appeals' decision affirming the city manager's decision. The Court of Appeals, BORRELLO, P.J., and O'CONNELL and M. J. KELLY, JJ., denied leave to appeal in an unpublished order, entered May 3, 2010 (Docket No. 296023). The Supreme Court, in lieu of granting leave to appeal, remanded the matter to the Court of Appeals for consideration as on leave granted. 488 Mich 868 (2010).

The Court of Appeals *held*:

1. The unambiguous language of MCL 125.3603(2) requires a majority of the members of the zoning board of appeals to reverse the certification granted by the city manager. Three out of the five members of the board had to vote to reverse the certification. The vote of two members to reverse the certification was not sufficient. The circuit court properly interpreted the statute.

2. The circuit court did not err by holding that substantial evidence supported the decision of the zoning board of appeals to deny SCA's appeal. There was no competent evidence that Detroit Bulk Storage's use of the property would be an expansion, extension, or enlargement of the nonconforming use of the property. The decision of the zoning board of appeals was supported by substantial evidence.

Affirmed.

ZONING — ZONING BOARD OF APPEALS — VOTING REQUIREMENTS FOR DETERMINATIONS — MAJORITY OF THE MEMBERS OF ZONING BOARD OF APPEALS.

The provision of the Zoning Enabling Act that provides that the "concurring vote of a majority of the members of the zoning board of appeals is necessary to reverse an order, requirement, decision, or determination of the administrative official or body, to decide in favor of the applicant on a matter upon which the zoning board of appeals is required to pass under the zoning ordinance, or to grant a variance in the zoning ordinance," unambiguously requires a majority of the members of the zoning board of appeals to concur; concurrence by a majority of the members present at the time the vote is taken but by less than a majority of the total number of members of the board is insufficient (MCL 125.3603[2]).

Berry Reynolds & Rogowski PC (by *Susan K. Friedlaender*) for Edw. C. Levy Co. and Levy Indiana Slag Co.

Kane, Clemons, Joachim and Downey (by *George J. Joachim*) for the Marine City Zoning Board of Appeals.

Fletcher Fealko Shoudy & Francis, P.C. (by *Gary A. Fletcher* and *T. Allen Francis*), for the St. Clair County Road Commission.

Musilli Brennan Associates, PLLC (by *Gary E. Gendernalik*), for Detroit Bulk Storage.

Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM. The Michigan Supreme Court has remanded this case for consideration as on leave granted.[1] Appellants, Edw. C. Levy Co. and Levy Indiana Slag Co., doing business as St. Clair Aggregates (collectively "SCA"), challenge the circuit court's order reversing the decision of appellee, Marine City Zoning Board of Appeals. We affirm.

I. FACTS

The St. Clair County Road Commission (the "Road Commission") owns a 5.98 acre parcel on the St. Clair River in Marine City that it uses for the storage and distribution of aggregate, rock salt, and calcium chloride. In 1999, Marine City rezoned the property from I-2 to Waterfront Recreation and Marine. The property retained its industrial status as a prior nonconforming use.

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[1] *Edw C Levy Co v Marine City Bd of Zoning Appeals*, 488 Mich 868 (2010).

In 2007, SCA, who owns a deep-water port on adjacent property, approached the Road Commission with a proposal to purchase the Road Commission's river-front property. The Road Commission rejected the proposal, but determined that it could obtain additional revenue by leasing the property to a commercial operator. It published a request for proposals and received proposals from SCA and others. In August 2007, the Road Commission accepted a proposal from Detroit Bulk Storage and entered into a five-year lease of the property.

A condition of the lease was that Detroit Bulk Storage obtain a business license from Marine City. In order for Detroit Bulk Storage to obtain a business license under the city code, the city manager was required to certify that the proposed use was allowed under the zoning ordinance or constituted a prior nonconforming use. Although the city manager originally recommended rejection of the license application, in a November 2007 letter, he certified that the proposed use was allowed. Although the city commission had initially rejected the Detroit Bulk Storage application, it then granted Detroit Bulk Storage a conditional business license.

In January 2008, SCA filed an appeal with the five-member zoning board of appeals, seeking a review of the city manager's certification of the proposed use of the property. The zoning board of appeals held a hearing in March 2008, and denied SCA's appeal—affirming the city manager's decision—by a three-to-two vote. In May 2008, SCA appealed the zoning board of appeals' decision to the St. Clair Circuit Court. The circuit court did not address the merits of the appeal, but held that one of the zoning board of appeals members, who was also a member of the Marine City Commission, should

have recused himself from voting.[2] The circuit court vacated the zoning board of appeals' decision and remanded the matter to the zoning board of appeals for a new vote based on the same record made before the zoning board of appeals at the original March 2008 hearing.

The hearing and new vote by the zoning board of appeals occurred on June 3, 2009. Because of the circuit court's ruling, only four of the five zoning board of appeals members were eligible to vote, and only three members were present for the meeting. At the conclusion of the hearing, the zoning board of appeals voted two-to-one to reverse the city manager's decision and to grant SCA's appeal.

In July 2009, SCA filed an amended claim of appeal in the circuit court, incorporating the latest ruling of the zoning board of appeals. The circuit court ruled that, under MCL 125.3603(2), to prevail in its appeal of the city manager's decision, SCA was required to get votes from a majority of all the zoning board of appeals members, not just those present at the time the vote was taken. And, according to the circuit court, because SCA only received two votes, and not the required three, the city manager's decision was still effective. The circuit court further held that "[b]ased upon the record as produced by the [zoning board of appeals] it [was] clear . . . that each board member considered the facts presented in determining whether the use of the

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[2] MCL 125.3601(13) provides:

> A member of the zoning board of appeals who is also a member of the zoning commission, the planning commission, or the legislative body shall not participate in a public hearing on or vote on the same matter that the member voted on as a member of the zoning commission, the planning commission, or the legislative body. However, the member may consider and vote on other unrelated matters involving the same property.

Road Commission's property by [Detroit Bulk Storage] was an expansion of the pre-existing use." Therefore, the circuit court found that the zoning board of appeals' decision was supported by competent evidence on the record and was not an abuse of discretion. Accordingly, the circuit court affirmed the decision of the zoning board of appeals affirming the city manager's decision that the use was allowed by the zoning. In its final order, the circuit court stated, in relevant part, as follows:

> The 2-1 vote of the Marine City Zoning Board of Appeals on June 3, 2009 was not sufficient to overturn the City Manager's certification of zoning pursuant to which Detroit Bulk Storage was granted a business license as the vote was not supported by a majority of the five members of the Marine City Zoning Board of Appeals.

Meanwhile, at the time this matter was moving back and forth between the zoning board of appeals and the circuit court, the Road Commission filed a rezoning petition, which the Marine City Commission rejected. The Road Commission then filed a second petition for rezoning. A lengthy public hearing before the city commission was held in October 2009. The city commission thereafter granted the rezoning request with conditions, and the parcel is now zoned Heavy Industrial.

In January 2010, SCA filed its application for leave to appeal the circuit court's order. This Court denied the application,[3] and SCA then applied for leave to appeal in the Michigan Supreme Court. The Michigan Supreme Court, in lieu of granting leave to appeal, then remanded the case to this Court to consider as on leave granted.

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[3] Unpublished order of the Court of Appeals, entered May 3, 2010 (Docket No. 296023).

II. INTERPRETATION OF MCL 125.3603(2)

A. STANDARD OF REVIEW

SCA argues that the circuit court erred in its interpretation of MCL 125.3603(2). Statutory interpretation is a question of law that we consider de novo on appeal.[4]

B. LEGAL STANDARDS

MCL 125.3603(2) provides:

> The concurring vote of a majority of the members of the zoning board of appeals is necessary to reverse an order, requirement, decision, or determination of the administrative official or body, to decide in favor of the applicant on a matter upon which the zoning board of appeals is required to pass under the zoning ordinance, or to grant a variance in the zoning ordinance.

C. APPLYING THE LEGAL STANDARDS

The unambiguous language of MCL 125.3603(2) requires a majority of the members of the zoning board of appeals to reverse the certification granted by the city manager. Thus, three members out of the five members of the zoning board of appeals had to vote to reverse the city manager's certification. The vote of *two* members to reverse the city manager's certification at the June 3, 2009, hearing was simply insufficient to do that. Contrary to SCA's contentions, the statute is not ambiguous: "a majority of the members of the zoning board of appeals" means just that. Where there are five members, a majority of the members of the zoning board of appeals is three. The Legislature is capable of indicating when it intends a different result, such as in the state

[4] *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

construction code where it added the language "present at a meeting"[5] to allow the sort of quorum voting that SCA argues constituted a majority here. Accordingly, we conclude that the trial court did not err in its interpretation of MCL 125.3603(2).

III. SUBSTANTIAL EVIDENCE

A. STANDARD OF REVIEW

SCA argues that the circuit court erred by holding that the zoning board of appeals' decision to deny SCA's appeal was supported by substantial evidence. "This Court reviews de novo a [circuit] court's decision in an appeal from a city's zoning board, while giving great deference to the [circuit] court and zoning board's findings."[6]

B. LEGAL STANDARDS

A circuit court reviews the decision of a zoning board of appeals to ensure that it:

> (a) Complies with the constitution and laws of the state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
>
> (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals.[7]

" 'Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evi-

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[5] See MCL 125.1503a(2).

[6] *Norman Corp v East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004).

[7] MCL 125.3606(1).

dence, it may be substantially less than a preponderance."[8] Under the substantial-evidence test, the circuit court's review is not de novo and the court is not permitted to draw its own conclusions from the evidence presented to the administrative body. Courts must give deference to an agency's findings of fact.[9] When there is substantial evidence, a reviewing court must not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result.[10] A court may not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record.[11]

C. APPLYING THE LEGAL STANDARDS

We note that SCA first appears to argue that because only one vote was cast at the June 3, 2009, meeting in favor of the certification, that position bears a heavier burden of proof than it would if it were the majority position. However, SCA fails to recognize that only two votes were ever cast at the meeting against certification. Therefore, nothing more than the standard burden of "substantial evidence" is required.

Moreover, we conclude that the circuit court did not err by holding that substantial evidence supported the zoning board of appeals' denial of SCA's appeal. An existing nonconforming use is a vested right in the use of particular property that does not conform to zoning

[8] *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 72; 592 NW2d 724 (1998).

[9] *THM, Ltd v Comm'r of Ins*, 176 Mich App 772, 776; 440 NW2d 85 (1989).

[10] *Black v Dep't of Social Servs*, 195 Mich App 27, 30; 489 NW2d 493 (1992).

[11] *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994) (opinion by BOYLE, J.).

restrictions, but is protected because it lawfully existed before the zoning regulation's effective date.[12] Nonconforming uses may not generally be expanded, and one of the goals of local zoning is the gradual elimination of nonconforming uses.[13] The policy of the law is against the extension or enlargement of nonconforming uses, and zoning regulations should be strictly construed with respect to expansion.[14] The continuation of a nonconforming use must be substantially of the same size and the same essential nature as the use existing at the time of passage of a valid zoning ordinance.[15] Moreover, the nonconforming use is restricted to the area that was nonconforming at the time the ordinance was enacted.[16] Nonconforming use involves the physical characteristics, dimensions, or location of a structure, as well as the use of the premises.[17]

Here, there was no competent evidence that the traffic and hours of operation would, in fact, increase as a result of Detroit Bulk Storage's use. Although the lease anticipated that a certain minimum tonnage of materials would be stored and handled, whether this quantity would exceed what the Road Commission had used is, again, unsupported by any evidence. Neighbors stated there was more truck traffic, but whether these were Detroit Bulk Storage's trucks, Road Commission trucks, SCA's trucks, or some other vehicles was not documented. Likewise, although the lease stated the

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[12] *Belvidere Twp v Heinze*, 241 Mich App 324, 328; 615 NW2d 250 (2000).

[13] *City of Troy v Papadelis* (*On Remand*), 226 Mich App 90, 95; 572 NW2d 246 (1997).

[14] *Norton Shores v Carr*, 81 Mich App 715, 720; 265 NW2d 802 (1978).

[15] *Id.*

[16] *Id*.

[17] *Long Island Court Homeowners Ass'n v Methner*, 74 Mich App 383, 387; 254 NW2d 57 (1977).

hours of operation, there was no evidence that Detroit Bulk Storage fully used the available hours or that the hours of operation were any different from the Road Commission's hours of operation. SCA's argument asserts that there was an expansion of the hours of operation, but points to nothing other than the terms of the lease as evidence of expansion.

The lease involved contingencies, not facts, regarding the amounts of material to be processed there and the hours of operation. Counsel for Detroit Bulk Storage identified facts showing that the Road Commission had used the property for the bulk storage of materials such as stone and salt and that that was what Detroit Bulk Storage was using the land for; it was the same activity, only now being carried out by two different operators. There was no record of how many tons had been stored over the years, and Detroit Bulk Storage's acts to date had consisted only of putting down an asphalt drive and improving the wiring in a building. Nor was there evidence that the tonnage allowed under the lease would actually be a significant increase over the Road Commission's prior use. Accordingly, applying the definition of "substantial evidence," we conclude that the circuit court did not err by holding that the zoning board of appeals' decision was supported by such evidence.

We affirm.

WILDER, P.J., and WHITBECK and FORT HOOD, JJ., concurred.

REDMOND v VAN BUREN COUNTY

Docket No. 297349. Submitted July 7, 2011, at Grand Rapids. Decided July 21, 2011, at 9:00 a.m. Leave to appeal denied, 491 Mich 913.

In this case arising out of a land dispute, Robert Redmond, Thomas R. Tibble, and Patti L. Tibble, brought an action in the Van Buren Circuit Court against Van Buren County and others, seeking access to their properties in the Syndicate Park subdivision in South Haven Township. Redmond ultimately settled and was no longer a party. The Tibbles had purchased several lots in Syndicate Park in 1995. The Tibbles were able to access their undeveloped property through a gated access drive on Lots 1 through 4 of Block 21 of the subdivision. On September 4, 1956, Dwight and Alice Porter had attempted to convey Lots 1 through 4 of Block 21 to the Sand Haven Voluntary Association, and its members used the gated drive to access their properties. The Tibbles, however, were never invited to join the association. Nonetheless, the Tibbles were provided access through the gate by key from 1995 until either 2002 or 2003. In 2006, a new electronically operated gate was installed on the access drive. The Tibbles were not given either the remote or the code necessary to operate the gate. Because the Tibbles were no longer able to use the gate, they were unable to access their property from a developed road. The Tibbles sought to open access through undeveloped roads in the subdivision, but permission was refused by the Department of Environmental Quality. In the suit, the Tibbles asserted that they had a right to access their property through the gated drive by way of easement by prescription, implication, or necessity. In an amended complaint, the Tibbles asserted that the Porters' conveyance of Lots 1 through 4 to the Sand Haven Voluntary Association created either a public or private dedication, and thus an easement, over Lots 1 through 4. Following a bench trial, the court, William C. Buhl, J., entered a judgment of no cause of action. The court found that there was no basis to find title by conveyance in the association or its individual members, that there had been no public dedication of the access lots, but that the named individual defendants could claim a private dedication from the Porters for their benefit in light of the their use and maintenance of the access drive for more than fifteen years. It also found that the Tibbles had not so used the drive for fifteen years and had no easement. The Tibbles appealed.

The Court of Appeals *held*:

1. The requirements for a public common-law dedication also apply to a private common-law dedication. Those requirements are an intent to dedicate, acceptance and maintenance, and use. In this case, the Porters' deed to the Sand Haven Voluntary Association demonstrated that they intended to dedicate Lots 1 through 4 for private use. The evidence established that individuals in the subdivision accepted, maintained, and used the lots in accordance with that intent. Accordingly, the trial court did not err when it found that the Porters' failed conveyance to the association created an irrevocable easement in the lots by virtue of a private dedication.

2. The grantor's intent controls the scope of the dedication. For a common-law dedication, such intent can be gathered from all of the facts and circumstances bearing on the question. The facts of this case demonstrated that the Porters intended to dedicate the use of Lots 1 through 4 to all lot owners in Syndicate Park whose only means of accessing their property by land was through Lots 1 through 4. Notably, the Tibbles' predecessor in interest had key access through the gate and the Tibbles had access through the gate until at least 2002, indicating that all landowners in the subdivision, regardless of their membership status with the Sand Haven Voluntary Association, used Lots 1 through 4 for access until the association required its members to pay dues in 2002 or 2003. Accordingly, the Tibbles, like the individual named defendants had an easement in Lots 1 through 4 by virtue of the Porters' private dedication and the defendants cannot prevent the Tibbles from using their easement.

Reversed and remanded.

1. PROPERTY — COMMON-LAW DEDICATION — PRIVATE — REQUIREMENTS.

As with a public common-law dedication of land, a private common-law dedication of land requires: (1) an intent of the owners of property to offer the property for use to the private individuals, (2) acceptance of the owners' offer and maintenance of the property by the private individuals, and (3) use of the property by the private individuals.

2. PROPERTY — COMMON-LAW DEDICATION — PRIVATE — SCOPE — GRANTOR'S INTENT.

The grantor's intent controls the scope of a private common-law dedication of land; for a common-law dedication, that intent can be gathered from all of the facts and circumstances bearing on the question.

Hann Persinger, P.C. (by *Richard D. Persinger*), for Thomas R. and Patti L. Tibble.

Schuitmaker, Cooper, Schuitmaker, Cypher & Knotek, P.C. (by *Harold Schuitmaker*), for Van Buren County.

Kelly L. Page for the Sand Haven Shores Homeowners Association, Walter W. Goodrich, and others.

Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM. Plaintiffs Thomas and Patti Tibble[1] appeal as of right the trial court's order dismissing the Tibbles' cause of action. This case arises out of a land dispute regarding the Tibbles' right to access their property located in Block 20 of the Syndicate Park subdivision (Syndicate Park). The Tibbles own five lots within Syndicate Park and are seeking to access those lots via Lots 1 through 4 of Block 21, upon which there is a locked gate. We reverse.

I. FACTS

Syndicate Park is in South Haven Township, Michigan. The west side of Syndicate Park abuts Lake Michigan. St. Joseph Avenue is a jagged road that runs roughly north/south, lies to the east of the subject parcels, and is an unimproved road with a gravel base. Drexel Boulevard runs east/west, north of Block 21 and south of Block 20. Lakeside Avenue runs parallel to Drexel Boulevard, north of Block 20 and south of Block 19. Both Lakeside Avenue and Drexel Boulevard are described as undeveloped, "heavily wooded," and "pretty rugged." Testimony indicated that it would be

[1] Plaintiff Robert Redmond reached a settlement and is no longer a party to these proceedings.

"challenging" and "expensive" to open Drexel Boulevard and, although opening Lakeside Avenue would not be as challenging, it did have one area of a "steep loft."

According to defendant Paul Hemmeter, the only way to get a vehicle to Blocks 19, 20, and 21 is to go through the gate at Lots 1-4 of Block 21. After passing through the gate, two drives originate on Lots 1-4 of Block 21. The first drive goes west through the properties of Block 21 (the properties of defendants Walter Goodrich, Darren and Lara Malek, Steve Evans, and Richard Shields) and then intersects Drexel Boulevard, thus, providing access to the properties of Goodrich, Malek, Evans, Shields, and defendant Steven Dombrauskas. The second drive goes northwest through Lots 1-4 of Block 21 and intersects Drexel Boulevard.

On September 4, 1956, Dwight and Alice Porter conveyed Lots 1-4 of Block 21 of Syndicate Park to defendant Sand Haven Voluntary Association.

In 1971, defendants Edward and Alice Palmer purchased a home in Syndicate Park on Lots 13-19 and 62-68 in Block 20. At the time of their purchase, there was a padlocked gate on Lots 1-4 in Block 21. A "roadway" went through the gate. According to Edward Palmer, he was uncertain whether Syndicate Park had a homeowners' association when he purchased his property. However, he began to pay membership dues to the Sand Haven Voluntary Association in either 2002 or 2003.

In 1987, defendant Steve Evans purchased several groups of lots for a seasonal home in Syndicate Park, including Lots 20-29 in Block 21. According to Evans, he was a member of the Sand Haven Voluntary Association, and he paid membership dues. Indeed, at one time, Evans was the Sand Haven Voluntary Association's treasurer. As the treasurer, Evans received tax

bills for Lots 1-4 in Block 21 because he "never could get the county to make . . . the taxes to the association." Evans paid the taxes with "association money."

In February 1988, defendant Paul Hemmeter purchased a home in Syndicate Park on Lots 26-55 in Block 20. At the time of his purchase, there was a small metal gate with a lock and pin on Lots 1-4 of Block 21. According to Hemmeter, each member of the Sand Haven Voluntary Association had a key to the gate. In 1990, Hemmeter purchased Lots 69-72 in Block 20 and also lots in Block 19.

According to Hemmeter, there was a "common understanding" that all members of the Sand Haven Voluntary Association could use the drives. Moreover, Hemmeter stated that he became a member of the Sand Haven Voluntary Association because he purchased his property from a member of association. Indeed, according to defendants, membership in the Sand Haven Voluntary Association transferred automatically when a member of the Sand Haven Voluntary Association transferred title to property in Syndicate Park.

In 1995, the Tibbles purchased Lots 8-12, 21-25, and 56-61 in Block 20 of Syndicate Park. At the time of purchase, the seller of the property provided the Tibbles with a key to the gate on Lots 1-4 of Block 21. According to Thomas, the lock on the gate would periodically change. Either Evans or the property caretaker would provide the Tibbles with a new key. According to Thomas, the Sand Haven Voluntary Association did not ask him to become a member. The Tibbles did not receive correspondence from the Sand Haven Voluntary Association or pay dues. The Tibbles later sold Lots 21-25 and 56-61 to Robert Redmond but retained Lots 8-12. In either 2002 or 2003, the Tibbles were no longer provided a key to the gate.

In May 2006, Evans applied for a permit to install a new gate on Lots 1-4 of Block 21. During the summer of 2006, an electronically operated cantilever gate was installed. The gate could be opened in two ways: either by entering a code on a keypad or by remote control. All members of the Sand Haven Voluntary Association received remote controls and a permanent code. Utility companies received a semipermanent code. And guests of members of the Sand Haven Voluntary Association received a temporary code, which changed every few months. The Tibbles, however, did not receive access through the gate. According to Thomas Tibble, the Tibbles therefore no longer had access to their property in Syndicate Park.

On August 29, 2006, Dombrauskas filed articles of incorporation for the Sand Haven Shores Homeowners Association. The articles listed Dombrauskas as the Sand Haven Shores Homeowners Association's agent. The articles stated that the purpose of the Sand Haven Shores Homeowners Association was to provide for routine maintenance and upkeep of property.

According to Hemmeter, the Sand Haven Shores Homeowners Association consisted of the following families: Hemmeter, Goodrich, Evans, Shields, Dombrauskas, Atkinson, and Palmer. Hemmeter testified that there were no written procedures governing how a person became a member of the Sand Haven Voluntary Association or how a person becomes a member of the Sand Haven Shores Homeowners Association. Nonetheless, Hemmeter testified that nonmembers who purchased property from members could become members of the Sand Haven Shores Homeowners Association by paying a $1,500 transfer fee. And, according to defendants, nonmembers who purchased property from nonmembers could become members of the Sand Haven

Shores Homeowners Association by paying an initiation fee. The amount of the initiation fee was to be determined by the Sand Haven Shores Homeowners Association. Moreover, according to Hemmeter, the Sand Haven Shores Homeowners Association had annual $600 membership dues.

In 2006 and 2007, the Maleks purchased Lots 9-19 in Block 21 of Syndicate Park. The Maleks paid the $1,500 transfer fee to become members of the Sand Haven Shores Homeowners Association and to access their property. The Maleks paid additional membership dues in 2007 and 2008 of $600 and $700 respectively.

According to Thomas Tibble, the Sand Haven Shores Homeowners Association did not ask him to become a member. The Tibbles did not receive correspondence from the Sand Haven Shores Homeowners Association or pay dues to the homeowners' association. Hemmeter confirmed that the Tibbles were not offered membership to the Sand Haven Shores Homeowners Association.

The Tibbles applied to the Department of Environmental Quality to open access to Lakeside Avenue and Drexel Boulevard from St. Joseph Avenue. But the Department denied the Tibbles' request.

On September 13, 2007, the Tibbles sued defendants to obtain access to their property in Syndicate Park through the electronic gate. The Tibbles hope eventually to build a home on their property in Syndicate Park. The Tibbles claimed an easement in the private drive entering Syndicate Park through the gate on Lots 1-4 under the theories of prescription, implication, and necessity.

After the plaintiffs proofs were presented at the July 2008 bench trial, the trial court determined that the Sand Haven Voluntary Association was a necessary party that had not been included as a defendant in the

case. Accordingly, the trial court directed the Tibbles to add Sand Haven Voluntary Association as a defendant. The trial court also granted defendants' motion to dismiss the counts of the Tibbles' complaint claiming an easement by implication and necessity.

The Tibbles filed an Amended and Restated Complaint, adding Sand Haven Voluntary Association and the unknown heirs of the Porters as defendants. The Tibbles' complaint retained their claim of an easement by prescription. However, the Tibbles' added two counts, claiming that the Porter's conveyance of Lots 1-4 to the Sand Haven Voluntary Association created either a public or a private dedication and, thus, an easement over Lots 1-4.

After a second bench trial proceeding, the trial court issued an opinion and order. With respect to Lots 1-4, the trial court opined that it had "no basis to find title by conveyance in the [Sand Haven Shores Homeowners Association] or its individual members." The trial court also opined that the Porters did not make a public dedication of Lots 1-4. However, the trial court found that defendants could "claim a private dedication for their benefit . . . from the Porters" because they used and maintained Lots 1-4 and erected the gates. The trial court noted that the individual defendants and their predecessors traveled Lots 1-4 for more than 15 years, but the Tibbles did not. The trial court also viewed the Porters' deed to the Sand Haven Voluntary Association as acquiescence to the defendants' use. The trial court summarized its conclusion as follows:

> It is the conclusion of the Court that the individual Defendants have, by private dedication by means of the Porters' deed, and/or by prescription and/or acquiescence an easement over Lots 1-4, Block 21 of South Haven Syndicate Park Sub-Division, and that the Plaintiffs have no such an [sic] easement.

The trial court entered a judgment of no cause of action and specifically found that defendants had the right to erect and maintain the gate at Syndicate Park. The Tibbles now appeal the trial court's judgment.

II. PRIVATE DEDICATION

A. STANDARD OF REVIEW

The Tibbles argue that the trial court erred by determining that the individual defendants and the Sand Haven Shores Homeowners Association acquired a right by private dedication to access their lots in Syndicate Park, while holding that the Tibbles were not included in that private dedication. This Court reviews a trial court's findings of fact following a bench trial for clear error and reviews de novo the trial court's conclusions of law.[2]

B. LEGAL PRINCIPLES

Michigan law recognizes both public and private dedications.[3] Traditionally, a public dedication was understood as "an appropriation of land to some public use, accepted for such use by or in behalf of the public."[4] Public dedications can be either statutory dedications or common-law dedications.[5] " 'The effect of a [public] dedication under [a] statute has been to vest the fee in

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[2] *Heeringa v Petroelje*, 279 Mich App 444, 448; 760 NW2d 538 (2008).

[3] See *Little v Hirschman*, 469 Mich 553, 557-563; 677 NW2d 319 (2004) (recognizing the validity of private dedications); *Badeaux v Ryerson*, 213 Mich 642, 646-647; 182 NW 22 (1921) (recognizing the validity of public dedications).

[4] *Clark v Grand Rapids*, 334 Mich 646, 656-657; 55 NW2d 137 (1952); see also *Little*, 469 Mich at 557 n 4.

[5] *Boone v Antrim Co Bd of Rd Comm'rs*, 177 Mich App 688, 693; 442 NW2d 725 (1989); see also *Little*, 469 Mich at 557 n 4.

the county, in trust for the municipality intended to be benefited, whereas, at common law, the act of dedication created only an easement in the public.' "[6] "Generally, a valid statutory dedication of land for a public purpose requires two elements: (1) a recorded plat designating the areas for public use; and (2) acceptance by the proper public authority."[7] A valid common-law dedication of land to the public requires the following elements: (1) an intent of the owners of property to offer the property to the public for use, (2) acceptance of the owners' offer by public officials and maintenance of the property by public officials, and (3) use of the property by the public generally.[8] "Neither a grant nor written words are necessary to render the act of dedicating land to public uses effectual at common law; intent to dedicate can be gathered from the circumstances."[9] As the Michigan Supreme Court recently stated, "With regard to an intention to dedicate, all facts and circumstances bearing on the question are considered."[10]

With respect to private dedications, the Michigan Supreme Court, in the cases of *Little v Hirschman*[11] and *Martin v Beldean*,[12] conducted an extensive analysis discussing the origins and this state's acceptance of private dedications. When discussing private dedica-

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[6] *Little*, 469 Mich at 557 n 4, quoting *Village of Grandville v Jenison*, 84 Mich 54, 65; 47 NW 600 (1890).

[7] *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 113; 662 NW2d 387 (2003).

[8] *Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958).

[9] *DeWitt v Roscommon Co Rd Comm*, 45 Mich App 579, 581; 207 NW2d 209 (1973).

[10] *2000 Baum Family Trust v Babel*, 488 Mich 136, 148; 793 NW2d 633 (2010).

[11] *Little*, 469 Mich at 557-563.

[12] *Martin v Beldean*, 469 Mich 541, 546-548; 677 NW2d 312 (2004).

tions, the Court did not make an explicit distinction between statutory and common-law dedications. However, the Court noted that courts of this state had recognized private dedications before private dedications were first statutorily recognized in the 1925 plat act[13] and later again in the Land Division Act,[14] i.e., the plat act of 1967.[15] With regard to private dedications from 1835 to 1966, the Court stated that such dedications of land "in a recorded plat" gave the grantees of the private dedications "at least an irrevocable easement in the dedicated land."[16] And, with regard to private dedications "in [a] plat" after the effective date of the Land Division Act—January 1, 1968—the Court stated that such a private dedication conveyed a fee interest.[17] Thus, on the basis of *Martin* and *Little*, this Court has opined that a private dedication in a plat made before January 1, 1968, conveys an irrevocable easement, whereas a private dedication in a plat after January 1, 1968, conveys a fee interest.[18] There does not appear to be any legal authority addressing private dedications that are not in a plat, that is, private dedications that are akin to common-law public dedications.

In a 1921 case, the Michigan Supreme Court determined that a common-law public dedication arose out of a deed—which the Court determined to be void—that attempted to convey property to a nonlegal entity.[19] In *Badeaux v Ryerson*, Louis Badeaux conveyed by war-

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[13] 1925 PA 360.

[14] MCL 560.101 *et seq*.

[15] *Little*, 469 Mich at 559; *Martin*, 469 Mich at 546-548.

[16] *Little*, 469 Mich at 561-562, 564.

[17] *Martin*, 469 Mich at 547-549.

[18] *Beach v Lima Twp*, 283 Mich App 504, 510; 770 NW2d 386 (2009).

[19] *Badeaux*, 213 Mich at 646-647.

ranty deed a parcel of land known as the "Indian burying ground" to the "Ottawa Tribe of Indians" in 1841.[20] After the conveyance, Indians, Badeaux's heirs, and others were buried on the land, which was enclosed with a fence and marked with a large white cross.[21] In 1853 and 1856, however, Badeaux conveyed the same land to other persons, who then conveyed the land to the defendant.[22] The defendant and the heirs of Badeaux (the plaintiffs) both asserted that the 1841 conveyance to the Ottawa Tribe of Indians was void and claimed title to the land.[23] The Court held that the 1841 deed was ineffective to convey title to the Ottawa Tribe of Indians.[24] The Court also held that title to the land passed to the defendant but was nonetheless subject to an easement held by the public for purposes of using the land as a cemetery by virtue of a common-law dedication.[25] The Court emphasized that the public used the land as a cemetery with the consent of the owner both before and after the failed conveyance and had not surrendered the easement.[26] The Court explained that a common-law dedication need not be in writing and that "dedications have been established in every conceivable way by which the intention of the dedicator could be evinced."[27]

C. APPLYING THE LEGAL PRINCIPLES

In the present case, the trial court found that the Porters' failed conveyance to the Sand Haven Voluntary

[20] *Id.* at 644.

[21] *Id.* at 644-645.

[22] *Id.* at 645.

[23] *Id.*

[24] *Id.* at 647.

[25] *Id.* at 646-647.

[26] *Id.*

[27] *Id.* at 647.

Association created an easement in Lots 1-4 by virtue of a private dedication. The trial court's finding is analogous to the Michigan Supreme Court's decision in *Badeaux*. Both *Badeaux* and the present case involved failed conveyances of land to nonlegal entities.[28] And, in both *Badeaux* and the present case, private individuals used and maintained the land at issue (that is, the cemetery in *Badeaux* and Lots 1-4 in the present case, respectively) both before and after a failed conveyance.[29] The only difference between *Badeaux* and the present case is that the cemetery in *Badeaux* was used by the public and Lots 1-4 in the present case are used by a specific group of private individuals.

As previously noted, there is no legal authority in Michigan addressing private dedications that are not in a plat, that is, common-law private dedications. Nonetheless, applying the requirements for a public common-law dedication articulated by the Michigan Supreme Court (intent to dedicate, acceptance and maintenance, and use) to this case, suggests that a private common-law dedication was established in the present case.[30]

The Porters' deed to the Sand Haven Voluntary Association demonstrates that the Porters intended to dedicate Lots 1-4 for private use. Moreover, the evidence at trial established that private individuals in Syndicate Park accepted, maintained, and used Lots 1-4. The inscription of "1950" on the cement footing of the gate on Lots 1-4 indicates that the gate and the private drives on Lots 1-4 were used by private individuals in Syndicate Park before the Porters' failed conveyance in 1956. Palmer, the earliest resident of

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[28] See *id*.

[29] See *id.* at 646-647.

[30] See *Bain*, 352 Mich at 305.

Syndicate Park to testify in this case, testified that the gate and private drives on Lots 1-4 were present when he purchased his property in 1971. Hemmeter testified that he maintained the drives after purchasing property in Syndicate Park in 1988. And, there was testimony that the old and new gates on Lots 1-4 were maintained by private individuals in Syndicate Park. Accordingly, we conclude that the trial court did not err when it found that the Porters' failed conveyance to the Sand Haven Voluntary Association created an irrevocable easement in Lots 1-4 of Block 21 by virtue of a private dedication.[31]

The issue of *who* retained the easement by private dedication in Lots 1-4 is a more complicated matter. A grantor's intent controls the scope of a dedication.[32] Defendants contend that this Court should not look outside the four corners of the Porters' deed to the Sand Haven Voluntary Association to determine the intent and scope of the Porters' dedication because the deed unambiguously indicates that the Porters intended to convey Lots 1-4 to the Sand Haven Voluntary Association and, therefore, only to the Sand Haven Voluntary Association's *members*. However, "intent to dedicate [for a common-law dedication] can be gathered from the circumstances."[33] Indeed, "all facts and circumstances bearing on the question are considered."[34]

The facts and circumstances here illustrate that the Porters intended to dedicate the use of Lots 1-4 to all the lot owners of Syndicate Park whose only means of accessing their property by land is through Lots 1-4. Indeed, given the facts of this case, such a conclusion is the most

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[31] See *id.*; *Badeaux*, 213 Mich at 646-647; *Beach*, 283 Mich App at 510.

[32] *Higgins Lake*, 255 Mich App at 88.

[33] *DeWitt*, 45 Mich App at 581.

[34] *2000 Baum Family Trust*, 488 Mich at 148.

equitable solution. The Porters' failed conveyance to the Sand Haven Voluntary Association indicates intent to benefit the lot owners in Syndicate Park. The private drives originating on Lots 1-4 appear to have been (and still are) the only means to access Blocks 19-22, which indicates an intention to dedicate the use of Lots 1-4 to the lot owners in Syndicate Park who could only access their properties by a right of way over Lots 1-4.

Moreover, the members of the Sand Haven Voluntary Association at the time of the Porters' failed conveyance are unknown. The trial court did not receive any records with respect to the Sand Haven Voluntary Association's members. And the trial court did not receive any records of minutes kept by the Sand Haven Voluntary Association during meetings. It is certainly possible that individuals other than members of the Sand Haven Voluntary Association used and maintained Lots 1-4 after the Porters' conveyance to the Sand Haven Voluntary Association. Indeed, the notion that the use of Lots 1-4 has been limited to members of the Sand Haven Voluntary Association since the Porters' conveyance is highly suspect. Palmer testified that he was uncertain whether a homeowners' association existed at the time he purchased his property in Syndicate Park in 1971. Indeed, although Palmer purchased property in Syndicate Park in 1971—and apparently traveled Lots 1-4—Palmer did not start paying dues to the Sand Haven Voluntary Association until either 2002 or 2003. Evans testified that he purchased his property in Syndicate Park in 1987 and was a member of the Sand Haven Voluntary Association. But he did not pay dues to the Sand Haven Voluntary Association until "much later on."

More importantly, the Tibbles' predecessor in interest had key access through the gate. And the Tibbles

were provided access through the gate on Lots 1-4 from 1995 until either 2002 or 2003. This evidence indicates that all landowners in Syndicate Park—regardless of their membership status with the Sand Haven Voluntary Association—used Lots 1-4 until the Sand Haven Voluntary Association required its members to pay dues in either 2002 or 2003. Thus, the Porters do not appear to have intended the exclusion of any landowners in Syndicate Park Blocks 19-22 from using Lots 1-4 to access their properties.

Accordingly, we conclude that the Porters intended to dedicate Lots 1-4 for the use of the lot owners in Syndicate Park whose only means of accessing their property by land was through Lots 1-4. Thus, we further conclude that the Tibbles, like the defendants, had an easement in Lots 1-4 by virtue of the Porters' private dedication. Accordingly, the defendants cannot prevent the Tibbles from using their easement.[35]

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. The Tibbles, being the prevailing parties, may tax costs pursuant to MCR 7.219.

SAWYER, P.J., and WHITBECK and OWENS, JJ., concurred.

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[35] See *Murphy Chair Co v American Radiator Co*, 172 Mich 14, 28; 137 NW 791 (1912) ("[T]he owner of [an] easement cannot prevent another, even a trespasser, from using the land, if his use does not impede the free exercise of the right of passage.").

In re APPLICATION OF MICHIGAN CONSOLIDATED GAS COMPANY TO INCREASE RATES

Docket Nos. 298830 and 298887. Submitted July 6, 2011, at Lansing. Decided July 21, 2011, at 9:05 a.m. Amended, 293 Mich App 801. Applications for leave to appeal and Michigan Consolidated Gas Company's applications for leave to cross-appeal dismissed, Attorney General application for leave to cross-appeal denied, 491 Mich ___.

Michigan Consolidated Gas Company (Mich Con) filed an application in the Public Service Commission (PSC) requesting a rate increase on an annual basis; continued authority to use, with modifications, its existing uncollectible expense true-up, or tracking, mechanism (UETM); and confirmation that it had properly followed a PSC directive to propose a Low-Income and Energy Efficiency Fund (LIEEF) contribution as part of its next general rate case filing. The Association of Businesses Advocating Tariff Equity (ABATE), the Attorney General, and Utility Workers Union of America AFL-CIO, Local 223 intervened. Following evidentiary hearings, the PSC approved continued use of the UETM (which was intended to adjust future rates to make up for 80 percent of the difference between Mich Con's estimated and actual burdens in connection with customers from whom it could not collect amounts due on their bills), approved an increase in the base level of uncollectible expenses to $69.9 million, and rejected the Attorney General's objections that such tracking mechanisms are not statutorily authorized. In addition, the PSC also approved $5.069 million in test-year funding for the LIEEF and rejected the objection that the Legislature had repealed the legislation that authorized the funding. ABATE and the Attorney General appealed separately, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Retroactive ratemaking in utility cases is prohibited absent statutory authorization, but retroactive ratemaking does not occur if only future rates are affected. The PSC may properly use accounting conventions whereby certain expenses dating from one year are characterized as expenses incurred in a subsequent year to which they are then deferred because the expense is recovered on a prospective basis only. The PSC properly approved Mich Con's use of the UETM, which did not constitute retroactive ratemaking.

2. The Customer Choice and Electricity Reliability Act, MCL 460.10 *et seq*., originally required the PSC to establish standards for the use of the LIEEF, as well as secure funding for the program. As amended by 2008 PA 286, the act no longer refers to a LIEFF, but MCL 460.9p(3), added by 2009 PA 172, directs that certain civil fines be deposited in the LIEEF, and the act appropriating money for the PSC for fiscal year 2009-2010 included an appropriation for the LIEFF and required the PSC to perform certain administrative actions with respect to the fund. Deletion of all references to the LIEEF from the Customer Choice and Electricity Reliability Act indicated a legislative intent to withdraw any obligation or prerogative on the part of PSC-regulated utilities to raise money for that fund. Moreover, MCL 460.6a(2) does not grant the PSC authority to approve a utility's collecting such funds. The PSC did not have statutory authority to approve funding for the LIEEF.

Affirmed in part, reversed in part, and remanded.

1. PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — RATEMAKING AUTHORITY.

Retroactive ratemaking in utility cases is prohibited absent statutory authorization; it does not occur if only future rates are affected with no adjustment to previously set rates; the Public Service Commission (PSC) may approve accounting conventions whereby certain expenses dating from one year are characterized as expenses incurred in a subsequent year to which they are then deferred; the PSC's approval of a tracking mechanism designed to reconcile recovery of a utility's estimated and actual losses stemming from customers from whom the utility cannot collect amounts due on their bills does not constitute retroactive ratemaking as the deferred expense is recovered on a prospective basis.

2. PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — LOW-INCOME AND ENERGY EFFICIENCY FUND — AUTHORITY TO ORDER FUNDING.

The Public Service Commission does not have statutory authority to administer and order funding by utilities of the Low-Income and Energy Efficiency Fund originally created by the Customer Choice and Electricity Reliability Act (MCL 460.10 *et seq*., MCL 460.6a[2]).

Clark Hill PLC (by *Robert A. W. Strong*, *Roderick S. Coy*, and *Leland R. Rosier)* for the Association of Businesses Advocating Tariff Equity.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Steven D. Hughey*, *Kristin M. Smith*,

and *Anne M. Uitvlugt*, Assistant Attorneys General, for the Public Service Commission.

Fahey Schultz Burzych Rhodes PLC (by *William K. Fahey* and *Stephen J. Rhodes*), *Bruce R. Maters*, and *Richard P. Middleton* for Michigan Consolidated Gas Company.

Bill Schuette, Attorney General, and *S. Peter Manning* and *Michael E. Moody*, Assistant Attorneys General, for the Attorney General.

Klimist, McKnight, Sale, McClow & Canzano, P.C. (by *John R. Canzano*), for Utility Workers Union of America, AFL-CIO, Local 223.

SAAD, P.J., and JANSEN and DONOFRIO, JJ.

DONOFRIO, J. In these consolidated cases, appellants, the Association of Businesses Advocating Tariff Equity (ABATE) and the Michigan Attorney General, appeal as of right an order of the Michigan Public Service Commission (PSC) that allowed petitioner, Michigan Consolidated Gas Company (Mich Con), to include through charges applied to its ratepayers more than $5 million in funding for the Low-Income and Energy Efficiency Fund (LIEEF). The Attorney General additionally appeals that part of the order that allowed Mich Con to continue to use an uncollectible expense true-up, or tracking, mechanism (UETM) as a way to reconcile recovery of estimated and actual losses stemming from customers who fail to pay their bills. We affirm the PSC's decision to allow Mich Con to continue using its UETM, but reverse the PSC's decision to allow Mich Con to charge its ratepayers for funding of the Low-Income and Energy Efficiency Fund.

I. FACTS

The PSC's opinion and order in this case contains the following concise statement of the facts:

> On June 9, 2009, Michigan Consolidated Gas Company (Mich Con) filed an application requesting a $192.639 million rate increase on an annual basis, and other relief based on the use of a 2010 projected test year. The other forms of regulatory relief initially sought by Mich Con included continuation of authority to use its existing uncollectible expense true-up mechanism (UETM) with modifications . . . . In addition, Mich Con sought confirmation from the Commission that the company had satisfied directives set forth in the Commission's orders in Case Nos. U-13898, U-13899, and U-15479. These directives included . . . the obligation to propose a Low-income and Energy Efficiency Fund (LIEEF) contribution as part of its next general rate case filing.
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> . . . At the prehearing conference, the ALJ granted petitions for leave to intervene filed by the Association of Businesses Advocating Tariff Equity (ABATE), Attorney General Michael A. Cox (Attorney General) . . . [and] the Utility Workers Union of America, AFL-CIO, Local 223 (Local 223), [among others.] The Commission Staff (Staff) also participated in the proceedings.
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> . . . In the absence of a Commission order directing it to do otherwise, on January 1, 2010, Mich Con self-implemented a $170 million increase in its gas rates that was applied on an equal percentage basis for all customer classes.
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> * * *
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> Evidentiary hearings concerning the remainder of Mich Con's general rate case took place on January 11, 12, and 14, 2010. The company presented the testimony and exhibits of an additional 22 witnesses, and the Staff offered

> testimony and exhibits from 13 witnesses. . . . The record of this proceeding consists of 1,866 pages of transcript and 112 exhibits that were received into evidence.[1]

The PSC approved the continued use of the UETM intended to adjust future rates to make up for 80 percent of the difference between Mich Con's estimated and actual burdens in connection with customers from whom it could not collect amounts due on their bills, approved a base level of uncollectible expenses of $69.9 million, and rejected the Attorney General's objections that such tracking mechanisms are not statutorily authorized. The PSC also approved $5,069,000 in test-year funding for the LIEEF and rejected appellants' objections that the Legislature had repealed the legislation authorizing such funding in the first instance.

This appeal followed.

II. STANDARDS OF REVIEW

All rates, fares, charges, classifications, joint rates, regulations, practices, and services prescribed by the PSC are presumed prima facie to be lawful and reasonable. MCL 462.25; see also *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 showing 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 statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).

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[1] *In re Application of Michigan Consolidated Gas Co to Increase Rates*, order of the Public Service Comm, entered June 3, 2010 (Case No. U-15985), pp 1-4.

A final order of the PSC must be authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). A reviewing court gives due deference to the PSC's administrative expertise and is not to substitute its judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).

Issues of statutory interpretation are reviewed de novo. *In re Rovas Complaint Against SBC Mich*, 482 Mich 90, 102; 754 NW2d 259 (2008). A reviewing court should give an administrative agency's interpretation of statutes it is obliged to execute respectful consideration, but not deference. *Id.* at 108.

Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Pelland Complaint Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

III. UNCOLLECTIBLE EXPENSE TRUE-UP MECHANISM

The UETM addresses the utility's burden in supplying power to customers from whom it cannot collect.[2] Mich Con sought to change its base level of uncollectible expenses from $37.3 million to $69.9 million to reflect its recent experience with increasing numbers of customers from whom it could not collect. Mich Con had been using its UETM to ensure its recovery of 90 percent of unpaid bills—less than 100 percent so that the utility would retain an incentive to expend efforts to collect from its customers. However, the hearing referee proposed adjusting that recovery rate to 80 percent on

[2] See *In re Mich Consol Gas Co Application*, 281 Mich App 545, 546 n 1; 761 NW2d 482 (2008).

the ground that Mich Con had shown something less than due diligence in the matter. The PSC accepted the higher figure for the base rate of uncollectible expenses and accordingly approved a continuation of the UETM, while adopting the referee's recommendation to shift Mich Con's risk factor from 90 to 80 percent. It is not in dispute that all cost-tracker mechanisms operate by comparing actual revenues to the base revenues approved by the PSC for the purpose of adjusting future rates to compensate for the differences.

Retroactive ratemaking in utility cases is prohibited, absent statutory authorization. *Mich Bell Tel Co v Pub Serv Comm*, 315 Mich 533, 547, 554-555; 24 NW2d 200 (1946). The Attorney General argues that use of the challenged tracking mechanism runs afoul of that principle. But retroactive ratemaking does not occur if only future rates are affected, with no adjustment to previously set rates. *Attorney General v Pub Serv Comm*, 262 Mich App 649, 655, 658; 686 NW2d 804 (2004).

This Court recently reiterated its approval of the PSC's use of the accounting convention whereby certain expenses dating from one year are characterized as expenses incurred in a subsequent year to which they are then deferred. *In re Consumers Energy Co Application for Rate Increase*, 291 Mich App 106, 114; 804 NW2d 574 (2010), citing *Attorney General*, 262 Mich App at 658.

This Court has specifically approved Mich Con's use of a UETM on the ground that

> the UETM, designed to defer . . . the difference between the initially projected and the actual uncollectible expenses for a given period to a future year, does not involve retroactive ratemaking because the deferred expense is deemed an expense of the year to which it is deferred and,

> thus, is recovered on a prospective basis. [*In re Mich Consol Gas Co Application*, 281 Mich App 545, 549; 761 NW2d 482 (2008).]

This weight of authority compels affirmance of the PSC's approval of Mich Con's use of the UETM.

IV. THE LOW-INCOME AND ENERGY EFFICIENCY FUND

The Customer Choice and Electricity Reliability Act, MCL 460.10 *et seq.*, was enacted by 2000 PA 141, with an effective date of June 5, 2000. *Consumers Energy*, 279 Mich App at 182-183. The act in part created the LIEEF, the purpose of which was " 'to provide shut-off and other protection for low-income customers and to promote energy efficiency by all customer classes.' " *Id.* at 183, quoting MCL 460.10d(7).

As originally enacted, MCL 460.10d(6)—redesignated as MCL 460.10d(7) by 2002 PA 609—required the PSC to "establish standards for the use of the [LIEEF] . . . ." See also *In re Consumers Energy*, 279 Mich App at 190. That subsection further commanded the PSC to "issue a report to the legislature and the governor every 2 years regarding the effectiveness of the fund." Former MCL 460.10d(6). The subsection also provided for funding the LIEEF through "securitization savings exceed[ing] the amount needed to achieve a 5% rate reduction for all customers . . . for a period of 6 years," *id.*, but this Court has declared that the latter provision did not limit the PSC's options for funding the LIEEF after the running of that six-year period, *Consumers Energy*, 279 Mich App at 191. However, MCL 460.10d was amended by 2008 PA 286, effective October 6, 2008, with the result that the Customer Choice and Electricity Reliability Act no longer refers to a LIEEF. Appellants assert that the legislative debates attendant on the enactment of the 2008 legislation included a proposal to authorize a LIEEF factor and

extend LIEEF requirements to all Michigan utilities, but this proposal did not win passage.

Yet MCL 460.9p(3), added by 2009 PA 172, effective December 15, 2009, directs that civil fines assessed against municipally owned electric or natural gas utilities be deposited "in the low income and energy efficiency fund." And the appropriations act that appropriated funds for the PSC for the 2009-2010 fiscal year, 2009 PA 130, included provisions for the LIEEF. In particular, § 114 of the act listed an appropriation of $90 million for "[l]ow-income energy efficiency assistance," along with one for the same amount for "[l]ow-income energy efficiency fund[.]" Section 361(1) of the act in turn called upon the PSC to "implement a process for the low-income energy efficiency fund grants that shall require an application deadline of May 1 and the award announcements on October 1 of each year," while § 361(2) required the PSC to "report by November 1, 2009 to the subcommittees, the state budget office, and the fiscal agencies on the distribution of funds appropriated in part 1 [of the act] for the low-income/energy efficiency assistance program."

If this recent legislative activity indicates the Legislature's intention that the LIEEF continue to exist, and that the PSC retain some role in managing it, the deletion of all references to the LIEEF from the Customer Choice and Electricity Reliability Act—whose now-deleted provisions were recognized as the fund's enabling legislation in the first instance, see *Consumers Energy*, 279 Mich App at 183—nonetheless indicates a legislative intent to withdraw any obligation, or prerogative, on the part of PSC-regulated utilities to raise money for that fund. See *Ford Motor Co v Unemployment Compensation Comm*, 316 Mich 468, 473; 25 NW2d 586 (1947) ("The court is not at liberty to read

into the statute provisions which the legislature did not see fit to incorporate, nor may it enlarge the scope of its provisions by an unwarranted interpretation of the language used.").

Moreover, while MCL 460.6a(2) grants the PSC authority to establish procedures for considering and deciding petitions from regulated utilities and allow a utility to recover its reasonably and prudently incurred costs, it does not grant the PSC authority to approve a utility's collecting funds from its ratepayers in general to fund a program designed to offer some protection against interruptions in services, or other such relief, to distressed ratepayers. That activity has less to do with regulating a utility than with helping the poor. Similarly, a program to promote energy efficiency in general has more to do with environmentalism and conservation than with assessing a utility's reasonably and prudently incurred costs.

For these reasons, we hold that administration of a LIEEF does not fall within the scope of the PSC's general statutory powers, but depends in every instance on specific statutory authorization. Accordingly, we reverse the PSC's order below insofar as it approved more than $5 million in LIEEF funding to come from Mich Con's ratepayers and remand this case to the PSC for appropriate proceedings consistent with this opinion with respect to the LIEEF, and any remaining implementation regarding the UETM adjustment.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction. Because no party has prevailed in full, we do not award costs pursuant to MCR 7.219.

SAAD, P.J., and JANSEN, J., concurred with DONOFRIO, J.

PEOPLE v ZAJACZKOWSKI

Docket No. 295240. Submitted February 1, 2011, at Grand Rapids. Decided July 26, 2011, at 9:00 a.m. Leave to appeal granted, 490 Mich 1004.

Jason J. Zajaczkowski pleaded guilty in the Kent Circuit Court, James R. Redford, J., to a charge of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(*ii*). The plea was conditioned on defendant's being permitted to appeal with regard to the issue whether the undisputed facts established that defendant committed only third-degree criminal sexual conduct, MCL 750.520d(1)(a). The facts indicate that defendant was born in 1977 during the marriage of Walter and Karen Zajaczkowski. Walter and Karen divorced in 1979. The divorce judgment referred to defendant as "the minor child of the parties." In 1992, Walter had a child with another woman; that child was the victim in this case. In 2007, when defendant was approximately 30 years old and the victim was approximately 15, the criminal sexual conduct occurred and, in 2008, the victim gave birth to defendant's child. During defendant's preliminary examination, Walter indicated that although he was not sure that he was defendant's biological father, he always referred to him as his son. Shortly thereafter, genetic testing indicated that Walter was not defendant's biological father. The Court of Appeals granted defendant's delayed application for leave to appeal.

The Court of Appeals *held*:

1. To be guilty of violating MCL 750.520b(1)(b)(*ii*), defendant must have sexually penetrated a victim at least 13 years old but less than 16 years old and defendant must have been related to the victim by blood or affinity to the fourth degree. There is no dispute that defendant sexually penetrated the victim, who was approximately 15 years old.

2. The definition of being related "by blood" in both legal and nonlegal dictionaries means sharing a common ancestor. The phrase "related . . . by blood," therefore, means being related by descent from a common ancestor.

3. The term "affinity" means a relationship that originates through a marriage.

4. Degrees of kinship were computed according to the rules of the civil law when the criminal sexual conduct statute was enacted. Under the civil-law method of computing the degree of relationship, siblings are related to the second degree.

5. The 1979 divorce judgment determined that defendant was the issue of the marriage between the victim's father and defendant's mother. Because defendant was conceived and born during his mother's marriage to the victim's father, a strong presumption of legitimacy arose. Only defendant's mother and his legal father could rebut the presumption with clear and convincing evidence in a proper legal proceeding. Defendant lacked standing to challenge that he is the legitimate issue of the victim's father. Therefore, as a matter of law, defendant and the victim are related by blood—a brother and a sister sharing the same father—and they are related within the second degree of consanguinity by descent from a common ancestor.

Affirmed.

1. CRIMINAL LAW — FIRST-DEGREE CRIMINAL SEXUAL CONDUCT — WORDS AND PHRASES — RELATED BY BLOOD — RELATED BY AFFINITY.

The phrase "related . . . by blood" used in MCL 750.520b(1)(b)(*ii*) means being related by descent from a common ancestor; the term "affinity" in the statute refers to a relationship that originates through marriage.

2. PARENT AND CHILD — PRESUMPTION OF LEGITIMACY — CHALLENGES TO PRESUMPTION OF LEGITIMACY.

A child conceived and born during a lawful marriage is presumed to be the legitimate issue of the marriage; only the mother and the presumed legal father may challenge the presumption of legitimacy with clear and convincing evidence in a proper legal proceeding.

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

Ronald D. Ambrose for defendant.

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

MARKEY, J. We granted defendant's delayed applica-

tion for leave to appeal his conviction following a guilty plea of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(*ii*). Defendant entered his plea on the condition that he be permitted to appeal whether the undisputed facts here establish that he may only be found guilty of third-degree criminal sexual conduct, MCL 750.520d(1)(a).

Defendant was born on January 19, 1977, during the marriage of Walter and Karen Zajaczkowski. Walter and Karen divorced in 1979. The April 3, 1979, judgment of divorce awarded custody of defendant to Karen and visitation rights to Walter. The court ordered Walter to pay child support for defendant and ordered Walter to retain defendant as the beneficiary of his life insurance policy. The judgment of divorce referred to defendant as "the minor child of the parties." Walter had a child with another woman in 1992, and that child is the victim in this case and presumably for some time was considered defendant's half-sister. After the divorce, defendant was in and out of Walter's and the victim's life. Defendant was approximately 30, and the victim was approximately 15, when the criminal sexual conduct occurred in 2007. The victim gave birth to defendant's child in 2008.

During defendant's preliminary examination, Walter, in response to a question, indicated that he was not sure whether he was defendant's father. Still, he always referred to him as his son. Shortly thereafter, genetic testing indicated that Walter is not defendant's natural father. The legal issue of first impression is whether defendant "is related to the victim by blood or affinity to the fourth degree." The trial court answered "yes." Also at issue is whether defendant has standing to challenge his own paternity. We conclude that he does not. We affirm.

This case involves statutory construction, an issue of law, which this Court reviews de novo. *People v Perkins*, 473 Mich 626, 630; 703 NW2d 448 (2005). We must give effect to the intent of the Legislature as expressed in the plain language of the statute. *Id*. "We may consult dictionary definitions of terms that are not defined in a statute." *Id*. at 639.

MCL 750.520b(1)(b)(*ii*) provides that "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . . [the] other person is at least 13 but less than 16 years of age and . . . [t]he actor is related to the victim by blood or affinity to the fourth degree." So, to be guilty of violating MCL 750.520b(1)(b)(*ii*), defendant must have (1) sexually penetrated (2) a victim at least 13 years old but less than 16 years old, and (3) defendant must have been related to the victim by blood or affinity to the fourth degree. The parties do not dispute the first two elements. The sole issue is whether defendant is related to the victim by blood or affinity to the fourth degree. We conclude that notwithstanding the genetic testing results, the strong presumption of legitimacy has not been overcome by proper parties with clear and convincing evidence in a court of competent jurisdiction. *In re KH*, 469 Mich 621, 634-635; 677 NW2d 800 (2004). Because defendant and the victim share the same father, they are "related . . . by blood . . . to the fourth degree" as a matter of law.

The Legislature has not defined the terms "by blood" and "affinity" in the criminal sexual conduct statute. This Court has not previously addressed the meaning of a relationship "by blood" in the context of the criminal sexual conduct statute. In the context of an insurance policy, however, this Court has addressed the meaning of the term "relative," which was defined in the insur-

ance policy at issue as " 'a person related to the named insured by blood, marriage or adoption who is a resident of the same household.' " *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 265; 548 NW2d 698 (1996). Lacking further definitions in the insurance policy, the Court sought the aid of a dictionary for the meaning of the term "by blood." The Court stated that a "blood relation" is "also known as one related by consanguinity," meaning "a person who shares with another descent from a common blood ancestor." *Id*., citing Black's Law Dictionary (6th ed), p 172; see also *In re Mooney Estate*, 154 Mich App 411, 414; 397 NW2d 329 (1986) (defining "lineal descendants" as "blood relatives in the direct line of descent"), and 23 Am Jur 2d, Descent and Distribution, § 70, pp 690-691 (defining affinity and consanguinity). Similarly, a nonlegal dictionary defines a "blood relation" as "a person related by birth rather than by marriage." *Random House Webster's College Dictionary* (2000). Thus, both the common and the legal definitions of being related "by blood" mean sharing a common ancestor. Relatives who share only paternal or maternal descent are so-called half-bloods, but Michigan has long recognized that this is a distinction generally without legal effect. See *In re Heffernan Estate*, 143 Mich App 85, 89; 371 NW2d 481 (1985); MCL 700.2107. Giving effect to the Legislature's intent as expressed in the text of the statute, the phrase "related . . . by blood" as used in the criminal sexual conduct statute means being related by descent from a common ancestor.

This conclusion is reinforced by reading "by blood" in the context of the phrase in which it appears. Specifically, "related . . . by blood" is an alternative to being related "by . . . affinity." This Court has addressed the meaning of the term "affinity" in the context of the criminal sexual conduct statute several times. See

People v Russell, 266 Mich App 307, 311, 313; 703 NW2d 107 (2005), *People v Armstrong*, 212 Mich App 121, 122-129; 536 NW2d 789 (1995), and *People v Denmark*, 74 Mich App 402, 408; 254 NW2d 61 (1977). Each of these cases considered the well-established meaning of the term "affinity" set forth in *Bliss v Caille Bros Co*, 149 Mich 601, 608; 113 NW 317 (1907):

> Affinity is the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all the blood relatives of the husband.

In holding that stepsiblings were related by affinity, the *Armstrong* Court noted that the *Random House College Dictionary* (rev ed) defined "affinity" as "a 'relationship by marriage or by ties other than those of blood' " and that "[t]he common and ordinary meaning of affinity is marriage." *Armstrong*, 212 Mich App at 128. Consequently, the Court ruled that the "defendant and the victim were related by affinity because they were family members related by marriage." *Id*. Thus, the accepted meaning of affinity is a relationship that originates through marriage.

We also find the *Bliss* definition of affinity helpful in understanding the entire phrase in the criminal sexual conduct statute requiring that "[t]he actor is related to the victim by blood or affinity to the fourth degree." MCL 750.520b(1)(b)(*ii*). The statute does not state how degrees of relationships are to be determined, but *Bliss*, 149 Mich at 608, notes that "the degrees of affinity are computed in the same way as those of consanguinity" or blood. There are two ways that the degree of a relationship may be determined, "the civil-law method, and the

common-law (or canon-law) method." 23 Am Jur 2d, Descent and Distribution, § 72, p 692. Michigan has long followed the civil-law method. See *Ryan v Andrews*, 21 Mich 229, 234 (1870). When the Legislature enacted the current criminal sexual conduct statute, "degrees of kindred [were] computed according to the rules of the civil law . . . ." MCL 702.84 (repealed by 1978 PA 642, effective July 1, 1979); see *In re Coughlin's Estate*, 336 Mich 279, 280; 57 NW2d 884 (1953).

> The method of computing degrees of consanguinity by the civil law is to begin at either of the persons claiming relationship, and count up to the common ancestor, and then downwards to the other person, in the lineal course, calling it a degree for each person, both ascending and descending, and the degrees they stand from each other is the degree in which they are related. [*Van Cleve v Van Fossen*, 73 Mich 342, 345; 41 NW 258 (1889).]

Under the civil-law method of computing the degree of relationship, siblings are related to the second degree. *Crystal v Hubbard*, 414 Mich 297, 313 n 6; 324 NW2d 869 (1982).

We note that the parties' arguments below focused on whether defendant was related by affinity to the victim's father, and, hence, to the victim. Defendant argued below and on appeal that because genetic testing conclusively showed that defendant is not the biological son of the victim's father, they are not related by blood. And, defendant argues, any relationship by affinity ended when the victim's father divorced defendant's mother. In the trial court, the prosecutor conceded that genetic testing had established that defendant was not a blood relative of the victim's father, but defendant was the legal son of the victim's father pursuant to a 1979 judgment of divorce that determined that defendant was the issue of

the marriage between defendant's mother and the victim's father. The trial court determined that there existed a "decade's long relationship of affinity" between the victim and defendant and a decade's long declaration of a court of competent jurisdiction that defendant is the issue of the victim's father. The trial court also noted that the "step sibling relationship" between defendant and the victim went unchallenged until after criminal proceedings were instituted and that the criminal sexual conduct statute is designed to protect minor children from sexual abuse by persons with whom they have a close relationship, citing *Armstrong*, 212 Mich App at 127.

On appeal the prosecution concedes that there is no evidence a relationship by affinity currently exists between the victim and defendant. The prosecution also asserts that its concession that no biological relationship exists between defendant and the victim's father does not affect the legal conclusion that defendant and the victim are brother and sister because they share the same legal father. The prosecution argues that the judgment of divorce between the victim's father and defendant's mother did not state that defendant was not the issue of the marriage. Moreover, it is important to emphasize that defendant lacks standing to collaterally challenge the divorce judgment. Consequently, as a matter of law, defendant and the victim are related by blood—brother and sister sharing the same father.

We agree with the prosecutor's analysis. The 1979 judgment of divorce determined that defendant was the issue of the marriage between the victim's father and defendant's mother. Even if the judgment had not made such a determination, because defendant was conceived and born during the marriage, he is presumed to be the

legitimate issue of the marriage. MCL 552.29[1]; *In re KH*, 469 Mich at 634-635. "The rule that a child born in lawful wedlock will be presumed to be legitimate is as old as the common law. It is one of the strongest presumptions in the law." *People v Case*, 171 Mich 282, 284; 137 NW 55 (1912). Indeed, the presumption was once immutable because "Lord Mansfield's Rule" precluded the admission of the testimony of either the husband or the wife that a child was not the issue of the marriage. *Serafin v Serafin*, 401 Mich 629, 632-633; 258 NW2d 461 (1977). The *Serafin* Court abrogated Lord Mansfield's Rule in Michigan and held that the presumption of legitimacy may be rebutted by clear and convincing evidence. *Id*. at 634-636. Nonetheless, courts have held that only the mother and the presumed legal father may challenge the presumption of legitimacy.

In *Girard v Wagenmaker*, 437 Mich 231, 235; 470 NW2d 372 (1991), the Court held that a putative biological father lacked standing to challenge the presumption under either the Paternity Act, MCL 722.711 *et seq*., or the Child Custody Act, MCL 722.21 *et seq*. On the basis of the language of the Paternity Act, the Court held that a putative biological father lacked standing to bring an action to establish paternity unless at the time the complaint was filed there was a prior court determination that the child was not the issue of the marriage. *Girard*, 437 Mich at 242-243. Similarly, in *In re KH*, the Court held that a putative biological father could not intervene in a child protective proceeding to seek a determination of paternity where the child had a presumptive legal father. *In re KH*, 469 Mich at 624.

[1] MCL 552.29 provides: "The legitimacy of all children begotten before the commencement of any action under this act [regarding divorce] shall be presumed until the contrary be shown."

The Court opined that "[i]f the mother or legal father does not rebut the presumption of legitimacy, the presumption remains intact, and the child is conclusively considered to be the issue of the marriage despite lacking a biological relationship with the father." *Id*. at 635.

Our Supreme Court more recently reiterated these principles in *Barnes v Jeudevine*, 475 Mich 696; 718 NW2d 311 (2006). In that case, the child was born four months after entry of a default judgment of divorce that provided that " 'no children were born of this marriage and none are expected.' " *Id*. at 699. The plaintiff putative biological father sought an order of filiation under the Paternity Act. The defendant mother, who had previously signed an affidavit of parentage with the plaintiff, denied that the child was born " 'out of wedlock.' " *Id*. 700. After discussing the longstanding presumption of legitimacy, the Court held that the Paternity Act "requires that there be an affirmative finding regarding the child's paternity in a prior legal proceeding that settled the controversy between the mother and the legal father." *Id*. at 705. The affidavit that the parties had signed was unavailing because there had been no legal action addressing the issue of the child's paternity during which the presumption of legitimacy had been rebutted by clear and convincing evidence. *Id*. at 706-707. Thus, the plaintiff lacked standing under the Paternity Act because the child was conceived during the marriage, and there was no prior court determination that the child was not the issue of the marriage. *Id*. at 707.

Rules similar to those discussed in these cases involving paternity actions, child custody disputes, and child protective proceedings have been codified with respect

to intestate succession. MCL 700.2114(1)(a) provides: "If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for purposes of intestate succession." Furthermore, "[o]nly the individual presumed to be the natural parent of a child under subsection (1)(a) may disprove a presumption that is relevant to that parent and child relationship, and this exclusive right to disprove the presumption terminates on the death of the presumed parent." MCL 700.2114(5).

Here, because defendant was conceived and born during his mother's marriage to the victim's father, the strong presumption of legitimacy arose. *In re KH*, 469 Mich at 634-635. Only defendant's mother and his legal father may rebut the presumption with clear and convincing evidence in a proper legal proceeding. *Id*. at 635; *Barnes*, 475 Mich at 705; MCL 700.2114(5). For these reasons, we agree with the prosecutor that defendant lacks standing to challenge that he is the legitimate issue of the victim's father.[2] Therefore, as a matter of law, defendant and the victim are related by blood—brother and sister sharing the same father—and they are related within the second degree of consanguinity by descent from a common ancestor. This Court will affirm the trial court when it reaches the correct result

[2] Although not raised by the parties, we question whether the circuit court presiding over a criminal case would have ancillary jurisdiction to set aside the presumption of legitimacy. The circuit court is a court of general jurisdiction, MCL 600.151, and has "original jurisdiction in all matters not prohibited by law . . . ." Const 1963, art 6, § 13. The circuit court would also acquire in personam jurisdiction over one accused of committing a felony upon the filing of a proper bindover by the district court. *People v Goecke*, 457 Mich 442, 458-459; 579 NW2d 868 (1998). But MCL 600.1021(1)(a) grants to the family division of the circuit court the "sole and exclusive jurisdiction over . . . [c]ases of divorce and ancillary matters . . . ." See *People v Likine*, 288 Mich App 648, 654; 794 NW2d 85 (2010), lv gtd 488 Mich 955 (2010).

even if for the wrong reason. *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998).

We affirm.[3]

OWENS, P.J., and METER, J., concurred with MARKEY J.

[3] We are bound by stare decisis and decline defendant's invitation to "revisit" the issue of jail credit for parolees, an issue decided in *People v Idziak*, 484 Mich 549; 773 NW2d 616 (2009).

KARMOL v ENCOMPASS PROPERTY AND CASUALTY COMPANY

Docket No. 298366. Submitted July 12, 2011, at Detroit. Decided July 26, 2011, at 9:05 a.m. Leave to appeal denied, 491 Mich 885.

Justin Durand, a minor, suffered injuries in an automobile accident. During the first year of his convalescence, all his hospital and medical expenses were paid by a health benefit plan established under the Employee Retirement Insurance Security Act (ERISA), 29 USC 1001 *et seq*., that was administered by Paramount Care, Inc. Justin's entitlement to the benefits stemmed from the status of his mother, Kristine K. Karmol, as a subscriber of the self-funded plan. Karmol also had a no-fault automobile insurance policy issued by Encompass Property and Casualty Company. The ERISA plan designated the plan as a secondary payor when a member is entitled to benefits under a no-fault insurance policy and contained a coordination-of-benefits provision that named Karmol's health-care insurer as the primary source of coverage. One year after the accident, Paramount sued Encompass in the United States District Court for the Western District of Ohio, seeking reimbursement of the funds it had expended on Justin's behalf. That same day, Kristine Karmol and Justin Durand, by his next friend, Kristine Karmol, brought an action in the Lenawee Circuit Court against Encompass and Paramount, alleging breach of contract and seeking a declaratory judgment, interest, costs, and attorney fees. After a settlement was reached in the federal lawsuit whereby Encompass agreed to shoulder liability for Justin's personal protection insurance benefits, the parties in the Lenawee Circuit Court action stipulated to Paramount's dismissal from the action. Encompass sought summary disposition, contending that the no-fault insurance claim lacked a factual basis because plaintiffs had not personally incurred any costs or expenses. After that motion was denied and discovery disputes erupted, the circuit court, Timothy P. Pickard, J., sanctioned Encompass for discovery misconduct by entering an order granting Karmol a default judgment and awarding her attorney fees, costs, and interest. Encompass appealed.

The Court of Appeals *held*:

1. A claimant's right to personal protection insurance benefits under the no-fault insurance act arises not when an injury occurs but when an allowable expense is incurred. A claimant incurs an expense when he or she becomes liable for the cost. Such benefits become overdue in accordance with MCL 500.3142(2) if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If benefits are not timely paid after an expense is incurred, interest begins accumulating pursuant to MCL 500.3142(3) and attorney fees become recoverable under MCL 500.3148(1). Because the purpose of the interest-penalty provisions is to see that the injured party is quickly paid, these statutes do not apply when the dispute involves two insurers acting in good faith.

2. No evidence suggests that Encompass delayed in paying no-fault benefits to Karmol. In relation to Karmol, no-fault benefits were never overdue. No evidence suggests that Karmol incurred a single expense. The circuit court erred by awarding Karmol interest, costs, and attorney fees and denying Encompass's motion for summary disposition.

Reversed and remanded for entry of a judgment in favor of Encompass.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — RIGHT TO BENEFITS — INCURRED EXPENSES — OVERDUE BENEFITS — INTEREST — ATTORNEY FEES — GOOD-FAITH DISPUTE BETWEEN INSURERS.

A claimant's right to personal protection insurance benefits under the no-fault automobile insurance act arises when an allowable expense is incurred, not when an injury occurs; a claimant incurs an expense when the claimant becomes liable for the cost; such benefits become overdue if not paid within 30 days after the insurer receives reasonable proof of the fact and of the amount of the loss sustained; interest begins accumulating and attorney fees become recoverable if benefits are not timely paid after an expense is incurred; the interest-penalty provisions of the act do not apply when the dispute involves two insurers acting in good faith because the purpose of the provisions is to see that the injured party is quickly paid (MCL 500.3142[2] and [3]; MCL 500.3148[1]).

Patrick R. Millican for Kristine K. Karmol and Justin Durand.

Vandeveer Garzia, P.C. (by *Donald C. Brownell* and *Bryan R. Padgett*), for Encompass Property and Casualty Company.

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

GLEICHER, J. When Justin Durand, a minor, suffered serious injuries in a car accident, both an Employee Retirement Insurance Security Act (ERISA), 29 USC 1001 *et seq*., health benefit plan and a Michigan no-fault insurer bore responsibility for paying his medical expenses. The ERISA plan paid Justin's medical bills for one year before filing a lawsuit against the no-fault insurer seeking reimbursement. Eventually, the no-fault insurer agreed to shoulder liability for Justin's personal protection insurance (PIP) benefits. In the meantime, Kristine Karmol, Justin's mother, filed an action for herself and Justin, seeking attorney fees attributable to overdue no-fault benefits, despite that she had never been obligated to pay Justin's expenses. The circuit court entered a default judgment against the no-fault insurer in Karmol's favor, and awarded Karmol attorney fees, costs, and interest totaling $49,600.04.[1] We reverse.

I. FACTS AND PROCEEDINGS

On February 28, 2006, Justin was a passenger in a vehicle that left the roadway and struck a mailbox, a concrete walkway, and a culvert before coming to rest. Justin endured severe injuries, including fractures of his hip joint, femur, and ankle. During the first year of Justin's convalescence, the ProMedica Physicians Group Employee Health Care Benefit Plan, adminis-

[1] As Karmol filed suit on behalf of herself as well as her minor son, we refer to her as the singular plaintiff.

tered by defendant Paramount Care, Inc., paid all of his hospital and medical expenses. Justin's entitlement to ProMedica health-care benefits stemmed from plaintiff Kristine Karmol's status as a subscriber in the ProMedica benefit plan, a self-funded employee-welfare benefit plan created and administered pursuant to the ERISA.[2] Karmol also owned a no-fault automobile insurance policy issued by defendant Encompass Property and Casualty Company.

The ProMedica plan designates ProMedica as a secondary payor when an insurance policy entitles a member to no-fault insurance benefits. The Encompass no-fault insurance policy contains a coordination-of-benefits (COB) provision that names Karmol's health-care insurer as the primary source of coverage. Luckily, a well-settled legal rule governs this conflict. In *Auto Club Ins Ass'n v Frederick & Herrud, Inc (After Remand)*, 443 Mich 358, 389; 505 NW2d 820 (1993), our Supreme Court held that a self-funded ERISA plan trumps a no-fault insurance policy: "an unambiguous COB clause in an ERISA health and welfare benefit plan must be given its plain meaning despite the existence of a similar clause in a no-fault policy . . . ."

Exactly one year after Justin's accident, Paramount sued Encompass in the United States District Court for the Western District of Ohio, seeking reimbursement of the funds it had expended on Justin's behalf. That same day, Karmol filed a complaint in the Lenawee Circuit Court, naming as defendants Paramount and Encompass. Karmol's complaint averred that Paramount "ha[d]/and or [is] exercising subrogation and/or reim-

[2] Justin's parents are divorced. It appears that Justin's father is a participant in a different ERISA plan, administered by Ingenix Subrogation Services, through which Justin received limited benefits not at issue here.

bursement rights" from Karmol, and alleged that Encompass refused to pay "or is expected to refuse to pay" Justin's PIP benefits. The complaint set forth breach-of-contract and declaratory-judgment counts, and sought interest, costs, and "no-fault attorney fees." After Paramount and Encompass answered the complaint, the parties filed pretrial statements describing their case theories. Karmol's pretrial statement asserted, "Encompass has not paid no[-]fault benefits to plaintiffs for medical bills when they were first in priority to pay the bills."

Almost nothing occurred in the litigation until December 13, 2007, when Patrick R. Millican, Karmol's counsel, filed in the circuit court an "Affidavit of Progress."[3] Millican's affidavit declared that Encompass and Paramount had settled Paramount's federal court lawsuit, and asserted that "Plaintiff's [sic] are currently in the process of obtaining releases" from Paramount and Ingenix, Justin's father's ERISA plan. In March 2008, the parties stipulated to Paramount's dismissal from the instant lawsuit, leaving only Encompass as a defendant.

In April 2008, Encompass moved for summary disposition under MCR 2.116(C)(6), (7), and (10). Encompass contended that because Karmol had not personally incurred any costs or expenses, her first-party, no-fault claim lacked a factual basis. Encompass supported its motion by filing a copy of Encompass's check to Paramount for $155,580.72. In response, Karmol submitted an affidavit averring that "as of February 28, 2007, Encompass had not paid the medical bills in excess of $150,000.00 for treatment rendered to Justin M. Durand." Karmol further claimed that a question of fact

[3] Millican filed the affidavit after the circuit court placed the matter on "no progress" status.

existed concerning her entitlement to attorney fees. In a bench opinion, the circuit court denied summary disposition, reasoning that Karmol and Justin "have an obligation to preserve their claim. They have an obligation to do that. Otherwise, the insurance company can turn around and bill them for what they pay." Encompass moved for reconsideration, arguing that because Karmol had incurred no expenses or suffered any damages, she lacked standing to bring a claim against Encompass. The circuit court denied reconsideration. In denying Encompass summary disposition, the circuit court incorrectly focused on the one-year period of limitations applicable in PIP-benefit cases, MCL 500.3145, rather than considering the statutory provisions relevant to Karmol's claim for attorney fees and interest.

After the circuit court denied Encompass summary disposition, the lawsuit took on a life of its own. The parties exchanged copious interrogatories and requests for admission. Discovery disputes erupted, generating motions and countermotions, and bilateral accusations of misconduct. Amid the flurry of paper, a "Settlement Agreement and Mutual Release" emerged, embodying the terms of Encompass's final settlement with Paramount. In relevant part, the release recited Encompass's agreement "that it is the party primarily responsible for the payment of reasonable and necessary medical expenses incurred by Justin Durand as a direct and proximate result of the automobile accident . . . ." The Encompass claims file, produced during discovery, confirms that shortly after Justin's accident, an Encompass agent informed Karmol, "We will be responsible for replacement services, attendant care, mileage and any miscellaneous out of pocket" expenses. Pursuant to the COB provision in its policy, Encompass adjusted Jus-

tin's claim on the basis of its status as a secondary payor until ProMedica's ERISA bona fides came to light.

Notably absent from the record is any indication that Karmol had been asked to pay a medical bill, actually paid a medical bill, or had been threatened with the prospect of paying for any of Justin's care. Rather, the record evidence demonstrates that Paramount completely paid Justin's expenses until the date it settled its dispute with Encompass. At that point, Encompass assumed responsibility for Justin's PIP benefits. No evidence suggests that any charge for medical services ever qualified as "overdue." Nor have we found any indication that either Promedica or Encompass acted in bad faith.

In November 2009, the circuit court heard argument regarding the parties' discovery disagreements, and sanctioned Encompass for discovery misconduct by entering an order granting Karmol a default judgment. The order further stated "that the sole remaining issues in this case are the amount of attorney fees, costs and interest due to the Plaintiffs." Subsequently, the circuit court entered a judgment in favor of Karmol for $8,389.83 in interest, $40,730 in attorney fees, plus interest until fully paid, and $480.21 in costs.

II. ISSUES PRESENTED AND ANALYSIS

Encompass challenges the circuit court's entry of a default judgment, the amount of the attorney fee award, and its responsibility to pay any penalty interest and attorney fees, and it finally asserts that the circuit court's bias precluded a fair and impartial adjudication. Essentially, Encompass argues that because it never unreasonably refused to pay no-fault benefits, the circuit court erred by awarding interest, costs, and attorney fees. This contention tracks Encompass's summary

disposition argument that Karmol never incurred any expenses, rendering meritless her first-party, no-fault claim. Because we find this argument dispositive of Encompass's other claims, we turn to an analysis of the circuit court's summary disposition ruling, which we review de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). "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).

An injured claimant's entitlement to first-party no-fault benefits arises from MCL 500.3107(1), which states, in relevant part:

> Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.

This provision of the no-fault insurance act, MCL 500.3101 *et seq.*, describes in general terms the nature of the benefits available to claimants. Encompass never challenged the reasonableness or necessity of Justin's medical or attendant-care expenses. Rather, Encompass insisted in its summary disposition motion that because Karmol never personally incurred any compensable expenses, no genuine factual dispute existed regarding Encompass's liability to Karmol.

Under the no-fault act, PIP benefits "accrue not when the injury occurs but as the allowable expense . . . is incurred." MCL 500.3110(4). Our Supreme Court clarified this principle in *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003),

explaining that a claimant "incurs" an expense when he or she becomes "liable" for the cost. "An insured could be liable for costs by various means, including paying for costs out of pocket or signing a contract for products or services." *Id.* at 484 n 4. Thus, a claimant's right to PIP benefits arises when the claimant finds himself or herself on the hook for an expense.

Once an expense is incurred, however, a no-fault insurer may not dawdle in rendering payment. PIP benefits become "overdue" if not paid "within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). As our Supreme Court explained in *Proudfoot*, 469 Mich at 484-485, a loss is "sustained" when the expense is "incurred." If benefits are not timely paid after an expense is incurred, interest begins accumulating pursuant to MCL 500.3142(3), and attorney fees become recoverable under MCL 500.3148(1). Because the purpose of the interest-penalty provisions "is to see that *the injured party* is quickly paid," these statutes do not apply "when the dispute involves two insurers acting in good faith." *Allstate Ins Co v Citizens Ins Co of America*, 118 Mich App 594, 607; 325 NW2d 505 (1982) (emphasis added).

According to Millican, Karmol filed this lawsuit preemptively, based on her fear that Encompass, Paramount, or Justin's care providers would bill her directly for Justin's medical expenses. Alternatively, Karmol's complaint suggests that Karmol anticipated that Paramount would seek reimbursement from her, in addition to pursuing its federal court claim against Encompass. Karmol's action for a declaratory judgment was perfectly suited to allay these apprehensions. Indeed, "declaratory judgments exist to provide broad, flexible remedies for plaintiffs who seek guides for future con-

duct in order to preserve their legal rights." *Manley v DAIIE*, 127 Mich App 444, 450-451; 339 NW2d 205 (1983), aff'd in part and rev'd in part on other grounds 425 Mich 140 (1986). Karmol appropriately sought a judicial determination concerning Justin's right to no-fault coverage under the Encompass policy.

Similarly, Paramount and Encompass elected to resolve their dispute without involving Karmol. This Court has emphasized that a "separate suit for indemnification is the preferable method of handling such a dispute between insurers, since the injured person recovers for his injuries without delay while the insurers thereafter iron out their respective liabilities." *Farmers Ins Group v Progressive Cas Ins Co*, 84 Mich App 474, 484; 269 NW2d 647 (1978). In that spirit, Encompass and Paramount worked out their differences in federal court, ultimately agreeing that Encompass bore primary responsibility for the payment of Justin's medical expenses. This settlement ended the federal court lawsuit and simultaneously resolved Karmol's declaratory judgment action.

Thus, six months after Karmol filed her circuit court complaint, she could rest assured that Encompass had assumed full responsibility for the costs of Justin's care. No medical bills remained unpaid, and Karmol had never been exposed to personal liability for the costs of Justin's care. Indeed, no evidence suggests that payment for a single medical bill or other benefit had ever been delayed. The no-fault compensation system is intended to "provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978). Despite that an ERISA plan rather than a no-fault insurer initially paid Justin's bills, Paramount and Encompass fulfilled the spirit

and purpose of the no-fault act by settling their differences without involving Karmol.

Moreover, given that Paramount never sought penalty interest or attorney fees against Encompass (and could not have successfully pursued such a claim under *Allstate Ins* Co, 118 Mich App at 607), we find perplexing Karmol's claim of entitlement to these sanctions. Indisputably, Karmol never paid any medical bills. Nor was Karmol ever threatened with a lien against a third-party recovery, or served with a reimbursement action. The ProMedica plan affords a right of reimbursement against Karmol, but specifically states that "[*a*]*s an alternative to reimbursement by the Member*, the Benefit Plan may subrogate to the Member's rights of recovery and remedies by joining in the Member's lawsuit, assigning its rights to Member to pursue on the Benefit Plan's behalf, or bringing suit in the Member's name as subrogee." (Emphasis added.) Here, after paying the medical bills for a year, the plan elected to seek reimbursement from Encompass. Simply put, no evidence suggests that Encompass delayed in paying no-fault benefits to Karmol. In relation to Karmol, no-fault benefits were never overdue. Indeed, no evidence suggests that Karmol incurred a single expense. Accordingly, the circuit court erred by denying summary disposition to Encompass on this ground.

Reversed and remanded for entry of judgment in favor of Encompass. We do not retain jurisdiction. As the prevailing party, Encompass may tax costs under MCR 7.219.

TALBOT, P.J., and HOEKSTRA, J., concurred with GLEICHER, J.

PEOPLE v STRICKLAND

Docket No. 298707. Submitted July 13, 2011, at Detroit. Decided July 28, 2011, at 9:00 a.m. Leave to appeal denied, 490 Mich 1002.

Jerome Strickland was convicted by a jury in the Wayne Circuit Court of first-degree home invasion, assault with intent to do great bodily harm less than murder, being a felon in possession of a firearm, felonious assault, and possession of a firearm during the commission of a felony. Strickland had broken into the home of a senior couple, during which one of the occupants armed himself with a gun. The prosecution argued that Strickland jointly possessed the firearm when he placed both hands on the gun as he attempted to take it from the man during the fight. On the first day of trial, Strickland requested new counsel on the basis of the grievance he had filed against, and his lack of confidence in, his appointed counsel, as well as counsel's failure to file pretrial motions to dispose of the assault and firearm charges. The court, Vera Massey Jones, J., denied the request. Strickland appealed his convictions and sentences.

The Court of Appeals *held*:

1. A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion. Appointment of a substitute counsel is warranted only upon a showing of good cause and if substitution will not unreasonably disrupt the judicial process. When a defendant asserts that his or her assigned attorney is not adequate or diligent or is disinterested, the trial court should hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusions on the record. Absent substantial reason, adequate cause does not exist to substitute an attorney on the basis of a defendant's mere allegation of lack of confidence or general unhappiness with his or her representation. Disagreements about trial strategy or professional judgment also do not warrant substitution of counsel. Strickland stated that he was dissatisfied because his counsel provided no details, did not challenge the evidence, and did not visit him in jail. He failed, however, to explain which motions should have been filed or how they would have been successful. Counsel was not required to file a futile motion, and this reason

did not establish good cause for substitution of counsel. Under the facts presented, the trial court did not abuse its discretion by denying defendant's untimely request for substitution of counsel on the first day of trial.

2. In a challenge to the sufficiency of the evidence, the evidence is viewed in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. There was sufficient evidence that permitted a rational trier of fact to reasonably infer that Strickland assaulted one of the home's occupants with the intent to do great bodily harm less than murder by repeatedly striking the victim in the head and face while pinning his hands to his chest and struggling with him over possession of the firearm.

3. Possession of a firearm is a question of fact for the trier of fact and can be proved by circumstantial evidence and reasonable inferences arising from the evidence. Possession of a firearm may be sole or joint. Dominion or control over the firearm need not be exclusive; the essential question is one of control. Strickland argued on appeal that there was insufficient evidence to support the firearm and dangerous weapon elements of the offenses of assault with intent to do great bodily harm less than murder, felonious assault, felon-in-possession, and felony-firearm. When Strickland discovered that one of the occupants of the home was armed with a gun, Strickland immediately attacked him and attempted repeatedly to take the gun. Strickland had both hands on the gun. It discharged as Strickland attempted to gain sole possession of the gun. A rational trier of fact could reasonably have inferred that there was sufficient evidence to support the possession elements of felon-in-possession, felonious assault, and felony-firearm.

4. The validity of multiple punishments under the double jeopardy provisions of the United States and Michigan Constitutions is determined under the same-elements test. A reviewing court must determine whether each provision requires proof of a fact that the other does not. Convictions of both assault with intent to do great bodily harm less than murder and felonious assault do not violate the constitutional double jeopardy protections because the two crimes have different elements.

Affirmed.

1. ATTORNEY AND CLIENT — SUBSTITUTION OF COUNSEL — GOOD CAUSE.

A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion; appointment of a substi-

tute counsel is warranted only upon a showing of good cause and if substitution will not unreasonably disrupt the judicial process; if a defendant claims that his or her assigned counsel is not adequate or diligent or is disinterested, the court should hear the defendant's claim and, if there is factual dispute, take testimony and state its findings and conclusions on the record; absent substantial reason, adequate cause does not exist to substitute an attorney on the basis of a defendant's mere allegation of lack of confidence or general unhappiness with his or her representation; substitution is also not warranted on the basis of disagreements about trial strategy or professional judgment.

2. CRIMINAL LAW — FIREARMS — JOINT POSSESSION.

Possession of a firearm as an element of an offense is a question of fact for the trier of fact and can be proved by circumstantial evidence and reasonable inferences arising from the evidence; possession of a firearm may be sole or joint and dominion or control over the firearm need not be exclusive; the essential question is one of control.

3. CONSTITUTIONAL LAW — DOUBLE JEOPARDY.

The "same-elements" test is applied in order to determine the validity of multiple punishments under the double jeopardy provisions of the United States and Michigan Constitution; a reviewing court must determine whether each crime requires proof of a fact that the other does not (US Const, Am V; Const 1963, art 1, § 15).

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

Jonathon B. D. Simon for defendant.

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

TALBOT, P.J. Jerome Strickland challenges his jury trial convictions of first-degree home invasion,[1] assault

[1] MCL 750.110a(2).

with intent to do great bodily harm less than murder,[2] being a felon in possession of a firearm,[3] felonious assault,[4] and possession of a firearm during the commission of a felony.[5] Strickland was sentenced as a fourth-offense habitual offender to concurrent prison terms of 320 months to 60 years for the first-degree home invasion conviction, 2 to 20 years for the conviction of assault with intent to do great bodily harm less than murder, 2 to 5 years for the felon-in-possession conviction, and 2 to 15 years for the felonious assault conviction, to be served consecutively to a 2-year term of imprisonment for the felony-firearm conviction.[6] We affirm.

Strickland was convicted of breaking into the home of a senior couple, Arlis and Vera Clarkson, during which 70-year-old Arlis armed himself with a gun after realizing the possibility of an intruder. The prosecution alleged that while Strickland was assaulting Arlis, he jointly possessed Arlis's firearm when he placed both hands on the gun as he attempted to take it from Arlis. The gun discharged three times during the struggle, and Arlis was shot in the hand. Strickland conceded at trial that he invaded the Clarksons' home, but argued that he never possessed Arlis's gun.

I. APPOINTMENT OF NEW COUNSEL

Strickland first argues that the trial court abused its discretion by denying his request for new counsel made on the first day of trial. We disagree.

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[2] MCL 750.84.

[3] MCL 750.224f.

[4] MCL 750.82.

[5] MCL 750.227b.

[6] MCL 769.12.

"A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion."[7] "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes."[8] As this Court has explained:

> "An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic."[9]

Initially, we reject Strickland's claim that the trial court failed to adequately inquire into the nature of the breakdown of the attorney-client relationship. "When a defendant asserts that the defendant's assigned attorney is not adequate or diligent, or is disinterested, the trial court should hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusion on the record."[10] Because the trial court accepted a copy of the grievance that Strickland had filed against his attorney and gave him an opportunity to "say whatever he wants to say" on the record about counsel's alleged inadequacies, the trial court was aware of Strickland's complaints regarding appointed counsel.

Further, neither Strickland's complaints nor his filing of a grievance established good cause for the ap-

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[7] *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

[8] *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

[9] *Traylor*, 245 Mich App at 462, quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

[10] *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005).

pointment of new counsel. A mere allegation that a defendant lacks confidence in his or her attorney, unsupported by a substantial reason, does not amount to adequate cause.[11] Likewise, a defendant's general unhappiness with counsel's representation is insufficient.[12] Strickland stated that he was dissatisfied because counsel provided "no details, no challenges against the evidence," gave Strickland "nothing to work with," and did not visit him in jail. Upon inquiry by the trial court, however, counsel explained that he had recently met with Strickland at the jail to explain the prosecution's plea offer, thereby refuting the lack-of-contact claim. Strickland's remaining complaints lacked specificity and did not involve a difference of opinion with regard to a fundamental trial tactic. Counsel's decisions about defense strategy, including what evidence to present and what arguments to make, are matters of trial strategy,[13] and disagreements with regard to trial strategy or professional judgment do not warrant appointment of substitute counsel.[14]

In addition to the matters mentioned in the trial court, Strickland adds on appeal that counsel failed to file any pretrial motions to dispose of the assault and firearm charges. Strickland does not indicate what motions should have been filed or explain how they would have been successful. Counsel was not required to file a futile motion.[15] Any failure by counsel in this regard did not establish good cause for substitution of counsel.

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[11] *People v Otler*, 51 Mich App 256, 258-259; 214 NW2d 727 (1974).

[12] See, e.g., *Traylor*, 245 Mich App at 463 (noting that a defendant's filing of a grievance against his counsel is insufficient alone to warrant new counsel).

[13] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[14] *Traylor*, 245 Mich App at 463-464.

[15] See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Finally, Strickland waited until the day of trial to request new counsel. The jury and witnesses were present, and the prosecutor and defense counsel were ready to proceed. A substitution of counsel at that point would have unreasonably delayed the judicial process. Although Strickland claimed to have made the request one month earlier, the record does not support that claim. Consequently, the trial court did not abuse its discretion by denying his untimely request for a new attorney.[16]

II. SUFFICIENCY OF THE EVIDENCE

Strickland argues that he never possessed a weapon, so the evidence was insufficient to support the firearm and dangerous-weapon elements of the offenses of assault with intent to do great bodily harm less than murder, felonious assault, felon-in-possession, and felony-firearm. We disagree.

In 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 any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt."[17] "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the [trier of fact's] verdict."[18]

We first note that, Strickland's sufficiency challenge to his conviction of assault with intent to do great bodily harm less than murder is without merit. His conviction for assault with intent to do great bodily harm less than

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[16] *Traylor*, 245 Mich App at 462.

[17] *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

[18] *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

murder did not rely on the factual question of whether he possessed a firearm, and possession of a firearm or a dangerous weapon is not a necessary element of that offense.[19] Viewed in a light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to reasonably infer that Strickland assaulted Arlis with the intent to do great bodily harm less than murder by repeatedly striking the 70-year-old victim in the head and face while pinning his hands to his chest and struggling with him over possession of the firearm.

With regard to the remaining convictions, possession is a question of fact for the trier of fact and can be proved by circumstantial evidence and reasonable inferences arising from the evidence.[20] Possession of a firearm may be sole or joint; thus dominion or control over the object need not be exclusive.[21] The essential question is one of control.[22]

Strickland invaded the Clarksons' home and discovered that Arlis had armed himself with a gun. Arlis testified that Strickland immediately attacked him and attempted to take the gun. During the struggle, Strickland had both of his hands on the gun, repeatedly tried to take it away, and directed Arlis to "give it up." Strickland nearly managed to completely wrest control of the gun away from Arlis a couple of times. As Strickland attempted to gain sole possession of the gun, it discharged and Arlis was shot.

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[19] *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997).

[20] *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989); *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

[21] *Hill*, 433 Mich at 470; cf. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

[22] See *Hill*, 433 Mich at 470-471; *Konrad*, 449 Mich at 271.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to reasonably infer that Strickland possessed the gun jointly with Arlis during the assault. Although Strickland provides an alternative view of the evidence, it was up to the trier of fact to evaluate the evidence and, for purposes of resolving Strickland's sufficiency challenge, this Court is required to view the evidence in a light most favorable to the prosecution.[23] There was sufficient evidence of possession to support defendant's convictions.

III. DOUBLE JEOPARDY

Strickland lastly argues that his dual convictions and sentences for both assault with intent to do great bodily harm less than murder and felonious assault violate his double jeopardy right not to be subjected to more punishment than the Legislature intended. Because this issue was not raised below, our review is limited to plain error affecting substantial rights.[24]

The validity of multiple punishments under the double jeopardy provisions of the United States and Michigan Constitutions is generally determined under the "same-elements test," which requires the reviewing court to determine " 'whether each provision requires proof of a fact which the other does not.' "[25] Our Supreme Court has determined that convictions of both assault with intent to do great bodily harm less than murder and felonious assault do not violate the consti-

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[23] *Wolfe*, 440 Mich at 515.

[24] *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

[25] *People v Smith*, 478 Mich 292, 305, 315-316; 733 NW2d 351 (2007), quoting *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

tutional double jeopardy protections because the two crimes have different elements.[26] This Court is bound to follow decisions of our Supreme Court.[27] Accordingly, Strickland has failed to demonstrate error.

Affirmed.

HOEKSTRA and GLEICHER, JJ., concurred with TALBOT, P.J.

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[26] *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007).

[27] *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002).

PIC MAINTENANCE, INC v DEPARTMENT OF TREASURY

Docket No. 298358. Submitted June 8, 2011, at Lansing. Decided June 16, 2011. Approved for publication July 28, 2011, at 9:05 a.m.

The Michigan Unemployment Insurance Agency (UIA) determined on July 16, 2007, that P.I.C. Maintenance, Inc. (PIC) employed several workers who qualified as employees, not as independent contractors as it claimed. On the basis of the UIA determination (which was challenged by PIC and still pending in a different forum), the Department of Treasury issued PIC three final assessments on April 28, 2008, by certified mail for unpaid employee withholding taxes for the years 2004, 2005, and 2006. PIC filed a petition in the Tax Tribunal on July 27, 2009, seeking relief from the department's demand that it pay the overdue withholding taxes. The tribunal granted summary disposition in favor of the department because PIC had failed to appeal the final assessments within 35 days of notice of the assessments as required by MCL 205.22(1). The tribunal also ruled that the injunctive relief that PIC requested was specifically precluded by MCL 205.28(b). PIC appealed.

The Court of Appeals *held*:

1. The department is required to give a taxpayer notice of any assessment, decision, or order by personal service or certified mail sent to the last known address of the taxpayer. MCL 205.28(1)(a). A taxpayer must appeal the contested portion of the assessment, decision, or order within 35 days of the assessment, decision, or order. MCL 205.22(1). If a taxpayer fails to file an appeal within that period, the assessment, decision, or order is final and not reviewable by any court by mandamus, appeal, or other method of direct or collateral attack. MCL 205.22(4). The Tax Tribunal's determination that the department had sent the three final assessments to PIC by certified mail on April 21, 2008, was supported by competent, material, and substantial evidence on the record. PIC failed to file an appeal from the assessments until more than one year after the appeal period had run. The tribunal properly granted summary disposition in favor of the department.

2. MCL 205.28(1)(a) does not require proof of delivery or receipt of the notice of assessment, decision, or order. Rather,

personal service or service by certified mail addressed to the last known address of the taxpayer is the only requirement, which the department accomplished. Nor does due process require actual receipt. Moreover, PIC failed to file the appeal within 35 days of the date it admitted it had actual notice.

3. PIC argued that its petition was timely because the 35-day appeal period should have started on July, 16, 2009, the date it received a final demand letter from the department demanding payment of PIC's outstanding liability. MCL 205.22(1) plainly states that only assessments, decisions, or orders of the department may be appealed. The final demand letter was not an assessment, decision, or order but was the enforcement of the final assessments. It referred to an outstanding liability and to taxes due but did not purport to be an independent assessment, decision, or order.

4. While PIC argued that its appeal was timely because the statutory appeal period was tolled while it communicated or negotiated with the department, it cited no authority to support that argument, nor did it prove that negotiations were occurring regarding the assessments.

5. PIC failed to articulate how the notice requirements set forth in MCL 205.28(1)(a) violated due process and abandoned the argument on appeal.

6. The Tax Tribunal does not have authority to grant a delayed appeal.

Affirmed.

1. TAXATION — ASSESSMENTS — APPEALS.

A taxpayer must appeal the contested portion of a Department of Treasury assessment, decision, or order in the Tax Tribunal within 35 days of the assessment, decision, or order; if the taxpayer fails to file an appeal within the proper time period, the assessment, decision, or order is final and not reviewable by any court by mandamus, appeal, or other method of direct or collateral attack; a final demand letter from the department demanding full payment of the tax outstanding is not an assessment, decision, or order; the Tax Tribunal does not have equitable power to grant a delayed appeal (MCL 205.22[1]).

2. TAXATION — ASSESSMENTS — DEPARTMENT OF TREASURY — NOTICE.

The Department of Treasury must give a taxpayer notice of any assessment, decision, or order by personal service or certified mail

sent to the last known address of the taxpayer; proof of delivery or actual receipt of the notice is not required (MCL 205.28[1][a]).

Rubenstein Isaacs, P.C. (by *Erwin A. Rubenstein* and *Ann M. O'Connell*), for petitioner.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Bradley K. Morton*, Assistant Attorney General, for respondent.

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

PER CURIAM. Petitioner, P.I.C. Maintenance, Inc., appeals as of right the order of the Michigan Tax Tribunal granting the motion by respondent, the Department of Treasury, for summary disposition. The Tax Tribunal dismissed the petition because petitioner failed to timely appeal respondent's final assessments. The Tax Tribunal also found that petitioner had failed to state a claim on which relief can be granted. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case stems from a July 16, 2007, determination by the Michigan Unemployment Insurance Agency (UIA) that petitioner had employed several workers who qualified as employees, not independent contractors as claimed by petitioner. Petitioner appealed the UIA decision in a different forum; that appeal is still pending. Upon learning about the UIA determination, respondent issued petitioner three final assessments on April 28, 2008, for unpaid employee withholding taxes for the years 2004, 2005, and 2006.

On July 27, 2009, petitioner filed a petition in the Tax Tribunal seeking relief from respondent's demand that it pay overdue withholding taxes for those tax years. Petitioner denied liability for the taxes, penalties, and interest claimed by respondent and requested that

the Tax Tribunal stay all collection activities by respondent. Respondent filed its answer on August 14, 2009, and filed a motion for summary disposition pursuant to MCR 2.116(C)(4) and (8) on October 6, 2009. Respondent claimed that petitioner's appeal was untimely and that the Tax Tribunal could therefore not consider the appeal pursuant to MCL 205.22(1). Respondent further claimed that because MCL 205.28(b) prohibits the issuance of an injunction to stay proceedings for the assessment and collection of a tax, petitioner had failed to state a claim on which relief can be granted since it specifically requested that the Tax Tribunal stay all collection activities by respondent until the resolution of its appeal from the UIA determination.

The Tax Tribunal granted summary disposition in favor of respondent and dismissed the petition on the basis that petitioner had failed to timely appeal respondent's final assessments. The Tax Tribunal found that respondent's certified-mail log, which indicated the date the final assessments were issued, was credible evidence and did not find petitioner's argument that it had never received notice of the assessments "persuasive." The Tax Tribunal also found that the injunctive relief petitioner requested was specifically precluded by MCL 205.28(b). This appeal followed.

II. TIMELINESS OF APPEAL

On appeal, petitioner first argues that the Tax Tribunal erred when it granted summary disposition in favor of respondent on the basis that its petition was untimely because petitioner maintains that the petition was timely filed. Specifically, petitioner argues that the 35-day appeal period should not have commenced on April 28, 2008, because it did not receive notice of the final assessments and that the appeal period should

have begun on July 16, 2009, the date on which it received a final demand letter from respondent.

A. STANDARD OF REVIEW

" 'This Court's review of Tax Tribunal decisions in nonproperty tax cases is limited to determining whether the decision is authorized by law and whether any factual findings are supported by competent, material, and substantial evidence on the whole record.' " *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008), quoting *J C Penney Co, Inc v Dep't of Treasury*, 171 Mich App 30, 37; 429 NW2d 631 (1988); see also Const 1963, art 6, § 28. The interpretation and application of a statute constitutes a question of law that this Court reviews de novo. *Toaz*, 280 Mich App at 459. This Court considers the pleadings and any affidavits or other documentary evidence submitted by the parties to determine if there is a genuine issue of material fact when reviewing a motion under MCR 2.116(C)(4). *Id.* Jurisdictional questions are reviewed de novo, but "this Court must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate . . . [a lack of] subject matter jurisdiction." *Id.* (citations and quotation marks omitted). Summary disposition pursuant to MCR 2.116(C)(8) tests the legal basis of the claim and is granted if, considering the pleadings alone, the "claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery." *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380; 563 NW2d 23 (1997).

B. APPLICABLE LAW

A taxpayer's right to appeal a Department of Treasury assessment is governed by MCL 205.22, which provides in relevant part:

> (1) A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days . . . .
>
> * * *
>
> (4) The assessment, decision, or order of the department, if not appealed in accordance with this section, is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack.
>
> (5) An assessment is final, conclusive, and not subject to further challenge after 90 days after the issuance of the assessment, decision, or order of the department, and a person is not entitled to a refund of any tax, interest, or penalty paid pursuant to an assessment unless the aggrieved person has appealed the assessment in the manner provided by this section.

The Department of Treasury is required to give a taxpayer notice of any assessment, decision, or order, pursuant to MCL 205.28(1)(a). That statute provides that notice "shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer." MCL 205.28(1)(a).

"When interpreting a statute, this Court's goal is to ascertain and give effect to the intent of the Legislature by enforcing plain language as it is written." *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 276; 730 NW2d 523 (2006). Thus, this Court will begin construing a statute by referring to the statutory language itself. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 147; 761 NW2d 470 (2008). When a statute's language is clear and unambiguous, judicial construction or interpretation is not necessary or permissible, and this Court will simply apply the terms of the statute to the circumstances of the particular case. *Dep't of Transp v Tomkins*, 481 Mich 184, 191;

749 NW2d 716 (2008). Judicial construction is only permitted when a statute is ambiguous. *Id.* A statute is ambiguous when "reasonable minds can differ regarding the meaning of [the] statute." *Gateplex Molded Prods, Inc v Collins & Aikman Plastics, Inc*, 260 Mich App 722, 726; 681 NW2d 1 (2004).

C. ANALYSIS

Relying on MCL 205.22(1), the Tax Tribunal dismissed petitioner's appeal and granted summary disposition in favor of respondent because the petition was not timely filed. We hold that the Tax Tribunal properly dismissed the petition. MCL 205.22(1) requires a taxpayer to appeal any assessment within 35 days of its issuance. MCL 205.22(4) provides that if an assessment is not appealed in accordance with MCL 205.22(1), it "is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack."

Petitioner argues that its petition should have been considered timely; however, we conclude that the Tax Tribunal's finding that respondent sent the three final assessments by certified mail on April 21, 2008, is supported by competent, material, and substantial evidence. Respondent submitted its certified-mail log to the Tax Tribunal to substantiate its claims. The assessments were sent by certified mail on April 21, 2008, but were "issued" on April 28, 2008, because the department postdates its assessments in order to allow processing time. See *Hatherly Assoc, Inc v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued June 29, 2010 (Docket No. 291100)[1]

[1] "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). However, unpublished opinions can be instructive or persuasive. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

(explaining that the Treasury Department postdates assessments by one week). Pursuant to MCL 205.22(1), petitioner thus had until June 2, 2008, to petition for relief from the final assessments because the statute clearly provides that a taxpayer has 35 days to appeal an assessment. Reasonable minds cannot differ regarding the meaning of "35 days"; thus, we must apply the statute as it is written. *Tomkins*, 481 Mich at 191. It is undisputed that petitioner did not file its appeal until July 27, 2009. Thus, the petition was untimely, and the Tax Tribunal properly granted summary disposition in favor of respondent.

Petitioner's claim that it did not receive the assessments on April 28, 2008, does not change the outcome. MCL 205.28 governs the manner in which respondent was required to provide notice regarding the collection of taxes. The statute provides in relevant part that notice "shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer." MCL 205.28(1)(a). The uncontroverted evidence demonstrates that respondent complied with the statute and sent the final assessments to petitioner by certified mail. Petitioner then had 35 days to appeal the assessed taxes in the Tax Tribunal pursuant to MCL 205.22(1), but failed to do so until July 27, 2009. Even if we were to assume that petitioner never received the final assessments, the Tax Tribunal did not err when it granted summary disposition to respondent. The statute does not require proof of delivery or actual receipt; it requires only personal service or service by certified mail addressed to the last known address of the taxpayer. MCL 205.28(1)(a). When a statute's language is clear and unambiguous, we must apply the terms of the statute to the circumstances of the particular case. *Tomkins*, 481 Mich at 191. The statutory language at issue in this case does not refer to or imply

that proof of receipt is necessary, and we will not read words into the plain language of the statute. *Id.*; see also Bickler v Dep't of Treasury, 180 Mich App 205, 209-211; 446 NW2d 644 (1989) (discussing delivery requirements imposed by MCL 205.28(1)(a), but not stating that proof of actual receipt is necessary to satisfy due process).

Contrary to petitioner's claim that it filed its petition within 35 days after receiving notice of the assessments, the record indicates that petitioner had actual notice of the assessments by at least May 19, 2009. Correspondence between petitioner's counsel and a representative of respondent, attached to the petition, indicates that copies of the final assessments dated April 28, 2008, were attached to the letter. However, petitioner did not petition the Tax Tribunal regarding the assessments until July 27, 2009, more than 35 days after admittedly having a copy of the assessments on May 19, 2009. Further, the correspondence between petitioner and respondent that petitioner acknowledges receiving was mailed to the same address that the final assessments were mailed to, as indicated in respondent's certified-mail log. Thus, the evidence supports the Tax Tribunal's conclusion that petitioner had actual notice of the assessments and failed to appeal within the statutory 35-day appeal period.

Petitioner argues that its petition was timely because the 35-day appeal period should have started on July 16, 2009, the date petitioner received a final demand letter from respondent demanding full payment of petitioner's "outstanding liability" for withholding taxes assessed. The Tax Tribunal's rejection of petitioner's argument did not constitute an error of law. The plain language of the statute states that taxpayers aggrieved by "an assessment, decision, or order" of the Depart-

ment of Treasury may appeal. MCL 205.22(1). Thus, only assessments, decisions, or orders are appealable. The July 16, 2009, letter was not an assessment, decision, or order; rather, it was an enforcement of the April 28, 2008, final assessments. Further, the letter itself did not purport to be an independent assessment, decision, or order; rather, it referred to an "outstanding liability." The outstanding liability referred to the taxes due as reflected by the final assessments. Finally, as already discussed petitioner clearly had actual notice of the assessments before respondent issued the July 16, 2009, final demand letter. Thus, the final assessments aggrieved petitioner, and it was required to appeal the final assessments within 35 days pursuant to MCL 205.22(1). Because petitioner failed to timely appeal, the Tax Tribunal properly granted summary disposition in favor of respondent.

Petitioner argues in the alternative that even if the July 16, 2009, letter did not constitute a final decision, its petition should be considered timely because the 35-day appeal period was tolled since petitioner was communicating with a representative of respondent regarding petitioner's appeal of the UIA decision. Petitioner asserts that this Court's decision in *Curis Big Boy, Inc v Dep't of Treasury*, 206 Mich App 139; 520 NW2d 369 (1994), supports a finding that the statutory appeal period was tolled while petitioner communicated with respondent. Petitioner claims that *Curis Big Boy* should be read to support the proposition that the statutory period for appealing a decision of the Department of Treasury may be tolled on the basis of communications between the taxpayer and the department. In *Curis Big Boy* the petitioner appealed the Tax Tribunal's denial of his claim for a single business tax refund. *Id.* at 140. The Tax Tribunal granted the respondent's motion to dismiss on the basis of the petitioner's failure to

timely file an appeal in accordance with MCL 205.22(1). *Id.* at 141. The petitioner had argued that the statutory period for appeal was tolled because he was engaged in negotiations with the respondent. *Id.* This Court stated that the record did not support the petitioner's contention that a settlement was being negotiated and affirmed the Tax Tribunal's dismissal. *Id.* at 141-142.

Contrary to petitioner's argument, *Curis Big Boy* did not explicitly hold that evidence of negotiations with the department would have tolled the statutory appeal period. Petitioner in this case does not cite any other authority to support its argument that the statutory appeal period is tolled during negotiations between the parties. Further, as in *Curis Big Boy*, there is no evidence in this case that petitioner and respondent were engaged in negotiations; rather, the letters attached by petitioner indicate that respondent was voluntarily delaying collection action pending the resolution of the UIA appeal.[2] Respondent's voluntary decision to not immediately pursue collection of the assessed taxes does not constitute negotiation with petitioner. The letters also do not indicate that there was any discussion regarding petitioner's actual liability. Further, respondent's voluntary collection forbearance does not negate the fact that final assessments were issued on April 28, 2008, and petitioner failed to appeal those assessments in accordance with MCL 205.22(1). The appeal period set forth in MCL 205.22(1) is not contingent on whether the department immedi-

[2] Petitioner supports its assertion that respondent indicated it would not take collection action until resolution of the UIA case by referring to letters from its counsel to a representative of the Department of Treasury that it attached to its petition. These letters, written by petitioner's counsel, updated respondent regarding the progression of the UIA appeal and generally implied that petitioner believed there was an agreement not to pursue collection pending resolution of the UIA case.

ately takes collection action; rather, the statute clearly states that a "taxpayer aggrieved by an assessment, decision, or order of the department may appeal" within 35 days. MCL 205.22(1). Petitioner should not have assumed that it could ignore the appeal procedures until respondent demanded payment of the assessed taxes.

Lastly, petitioner argues that due process requires that its petition should have been considered even if it was not timely. Petitioner specifically asserts that its petition should have been considered even if respondent properly provided notice because the notice requirements set forth in MCL 205.28(1)(a) are violative of due process. However, petitioner fails to articulate how the statute is contrary to due process. Petitioner's failure to properly address the merits of its assertion of constitutional error constitutes abandonment of the issue on appeal. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). However, we note that due process itself does not require proof of actual receipt; rather, due process requires " 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509; 751 NW2d 453 (2008), quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950). Sending notice by certified mail is reasonably calculated to apprise interested parties of the pendency of the action when the correspondence is not returned to the government as "unclaimed." *Sidun*, 481 Mich at 509-511. There is no contention that the final assessments were returned to respondent. "Due process does not require that a property owner receive actual notice before the government may take his property." *Id.* at 509. Thus, respondent

properly provided petitioner with the notice due process requires. Therefore, petitioner was required to appeal the assessment within 35 days of respondent's notice. MCL 205.22(1). The Tax Tribunal did not err when it granted summary disposition in favor of respondent because petitioner failed to timely appeal the assessment.

III. EQUITABLE RELIEF

A. EQUITY JURISDICTION

Petitioner also argues that regardless of whether its petition was timely, the Tax Tribunal should have exercised its "equity jurisdiction" to grant petitioner a delayed appeal. Specifically, petitioner argues that *Curis Big Boy* permits the Tax Tribunal to grant a delayed appeal because the decision recognizes that " 'there may be an extraordinary case which justifies the exercise of equity jurisdiction . . . .' "[3] *Curis Big*

[3] Petitioner also argues for the first time on appeal that this Court must reverse the decision of the Tax Tribunal because if petitioner pays the assessed taxes and later wins the appeal regarding the UIA determination, it will not be able to get a refund pursuant to MCL 205.27a. Issues not raised before the Tax Tribunal are not properly preserved for appeal and need not be addressed by this Court. *Toaz*, 280 Mich App at 463. Nevertheless, petitioner's claim that it would not be able to receive a refund for wrongly paid taxes lacks merit. Petitioner focuses on the language of MCL 205.27a(2), which provides that the "taxpayer shall not claim a refund of any amount paid to the department after the expiration of 4 years after the date set for the filing of the original return." However, petitioner ignores the exception to the time limitation set forth in MCL 205.27a(3)(a), which specifically provides that the running of the period of limitations is suspended during any "period pending a final determination of tax," including litigation of liability for a tax administered by the Department of Treasury. Further, we note that MCL 205.30(1) clearly provides that the "department shall credit or refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed,

Boy, 206 Mich App at 142, quoting *Wikman v City of Novi* 413 Mich 617, 648; 322 NW2d 103 (1982).

Contrary to the language that petitioner quotes from *Curis Big Boy*, this Court has specifically held that the "Tax Tribunal does not have authority to grant a delayed appeal." *Toaz*, 280 Mich App at 462, citing *Curis Big Boy*, 206 Mich App at 142. The language petitioner quotes from *Curis Big Boy* was merely an observation and was not part of this Court's holding in that case. The petitioner in *Curis Big Boy* similarly argued that the Tax Tribunal should have exercised its equitable power to grant a "delayed appeal." *Curis Big Boy*, 206 Mich App at 142. This Court held that the Tax Tribunal did not have authority to grant a delayed appeal in light of MCL 205.22 when the petitioner had failed to exercise its legal remedy. *Id.* Like the situation in *Curis Big Boy*, this case is not the "extraordinary case which justifies the exercise of equity jurisdiction." *Id.* There is no reason petitioner could not have appealed the final assessments immediately. Petitioner would still have been able to work with respondent regarding any voluntary forbearance of tax collection. *Curis Big Boy* recognized, and we reiterate, that petitioner was required to appeal the assessments within 35 days, *id.*; otherwise, "the assessment, decision, or order of the department . . . is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack," MCL 205.22(4). Therefore, because petitioner failed to timely appeal the assessments, the Tax Tribunal did not err when it granted summary disposition pursuant to MCR 2.116(C)(4) in favor of respondent.

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excessive in amount, or wrongfully collected with interest at the rate calculated under [MCL 205.23] for deficiencies in tax payments."

B. INJUNCTIVE RELIEF

Finally, petitioner argues that the Tax Tribunal erred when it determined that petitioner had failed to state a claim on which relief can be granted and granted summary disposition in favor of respondent pursuant to MCR 2.116(C)(8). Specifically, petitioner argues that the Tax Tribunal erred when it found that petitioner's request to have the Tax Tribunal stay all collection activities of respondent constituted injunctive relief specifically barred by statute. Petitioner argues that despite MCL 205.28(1)(b), there is no absolute prohibition against the issuance of an injunction regarding the assessment and collection of a tax.

Because we conclude that the Tax Tribunal properly dismissed the petition as untimely we need not reach this issue. However, we note that MCL 205.28(1)(b) provides that "[a]n injunction shall not issue to stay proceedings for the assessment and collection of a tax." Petitioner relies on *Stone v Michigan*, 247 Mich App 507, 531; 638 NW2d 417 (2001), rev'd on other grounds 467 Mich 288 (2002), to support its argument that a stay would be permissible in this case despite MCL 205.28(1)(b). However, *Stone* did not hold that an injunction may be granted despite the statutory prohibition. The Court held that an injunction was properly issued in that case because the injunction did not involve a proceeding for the " 'assessment and collection' of a tax"; rather, it dealt with taxes that were already assessed and collected and would be again, albeit unlawfully. *Stone*, 247 Mich App at 531. Unlike the situation in *Stone*, the relief petitioner requests in the instant case is specifically a stay prohibiting the collection of taxes pursuant to respondent's final assessment. Therefore, MCL 205.28(1)(b) applies, and the issuance of an injunction or stay is statutorily prohib-

ited. Thus, the Tax Tribunal did not err when it granted summary disposition in favor of respondent.

IV. CONCLUSION

The Tax Tribunal's findings of fact were supported by competent, material, and substantial evidence. Respondent's certified-mail log, which indicated that the final assessments were issued on April 28, 2008, and sent by certified mail to petitioner's address, supported the Tax Tribunal's factual finding regarding the final assessment date. Additionally, petitioner submitted letters that demonstrated it had actual notice of the assessments more than 35 days before it petitioned the Tax Tribunal for relief. Finally, petitioner acknowledged the receipt of a letter sent to the same address as the assessments. Further, the Tax Tribunal did not make an error of law or adopt a wrong legal principle when it granted summary disposition in favor of respondent because petitioner failed to timely file an appeal of respondent's final assessments as required by MCL 205.22. Because petitioner did not timely appeal respondent's final assessments in accordance with MCL 205.22, the assessments "[were] final and [were] not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack." MCL 205.22(4).

Affirmed. Respondent, being the prevailing party, may tax costs pursuant to MCR 7.219.

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

WHITE v STATE FARM FIRE AND CASUALTY COMPANY

Docket No. 298083. Submitted July 6, 2011, at Detroit. Decided July 28, 2011, at 9:10 a.m.

Steven M. and Gail A. White hired a public adjusting firm, Associated Adjusters, Inc., to assist them in presenting a claim for damage caused by a fire at their residence to their insurer, State Farm Fire and Casualty Company. Jeffery Moss, a licensed public adjuster, was assigned by Associated Adjusters to assist the Whites, who signed a contract assigning to Associated Adjusters 10 percent of the total payment on the Whites' claim. When the parties were unable to reach a settlement, Moss notified State Farm in writing that, pursuant to MCL 500.2833(1)(m), the Whites demanded that the amount of the loss be set by an appraisal. Moss stated that he would represent the Whites as their appraiser and that he would be paid by the Whites on a time-and-expenses basis. State Farm responded that it would not accept Moss as an appraiser because he was not "disinterested" as required under the policy or "independent" as required under MCL 500.2833(1)(m) because of the contingency-fee contract between the Whites and Associated Adjusters. The Whites brought an action against State Farm in the Oakland Circuit Court, seeking a declaratory judgment regarding Moss's ability to serve as the Whites' appraiser. The court, Colleen A. O'Brien, J., granted in part the Whites' motion for summary disposition, ruling that Moss is "competent" and "independent" under MCL 500.2833(1)(m) and thus qualified to serve as an appraiser despite having a contingency-fee contract with the Whites for the adjusting. The court also held that the statute was constitutional and does not violate State Farm's due-process rights. State Farm appealed.

The Court of Appeals *held*:

1. MCL 500.2833(1)(m) requires a fire-insurance policy in Michigan to provide that, if the amount of the loss cannot be agreed upon and a party makes a written demand for an appraisal, each party shall select a "competent" and "independent" appraiser and the two appraisers shall then select a "competent" and "impartial" umpire. If the appraisers fail to agree within a reasonable time, they must submit their differences to the umpire.

A written agreement signed by any two of the three individuals thereafter sets the amount of the loss.

2. A contingency-fee agreement does not prohibit an appraiser from being "independent" under MCL 500.2833(1)(m). However, the opposing party must be made aware that a contingency-fee agreement exists. A dictionary defines "independent" as not dependent and not subject to control, restriction, modification, or limitation from a given outside source. Moss is not subject to control, restriction, modification, or limitation by anyone. He is not an employee of the Whites or under any legal duty to them with the exception of the public-adjusting contract. He is capable of exercising his own judgment regarding the value of the loss. The trial court's decision that Moss is qualified to serve as the Whites' competent and independent appraiser is affirmed.

3. Appraisers in Michigan are not considered to be quasi-judges and are not held to the same standard of fairness under MCL 500.2833(1)(m) as are umpires, who must be "impartial." An "independent" appraiser may be biased toward the party who hires and pays the appraiser as long as he or she retains the ability to base his or her recommendation on his or her own judgment. This situation does not deprive the other party of any constitutional right. Appraisers are not disqualified from their appointments simply because they have served as adjusters for the parties seeking their appointment.

Affirmed.

SHAPIRO, J., concurring, wrote separately to disagree with State Farm's argument that party-appointed appraisers should be required to possess the same level of neutrality as umpires. State Farm's argument is inconsistent with the Legislature's decision to distinguish in MCL 500.2833(1)(m) between the role of the party-selected appraisers, who need not be impartial but must be independent and not under the control of the parties, and the umpire, upon whom the decision ultimately rests, who must be impartial. The role that an appraiser plays, the fact that an appraiser is paid by one side to the dispute, and the fact that an appraiser exclusively, or nearly exclusively, works for either insurers or insureds, is the source of any lack of impartiality, not whether the appraiser is compensated at an hourly rate or by a contingent fee.

INSURANCE — FIRE INSURANCE POLICIES — DISPUTES REGARDING AMOUNT OF LOSS — APPRAISERS — UMPIRES — CONTINGENCY-FEE AGREEMENTS — WORDS AND PHRASES — INDEPENDENT APPRAISERS.

A fire insurance policy in Michigan must provide that, in the event that the insured and the insurer fail to agree on the actual cash

> value or amount of a loss, either party may demand in writing that the amount be set by appraisal; the policy must provide that each party must select a competent, independent appraiser and that the two appraisers must then select a competent, impartial umpire, or lacking agreement, the relevant circuit court may appoint an umpire; the policy must provide that if the appraisers fail to agree on the amount of the loss within a reasonable time, they must submit their differences to the umpire and that an agreement signed by any two of the three shall set the amount of the loss; an appraiser, to be independent, must not be subject to control, restriction, modification, or limitation by anyone and must retain the ability to base his or her recommendation on his or her own judgment; a contingency-fee agreement does not prevent an appraiser from being independent (MCL 500.2833[1][m]).

Fabian, Sklar & King, P.C. (by *Michael H. Fabian*), and *Donald M. Fulkerson*, for plaintiffs.

Patrick, Johnson & Mott, P.C. (by *Paul H. Johnson, Jr.*, and *Cary R. Berlin*), for defendant.

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

METER, J. In this dispute involving a fire-insurance policy, defendant, plaintiffs' insurance company, appeals as of right a partial grant of summary disposition to plaintiffs.[1] Defendant argues that the trial court erred by ruling that plaintiffs' appraiser, Jeffery Moss, is "independent" under MCL 500.2833(1)(m) and that he may proceed with the appraisal process. In the alternative, defendant submits that MCL 500.2833(1)(m) is unconstitutional as a violation of defendant's due-process rights if it permits appraisers with pertinent contingency-fee contracts in effect to serve as appraisers in coverage disputes. We affirm.

In June 2008, plaintiffs' residence in Farmington Hills was severely damaged by a fire. Plaintiffs hired

[1] The court ruled in defendant's favor concerning other matters not pertinent to this appeal.

the public adjusting firm Associated Adjusters, Inc. (Associated), to assist them in presenting their claim to defendant. Jeffery Moss, a licensed public adjuster, was assigned to assist plaintiffs. Moss and plaintiffs signed a contract assigning to Associated 10 percent of the total payment on plaintiffs' claim.

A dispute developed during negotiations between Associated and defendant, and when the differences could not be settled, Moss sent a letter to defendant demanding appraisal pursuant to MCL 500.2833(1)(m). He stated that he would represent plaintiffs as their appraiser in the dispute. For the appraisal, he is to be paid on a time-and-expense basis.[2] Defendant responded that it would not accept Moss as plaintiffs' appraiser because he is not "disinterested" under defendant's policy or "independent" under MCL 500.2833(1)(m). Plaintiffs then filed this action, seeking a declaratory judgment that Moss is "independent" under the statute and qualified to serve as an appraiser despite his contingency-fee adjusting agreement that remains in effect.

The parties filed cross-motions for summary disposition under MCR 2.116(C)(10). The trial court ruled that Moss is "competent" and "independent" under MCL 500.2833(1)(m) and thus qualified to serve as an appraiser despite having a contingency-fee contract with plaintiffs for the adjusting. The trial court also ruled that the statute is constitutional and does not violate defendant's due-process rights.

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[2] Moss is to receive an hourly rate of $250, with total compensation not exceeding $5,000. Evidence indicated that his total payment, under both the adjusting contract and the appraisal agreement, would not exceed 10 percent of the final amount obtained from defendant. Presumably, the time-and-expense payment for the appraisal would be adjusted downward, if need be, to ensure that the 10 percent limit would not be exceeded.

This Court reviews de novo both declaratory rulings and summary-disposition rulings. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10; 743 NW2d 902 (2008); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In evaluating a motion for summary disposition under MCR 2.116(C)(10), a court considers all pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Evidence is considered in the light most favorable to the nonmoving party, and the moving party is entitled to judgment as a matter of law if there is no genuine issue of material fact. *Maiden*, 461 Mich at 120.

Defendant concedes in its appellate brief that this case involves interpreting the statutory term "independent" and does not analyze whether it may add the term "disinterested" to its policy as a separate, additional condition that appraisers must satisfy. Consequently, we resolve this appeal solely on the basis of the language of MCL 500.2833(1)(m). This statute indicates that a fire-insurance policy in Michigan must provide

> [t]hat if the insured and insurer fail to agree on the actual cash value or amount of the loss, either party may make a written demand that the amount of the loss or the actual cash value be set by appraisal. If either makes a written demand for appraisal, each party shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days after receipt of the written demand. The 2 appraisers shall then select a competent, impartial umpire. If the 2 appraisers are unable to agree upon an umpire within 15 days, the insured or insurer may ask a judge of the circuit court for the county in which the loss occurred or in which the property is located to select an umpire. The appraisers shall then set the amount of the loss and actual cash value as to each item. If the appraisers submit a written report of an agreement to the insurer, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall

> submit their differences to the umpire. Written agreement signed by any 2 of these 3 shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by the insured and the insurer. [*Id*.]

Defendant argues that because Moss signed an agreement with plaintiffs assigning to Associated 10 percent of the overall amount paid by defendants, and this agreement was still in effect when plaintiffs nominated Moss as their appraiser and in fact remains in effect, Moss has a pecuniary interest in the appraisal's outcome and is not "independent" under the statute.

This Court's decision in *Auto-Owners Ins Co v Allied Adjusters & Appraisers*, *Inc*, 238 Mich App 394; 605 NW2d 685 (1999), interpreted the requirement in MCL 500.2833(1)(m) that an appraiser be "independent" for the only time in a published opinion since the repeal of MCL 500.2832 by 1990 PA 305, effective January 1, 1992. Before the repeal of MCL 500.2832 and the enactment of the statute at issue here, the analogous former statute had read, in pertinent part, that "each [party] shall select a competent and *disinterested* appraiser," and should the two appraisers not come to an agreement, a "competent and *disinterested* umpire" would resolve the dispute. (Emphasis added.) See former MCL 500.2832 (repealed by 1990 PA 305, effective January 1, 1992, replaced by MCL 500.2833 added by 1990 PA 305, effective December 14, 1990). As the decision in *Auto-Owners* explained, MCL 500.2833 "indicates that the standards for appraisers and umpires are no longer the same." *Auto-Owners*, 238 Mich App at 400. The current version of the statute requires that appraisers be "competent [and] *independent*," while umpires must be "competent [and] *impartial*." MCL 500.2833(1)(m) (emphasis added).

Because the statute does not define the words "independent" or "impartial," it is proper to consider the dictionary definitions of these terms. See *Auto-Owners*, 238 Mich App at 398. The *Auto-Owners* Court indicated that "[t]he definition of 'independent' is '[n]ot dependent; not subject to control, restriction, modification, or limitation from a given outside source.' " *Id*. at 400, quoting Black's Law Dictionary (6th ed). On the contrary, "[t]he definition of 'impartial' is '[f]avoring neither; disinterested; treating all alike; unbiased; equitable, fair, and just.' " *Auto-Owners*, 238 Mich App at 400-401, quoting Black's Law Dictionary (6th ed). On the basis of this difference, the Court in *Auto-Owners* found that an "independent appraiser may be biased toward the party who hires and pays him, as long as he retains the ability to base his recommendation on his own judgment." *Auto-Owners*, 238 Mich App at 401. The Court held that appraisers "are not disqualified from their appointments on the basis of having previously served as adjusters." *Id*. The *Auto-Owners* Court did not decide any issue pertaining to a contingency-fee agreement such as the one at issue in this case.

This Court in *Linford Lounge, Inc v Michigan Basic Prop Ins Ass'n*, 77 Mich App 710, 713; 259 NW2d 201 (1977), interpreting the since-repealed statute that included the "disinterested" requirement, held that an appraiser may still be "disinterested" if he or she had previously served as an adjuster on a claim. That case, like the one at bar, involved a contingency-fee agreement paid to a public adjuster. Unlike in this case, the contract with the public adjuster in *Linford Lounge* was canceled before or at the time the adjuster was appointed as the insured's appraiser in the dispute. *Id*. at 712. However, contrary to defendant's contention, *Linford Lounge* does not *require* that the insured cancel its previously agreed-upon contract in order to appoint its

prior adjuster as its appraiser in the event of a dispute. The *Linford Lounge* Court held only that an appraiser is not disqualified under the "disinterested" standard simply because he or she had represented the insured previously as an adjuster. It did not decide whether the appraiser would have been "disinterested" if the contract had not been canceled. Neither *Auto-Owners* nor *Linford Lounge* holds, as defendant implies, that an appraiser currently working under a contingency-fee agreement as an adjuster cannot be "independent."

Because no published opinion in Michigan is directly on point with regard to the present appeal, we examine decisions from other jurisdictions. In *Rios v Tri-State Ins Co*, 714 So 2d 547 (Fla App, 1998), the court interpreted a contractual provision similar to MCL 500.2833(1)(m). The appraisal provision in the contract required each party to "select 'a competent, *independent* appraiser' (emphasis added), and the two party-designated appraisers will then select a 'competent, impartial umpire.' " *Id.* at 548. Given that the contract in *Rios*, like MCL 500.2833(1)(m), contained no definition of "independent," the court quoted the same definition discussed above[3] and "decline[d] to interpret the term 'independent' . . . to limit the type of compensation which can be paid." *Rios*, 714 So 2d at 549-550. While the court cautioned that the other party must be made aware of a contingency-fee agreement, it held that an appraiser may be independent while working under a contingency-fee agreement. *Id*. Another Florida panel held that a policy that required an appraiser to be "disinterested" did not prevent him from receiving a

[3] " '[N]ot subject to control, restriction, modification, or limitation from a given outside source[.]' " *Rios*, 714 So 2d at 549, quoting Black's Law Dictionary (6th ed).

contingency fee for the appraisal. See *Galvis v Allstate Ins Co*, 721 So 2d 421 (Fla App, 1998).

The court in *Hozlock v Donegal Cos*, 2000 Pa Super 25; 745 A2d 1261 (2000), stated that "[m]ere partiality does not necessarily render an arbitrator incapable of fair judgment." *Id*. at ¶ 7. While the policy at issue in *Hozlock* required only that the appraiser be "competent," the court went on to state that

> an appraiser who is paid with a contingency fee will not necessarily be any more biased towards his appointor than one paid with a flat fee. Caselaw should reflect that reality. Therefore, a holding that the mere existence of a contingency agreement warrants disqualification, in the absence of specific contractual language requiring impartiality, would be inappropriate. [*Id*. at ¶ 13.]

While *Hozlock* is not directly on point because it did not analyze the term "independent," it is instructive.[4] The court specifically declined to state whether the addition of "disinterested" into the policy would have changed the result, *id*. at ¶ 14, but, clearly, adding the word "independent" as defined above would not.

Other state cases have criticized contingency-fee agreements in certain contexts. The Iowa Supreme Court invalidated an appraisal award in *Central Life Ins Co v Aetna Cas & Sur Co*, 466 NW2d 257, 261-262 (Iowa, 1991), on the grounds that an appraisal is a quasi-judicial function and thus an appraiser must be disinterested. That court expressed the opinion that a

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[4] As discussed above, the *Hozlock* court opined that "a holding that the mere existence of a contingency agreement warrants disqualification, in the absence of *specific contractual language requiring impartiality*, would be inappropriate." *Id.* at ¶ 13 (emphasis added). We interpret that language to endorse the position that a contingency-fee agreement does not disqualify an appraiser under the "independent" standard because the word "independent," as we have defined it, does not require impartiality.

contingency-fee agreement gives the appraiser "a direct financial interest in the dispute" and thus renders him "interested." *Id*. at 261. The Rhode Island Supreme Court in *Aetna Cas & Sur Co v Grabbert*, 590 A2d 88, 94 (RI, 1991), an arbitration case, stated that "Grabbert's party-appointed arbitrator has violated Canon I of the Code of Ethics because his contingent fee gave him a direct financial interest in the award that would tend to destroy public confidence in the integrity of the arbitration process." The court nevertheless refused to vacate the arbitration award because of other considerations. *Id*. at 96-97. The court in *Rios* explicitly declined to follow both of these cases. *Rios*, 714 So 2d at 549.

We follow *Rios* and hold that a contingency-fee agreement does not prevent an appraiser from being "independent" under MCL 500.2833(1)(m).[5] Moss is clearly " 'not subject to control, restriction, modification, or limitation' " by anyone. See *Auto-Owners*, 238 Mich App at 400, quoting Black's Law Dictionary (6th ed). He is not an employee of plaintiffs or under any other legal duty to them with the exception of the public-adjusting contract. As such, he is capable of exercising his own judgment regarding the value of the loss in this proceeding and should not be disqualified to serve as plaintiffs' appraiser in this dispute under the "competent [and] independent" standard set forth in MCL 500.2833(1)(m). Moss testified that he makes his own determinations regarding the loss and does not listen to his clients regarding a recommended settlement amount, and defendant's appraiser agreed. Moss is "independent," and we affirm the trial court's decision.[6]

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[5] As in *Rios*, we find that the opposing party must be made aware that a contingency-fee agreement exists.

[6] We note that reading the word "independent" to require a time-and-expense compensation agreement would make it more difficult for

Defendant next argues that MCL 500.2833(1)(m), if it allows Moss to serve as an appraiser under the present facts, violates defendant's due-process rights. We disagree. We review matters of constitutional interpretation de novo. *Toll Northville*, 480 Mich at 10-11.

Contrary to defendant's implication, appraisers in Michigan are not considered to be quasi-judges. They are not held to the same standard of fairness as an "impartial" umpire. See MCL 500.2833(1)(m) (requiring the parties to select a "competent [and] impartial" umpire in appraisal disputes). Public adjusters and appraisers are hired to assist in presenting a claim to an insurance company and to assist in any dispute that might arise, respectively. They are more similar to attorneys than to judges and umpires. Attorneys and appraisers are hired by one party to assist in presenting that party's position, while judges and umpires must take the proposals of both parties and decide which one is to prevail.[7]

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policyholders to hire public adjusters. The situation is analogous to the hiring of attorneys on a contingency-fee basis; that system exists partly because many people would be unable to hire lawyers if time-and-expense were the only allowable compensation method.

[7] This Court adopted language from a California decision for the proposition that " '[c]ourts have repeatedly upheld agreements for arbitration conducted by party-chosen, nonneutral arbitrators, particularly when a neutral arbitrator is also involved. These cases implicitly recognize it is not necessarily unfair or unconscionable to create an effectively neutral tribunal by building in presumably offsetting biases.' " *Whitaker v Citizens Ins Co of America*, 190 Mich App 436, 440; 476 NW2d 161 (1991), quoting *Tate v Saratoga S & L Ass'n*, 216 Cal App 3d 843, 852; 265 Cal Rptr 440 (1989), disapproved of on other grounds by *Advanced Micro Devices, Inc v Intel Corp*, 9 Cal 4th 362; 36 Cal Rptr 2d 581; 885 P2d 994 (1994). While *Whitaker* and *Tate* refer to arbitration proceedings and not appraisals, they are instructive because arbitration and appraisal have pertinent similarities. But see *Mahnke v Superior Court of Los Angeles Co*, 180 Cal App 4th 565, 574-575; 103 Cal Rptr 3d 197 (2009) (noting that under California law appraisers are held to a "disinterested"

Auto-Owners, 238 Mich App at 401, allows for the likelihood of a party-appointed appraiser's being biased towards the party that retained the appraiser. This does not deprive defendant of any constitutional right. The cases cited by defendant in favor of its position assume that an appraiser is directly analogous to a judge. They are not binding in this situation because Moss is not required to be quasi-judicial or impartial. See *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927) (it was a violation of due process where the mayor of the city sat as a judge and received a salary increase for convicting a defendant), and *Caperton v A T Massey Coal Co, Inc*, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009) (a West Virginia justice had refused to recuse himself in a situation in which he had a conflict of interest). Moss is not a quasi-judge and there has been no denial of defendant's due-process rights. The trial court did not err in its ruling.

Affirmed.

BORRELLO, P.J., concurred with METER, J.

SHAPIRO, J. (*concurring*). I concur with Judge METER'S opinion in all respects. I write separately to emphasize the practical dislocations that would arise from adoption of defendant's argument. Defendant essentially asks that we require the party-appointed appraisers to possess the same level of neutrality as the umpire. Indeed, virtually all the cases cited by defendant address the requirements for judges and magistrates, which is, of course, an absolute standard of impartiality. I agree with the majority that defendant's position is inconsistent with the Legislature's decision to use

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standard much like the repealed MCL 500.2832, but arbitrators are held to a less-stringent standard not requiring disinterest).

statutory language that clearly distinguishes between the role of the party-selected appraisers and the umpire. The umpire, upon whom the decision ultimately rests, must be "impartial" while the appraisers need not be. Instead, they must be "independent," i.e. not under the actual control of the parties.

Appraisal is a practical mechanism to resolve disputes without the necessity for lawsuits and the appraiser acts as an expert for the party that hires the appraiser. While an appraiser brings specialized knowledge to the process, all parties also expect that each appraiser will articulate and generally support his or her client's position concerning the claim. In an appraisal, the two party-selected appraisers, through argument and compromise, attempt to reach a resolution of the claim that they both believe is reasonable. If that cannot be accomplished, then the umpire either induces them to bridge their differences or makes the decision himself with one of the two party-selected appraisers providing the second vote. Despite defendant's assertion of a due process claim, at no point does defendant assert that this method yields unfair results or that it is impracticable.

Defendant suggests that payment of an appraiser by contingent fee is corrupting, but that payment by hourly fee is not. This is a distinction without a difference. The appraiser appointed by defendant in this case makes his living acting on behalf of insurance companies and it is either naive or disingenuous to suggest that he will continue to be hired by them if they do not feel that the results he obtains are in their interest. Defendant's appraiser testified that over the past three years alone, defendant has appointed him as its appraiser on approximately 40 claims and has paid him $114,512.03 in appraiser fees. In the 14 recent claims

where this appraiser and a public adjustor, presumably working under a 10 percent contingency fee agreement, served as party appraisers, his hourly fees exceeded the policyholders' appraisers' fees by 42 percent. To maintain that he does not have a pecuniary interest in seeking a favorable outcome for defendant and the other insurance companies that retain him is absurd. This is not an attack on this gentleman's probity, because he is, in fact, paid to act as an advocate with specialized knowledge, as is plaintiff's appraiser. The role that an appraiser plays, the fact that he or she is paid by one side to the dispute, and the fact that he or she exclusively (or nearly exclusively) works for either insurers or insureds, is the source of the lack of impartiality, not whether the appraiser is compensated at an hourly rate or by a contingent fee. An appraiser's livelihood depends on maintaining a reputation among insureds or insurers that their respective positions will be well-articulated and supported and that the appraiser will obtain an acceptable, if not pleasing, outcome for the side that retained the appraiser. If we were to adopt defendant's extrastatutory requirements, virtually all party-appointed appraisers would have to be disqualified and the entire appraisal mechanism, which has fairly served all sides for decades, would come to a screeching halt. The result would be more unnecessary litigation.

Lastly, the majority opinion does not address plaintiffs' argument that defendant's policy, by requiring "disinterested" rather than "independent" appraisers, is inconsistent with state law, as it has existed since 1990, and constitutes fraud. Given our conclusion in this case, I agree that it was not necessary to do so and I make no judgment regarding defendant's intent in its continued use of the outdated term. However, it must be noted that defendant's response to this argument is

wholly devoid of merit. Defendant suggests that if its policy is out of compliance with the statute, indeed, even if it is purposefully so, it is of no consequence because its policy also states:

> **10. Conformity to State Law.**
>
> When a policy provision is in conflict with the applicable law of the state in which this policy is issued, the law of the State will apply.

This statement, which is itself required to be included by state law, is a sword provided to insureds should they discover that the policy issued to them does not comply with state law. Contrary to defendant's suggestion, it is not intended as a shield for insurers that issue policies inconsistent with state law. Insurers have a duty to comply with state law. The provision just cited is intended to require that compliance, not to facilitate noncompliance.

CHOUMAN v HOME OWNERS INSURANCE COMPANY

Docket No. 295491. Submitted July 6, 2011, at Detroit. Decided August 2, 2011, at 9:00 a.m.

Abir Chouman and her husband, Abdul Ajami, brought an action against Mariam and Hussein Hamadi in the Wayne Circuit Court after Chouman was injured in an automobile accident when Mariam rear-ended her. Plaintiffs subsequently added their no-fault insurer, Home Owners Insurance Company, as a defendant. Plaintiffs settled with the Hamadis, and Home Owners approved the settlement in its capacity as subrogee, but plaintiffs' case against Home Owners for underinsured motorist benefits proceeded to trial. Following the close of proofs, the court, John H. Gillis, Jr., J., granted plaintiffs' motion for a directed verdict, finding that Chouman had sustained a serious impairment of a body function. The jury then found that plaintiffs were entitled to $50,000 in underinsured motorist benefits from Home Owners. The court also awarded case evaluation sanctions to plaintiffs. Home Owners appealed.

The Court of Appeals *held*:

1. MRE 408 prohibits the introduction of evidence of compromise, offers to compromise, or compromise negotiations in order to prove liability for or the invalidity of the claim or its amount. MRE 409 prohibits the introduction of evidence of offering or promising to pay medical expenses in order to prove a party's liability for the injury. The evidence in this case established that Chouman received extensive medical treatment as long as Home Owners continued to pay first-party personal injury protection (PIP) no-fault benefits to plaintiffs, but Chouman essentially discontinued medical treatment when the company terminated those payments. Neither MRE 408 nor MRE 409 applied to the evidence of the company's payment of PIP benefits. Plaintiffs were entitled to present evidence that Chouman stopped receiving medical treatment, not because she no longer considered it necessary, but because plaintiffs were no longer receiving PIP benefits. However, the identity of the payor of those benefits was not relevant to any proper purpose and could not be introduced on remand.

2. The bar on the admission of evidence of compromise applies to settlements by parties to a suit with nonparties, at least to the extent of using the settlement as proof of liability of the settling party. Home Owners was not a party to plaintiffs' settlement with the Hamadis and was involved only to the extent of giving its approval pursuant to plaintiffs' insurance policy. The company's consent was not itself a compromise of a dispute, and the evidence was not barred by the rule against the admissibility of evidence of compromise. However, the evidence was, nonetheless, inadmissible because its probative value was substantially outweighed by its prejudicial effect.

3. Under the no-fault insurance act, to show a serious impairment of body function, the evidence must establish (1) an objectively manifested impairment of a body function (2) that is significant or important to the specific injured person and (3) affects that person's general ability to lead his or her particular normal life. In this case, an orthopedic surgeon testified that Chouman had sustained a herniated disk and a pinched nerve in her spine, and he continued to treat her for pain. He opined that Chouman was disabled from her work as a daycare school teacher. Home Owners presented the testimony of a physician specializing in rehabilitation, and she testified that Chouman had a herniated disk, but disagreed that Chouman continued to suffer from the condition or its symptoms, and opined that she was not restricted from her preaccident activities. The physicians disagreed regarding whether more recent tests had shown an improvement in Chouman's disk herniation. Although there was objectively manifested evidence of the spine injury, factual issues existed regarding whether the objectively manifested abnormailities in Chouman's spine and nerve continued to be impairments. Accordingly, the trial court erred by granting a directed verdict on the issue of whether Chouman had suffered a serious impairment of a body function.

Award of case evaluation sanctions vacated; judgment for plaintiff reversed and case remanded.

EVIDENCE — SETTLEMENTS — NONPARTIES — APPROVAL BY SUBROGEE.

The bar on the admission of evidence of compromise applies to settlements by parties to a suit with nonparties, at least to the extent of using the settlement as proof of liability of the settling party; however, an insurance company's approval, as subrogee, of a settlement between its insured and a third party is not itself

> a compromise of a dispute and is not barred by the rule against the admissibility of evidence of compromise; nonetheless, such evidence may be barred if its probative value is substantially outweighed by its prejudicial effect (MRE 408).

Giarmarco, Mullins & Horton, P.C. (by *Larry W. Bennett* and *Geoffrey S. Wagner*), and *Gary R. Blumberg* for Abir Chouman and Abdul Ajami.

Anselmi & Mierzejewski, P.C. (by *Kurt A. Anselmi* and *Mark D. Sowle*), for Home Owners Insurance Company.

Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM. Defendant Home Owners Insurance Company appeals by right a judgment entered in favor of plaintiffs, Abir Chouman and Abdul Aziz Ajami. This case arises out of an automobile accident in which Chouman was injured when Mariam Hamadi rear-ended her. Ajami is Chouman's husband, and defendant is their no-fault insurer. Hamadi was the original named defendant in this matter, but, as will be discussed, she is no longer a party. Defendant argues that the trial court erroneously admitted certain testimonial evidence, erroneously granted a directed verdict in plaintiffs' favor on the issue of whether Chouman sustained a serious impairment of body function, and erroneously awarded case evaluation sanctions in excess of plaintiffs' policy limits of liability. We vacate in part, reverse in part, and remand.

Defendant argues that the trial court erroneously admitted two pieces of testimonial evidence. The trial court's decision whether to admit evidence is reviewed

for an abuse of discretion, but preliminary legal determinations of admissibility are reviewed de novo; it is necessarily an abuse of discretion to admit legally inadmissible evidence. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007).

The first piece of testimonial evidence to which defendant objects is that defendant initially paid first-party personal injury protection (PIP) no-fault benefits to plaintiffs, but eventually terminated those payments. The second is that defendant consented to plaintiffs settling their direct claim against Hamadi and Hamadi's insurer, AAA, for Hamadi's policy limits. Plaintiffs' present claim against defendant is for underinsured motorist (UIM) benefits in the amount of the difference between plaintiffs' policy limits and Hamadi's policy limits. Defendant argues that the above evidence was irrelevant, unduly prejudicial, and legally inadmissible under MRE 408 and MRE 409.

MRE 408 and MRE 409 are clearly inapplicable to the evidence of defendant's payment of PIP benefits. MRE 408 prohibits evidence of compromise, offers to compromise, or compromise negotiations in order "to prove liability for or invalidity of the claim or its amount." See also *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 620-621; 792 NW2d 344 (2010). The purpose of the rule is to encourage parties to compromise. *Id.* at 621. MRE 409 prohibits evidence of "offering or promising to pay" medical expenses in order to "prove [a party's] liability for the injury." Neither rule prohibits admission of the same evidence for another purpose.

Chouman's injuries were disputed. Significantly, she received extensive medical treatment while defendant was paying her medical bills, but she mostly stopped receiving medical treatment thereafter. It was critical

for plaintiffs to explain *why* Chouman discontinued much of her medical treatment, in light of a possible argument that Chouman had discontinued treatment because she no longer considered it necessary. This evidence was highly and directly relevant to the underlying question of whether Chouman suffered a serious impairment of body function because of the accident. Under the circumstances it was not unduly prejudicial and not admitted for a purpose contrary to either MRE 408 or MRE 409. The trial court did not commit legal error or an abuse of discretion in admitting it. However, the identity of the payor of those benefits is not relevant to any proper purpose. Therefore, on remand plaintiffs are entitled to fully explain why Chouman discontinued medical treatments, but they may not introduce evidence that it was defendant who had previously been paying.

The evidence of defendant's consent to plaintiffs' settlement with Hamadi is, in contrast, a difficult question. Notwithstanding the lack of any explicit language precisely on point, MRE 408 has been found to apply to settlements by parties to a suit with nonparties, at least to the extent of using the settlement as proof of liability of the settling party. *Windemuller Electric Co v Blodgett Mem Med Ctr*, 130 Mich App 17, 20-23; 343 NW2d 223 (1983). And properly so, because not only are voluntary and freely-negotiated compromises encouraged, settlements may be motivated by a great many possible considerations unrelated to the substantive merits of a claim. This exclusionary rule historically only applied in the context of actual disputes regarding liability between the parties, *Ogden v George F Alger Co*, 353 Mich 402, 406-407; 91 NW2d 288 (1958), and for the purpose of making peace between them rather than for any other purpose. *Manistee Nat'l Bank v Seymour*, 64 Mich 59, 69-70; 31 NW 140 (1887).

Defendant was not a party to the settlement or any part of the settlement process and was involved only to the extent of giving its approval pursuant to plaintiffs' policy, which explicitly excluded UIM coverage "to any person who settles a **bodily injury** claim without [defendant's] written consent." On the other hand, such consent clauses are obviously relevant to insurers' subrogation rights, making defendant's interest greater than some kind of bystander. Ultimately, it does not appear that defendant's consent to the settlement was, itself, a compromise of a dispute defendant had with any party or nonparty. We therefore conclude that its admission into evidence is not barred by MRE 408.

Nevertheless, the policy concerns underlying MRE 408 remain applicable: as defendant points out, its consent to the compromise may have been the result of the same wide range of possible motivations that might drive an actual settlement.[1] Additionally, the contract standard related to defendant's approval of the Hamadi settlement differs completely from the substantial impairment standard that plaintiff was required to prove in the case before the jury. We therefore find as a matter of law that defendant's consent to plaintiffs' settlement with Hamadi and AAA is *itself* inadmissible because it has so little "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable," MRE 401, that we conclude its probative value is substantially out-

[1] Defendant also argues that it had the option of forcing Hamadi and AAA to defend against plaintiffs' claim at trial, which "would not have resulted in an expeditious use of the trial court's time." However, we do not take seriously the contention that defendant would deliberately engage in frivolity, nor do we take seriously the seemingly open admission that defendant would put other concerns ahead of its duties to its insureds.

weighed by the danger of unfair prejudice, confusion, redundancy, or other related concerns, MRE 403.

However, under the specific and narrow circumstances of this particular case, we would not find its admission to warrant reversal, for two reasons.[2] First, it appears that the consent to the settlement was really only incidental to the evidence plaintiffs truly sought, which was an admission, under oath and at trial, by defendant's claims adjuster that Chouman had in fact sustained a bodily injury and was in fact legally entitled to recover damages from Hamadi. The claims adjuster also testified that defendant had investigated whether Hamadi was collectable, and it determined that Hamadi was uncollectable beyond her policy limits. Therefore, defendant's subrogation rights would have been meaningless beyond the settlement amount anyway, and that was defendant's sole reason for consenting to the settlement. Therefore, it was clearly presented to the jury that defendant had not given its consent because it believed plaintiffs' claims to be meritorious, but because defendant had nothing to lose.

Second, plaintiffs introduced the evidence in order to establish that Chouman had suffered a serious impairment of body function, as required for her to be entitled to UIM benefits. Because the trial court granted a directed verdict in plaintiff's favor on that issue, the jury never had cause to consider the settlement evidence for that purpose. Consequently, any error in its admission became irrelevant.[3]

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[2] That is to say, if we were not reversing for other reasons, discussed later in this opinion, we would not reverse on this basis alone.

[3] As we discuss later in this opinion, the trial court's grant of directed verdict was erroneous. Nonetheless, for whatever reason, the issue of whether Chouman suffered a serious impairment of body function was removed from the jury's consideration.

Defendant contends that the trial court's grant of the directed verdict was erroneous. We review directed verdicts de novo. *Zsigo v Hurley Med Ctr*, 475 Mich 215, 220-221; 716 NW2d 220 (2006). "When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor." *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994). A directed verdict is appropriate where reasonable minds could not differ on a factual question. *Roberts v Saffell*, 280 Mich App 397, 401; 760 NW2d 715 (2008).

A "serious impairment of body function" is defined by MCL 500.3135(7) as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." Whether a plaintiff has suffered a "serious impairment of body function" is a threshold question that the trial court should decide as a matter of law unless "there is a material factual dispute regarding the nature and extent of the person's injuries . . . ." *McCormick v Carrier*, 487 Mich 180, 193-194; 795 NW2d 517 (2010). Whether someone has suffered a serious impairment is "inherently fact- and circumstance-specific and [the analysis] must be conducted on a case-by-case basis." *Id*. at 215. Therefore, the evidence must establish (1) an objectively manifested impairment of a body function, (2) that is significant or important to the specific injured person, and (3) that affects that specific person's general ability to lead his or her particular normal life. *Id*. However, there is no bright-line rule or checklist to follow in making that evaluation. *Id*. at 216.

The first part of our analysis is whether there is a material factual dispute regarding the nature and extent of Chouman's injuries. Plaintiffs presented testi-

mony from Chouman's treating physician, Dr. Hassan Hammoud, a board-certified orthopedic surgeon. Dr. Hammoud first saw Chouman as a patient in June 2007, approximately four months after the accident. He initially found that Chouman suffered from muscle spasms, pain, numbness, and restricted range of motion. He and other doctors ordered an MRI[4] and an EMG.[5] On the basis of the test results, and in partial reliance on the expertise of the specialists who performed them, Dr. Hammoud concluded that Chouman had a herniated disk in her lumbar spine and a pinched nerve. He noted that a later MRI performed in 2008 continued to show a bulge in the same disk, although less severe. He continued to treat her monthly with, among other things, pain medication. Dr. Hammoud opined that Chouman was disabled from being able to perform her job as a daycare school teacher.

Defendant presented testimony from its retained examining physician, Dr. Annette DeSantis, who was board-certified in physical medicine and rehabilitation. Dr. DeSantis examined Chouman in October 2008. She agreed that the one MRI she had available at that time showed a herniated disk in Chouman's spine, but she did not find any clinical evidence of nerve root irritation or damage during her tests, a year and a half later,

[4] Magnetic resonance imaging is a scanning technology that permits detailed, potentially three-dimensional viewing of soft tissue structures within the body—such as muscles, nerves, and connective tissue—without using ionizing radiation; as distinct from x-rays or CT scans, which do subject the body to ionizing radiation and are much less useful for visualizing soft tissue.

[5] Electromyography detects electrical activity in muscle tissues in order to evaluate the health and functionality of those tissues, although abnormal results can be indicative of a wide range of problems ranging from strictly muscle dysfunction to strictly nerve dysfunction. The test may be performed through the insertion of needles directly into muscles or through the use of surface electrodes.

which largely entailed asking Chouman to engage in a variety of movements and positions. She agreed that the 2008 MRI continued to reflect a "small disk protrusion" but "no definite neural impingement." She explained that bulging disks, per se, were normal. Dr. DeSantis opined that the 2008 MRI was consistent with her findings, but she did not render a consistency opinion concerning the 2007 MRI. She admitted that an EMG is an objective test and that a showing of radiculopathy[6] would be abnormal, but she had not reviewed the EMG itself. Dr. DeSantis found no objective basis for restricting Chouman from her preaccident activities, returning to her job, or doing anything around the house.

Dr. Hammoud pointed out that the second MRI's depiction of a more moderate protrusion of the disk could have been because Chouman's condition had actually improved, or it could have merely looked different as an artifact of the second imaging being performed by a different radiologist in a different place. Dr. DeSantis agreed with Dr. Hammoud that the apparent improvement depicted on the second MRI could have been because of true recovery or it could have been for "a lot of different reasons" including simply "different radiologists." Dr. DeSantis agreed that there was no medical evidence to show that the herniated disk in Chouman's spine was the result of anything other than the automobile accident, but she noted that there was simply no medical evidence whatsoever concerning the state of Chouman's spine before the accident. Dr. DeSantis testified that she would have expected Chouman to experience symptoms within a few days at the most if

[6] Radiculopathy is a generic term referring to a dysfunction in a nerve, generally pertaining to the nerve root at the spine. Presumably, this is a reference to Chouman's pinched nerve.

the accident had caused the herniation. However, she admitted that Chouman did complain of symptoms on the day of the accident and had apparently not reported any symptoms for at least the previous twelve months.

Ultimately, we find that there seems to be no dispute whatsoever that Chouman has a bulging disk in her spine, which was objectively manifested during two MRIs. Furthermore, we can conceive of no serious dispute that the spine is an extremely important part of every person's body. We cannot, however, agree with the trial court that reasonable minds could not differ regarding the extent and nature of Chouman's injuries. In particular, there appears to be a genuine dispute whether the objectively manifested abnormalities in Chouman's spine and nerve continue to be *impairments*. Dr. DeSantis unequivocally testified that she was unable to find an objective basis for Chouman to be restricted in any way. The trier of fact need not accept her conclusions, of course, but because there is a genuine question of fact regarding the nature and extent of Chouman's injuries, the threshold question of whether she suffered a "serious impairment of body function" may not be decided as a matter of law.[7] Consequently, the trial court erred by granting a directed verdict on that issue.

Because the trial court erroneously took the issue of whether Chouman suffered a "serious impairment of body function" from the jury's consideration, the judgment in plaintiffs' favor must be reversed and the

[7] We note that such impairments need not be permanent. See *McCormick*, 487 Mich at 203. Dr. DeSantis did not contradict Dr. Hammoud's examination or opine that Chouman had *never* been subject to an objective basis for restricting her life. However, we do not perceive that plaintiffs' claim is only about the past rather than also including the present and the future.

award of case evaluation sanctions vacated.[8] On retrial, in the absence of any stipulation between the parties to the contrary, plaintiffs may fully explain why Chouman discontinued some of her medical treatment so long as they do not identify defendant as the payor of benefits, evidence of defendant's consent to plaintiffs' settlement with Hamadi shall not be admissible, and the trial court shall submit the issue of whether Chouman suffered a "serious impairment of body function" to the jury for its consideration.

The award of case evaluation sanctions is vacated. The judgment in plaintiffs' favor is reversed, and the matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ., concurred.

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[8] We decline to consider defendant's arguments pertaining to that award.

JEDDO DRYWALL, INC v CAMBRIDGE INVESTMENT GROUP, INC

Docket No. 295726. Submitted March 8, 2011, at Detroit. Decided August 2, 2011, at 9:05 a.m.

Jeddo Drywall, Inc., brought an action in the Wayne Circuit Court against Cambridge Investment Group, Inc., Cambridge Meadows, LLC, and others, seeking enforcement of its construction liens for work performed on and materials supplied for construction of a residential structure on Lot 204 in Phase 3 of the Cambridge Meadows Subdivision No. 3 in Brownstown Township. Stock Building Supply, LLC, subsequently filed a cross-claim, counterclaim, and third-party complaint to foreclose on its construction liens for the same project. Cambridge Meadows, LLC, had executed a mortgage on March 17, 2005, with Ohio Savings Bank (later known as AmTrust Bank) to finance land acquisition, as well as future construction advances. The subdivision secured the mortgage. Clearing, grading, paving, and utility work had been done in the subdivision in 2002 before the origination date of the mortgage. Stock first provided materials to construct the residence on Lot 204 on February 3, 2006, the date the building permit was issued for the residence, while Jeddo first supplied labor and materials for the residence in September 2006. After AmTrust became insolvent, AmT CADC Venture, LLC, was appointed receiver and substituted for AmTrust as a party. The court, Isidore B. Torres, J., granted summary disposition in favor of Jeddo and Stock pursuant to MCR 2.116(C)(10), finding that their construction liens had priority over the mortgage held by AmTrust. The court reasoned that the Construction Lien Act (CLA), MCL 570.1101 *et seq.*, required this result because actual physical improvements had been made to Lot 204 before AmTrust recorded its mortgage in 2005. AmT CADC Venture appealed.

The Court of Appeals *held*:

1. The CLA is a remedial statute that must be liberally construed to secure the beneficial results, intents, and purposes of the act. It was meant to protect the right of the lien claimants to payment for wages or materials and to protect owners from paying twice for those services. Under 570.1119(3), a construction lien takes priority over all other interests, liens, or encumbrances that

may attach to the building, structure, or improvement when the other interests, liens, or encumbrances are recorded after the first actual physical improvement. MCL 570.1103(1) defines "actual physical improvement" as the actual physical change in or alteration of real property as a result of labor that a contractor, subcontractor, or laborer provides pursuant to a contract and that is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement. Liens relate back to the first actual physical improvement regardless of when or the person by whom the particular work was done or the materials furnished for which a lien is claimed.

2. The clearing, grading, paving and installation of utilities in 2002 on property that included Lot 204 constituted an actual physical improvement to the property. Even though the owners and developers of the project changed throughout the years, the evidence demonstrated that they were all related entities with partial common ownership and, more importantly, the various permits issued always referred to the development of Phase 3. The actual physical improvements made in 2002 were related to the same project for which Jeddo and Stock provided labor and materials in 2006. Jeddo's and Stock's construction liens had priority over the AmTrust mortgage because their first work on Lot 204 in 2006 related back to the first actual physical improvements in 2002, which preceded the recording of the AmTrust mortgage.

3. Under MCL 570.1107(3), a change in ownership of a construction project does not alter the validity of a lien. Nothing in the CLA alters the priority of a contractor's lien when there is a change of ownership of property to indisputably related companies continuing the same development project.

4. MCL 570.1111(1) requires a contractor, subcontractor, laborer, or supplier to file a construction lien within 90 days after the lien claimant last furnished labor or material for an improvement or the right to the lien will cease to exist. MCL 570.1117(1) requires that proceedings for the enforcement of a construction lien be brought no later than one year after the date the claim of lien was recorded. After Stock recorded its construction lien on April 12, 2006, it filed three "amended" claims of liens as time elapsed. Stock's third amended claim of lien covered work from the time Stock first provided materials for construction on Lot 204 (February 3, 2006) until the last date it provided materials (April 27, 2007). The third amended lien was valid, and the instant action was timely filed within one year of the date the lien was recorded. All the liens related to materials provided for a single portion of the development project: construction of the residence on Lot 204.

Because it was required to record its lien within 90 days of the last furnishing of material, Stock properly protected its right to payment by filing liens during the various delays in construction.

Affirmed.

1. MECHANICS' LIENS — CONSTRUCTION LIENS — PRIORITY — ACTUAL PHYSICAL IMPROVEMENTS.

A construction lien takes priority over all other interests, liens, or encumbrances that may attach to the building, structure, or improvement when the other interests, liens, or encumbrances are recorded after the first actual physical improvement; "actual physical improvement" means the actual physical change in or alteration of real property as a result of labor that a contractor, subcontractor, or laborer provides pursuant to a contract and that is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement; construction liens relate back to the first actual physical improvement regardless of when or by whom the particular work was done or the materials furnished for which a lien is claimed (MCL 570.1103[1]; MCL 570.1119[3]).

2. MECHANICS' LIENS — CONSTRUCTION LIENS — CHANGE IN PROJECT OWNERSHIP — PRIORITY.

A change in ownership of a construction project does not alter the validity of a construction lien; nothing in the Construction Lien Act alters the priority of a contractor's lien arising out of a construction project when there is a change of ownership of the property to related companies (MCL 570.1107[3]).

3. MECHANICS' LIENS — CONSTRUCTION LIENS — CLAIM OF LIEN — RECORDING — LIMITATION OF ACTIONS.

A contractor, subcontractor, laborer, or supplier must file a construction lien within 90 days after the lien claimant last furnished labor or material for an improvement or the right to the lien will cease to exist; a proceeding for the enforcement of a construction lien must be brought no later than one year after the date the claim of lien was recorded (MCL 570.1111[1]; MCL 570.1117[1]).

Laura M. Beam for Jeddo Drywall, Inc.

May, Simpson & Strote (by *Ronald P. Strote* and *Marilyn K. Smyth*) for Stock Building Supply, LLC.

Dawda, Mann, Mulcahy & Sadler, PLC (by *John Mucha, III*, *Randall R. Cole*, and *Kenneth A. Flaska*), for AmT CADC Venture, LLC.

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

SAAD, J. AmT CADC Venture, LLC, formerly known as AmTrust Bank,[1] appeals the trial court's grant of summary disposition to plaintiff, Jeddo Drywall, Inc., and counterplaintiff/cross-plaintiff, Stock Building Supply, LLC. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

The issue presented here is whether construction liens recorded by Jeddo and Stock have priority over a mortgage lien recorded earlier by AmTrust. Cambridge Meadows, LLC, failed to pay Jeddo and Stock for labor and materials they supplied to build a residential structure on Lot 204 in the Cambridge Meadows subdivision in Brownstown Township. On March 17, 2005, in exchange for a loan of $757,500, Cambridge Meadows executed a mortgage for land acquisition and future construction advances with AmTrust. The mortgage was secured by Cambridge Meadows Subdivision No. 3, which is a parcel of property that includes Lot 204. The mortgage was recorded on March 25, 2005. Though prior clearing, grading, paving, and utility work had been done in the subdivision, on February 3, 2006, Brownstown Township issued a permit for the construction of a single family home on Lot 204. On the

[1] Ohio Savings Bank, which later became known as AmTrust Bank, was the lender that originally entered into the mortgage at issue in this case. When AmTrust became insolvent, the Federal Deposit Insurance Corporation was appointed receiver and was substituted as the defendant/cross-defendant-appellant in this appeal. Thereafter, AmT CADC Venture, LLC, was appointed receiver and was substituted as the defendant/cross-defendant-appellant. For ease of reference, and because it was the name of the entity during most of the litigation, we refer to the bank that issued the mortgage on the disputed property as "AmTrust" throughout this opinion.

same date, Stock provided material to construct the home on Lot 204 for the first time. Jeddo supplied labor and materials to build the house on Lot 204 in September 2006. As noted, Jeddo and Stock were not paid, and both companies filed construction liens under the Construction Lien Act (CLA), MCL 570.1101 *et seq*.

AmTrust foreclosed on the Cambridge Meadows Subdivision No. 3 mortgage during the fall of 2008, and a sheriff's sale was conducted on December 3, 2008. The property was not redeemed. On December 4, 2008, Jeddo filed this action against, among others, Jeffrey and Rodney Walker, Cambridge Meadows, LLC, Cambridge Investment Group, Inc., Fountain Homes, Inc., and AmTrust to foreclose on its construction lien. Subsequently, Stock filed a cross-/counter-/third-party complaint to foreclose on its construction liens. The trial court entered default judgments against several defendants, and Jeddo and Stock filed motions for summary disposition against AmTrust, arguing that their construction liens had priority over the mortgage held by AmTrust. The trial court agreed and granted them summary disposition, ruling that there were no genuine issues of material fact. The trial court reasoned that because actual physical improvements had been made to Lot 204 before AmTrust recorded its mortgage, under MCL 570.1119 the construction liens had priority as a matter of law.

II. ANALYSIS

A. PRIORITY

The trial court granted summary disposition to Jeddo and Stock pursuant to MCR 2.116(C)(10). As this Court explained in *Michigan Pipe & Valve-Lansing, Inc v Hebeler Enterprises, Inc*, 292 Mich App 479, 483; 808 NW2d 323 (2011),

> [w]e review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

This Court also reviews de novo questions of statutory interpretation. *Id*. The parties agree that this case is controlled by the CLA. As set forth in MCL 570.1302(1), the CLA is "a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act." Further, "[s]ubstantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them." MCL 570.1302(1). As this Court further explained in *Michigan Pipe*, 292 Mich App at 483-484,

> [t]he goal of statutory interpretation is to give effect to the intent of the Legislature. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). If the language of the statute is unambiguous, the Legislature is presumed to have intended the meaning plainly expressed, and judicial construction is not permitted. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 141; 783 NW2d 133 (2010). An unambiguous statute must be enforced as written. *Klida v Braman*, 278 Mich App 60, 64; 748 NW2d 244 (2008).

As our Court explained in *M D Marinich, Inc v Mich Nat'l Bank*, 193 Mich App 447, 453; 484 NW2d 738 (1992),

> [o]ur Legislature enacted the Construction Lien Act effective March 31, 1981, in order to remedy many of the problems associated with a preceding act, the Mechanics' Lien Act of 1891. The Construction Lien Act was declared by the Legislature to be a remedial statute and shall be liberally construed to secure the beneficial results, intents,

> and purposes of the act. MCL 570.1302(1); *Fischer-Flack, Inc v Churchfield*, 180 Mich App 606, 610; 447 NW2d 813 (1989). It has long been recognized that construction lien laws serve two purposes: to protect the right of lien claimants to payment for wages or materials and to protect owners from paying twice for such services. *Id.* at 611.

With regard to the priority of construction liens over other encumbrances, MCL 570.1119(3) provides:

> A construction lien arising under this act shall take priority over all other interests, liens, or encumbrances which may attach to the building, structure, or improvement, or upon the real property on which the building, structure, or improvement is erected when the other interests, liens, or encumbrances are recorded subsequent to the first actual physical improvement.

Thus, pursuant to MCL 570.1119(3), a construction lien that arises under the CLA takes effect upon the first actual physical improvement to the property and has priority over all interests recorded after the first actual physical improvement. *Marinich*, 193 Mich App at 454. The phrase "actual physical improvement" is defined in MCL 570.1103(1), which provides:

> "Actual physical improvement" means the actual physical change in, or alteration of, real property as a result of labor provided, pursuant to a contract, by a contractor, subcontractor, or laborer which is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement. Actual physical improvement does not include that labor which is provided in preparation for that change or alteration, such as surveying, soil boring and testing, architectural or engineering planning, or the preparation of other plans or drawings of any kind or nature. Actual physical improvement does not include supplies delivered to or stored at the real property.

Our courts have further held that liens relate back to the first actual physical improvement " 'regardless of

the time when, or the person by whom, the particular work was done or the materials furnished for which a lien is claimed.' " *Marinich*, 193 Mich App at 452, quoting *Kay v Towsley*, 113 Mich 281, 283; 71 NW 490 (1897).

AmTrust argues that the trial court erred by granting summary disposition to Jeddo and Stock because no actual physical improvements were made to Lot 204 before AmTrust recorded its mortgage. As discussed, the record reflects that Lot 204 was a lot within a parcel of land alternatively referred to as Cambridge Meadows Subdivision No. 3, or "Phase 3" of the Cambridge Meadows Subdivision. To the extent that AmTrust contends that the first actual physical improvement had to occur on Lot 204 to give Jeddo's and Stock's liens priority, we disagree. The mortgage covers the entirety of Cambridge Meadows Subdivision No. 3, which specifically includes Lot 204, regardless of whether the first actual physical improvements were made to other parts of the property covered by the mortgage. In any case**,** Jeddo and Stock submitted evidence to show that actual physical improvements were made to areas that included Lot 204.

On August 1, 2002, the Wayne County Department of Environment issued a permit for Cambridge Investment Group to perform "[m]ass grading, proposed utility construction and paving" for a land area that includes Lot 204. Before the issuance of this permit, the Michigan Department of Environmental Quality issued a permit for the construction of various water mains throughout Cambridge Meadows Subdivision No. 3. On September 9, 2002, the Wayne County Department of Public Services issued permits for the installation of water mains, storm sewers, and sanitary sewers and to pave proposed roads in the subdivision. On the same

date, the Wayne County Department of Public Works issued permits to King/Inkster I, LLC, to pave roads within the subdivision and connect them to Wayne County roads.

AmTrust's argument is well-taken that permits issued for physical improvements do not establish that those improvements were actually made. However, Jeddo and Stock submitted other evidence to establish that the lots in Phase 3 were, indeed, developed as anticipated by the permits. An appraisal sent to a prior lender, Republic Bank, on October 20, 2002, states that, with regard to Phase 3, "[a]s of October 4, 2002, improvements completed include underground utilities, clearing, grading, etc." Further, AmTrust's mortgage with Cambridge Meadows, LLC, specifically states that each single family building site in "Phase III" was fully developed, which indisputably includes Lot 204.

Pursuant to MCL 570.1103(1), clearing, grading, paving, and the installation of utilities clearly constitute actual physical improvements to the land because the work was an "actual physical change in, or alteration of, real property." This work was sufficient to visibly place others on "notice that there may be outstanding liens against the property because construction work is in progress." *Marinich*, 193 Mich App at 455. Thus, the evidence submitted to the trial court established that actual physical improvements were made to Cambridge Meadows Subdivision No. 3, including specifically to Lot 204 as of October 4, 2002. AmTrust failed to submit any evidence that the physical improvements did not occur or that Lot 204 was not among those developed or improved in 2002. In responding to a motion for summary disposition, "[t]he nonmoving party must present more than mere allegations to establish a genuine issue of material fact for

resolution at trial." *Civic Ass'n of Hammond Lake v Hammond Lake Estates No 3 Lots 126-135*, 271 Mich App 130, 132 n 1; 721 NW2d 801 (2006). Because AmTrust failed to present evidence to counter Jeddo and Stock's showing that actual physical improvements were made to the disputed property, it failed to raise a genuine issue of material fact on this issue.

AmTrust argues that, if there were actual physical improvements to the property before AmTrust recorded its mortgage on March 25, 2005, those improvements were part of a different "project," owned and managed by different entities, and Jeddo's and Stock's liens cannot relate back to the work performed in 2002. We hold that, notwithstanding the change in ownership of the property, the actual physical improvements made in 2002 were related to the same project for which Jeddo and Stock provided labor and materials in 2006. Jeddo and Stock presented evidence that a large parcel of property was purchased by The Kelly Group in 1997, which was a name under which Fountain Homes, a company owned by Jeffrey and Rodney Walker, was doing business. The property includes the disputed land in Phase 3 of the Cambridge Meadows subdivision, as well as land encompassing other phases of the subdivision development project. Cambridge Investment Group, incorporated by Jeffrey Walker, later acquired the property. The permits for grading, paving, and utility work in 2002 were issued to Cambridge Investment Group, The Kelly Group, and King/Inkster I, LLC (of which Rodney Walker was resident agent)[2], and they all referred to the same project, the development of

[2] We take judicial notice of Rodney Walker's position as resident agent of King/Inkster I, LLC, on the basis of information contained in the Corporation Division Business Entity section of the Michigan Department of Licensing and Regulatory Affairs at <www.dleg.state.mi.us/bcs_corp/sr_corp.asp>.

Cambridge Meadows Subdivision No. 3. On August 22, 2003, Cambridge Investment Group conveyed property, including Lot 204, to Cambridge Meadows, LLC, which is wholly owned by Fountain Homes (Jeffrey and Rodney Walker), the original purchaser of the property. Thus, the evidence submitted to the trial court shows that, throughout the years, the owners and developers of the project were related entities with at least partial common ownership.

Further, Jeddo and Stock presented evidence showing that the project for which they provided labor and materials had remained the same since 2002, and AmTrust failed to present evidence in response. Jeddo and Stock submitted appraisal documents that clearly show that Cambridge Meadows subdivision was intended to be a residential development, divided into phases, from a time long before the first actual physical improvements were made in Phase 3. The documents also reflect that the clearing, grading, paving, and installation of underground utilities were all related to developing Phase 3 into residential lots within a platted subdivision for the construction of single-family homes. The labor and materials Jeddo and Stock provided for Lot 204 were a continuation of the development project. Moreover, AmTrust presented no evidence to establish a genuine issue of material fact that Jeddo and Stock provided labor and materials for a different project than was underway when the first actual physical improvements were made.

The Court in *Marinich* ruled that a change in the construction plans or construction contracts does not establish the existence of a new project if the work that is subject to the lien was part of a single project. *Marinich*, 193 Mich App at 455-458. We hold that the same rule obtains when the first actual physical im-

provement is made under the direction of a different developer if, as here, the work was performed as part of a single project. With regard to ownership of the property, we find nothing in the CLA to suggest that a change in ownership of the property to indisputably related companies continuing the same development project should alter the priority of a contractor's lien.

MCL 570.1106(2) provides that a "project" is "the aggregate of improvements contracted for by the contracting owner." This subsection does not indicate that the protections afforded by the CLA fail to apply when there is more than one owner or a change in ownership. Moreover, the CLA makes it clear that a change in ownership does not alter the validity of a lien, MCL 570.1107(3); a construction lien has priority over not only other mortgages and encumbrances, but over all other interests that may attach when the other interests are recorded after the first actual physical improvement, MCL 570.1119(3); and nothing in the CLA suggests that a transfer of ownership like the one that occurred here should alter priority. Here, evidence showed that this was not only a continuous development project, but the mortgage lender, then known as Ohio State Bank, was aware of the ownership interests in the property and the common interests of Jeffrey and Rodney Walker in those entities at least as early as 2003, long before it entered into the mortgage agreement. Construing the CLA liberally, as required by MCL 570.1302(1), and regardless of whether the property was owned or developed by other related entities, Jeddo and Stock's evidence established that the project was conceived as a whole and the development continued as planned from the time of the first actual physical improvements through the time when Jeddo and Stock provided labor and materials for Lot 204. Further, to the extent AmTrust suggests that a gap in time be-

tween the first actual physical improvements and the work performed by the lienholders should cut off the lienholders' priority, there is no requirement in the CLA that the construction commence in a timely progression. As our Supreme Court noted in *Williams & Works, Inc v Springfield Corp*, 408 Mich 732, 743; 293 NW2d 304 (1980), "mechanics' liens related back [to the commencement date], even if other contractors started their work weeks or months later."

AmTrust contends that affording priority to the construction liens in this case would make it impossible for lenders to assert priority over construction liens if prior work on the property had occurred. This Court addressed a similar argument in *Marinich*, 193 Mich App at 458-459:

> Defendant has also suggested that the trial court's interpretation of the Construction Lien Act will have a chilling effect on the construction finance industry because lenders would not risk subordinating their mortgage interests to lien claimants who are not known at the time a loan is made but are able to relate their liens back to the date of the first actual physical improvement on the project. While we agree with defendant that there is a potential risk for lenders contemplating the financing of construction projects, there is an adequate remedy afforded such lenders by the Construction Lien Act, MCL 570.1119(4), which provides for the recording of the mortgage interest before the first actual physical improvement is made. In addition, advances made by mortgage lenders after the first actual physical improvement is made may still enjoy priority over construction liens under MCL 570.1119(4) if the mortgagee has received a sworn statement from the contractor pursuant to MCL 570.1110. [Citations omitted.]

We further observe that when, as here, there is a major, multiphase subdivision project in which the land is cleared and prepped and phases and lots have been fully developed over several years, a lender has ample, visible

notice that its mortgage interest may be subject to the priority of liens filed by trades working on the development.

Because the first actual physical improvement on the project occurred before AmTrust recorded its mortgage in 2005, the liens recorded by Jeddo and Stock have priority over the mortgage. MCL 570.1119(3).

B. STOCK'S AMENDED LIENS

AmTrust contends that Stock failed to timely file its complaint seeking to foreclose on its liens. The record reflects that Stock recorded a lien on April 12, 2006, for $4,449.61, and it listed February 23, 2006 as the last day Stock provided materials for the Lot 204 project. Stock filed an "amended" claim of lien on August 22, 2006, for $26,455.68, which includes the prior lien amount and further unpaid amounts. Stock stated that the last day it furnished materials for the Lot 204 project was June 13, 2006. On January 24, 2007, Stock filed a "second amended" claim of lien for $28,651.60, which also included the prior balance owed on the project and listed the last day Stock furnished materials for Lot 204 as November 9, 2006. Finally, Stock filed its "third amended" claim of lien on July 3, 2007, for $35,997.48 with the last date it furnished materials listed as April 27, 2007. Each lien listed the first day Stock furnished materials as February 3, 2006. AmTrust contends that Stock is not entitled to foreclose on the first three liens because, contrary to MCL 570.1117(1), Stock filed this action in May 2008, more than one year after those liens were recorded. AmTrust further claims that Stock cannot recover the amounts accumulated from the initial lien to the "third amended" lien because, pursuant to MCL 570.1111(1), the "third amended" lien only

covers work performed within the previous 90 days. MCL 570.1111(1) provides, in part:

> [T]he right of a contractor, subcontractor, laborer, or supplier to a construction lien created by this act shall cease to exist unless, within 90 days after the lien claimant's last furnishing of labor or material for the improvement, pursuant to the lien claimant's contract, a claim of lien is recorded in the office of the register of deeds for each county where the real property to which the improvement was made is located.

And pursuant to MCL 570.1117(1), "[p]roceedings for the enforcement of a construction lien and the foreclosure of any interests subject to the construction lien shall not be brought later than 1 year after the date the claim of lien was recorded."

We hold that, under the circumstances of this case, Stock's "third amended" lien covered work performed from the time Stock first provided materials for construction on Lot 204 on February 3, 2006, until the last date Stock provided materials for construction on Lot 204 on April 27, 2007. As discussed, we must construe the CLA liberally "to secure the beneficial results, intents, and purposes of this act." MCL 570.1302(1). One of those purposes is "to protect the right of lien claimants to payment for wages or materials . . . ." *Marinich*, 193 Mich App at 453. It is clear that all of Stock's liens relate to materials it provided for a single portion of the development project—the construction of the residential structure on Lot 204. Because of various delays in construction, Stock found it necessary to protect its right to payment by filing liens during the gaps in work in the event the development project completely ceased. MCL 570.1111(1) required Stock to record its lien within 90 days of the last furnishing of material for the improvement or risk losing the protec-

tions under the CLA. Thus, it was logical for Stock to record its liens as time elapsed between deliveries when progress on construction was erratic. However, there is no dispute that, with respect to the Lot 204 project, Stock's final provision of materials was on April 27, 2007. Stock did not lose its ability to protect its right to payment for all materials supplied for the project by recording the prior liens when the final "third amended" lien clearly states that Stock's first provision of materials for the Lot 204 project was on February 3, 2006, and its final provision of materials for the Lot 204 project was on April 27, 2007. Under the CLA, Stock's "third amended" lien is valid, and Stock timely filed this action within one year of the date the lien was recorded.

Affirmed.

WILDER, P.J., and DONOFRIO, J., concurred with SAAD, J.

MASON COUNTY v DEPARTMENT OF COMMUNITY HEALTH

Docket No. 295365. Submitted May 4, 2011, at Detroit. Decided August 2, 2011, at 9:10 a.m. Leave to appeal denied, 490 Mich 1005.

Mason and Oceana Counties brought a declaratory action in the Mason Circuit Court, seeking a judgment declaring that neither plaintiff was able to control or substantially influence defendant West Michigan Community Mental Health System (WMCMHS) and, therefore, building leases that the counties held with WMCMHS were the result of arm's-length transactions, that WMCMHS had a legal obligation to make rental payments, and that WMCMHS had the right to use state funds and local matching funds for the payments. WMCMHS and the state defendants (the Department of Community Health [DCH], the Director of the DCH, and others) were parties to a services contract. The action arose after the DCH issued reimbursement guidelines stating that expenditures by community mental health authorities, such as WMCMHS, had to comply with certain provisions in Office of Management and Budget (OMB) Circular A-87 concerning less-than-arm's-length transactions. As a result of the new guidelines, WMCMHS began withholding rent payments from plaintiffs, believing that they had engaged in less-than-arm's-length transactions. The state defendants moved for summary disposition. The court, Richard I. Cooper, J., denied the motion. The state defendants then filed a second motion for summary disposition and plaintiffs filed their own motion for summary disposition. The court granted plaintiffs' motion for summary disposition, concluding that the leases were the result of arm's-length transactions, that the court had subject-matter jurisdiction over the action, and that the Centers for Medicare and Medicaid Services, the federal agency that oversees Medicaid, was not a necessary party to the action. The state defendants appealed.

The Court of Appeals *held*:

1. The Court of Claims has exclusive jurisdiction over all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies. This includes declaratory claims against the state which involve contract or tort

without more, even when money damages are not sought. Plaintiffs' underlying claim was for breach of contract against WMCMHS. That breach occurred as the result of WMCMHS's contract with the state defendants, but plaintiffs were not parties to that contract and, therefore, could not seek a declaratory ruling regarding that contract in the Court of Claims. Although the Court of Claims might have had concurrent jurisdiction over the action because it was ancillary to a state contract, the circuit court at least retained its own concurrent jurisdiction.

2. Under OMB Circular A-87, a less-than-arm's-length transaction is one under which one party to a lease agreement is able to control or substantially influence the actions of the other. Under 1995 PA 290, counties do not have the ability to control or substantially influence community mental health authorities given that such authorities are separate governmental entities, have their own boards to set policies and procedures, and have numerous independent powers and duties. Moreover, under the act, a county's involvement in a community mental health authority is limited to appointing board members, reviewing documents, and approving the county portion of the budget of the authority. This level of involvement does not constitute control or substantial influence. The trial court properly concluded that the plaintiffs did not control WMCMHS, and thus that those parties' leases were arm's-length transactions.

3. Plaintiffs were not unjustly enriched by the rent payments given that WMCMHS and plaintiffs were separate legal entities and WMCMHS did not own the buildings at issue.

4. Under MCR 2.205(A), parties must be joined if their presence in the action is essential to permit the court to render complete relief. Although WMCMHS might have sought federal dollars to pay the back-due rent, WMCMHS had not yet sought additional payment by the Centers for Medicare and Medicaid Services. Accordingly, that agency's presence was not required in the legal proceedings.

Affirmed.

MENTAL HEALTH — MENTAL HEALTH CODE — COMMUNITY MENTAL HEALTH AUTHORITIES — RELATIONSHIP WITH COUNTY GOVERNMENT — ARM'S-LENGTH TRANSACTIONS — CONTROL OR SUBSTANTIAL INFLUENCE.

Counties do not have the ability to control or substantially influence community mental health authorities given that such authorities are separate governmental entities, have their own boards to set policies and procedures, and have numerous independent powers and duties; under the Mental Health Code, a county's involvement

in a community mental health authority is limited to appointing board members, reviewing documents, and approving the county portion of the budget of the authority (MCL 330.1001 *et seq*.).

Mika Meyers Beckett & Jones, PLC (by *John H. Gretzinger*), for Mason and Oceana Counties.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Darrin F. Fowler*, Assistant Attorney General, for the Department of Community Health, the Director of the Department of Community Health, and others.

Cohl, Stoker & Toskey, P.C. (by *Timothy M. Perrone*), for the West Michigan Community Mental Health System and Richard VandenHeuvel.

Before: SAAD, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM. The state defendants[1] appeal as of right the trial court's order granting summary disposition and declaratory relief to plaintiffs Mason County and Oceana County (hereinafter county plaintiffs). The appeal requires us to consider the statutory relationship between a community mental health (CMH) authority, a county, and the state Department of Community Health (DCH). The trial court concluded that defendant West Michigan Community Mental Health System (WMCMHS), a CMH authority, and county plaintiffs were engaged in an arms-length transaction because under statute county plaintiffs did not have the ability to control or significantly influence WMCMHS. As a

[1] The state defendants, the Department of Community Health, the Director of the Department of Community Health, the Director of Community Mental Health Services Bureau, and the Director of the Program Development Consultations and Contracts Division, in their capacity as defendants in this suit, will be referred to simply as "defendants."

result, the trial court awarded county plaintiffs declaratory relief and concluded that they were owed rent under their contract with WMCMHS. We agree and affirm.

I. BASIC FACTS AND PROCEDURAL BACKGROUND

This case concerns whether WMCMHS can breach contracts to pay rent to plaintiffs as a result of its contract with defendant DCH. WMCMHS is a CMH authority created in 1997 by Mason, Oceana, and Lake Counties under the procedures outlined in the Mental Health Code, MCL 330.1001 *et seq*. Defendant DCH is the state agency that oversees and funds health-related services in the state of Michigan. In particular, it is the state agency that receives federal Medicaid money and disburses that money to healthcare providers throughout the state, including WMCMHS. WMCMHS and defendants are parties to a services contract that requires WMCMHS to "maintain all pertinent financial and accounting records," using the Office of Management and Budget (OMB) Circular A-87 to determine all costs.

WMCMHS is housed in two buildings owned by county plaintiffs: Mason County's Madden Building and Oceana County's Lincoln Street Building. The Madden Building was built in 1987 and was paid for through bonds retired by using federal and state funds. The original rental contract was a sublease agreement between Mason County and its department of mental health board in effect from 1987 to 2003. Oceana County's Lincoln Street Building was purchased in 1987 by Oceana County for mental health services at that time administered by its department of community mental health services. Oceana County and its department entered into a 10-year lease.

When it was created in 1997, WMCMHS assumed the lease agreements with both Oceana and Mason counties for the Madden Building and the Lincoln Street Building. In 2003, WMCMHS and Mason County renegotiated the Madden Building lease for a 10-year period, requiring annual rent of $100,000, payable in semiannual installments. In 2005, Oceana County and WMCMHS agreed to a one-year extension of the Lincoln Street Building lease, which provided for monthly payments of $3,125.

In November 2006, defendant DCH issued guidelines in which it stated that mental health authorities' expenditures must comply with the provisions in OMB Circular A-87 concerning less-than-arm's-length transactions. OMB Circular A-87 states:

> Rental costs under "less-than-arms-length" leases are allowable only up to the amount (as explained in Attachment B, section 37.b) that would be allowed had title to the property vested in the governmental unit. For this purpose, *a less-than-arms-length lease is one under which one party to the lease agreement is able to control or substantially influence the actions of the other.* Such leases include, but are not limited to those between (i) divisions of a governmental unit; (ii) governmental units under common control through common officers, directors, or members; and (iii) a governmental unit and a director, trustee, officer, or key employee of the governmental unit or his immediate family, either directly or through corporations, trusts, or similar arrangements in which they hold a controlling interest. For example, a governmental unit may establish a separate corporation for the sole purpose of owning property and leasing it back to the governmental unit. [OMB Circular A-87, Attachment B, § 37(c) (emphasis added).]

As a result, defendant DCH indicated that it would only use Medicaid monies to reimburse actual costs for health authorities engaged in less-than-arm's-length transactions with local governments. In 2006, aware of

defendants' position on the rental of county-owned buildings and believing that it had engaged in less-than-arm's-length transactions with plaintiffs, WMCMHS decided to withhold rent payments from county plaintiffs.

Plaintiffs brought this declaratory action in the Mason Circuit Court in July 2008, seeking a judgment declaring that neither Mason County nor Oceana County was able to control or substantially influence WMCMHS and, therefore, the leases they held were arm's-length transactions for which WMCMHS had a legal obligation to make rental payments. They further sought a declaration that WMCMHS had the legal right to use state funds and local matching funds for the leases.

Defendants moved for summary disposition, arguing that they had sovereign immunity, that plaintiffs had failed to state a cause of action against them and therefore the trial court lacked jurisdiction, and that plaintiffs lacked standing to challenge any contractual disputes arising between defendants and WMCMHS because they were not parties to the contract. WMCMHS responded in opposition, arguing that the true nature of the action was the interrelationship of its lease contracts with plaintiffs and its service contract with defendants. Plaintiffs concurred in these conclusions, asserting the lease amounts were not in dispute and were at or below fair market value. The real question concerned the legal relationship between plaintiffs, defendants, and WMCMHS.

The trial court denied defendants' motion, finding it had jurisdiction because Lake and Mason Counties were within its geographical jurisdiction and the rights and responsibilities regarding buildings owned by plaintiffs were in dispute. Although most of the funding at issue

came from federal sources, the court concluded that that did not deprive the state court of jurisdiction. The trial court also found that plaintiffs had standing because they had an interest in the contract WMCMHS had with the state. Complying with defendants' guidelines concerning OMB Circular A-87 made it impossible for WMCMHS to fulfill its contract with plaintiffs.

In August 2009, defendants filed a second motion for summary disposition and plaintiffs filed their own motion for summary disposition. Defendants argued for the first time that jurisdiction was only proper in the Court of Claims because plaintiffs sought an interpretation of a state contract and indirectly brought a claim for money damages against the state. Defendants also reargued that plaintiffs lacked standing; that plaintiffs illegally failed to transfer the county-owned buildings to WMCMHS upon its creation, as required by MCL 330.1205(3)(a); that the leases were not arm's-length transactions; that Oceana County was estopped from receiving rent payments because of representations it made to the state in order to receive state financing for renovations of the Lincoln Building; and that Mason County should not receive rental income from WMCMHS because such income amounted to unjust enrichment given the state money used to finance the Madden Building. Finally, defendants also argued for the first time that the Centers for Medicare and Medicaid Services (CMS), the federal agency that oversees Medicaid, was a required party to the lawsuit because federal money was implicated. Plaintiffs argued in their summary disposition motion that there was no question of fact that they did not control WMCMHS and that the evidence showed the leases were negotiated at arm's-length and were at or below fair market rates.

The trial court granted plaintiffs' motion for summary disposition. The trial court found plaintiffs had standing because defendants' policy meant plaintiffs were no longer getting their rent payments. The court also found that jurisdiction was proper because the issues involved local entities more than the state. It concluded that plaintiffs' mere ability to create the mental health authority board did not amount to control and that there were numerous other appointed bodies that were not controlled by the appointing authority. The court also held that MCL 330.1224 did not allow at-will removal of board members. Thus, the court found that the leases were arm's-length transactions.

The trial court briefly addressed the other issues, finding that CMS did not need to be joined, that plaintiffs were not required to transfer the buildings to WMCMHS because the buildings were not assets of the county agency, and that plaintiffs were not unjustly enriched by receiving rents because the counties remained separate from the mental health authority.

Defendants objected to plaintiffs' proposed order, and a hearing was held on their objections. The proposed order included not only a declaration that WMCMHS and plaintiffs had an arm's-length relationship in their lease agreements, but also that WMCMHS is legally obligated to pay the accumulated lease payment to both counties and that defendants could not declare the lease payments between the counties and WMCMHS ineligible for funding. Defendants objected to the implicit ruling that plaintiffs were "absolutely entitled to the reimbursement for these rents" in addition to a ruling that these were arm's-length transactions. WMCMHS agreed with this position and argued that the court should not declare that WMCMHS had an ongoing

responsibility to pay the rent. Defendants proposed an order that held that plaintiffs and WMCMHS have an arm's-length relationship, that CMS did not need to be joined, and that plaintiffs were not obligated to transfer ownership of the buildings to WMCMHS when they created that entity.

At a hearing on defendants' objections, the trial court ruled that the rent was owed and that the dollar amount was uncontested. Therefore, plaintiffs had a right to protect the amount owed through the creation of an escrow account or by defendants' posting a bond. The order that the trial court ultimately entered found that plaintiffs did not have the ability to control or substantially influence WMCMHS and that the leases between plaintiffs and WMCMHS were not less-than-arm's-length transactions. The court also found that WMCMHS had a legal obligation to pay the past-due rent and future rents due under the leases "unless there is a substantial or material change in circumstances that applies in the future[.]" The court held that WMCMHS "has the legal right to use Federal Medicaid, State general and local matching funds" to make the lease payments. In addition, the court held that plaintiffs were not required to transfer their buildings to WMCMHS, that the Court of Claims did not have exclusive jurisdiction, that plaintiffs did not lack standing, that CMS was not a necessary party, that the order was stayed pending appeal, and that WMCMHS had to "take actions" to escrow the amounts due under the leases or, alternatively, to post a bond to ensure payment. Defendants now appeal.

II. JURISDICTION

Defendants argue that the Court of Claims had exclusive jurisdiction over plaintiffs' claims and, as a

result, the trial court lacked subject-matter jurisdiction to issue its order. We disagree. Whether a circuit court has jurisdiction over a particular case is a question of law subject to review de novo. *Sierra Club Mackinac Chapter v Dep't of Environmental Quality*, 277 Mich App 531, 544; 747 NW2d 321 (2008).

Under the Michigan Constitution, the circuit court has "original jurisdiction in all matters not prohibited by law[.]" Const 1963, art 6, § 13; see also *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 568; 640 NW2d 567 (2002). The Court of Claims has exclusive jurisdiction over "all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies." MCL 600.6419(1)(a). This includes declaratory claims "against the state that involve contract or tort without more," even when money damages are not sought. *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 773; 664 NW2d 185 (2003).

> Thus, the Court of Claims, while having exclusive jurisdiction over complaints based on contract or tort that seek solely declaratory relief against the state, also has concurrent jurisdiction [with the circuit court] over complaints seeking declaratory and equitable relief not based on tort or contract if ancillary to a contract or tort claim. [*Duncan v Michigan*, 284 Mich App 246, 286-287; 774 NW2d 89 (2009), vacated in part on other grounds and aff'd in part 486 Mich 906, vacated 486 Mich 1071, reinstated 488 Mich 957 (2010).]

In this case, plaintiffs' underlying claim is one for breach of contract against WMCMHS. That breach of the contract between plaintiffs and WMCMHS occurred as a result of WMCMHS's contract with defendants. Not being parties to the contract between defendants and WMCMHS, however, plaintiffs have no rights un-

der that contract and could not seek a declaratory ruling regarding the contract with the state at the Court of Claims. Although defendants tried to pose this as a suit by plaintiffs for tortious interference with a contract, such a suit would have no basis if, in fact, defendants were correctly interpreting the statutes and OMB Circular A-87. Thus, there is only one possible underlying action: a simple breach of contract between two parties, plaintiffs and WMCMHS, neither of which is a state agency. At best, then, the Court of Claims would have concurrent jurisdiction over the action because it is ancillary to a state contract. *Id*. Still, the circuit court would retain concurrent jurisdiction, and, accordingly, the trial court did not err by concluding that it had subject-matter jurisdiction.

III. ARM'S-LENGTH TRANSACTION

Defendants' next assertion on appeal is that the trial court erred by concluding that under the Mental Health Code plaintiffs did not have the ability to control WMCMHS and, as a result, an arm's-length transaction existed between plaintiffs and WMCMHS. We disagree.

A. STANDARD OF REVIEW

Statutory interpretation is a question of law that we consider de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). We review for clear error the trial court's factual findings. MCR 2.613(C); *Pine Bluffs Area Prop Owners Ass'n, Inc v DeWitt Landing & Dock Ass'n*, 287 Mich App 690, 711; 792 NW2d 18 (2010).

The primary goal when interpreting statutes is "to give effect to the intent of the Legislature." *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712,

720; 691 NW2d 1 (2005). We give the words of the statute their common and ordinary meanings, and if the language is clear, we presume that "the Legislature intended the meaning it clearly expressed and further construction is neither required nor permitted." *Id.* To make effective the Legislature's intent through statutory construction, the changes in an act must be construed in light of the act's predecessor statutes and the law's historical development. *Advanta Nat'l Bank v McClarty*, 257 Mich App 113, 120; 667 NW2d 880 (2003).

B. STATUTORY HISTORY

Before addressing the merits of defendants' argument, we first examine the historical development of the Mental Health Code and the changes in the provision of mental health services made in 1995. The Michigan Constitution requires the Legislature to pass "suitable laws for the protection and promotion of the public health." Const 1963, art 4, § 51. Through that grant of power, the Legislature codified the Mental Health Code. Section 116(e) of 1974 PA 258 directed that the Department of Mental Health (DMH) do the following:[2]

> (i) It shall administer the provisions of chapter 2 so as to promote and maintain an adequate and appropriate system of county community mental health services throughout the state.
>
> (ii) In the administration of chapter 2, it shall be the objective of the department to shift from the state to a county the primary responsibility for the direct delivery of public mental health services whenever such county shall

[2] Before 1996, the Department of Community Health was the Department of Mental Health. See MCL 330.3101 (Executive Reorganization Order No. 1996-1).

> have demonstrated a willingness and capacity to provide an adequate and appropriate system of mental health services for the citizens of such county.

In 1995, the Legislature amended the Mental Health Code. 1995 PA 290. At that time, the Legislature assigned DCH responsibility for providing mental health services to residents of the state of Michigan. See MCL 330.1116(1) and (2)(a). However, in MCL 330.1116(2)(b), the Legislature directed DCH

> to shift primary responsibility for the direct delivery of public mental health services from the state to a community mental health services program [CMHSP] whenever the [CMHSP] has demonstrated a willingness and capacity to provide an adequate and appropriate system of mental health services for the citizens of that service area

in accordance with chapter 2 of the Mental Health Code, MCL 330.1200 *et seq*.

In sum, according to the language of the statutes, the goal as of 1974 was to shift responsibility for mental health services from the state to the counties, whereas in 1995 the goal became to shift the state's responsibility to CMHSPs. In other words, the state has always retained primary responsibility for mental health services, but the objective since 1974 has been to shift responsibility to localities and, in 1995, the local entity changed from counties to CMHSPs.

When the Mental Health Code was enacted in 1974, counties delivered mental health services through "county community mental health programs." 1974 PA 258, § 200 *et seq*. These entities should not be confused with CMHSPs, which came into being under 1995 PA 290 and will be further discussed later in this opinion. With respect to the 1974 county community mental health programs, § 210 of 1974 PA 258 provided that a single county or combination of adjoining counties

could elect to establish a county community mental health program by a majority vote of each county's board of commissioners. Section 204 provided that a county community mental health program would be "an official county agency." 1974 PA 258, § 204. Section 212 provided for the establishment of a 12-member county community mental health board, to be appointed by the county board of commissioners. *Id.* at § 212. The county community mental health board could not have more than four county commissioners unless the county community mental health board was made up of more than four counties, at which point the number of county commissioners could equal the number of counties and the 12-person board would increase in size to accommodate the extra appointments. *Id.* at § 222. A county board of commissioners could remove a county community mental health board member for neglect of official duty or misconduct in office. *Id.* at § 224. The county board of commissioners would approve the county community mental health board's annual plan and budget before it was sent to the DMH, and the county community mental health board would submit annual requests for county funds to the county board of commissioners. *Id.* at § 226(c) and (e). The county was responsible for 10 percent of the net costs for services "provided by [DMH], directly or by contract, to a resident of that county." *Id.* at § 302. Subject to certain qualifications, DMH was responsible for 90 percent of the annual net cost of a county community mental health program. *Id.* at § 308.

With regard to the CMHSPs created under 1995 PA 290, § 204(1) of the act, MCL 330.1204(1), provides as follows:

> A community mental health services program established under this chapter shall be a county community

> mental health agency, a community mental health organization, or a community mental health authority. A county community mental health agency is an official county agency. A community mental health organization or *a community mental health authority is a public governmental entity separate from the county or counties that establish it*. [Emphasis added.]

MCL 330.1100a(18) defines a "county community mental health agency" as

> an *official county or multicounty agency* created under [MCL 330.1210] that operates as a community mental health services program and that has not elected to become a community mental health authority under [MCL 330.1205] or a community mental health organization under the urban cooperation act of 1967, 1967 (Ex Sess) PA 7, MCL 124.501 to 124.512. [Emphasis added.]

A "community mental health organization" is "a community mental health services program that is organized under the urban cooperation act of 1967 . . . ."[3] MCL 330.1100a(15). Finally, a "community mental health authority" is "a separate legal public governmental entity created under [MCL 330.1205] to operate as a community mental health services program." MCL 330.1100a(14).

To understand why the Legislature altered the provision of mental health services and created CMHSP, we must then examine the legislative history of Senate Bill 525, which was enacted by 1995 PA 290. In *Kinder*

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[3] Section 4 of the Urban Cooperation Act, MCL 124.501 *et seq*., provides:

> A public agency of this state may exercise jointly with any other public agency of this state, with a public agency of any other state of the United States, with a public agency of Canada, or with any public agency of the United States government any power, privilege, or authority that the agencies share in common and that each might exercise separately. [MCL 124.504.]

Morgan Mich, LLC v City of Jackson, 277 Mich App 159, 170; 744 NW2d 184 (2007), this Court noted that

> legislative analyses are "generally unpersuasive tool[s] of statutory construction." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001). This is because legislative analyses are prepared by House and Senate staff members and do not necessarily represent the views of any individual legislator. *Id*. at 588 n 7. "Nevertheless, '[c]ourts may look to the legislative history of an act, as well as to the history of the time during which the act was passed, to ascertain the reason for the act and the meaning of its provisions.' " *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 546; 716 NW2d 598 (2006) (citation omitted). Indeed, legislative bill analyses do have probative value in certain, limited circumstances. See *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 406 n 12; 578 NW2d 267 (1998); *Kern v Blethen-Coluni*, 240 Mich App 333, 338 n 1; 612 NW2d 838 (2000); *Seaton v Wayne Co Prosecutor*, 233 Mich App 313, 321 n 3; 590 NW2d 598 (1998). [Alterations in original.]

House Legislative Analysis, SB 525, February 9, 1996 (hereinafter Bill Analysis) addresses this bill.[4] It notes that the bill was intended, in pertinent part, to amend the Mental Health Code to require a shift of primary responsibility for mental health services from the state to CMHSPs rather than from the state to counties.[5] Bill Analysis, pp 1, 7. Consistent with the definition of "community mental health authority" found in MCL

[4] The bill was also addressed in an earlier analysis by the Senate Fiscal Agency. Senate Fiscal Agency Analysis, SB 525, June 14, 1995. That analysis provides no additional insights. It is noted that when the Senate Fiscal Agency analysis was preformed, the community mental health authorities were referred to as community mental health entities in the proposed legislation.

[5] While the Bill Analysis indicates that this was a *required* shift from counties to CMHSPs, the "county community mental health agency" that is one of the three recognized CMHSPs, MCL 330.1204(1), is an "official

330.1100a(14), the analysis indicated that "[A] community mental health organization or a community mental health authority would be a public governmental entity separate from the county or counties that established it." *Id*. at 8.

In the first section of the analysis discussing arguments for the bill, it is noted that the changes were intended "to provide more flexibility and authority for the locally-based CMH system" and that the amended code would see CMHSPs "as a single-entry point to access mental health services . . . ." *Id*. at 35. In the second section discussing arguments for the bill, it is noted that "[p]erhaps the most significant aspect of the bill is that direct delivery of mental health services would be shifted from the county CMH to a new entity, the CMHSP." *Id*. at 36. In the first section discussing arguments against the bill, *id*. at 37, it is noted that there were concerns with the fact that governmental immunity was being extended to the employees and board members of CMH authorities. In this context, the analysis stated:

> [U]nlike a CMHSP agency in which an elected body of officers (the county board of commissioners) is closely involved by developing policies and procedures and exercising budgetary and other controls, an authority would be a separate entity from the county and would be virtually untouchable even by the commissioners who vote it into existence. For instance, the commissioners would have to ask to see a copy of the authority's budget, and then only for informational purposes. Other than dissolving an authority, a county board of commissioners would have little if no input into the delivery of services to the mentally ill and developmentally disabled population of the area served by the authority. [*Id.*]

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county or multicounty agency," MCL 330.1100a(18). Thus, while referred to as a CMHSP, it appears that a county could elect to retain control by choosing this form of CMHSP.

The analysis indicates that a CMH authority was intended to be largely autonomous from the governing body of the county.

C. ANALYSIS

Defendants contend that pursuant to the Mental Health Code, plaintiffs have the ability to control or substantially influence WMCMHS and, therefore, there was no arm's-length transaction between plaintiffs and WMCMHS. According to defendants, plaintiffs are granted through statute the ability to establish a mental health authority such as WMCMHS, to appoint all of WMCMHS's board members, to remove WMCMHS board members, to approve funding to support WMCMHS, and to dissolve WMCMHS. In fact, plaintiffs may appoint up to four of their county commissioners to WMCMHS's board. The trial court, in contrast, concluded that plaintiffs' ability under statute to create the authority and appoint members to the board did not amount to the ability to control or substantially influence and did not render the transaction less-than-arm's-length. We agree with the trial court.

As noted earlier in this opinion, OMB Circular A-87 provides the definition for a less-than-arm's-length transaction. A less-than-arm's-length lease "is one under which one party to the lease agreement is able to control or substantially influence the actions of the other." OMB Circular A-87, Attachment B, § 37(c). OMB Circular A-87 gives some examples of less-than-arm's length transactions including, but not limited to

> (i) divisions of a governmental unit; (ii) governmental units under common control through common officers, directors, or members; and (iii) a governmental unit and a director, trustee, officer, or key employee of the governmental unit or his immediate family, either directly or through

> corporations, trusts, or similar arrangements in which they hold a controlling interest. [*Id*.]

Other than these examples, OMB Circular A-87 does not define "control" or "influence." A common meaning of "control" is to "exercise restraint or direction over; dominate, regulate, or command; to hold in check; curb." *Webster's Universal College Dictionary* (1997).

While some provisions of 1995 PA 290 could be construed as indicating that a CMH authority is not autonomous from the county, the bulk of this act, consistent with the legislative analysis discussed above, indicates that autonomy was intended and counties do not have the ability to control or substantially influence a CMH authority. The act indicates that the authorities are, in essence, run independently from the counties. Moreover, the act indicates that the state, not counties, exerts control over CMHSPs, including the CMH authorities.

With regard to independence from the counties, as previously noted, the act provides that a CMH authority is "a public governmental entity separate from the county or counties that establish it." MCL 330.1204(1). Its board sets its policies and procedures. MCL 330.1204(2). It has numerous powers, MCL 330.1205(4)(f), including the power to, in its own name,

> (*i*) Enter into contracts and agreements.
>
> (*ii*) Employ staff.
>
> (*iii*) Acquire, construct, manage, maintain, or operate buildings or improvements.
>
> (*iv*) Subject to subdivision (e), acquire, own, operate, maintain, lease, or dispose of real or personal property . . . .
>
> (*v*) Incur debts, liabilities, or obligations that do not constitute the debts, liabilities, or obligations of the creating county or counties.

> (*vi*) Commence litigation and defend itself in litigation. [MCL 330.1205(4)(f).]

Further, it can finance the purchase of real or tangible personal property, MCL 330.1205(10), and is "responsible for all executive administration, personnel administration, finance, accounting, and management information system functions." MCL 330.1205(5)(b). The county is "not liable for any intentional, negligent, or grossly negligent act or omission, for any financial affairs, or for any obligation of a [CMH] authority, its board, employees, representatives, or agents." MCL 330.1205(6). Moreover, an authority employee is not a county employee. MCL 330.1205(8).

The boards of CMHSPs, including CMH authorities, must, among other things:

> (a) Annually conduct a needs assessment to determine the mental health needs of the residents of the county or counties it represents and identify public and nonpublic services necessary to meet those needs. Information and data concerning the mental health needs of individuals with developmental disability, serious mental illness, and serious emotional disturbance shall be reported *to the department* in accordance with procedures and at a time established by the department, along with plans to meet identified needs. . . .
>
> (b) Annually review and submit *to the department* a needs assessment report, annual plan, and request for new funds for the community mental health services program. . . .
>
> (c) . . . In the case of a community mental health authority, provide a copy of its needs assessment, annual plan, and request for new funds *to the board of commissioners of each county creating the authority*.
>
> (d) Submit the needs assessment, annual plan, and request for new funds *to the department* by the date specified by the department. The submission constitutes

the community mental health services program's official application for new state funds.

* * *

(f) Submit *to each board of commissioners* for their approval an annual request for *county* funds to support the program. . . .

(g) Annually approve the community mental health services program's operating budget for the year.

(h) Take those actions it considers necessary and appropriate to secure private, federal, and other public funds to help support the community mental health services program.

(i) Approve and authorize all contracts for the provision of services.

(j) Review and evaluate the quality, effectiveness, and efficiency of services being provided by the community mental health services program. The board shall identify specific performance criteria and standards to be used in the review and evaluation. These shall be in writing and available for public inspection upon request.

(k) . . . [A]ppoint an executive director of the community mental health services program who meets the standards of training and experience established by the department.

(*l*) Establish general policy guidelines within which the executive director shall execute the community mental health services program.

(m) Require the executive director to select a physician, a registered professional nurse with a specialty certification . . . or a licensed psychologist to advise the executive director on treatment issues. [MCL 330.1226(1) (emphasis added).]

This statute indicates that a county's involvement in the running of a CMH authority is limited to the receipt of a copy of reports, and the approval of the *county*

portion of the budget. We note that MCL 330.1226a allows a CMHSP board to create a special fund account to receive fees and third-party reimbursements, but only with approval of the board of county commissioners. However, reports regarding the funds are sent to DCH. *Id.*

Defendants argue that plaintiffs exert control through the appointment process. We conclude that the appointment process does not grant plaintiffs the ability to control or substantially influence. Although plaintiffs appoint all members of the board, no more than 4 of 12 board members can be county commissioners. MCL 330.1222(2). Other board members must be "representative of providers of mental health services, recipients or primary consumers of mental health services, agencies and occupations having a working involvement with mental health services, and the general public." MCL 333.1222(1). As a result, 2/3 of board members who are appointed by plaintiffs are interested in the provision of mental health services and have no loyalty to cause them to prefer plaintiffs over WMCMHS. The county commissioners operating in a dual role may, indeed, influence board decisions in favor of plaintiffs, but, without more, this cannot be said to amount to *substantial* influence. They lack a majority vote, but even more importantly, they have the duty and ethical obligation to act in the best interest of the CMH authority while performing in their capacity as CMH authority board members.

Defendants assert that plaintiffs have the ability to control because WMCMHS's board members can be removed by plaintiffs at will. We again disagree. The relevant sentence of the statute reads:

> A board member may be removed from office by the appointing board of commissioners or, if the board member was appointed by the chief executive officer of a county or a city under [MCL 330.1216], by the chief executive officer who appointed the member for *neglect of official duty or misconduct in office* after being given a written statement of reasons and an opportunity to be heard on the removal. [MCL 330.1224 (emphasis added).]

Defendants argue that the clause set off by commas severs the beginning of the sentence from the for-cause qualifier that follows and, as a result, plaintiffs have the ability to remove board members at will. Defendant's reading of the statute is without merit because it leaves "or" hanging without an explanation. Instead, the clause cited is an essential interrupting dependent clause that must be set off by commas. It interrupts the flow of the sentence to explain that the power of a chief executive officer (CEO) to remove a board member exists only when the CEO has appointed the member pursuant to MCL 330.1216. Thus, the sentence identifies two authorities with the power of removal, "the appointing board of commissioners" and the appointing CEO, and then, following the interrupting clause, identifies the grounds for which each authority may remove the member—"for neglect of official duty or misconduct in office after being given a written statement of reasons and an opportunity to be heard on the removal." Thus, whichever authority is involved, board members may only be removed for cause and after a hearing. Plaintiffs' authority to remove board members for cause only greatly reduces plaintiffs' ability to control or substantially influence WMCMHS.

Moreover, plaintiffs' capacity to dissolve WMCMHS under MCL 330.1205(2)(b) and MCL 330.1220 is also not a real or actual ability to control the board. As a practical matter, plaintiffs' mental health costs would greatly in-

crease if WMCMHS were to be dissolved.[6] Defendants are correct in stating that the proper test is not whether plaintiffs *actually* control the board but whether they have that *ability*. As the court stated in *Biloxi Regional Med Ctr v Bowen*, 835 F2d 345, 352 (D DC, 1987):

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[6] Counties have a financial incentive to create a CMH authority. Under MCL 330.1302, counties are made financially liable for 10 percent of the net cost of services, except as otherwise provided in chapter 3 (and subsection (2), which is not pertinent here). Under MCL 330.1308(1) the state is made responsible for 90 percent of the annual net cost of a CMHSP. However, under MCL 330.1308(2), an exception to the local match requirement is carved out for CMH authorities:

> Beginning in the fiscal year after a [CMHSP] becomes a [CMH] authority under [MCL 330.1205], if the department increases the amount of state funds provided to [CMHSPs] for the fiscal year, all of the following apply:
>
> (a) *The amount of local match required of a* [*CMH*] *authority for that fiscal year shall not exceed the amount of funds provided by the* [*CMHSP*] *as local match in the year in which the program became a* [*CMH*] *authority*.
>
> (b) Subject to the constraint of funds actually appropriated by the county or county board of commissioners, *the amount of county match required of a county or counties that have created a* [*CMH*] *authority shall not exceed the amount of funds provided by the county or counties as county match in fiscal year 1994-1995 or the year the authority is created, whichever is greater*.
>
> (c) If the local match provided by the [CMHSP] is less than the level of local match provided in the year in which the [CMHSP] became a [CMH] authority, subdivision (a) does not apply.
>
> (d) The state is not obligated to provide additional state funds because of the limitation on local funding levels provided for in subdivisions (a) and (b). [Emphasis added.]

This indicates that there is a local match required of the CMH authority itself, as well as a local match required of the county. However, of import here is the fact that the local match for both entities is capped if a county elects to create an authority. Accordingly, if plaintiffs dissolve WMCMHS, the state through MDCH would have responsibility for providing mental health services in Mason, Oceana, and Lake Counties and plaintiffs would lose the financial liability cap incentive, or match limit, that they currently enjoy. Plaintiffs portion of the costs for providing mental health services would increase to 10 percent.

> We realize, of course, that the District Court was properly concerned not with the actual but with the potential ability of the City to influence the Center. Indeed, the power of the sword of Damocles is not that it falls but that it hangs. Here, though, the power that the City has over the Center is more akin to the power that the butterknife of Damocles might have on those above whom it hangs. Realistically, if the City had any ability to influence the Center's actions or policies, it was not "significant."

In sum, the counties' involvement with CMH authorities is limited to appointing board members, reviewing documents, approving *county* funding, which covers a relatively small part of a CMH authority's budget, and having the power to dissolve a CMH authority. As previously noted, a county board of commissioners had very similar control over the appointment of members to county community mental health boards under 1974 PA 258. However, unlike CMH authorities, these community mental health programs were official county agencies. Moreover, the county boards of commissioners would approve the county community mental health board's annual plan and budget before it was sent to the DMH. By making a CMH authority "a public governmental entity separate from the county," and by taking away the county's responsibility for approving the annual plan and budget, it appears that, consistent with the legislative analysis, the intent of 1995 PA 290 was to substantially take away the control of county boards of commissioners.[7]

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[7] Compare *Oakland Co v Dep't of Mental Health*, 178 Mich App 48, 59-60; 443 NW2d 805 (1989) (given that DMH was discharging its obligation to provide mental health services by having counties deliver them pursuant to 1975 PA 258, as evidenced in part by state controls, appropriations for mental health services were to the state even though paid to local units of government such that the Headlee Amendment, Const 1963, art 9, § 30, was not implicated).

Consistent with this conclusion, we note that the state exerts substantial control over CMHSPs, including CMH authorities. The state is required to financially support CMHSPs, including the authorities. MCL 330.1202; MCL 330.1240. The state can audit or call for an audit of a CMHSP. MCL 330.1244(d). The state reviews each CMHSP's "annual plan, needs assessment, request for funds, annual contract, and operating budget" and approves or disapproves state funding. MCL 330.1232; see also MCL 330.1234. Moreover, the state oversees the expenditures of CMHSPs, MCL 330.1236, and the state is responsible for certifying CMHSPs and can revoke certifications and cancel state funding, MCL 330.1232a(8) and (14)(a). That the counties do not have similar authority is a further indicator that they do not have the ability to control or substantially influence the board of a CMH authority. To conclude otherwise would appear to be a repudiation of the statutory scheme.

Further, we are not persuaded by defendants' argument that plaintiffs had actual control over WMCMHS. Larry VanSickle, who served as chairman of Oceana County's Board of Commissioners and as a member of WMCMHS's board, testified that he considered Oceana County's interests when he cast votes as part of the WMCMHS's board. Another board member recognized the potential influence of plaintiffs through the dual role of some county commissioners. Still, even considering the close relationship between WMCMHS's board members who were also county commissioners, plaintiffs did not have the ability to control or even substantially influence WMCMHS. As noted earlier, board members who were also county commissioners did not make up a majority of WMCMHS's board and, accordingly, did not have the ability to control or substantially influence. Moreover, all of WMCMHS's board members

owed a duty of loyalty to WMCMHS. As a result, plaintiffs and WMCMHS were engaged in an arm's-length transaction.

Finally, defendants contend that, even if there was an arm's-length relationship, plaintiffs were not entitled to rent payments because either they previously agreed not to accept rent payments from the county agencies that preceded WMCMHS or they accepted state financing for the building and would be unjustly enriched by rent payments from WMCMHS. In return for state financing for the Lincoln Street Building, Oceana County agreed in 1993 to tie future lease payments for the mental health agency to the costs connected with using the building and not more. Despite this agreement with the state, Oceana later demanded rent payments from WMCMHS that were greater than the costs to use the building. Similarly, the Madden Building was financed with state and federal money for the purpose of providing mental health services in Mason County. As a result, Mason County should not be entitled to rent payments. We disagree.

We conclude that plaintiffs were not unjustly enriched by the rent payments because WMCMHS and plaintiffs are separate legal entities, MCL 330.1204(1), and WMCMHS did not own the buildings at issue. When WMCMHS was created in 1997, plaintiffs had no obligation to transfer their buildings to WMCMHS. Under MCL 330.1205(3)(a), "[a]ll assets, debts, and obligations of the county community mental health agency or community mental health organization, including, but not limited to, equipment, furnishings, supplies, cash, and other personal property, shall be transferred to the [CMH] authority." However, at the time WMCMHS was created, the county agency did not hold title to either building, but merely leased them.

The leasehold was transferred, as required by statute. The Legislature certainly anticipated that county agencies, often housed in county-owned, state-and-federally-funded buildings, would stay in those facilities. It allowed mental health authorities to purchase real property and to be reimbursed for such purchases if carried out by lease-purchase arrangements. MCL 330.1242(a). There do not appear to be any inequities that would result from allowing the independent CMH authorities to continue to rent appropriate space from the counties at or below fair market rates.

For these reasons the trial court did not err by concluding that plaintiffs and WMCMHS were engaged in an arm's-length transaction and that plaintiffs were entitled to rent payments.

IV. NECESSARY PARTY

Defendants' final issue on appeal is that the trial court erred by failing to require plaintiffs to join CMS as a necessary party to the litigation. We disagree. The trial court's decision regarding joinder is reviewed for abuse of discretion. See *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 136; 715 NW2d 398 (2006). The trial court did not abuse its discretion if the outcome of its decision is within the range of principled outcomes. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007).

Under MCR 2.205(A), persons must be joined if "their presence in the action is essential to permit the court to render complete relief . . . ." The purpose of the rule is to prevent the splitting of causes of action and to ensure that all parties having a real interest in the litigation are present. See *id.*; *Gordon Food Serv, Inc v Grand Rapids Material Handling Co*, 183 Mich App 241, 243; 454 NW2d 137 (1989).

While it is possible that WMCMHS could seek federal dollars to pay back-due rent, at this point it is unclear where exactly the money will come from. If the state continued to receive federal money without a deduction for the payments defendants refused to pay WMCMHS, then it would be state dollars that would fund plaintiffs' shortfall. On the other hand, if the state continued to pay WMCMHS the same amount but only prohibited the funds' use for rent, WMCMHS can only look to itself for the source of the money. Until additional payment by CMS is sought either administratively or through further litigation, there is nothing requiring the presence of that agency in the legal proceedings. The trial court did not abuse its discretion by not requiring CMS to be a party, especially given that none of the parties, nor CMS itself, requested that it be joined.

Affirmed.

SAAD, P.J., and JANSEN and K. F. KELLY, JJ., concurred.

HURON BEHAVIORAL HEALTH v DEPARTMENT OF COMMUNITY HEALTH

Docket No. 295740. Submitted May 4, 2011, at Detroit. Decided August 4, 2011, at 9:00 a.m.

Huron Behavioral Health petitioned the Huron Circuit Court for review of the administrative determination by the Department of Community Health (respondent) that petitioner was not required to reimburse respondent for rent paid to Huron County for leased office space. Petitioner, a community mental health (CMH) authority, received state, county and federal funds to provide mental-health services to residents of Huron County. Petitioner and respondent had entered into a service contract by which petitioner agreed to provide the mental-health services in exchange for reimbursement from the state. The contract required petitioner to document costs and comply with Office of Management and Budget (OMB) Circular A-87, which prohibits a provider from paying rent to a governmental unit if the provider and the governmental unit are engaged in a less-than-arm's-length transaction. Petitioner provided annual budgets to respondent from 1999 to 2006 as required by state and federal funding laws; the budgets included the cost of rent paid to Huron County. Respondent audited those budgets and determined that the relationship between petitioner and Huron County was not arm's-length and that, in accordance with OMB Circular A-87, petitioner was therefore not entitled to reimbursement for the rent. Petitioner sought a review hearing of the audit after respondent demanded reimbursement of rent paid in the amount of $612,985. The hearing referee found against petitioner on each issue, and respondent entered a final order that adopted the referee's findings. The court, M. Richard Knoblock, J., determined that petitioner was entitled to equitable relief because it had detrimentally relied on respondent's annual approval of its budget, that there was no improper self-dealing between petitioner and Huron County, and that the lease contracts were arm's-length transactions. Respondent appealed by delayed leave granted.

The Court of Appeals *held*:

1. Administrative tribunals do not have equitable jurisdiction unless expressly authorized by statute. Nothing in the Administrative Procedures Act, including MCL 24.306, which governs circuit court review of agency decisions, permits a court to set aside an administrative decision on equitable grounds. The court erred by reversing the administrative order on the basis that it was inequitable, but the error was harmless in light of the flaws in the agency's decision.

2. While an agency's interpretation of a statute is entitled to respectful consideration, it is not binding on the courts and cannot conflict with the Legislature's intent as expressed in the language of the statute. MCL 330.1204 provides that a CMH authority is a public governmental entity separate from the county or counties that establish it. CMH authorities are largely autonomous and run independently from the counties. CMH authorities have numerous powers under MCL 330.1205, and the CMH authority's board sets its policies and procedures and handles the day-to-day management of the authority, MCL 330.1204(2) and 330.1226. Under MCL 330.1226(c) and (f), a county only has the power to obtain a copy of the CMH authority's reports and approve the county portion of the authority's budget. While Huron County appointed all of petitioner's board members, only 4 of the 12 members could be county commissioners, and once on the board, the members owe a duty to petitioner and may only be removed for cause after a hearing. MCL 330.1222(1) and (2); MCL 330.1224; MCL 330.1226. Thus, the circuit court did not err by concluding that Huron County did not have the ability to control or significantly influence petitioner. The lease agreement between petitioner and Huron County was an arm's-length transaction, and petitioner was entitled to reimbursement for the rent it paid to Huron County.

Affirmed.

1. ADMINISTRATIVE LAW — CIRCUIT COURTS — REVIEW OF AGENCY DECISIONS — EQUITY.

Administrative tribunals do not have equitable jurisdiction unless expressly authorized by statute; a court may not set aside an administrative decision on equitable grounds (MCL 24.306).

2. ADMINISTRATIVE LAW — COMMUNITY MENTAL HEALTH AUTHORITIES — DEPARTMENT OF COMMUNITY HEALTH — REIMBURSEMENT FOR RENT — ARM'S-LENGTH TRANSACTIONS.

A community mental health (CMH) authority is a largely autonomous public governmental entity separate from the county or counties that establish it and run independently of those counties; a county does not have the ability to control or significantly

> influence a CMH authority, so a lease entered into between a county and a CMH authority is an arm's-length transaction, and the authority is entitled to reimbursement from the Department of Community Health for rent paid under the agreement.

Janis Meija, Jr. & Associates, P.C. (by *Janis Meija, Jr.*), for Huron Behavioral Health.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Darrin F. Fowler*, Assistant Attorney General, and *Nan Elizabeth Casey*, Special Assistant Attorney General, for the Department of Community Health.

Before: SAAD, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM. Respondent, the Michigan Department of Community Health (DCH), appeals by delayed leave granted the circuit court's order reversing an administrative decision. *Huron Behavioral Health v Dep't of Community Health*, unpublished order of the Court of Appeals, entered April 12, 2010 (Docket No. 295740). Because we conclude that Huron County and petitioner, Huron Behavioral Health, were engaged in an arm's-length transaction and that petitioner was entitled to reimbursement from respondent for rental expenses, we affirm the circuit court's order.

I. BASIC FACTS AND PROCEDURAL BACKGROUND

Petitioner is a community mental health (CMH) authority that receives state, county, and federal funds to provide mental-health services to residents of Huron County. Respondent is a state agency that oversees and funds health-related services in the state of Michigan. In particular, it is respondent that receives federal Medicaid money and disburses that money to health-care providers throughout the state, including peti-

tioner. Petitioner and respondent entered into a service contract by which petitioner agreed to provide mental-health services to residents of Huron County in exchange for reimbursement from the state. The contract required petitioner to document costs and comply with Office of Management and Budget (OMB) Circular A-87.

Before 1996, petitioner was an agency under the control of Huron County and was charged with providing mental-health services to residents in Huron County. In 1996, petitioner continued providing mental-health services in Huron County, but became a CMH authority separate from the county. Since its creation in 1971, petitioner has been housed in a Huron County building and has been paying rent to the county.

From 1999 to 2006, in connection with its state and federal funding, petitioner provided annual budgets to respondent, which included the cost of rent paid to the county for that period. In 2008, respondent audited those budgets and determined that, because the relationship between petitioner and Huron County was not arm's-length, petitioner should not have made rental payments to the county and had not been entitled to reimbursements from respondent for that rent. Respondent relied on the provision in its contract with petitioner mandating compliance with OMB Circular A-87. OMB Circular A-87 states that Medicaid funds may not be used by a provider to pay rent to a governmental unit if the provider and the governmental unit are engaged in a less-than-arm's-length transaction. Respondent's auditor concluded that Huron County and petitioner were engaged in a less-than-arm's-length transaction because the county had the ability to control petitioner through the Huron County Board of Commissioners' appointment of petitioner's

board, removal of petitioner's board members at will, ability to dissolve petitioner, and provision of annual appropriations to petitioner. Respondent demanded that petitioner reimburse it in the amount of $612,985 for the rent paid.

Petitioner sought a review hearing of the audit, raising four issues: whether the federal Medicaid funding petitioner received is a "federal grant/award"; whether OMB Circular A-87 is applicable to contracts between petitioner and respondent; whether respondent properly determined that cost settlement is applicable to a determination of allowable costs; and whether respondent properly determined that petitioner and Huron County were "related parties" so that their lease agreement was "less than arms length." The hearing referee found against petitioner on each issue, and the DCH entered a final order that in large part adopted the referee's findings.

Petitioner appealed the final order adopting the referee's findings in the circuit court. Petitioner argued that OMB Circular A-87 did not apply to its contract with respondent, that cost settlement was not allowed, and that petitioner and the county did not have a less-than-arm's-length relationship. The circuit court reversed the administrative decision, citing two issues it was "troubled with." First, the circuit court found that petitioner was entitled to equitable relief because it had detrimentally relied on respondent's approval of petitioner's budget for many years. Second, the circuit court disagreed with the conclusion that this was not an arm's-length transaction. The circuit court reasoned that the Legislature has stated that the county and the CMH authority are separate legal entities. The circuit court also found that Huron County did not have control over petitioner. Being able to establish petition-

er's board was not enough for control, and the statutes restricted the county's choices of who made up the board. The circuit court read the language of MCL 330.1224 as permitting removal from the board for cause only, not at will. Thus, the circuit court concluded there was no improper self-dealing and the lease contracts were appropriate expenditures. Respondent now appeals by leave granted the circuit court's order.

II. STANDARD OF REVIEW

We review for clear error a circuit court's ruling concerning an agency's decision. *Glennon v State Employees' Retirement Bd*, 259 Mich App 476, 478; 674 NW2d 728 (2003). A decision is clearly erroneous when this Court is left with "the definite and firm conviction" that a mistake was made. *Id*.

The circuit court's review of an agency's decision is controlled by the Administrative Procedures Act (APA), MCL 24.201 *et seq*., which provides:

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.
>
> (b) In excess of the statutory authority or jurisdiction of the agency.
>
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and material error of law.

> (2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings. [MCL 24.306.]

"When reviewing whether an agency's decision was supported by competent, material, and substantial evidence on the whole record, a court must review the entire record and not just the portions supporting an agency's findings." *Great Lakes Sales, Inc v State Tax Comm*, 194 Mich App 271, 280; 486 NW2d 367 (1992). Substantial evidence is what "a reasoning mind would accept as sufficient to support a conclusion." *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002). Substantial evidence is "more than a mere scintilla" but less than "a preponderance" of evidence. *Mantei v Mich Pub Sch Employees Retirement Sys*, 256 Mich App 64, 71; 663 NW2d 486 (2003). A reviewing court must not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result. *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 584; 701 NW2d 214 (2005). Deference must be given to an agency's findings of fact, *id*. at 588, especially with respect to conflicts in the evidence, *Arndt v Dep't of Licensing & Regulation*, 147 Mich App 97, 101; 383 NW2d 136 (1985), and the credibility of witnesses, *VanZandt*, 266 Mich App at 588. Similarly, great deference should be given to an agency's administrative expertise. *VanZandt*, 266 Mich App at 588. At the same time, an issue of statutory interpretation is a question of law that we consider de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

III. EQUITABLE REMEDY

The circuit court erred to the extent that it applied equity to reverse the administrative decision. Adminis-

trative tribunals do "not have equitable jurisdiction" unless expressly authorized by statute. *Benton Harbor Area Sch Bd of Ed v Wolff*, 139 Mich App 148, 156; 361 NW2d 750 (1984). Moreover, nothing in the APA permits a court to set aside an administrative decision it finds inequitable. See MCL 24.306. However, as discussed in part IV of this opinion, the administrative decision was based on a flawed construction of the relevant statutes, so any error by the circuit court on this issue was harmless.

IV. ARM'S-LENGTH TRANSACTION

The circuit court did not err by concluding that petitioner and the county had an arm's-length relationship. Given the language and the historical development of the statutes governing CMH authorities and respondent's concession that Huron County did not actually attempt to control petitioner, they were engaged in an arm's-length transaction and petitioner was entitled to reimbursement for rent paid to Huron County.

"[The] primary goal when interpreting a statute is to ascertain and give effect to the intent of the Legislature," as gathered from the ordinary meaning of the language used. *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 131; 807 NW2d 866 (2011). "The Legislature is presumed to have intended the meaning that it plainly expressed, and clear statutory language must be enforced as written." *Id.* at 131-132 (citation omitted). The changes in an act must be construed in light of the act's predecessor statutes and the law's historical development. See *Advanta Nat'l Bank v McClarty*, 257 Mich App 113, 120; 667 NW2d 880 (2003).

The state began auditing the CMH authorities and mandating that OMB Circular A-87 be incorporated into their contracts. Section 37(c) of Attachment B of OMB Circular A-87 provides as follows:[1]

> Rental costs under "less-than-arms-length" leases are allowable only up to the amount (as explained in Attachment B, section 37.b) that would be allowed had title to the property vested in the governmental unit. For this purpose, *a less-than-arms-length lease is one under which one party to the lease agreement is able to control or substantially influence the actions of the other.* Such leases include, but are not limited to those between (i) divisions of a governmental unit; (ii) governmental units under common control through common officers, directors, or members; and (iii) a governmental unit and a director, trustee, officer, or key employee of the governmental unit or his immediate family, either directly or through corporations, trusts, or similar arrangements in which they hold a controlling interest. For example, a governmental unit may establish a separate corporation for the sole purpose of owning property and leasing it back to the governmental unit. [Emphasis added.]

We conclude that under the relevant statutory scheme, and given its historical development, the county did not have the ability to control or substantially influence petitioner, and the circuit court did not err in concluding that an arm's-length transaction existed between the county and petitioner.

A. STATUTORY HISTORY

This Court described the historical development of the relevant statutory scheme in *Mason Co v Dep't of Community Health*, 293 Mich App 462; 820 NW2d 192 (2011). This Court stated in relevant part:

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[1] This version became effective June 9, 2004.

The Michigan Constitution requires the Legislature to pass "suitable laws for the protection and promotion of the public health." Const 1963, art 4, § 51. Through that grant of power, the Legislature codified the Mental Health Code. Section 116(e) of 1974 PA 258 directed that the Department of Mental Health (DMH) [the agency that preceded the DCH] do the following:

"(i) It shall administer the provisions of chapter 2 so as to promote and maintain an adequate and appropriate system of county community mental health services throughout the state.

"(ii) In the administration of chapter 2, it shall be the objective of the department to shift from the state to a county the primary responsibility for the direct delivery of public mental health services whenever such county shall have demonstrated a willingness and capacity to provide an adequate and appropriate system of mental health services for the citizens of such county."

In 1995, the Legislature amended the Mental Health Code. 1995 PA 290. At that time, the Legislature assigned DCH responsibility for providing mental health services to residents of the state of Michigan. See MCL 330.1116(1) and (2)(a). However, in MCL 330.1116(2)(b), the Legislature directed DCH

"to shift primary responsibility for the direct delivery of public mental health services from the state to a community mental health services program [CMHSP] whenever the [CMHSP] has demonstrated a willingness and capacity to provide an adequate and appropriate system of mental health services for the citizens of that service area"

in accordance with chapter 2 of the Mental Health Code, MCL 330.1200 *et seq*.

In sum, according to the language of the statutes, the goal as of 1974 was to shift responsibility for mental health services from the state to the counties, whereas in 1995 the goal became to shift the state's responsibility to CMHSPs. In other words, the state has always retained primary responsibility for mental health services, but the objective

> since 1974 has been to shift responsibility to localities and, in 1995, the local entity changed from counties to CMHSPs.
>
> When the Mental Health Code was enacted in 1974, counties delivered mental health services through "county community mental health programs." 1974 PA 258, § 200 *et seq*. These entities should not be confused with CMHSPs, which came into being under 1995 PA 290 and will be further discussed later in this opinion. . . . Section 204 provided that a county community mental health program would be "an official county agency." 1974 PA 258, § 204. . . .
>
> With regard to the CMHSPs created under 1995 PA 290, § 204(1) of the act, MCL 330.1204(1), provides as follows:
>
> "A community mental health services program established under this chapter shall be a county community mental health agency, a community mental health organization, or a community mental health authority. A county community mental health agency is an official county agency. A community mental health organization or *a community mental health authority is a public governmental entity separate from the county or counties that establish it*." [*Mason Co*, 293 Mich App at 473-476.]

Accordingly, CMH authorities are largely autonomous and run independently of the counties. Huron County did not have the ability to control or substantially influence petitioner.

B. MERITS

As previously noted, MCL 330.1204 provides that a CMH authority such as petitioner is "a public governmental entity separate from the county or counties that establish it." MCL 330.1204(1). Its board sets its policies and procedures. MCL 330.1204(2). Petitioner has numerous powers, including the power to, in its own name, enter into contracts, employ staff, lease real estate, operate buildings, incur debts, and engage in

litigation. MCL 330.1205(4)(f). Further, it can purchase real or tangible personal property, MCL 330.1205(10), and is "responsible for all executive administration, personnel administration, finance, accounting, and management information system functions," MCL 330.1205(5)(b). Huron County, as an entity distinct from the CMH authority, is "not liable for any intentional, negligent, or grossly negligent act or omission, for any financial affairs, or for any obligation of a [CMH] authority, its board, employees, representatives, or agents . . . ." MCL 330.1205(6). Moreover, a CMH authority employee is not a county employee. MCL 330.1205(8).

Pursuant to the act, the board of the CMH authority is tasked with the day-to-day management of the CMH authority. MCL 330.1226. A county only has the power to obtain a copy of the CMH authority's reports and to approve the *county* portion of the CMH authority's budget. MCL 330.1226(c) and (f). A county is generally not otherwise involved in managing the CMH authority with one exception. MCL 330.1226a allows a CMHSP board to create a special fund account to receive fees and third-party reimbursements, but only with approval of the board of county commissioners. Still, reports regarding those special funds are sent to the DCH and not to the county. *Id.*

Huron County appoints all members of the petitioner's board. No more than 4 of the 12 board members, however, can be county commissioners, less than a majority. MCL 330.1222(2). Petitioner's board must "be representative of providers of mental health services, recipients or primary consumers of mental health services, agencies and occupations having a working involvement with mental health services, and the general public." MCL 330.1222(1). Moreover, once appointed by

Huron County, board members owe a duty to petitioner. See MCL 330.1226. Because only four county commissioners may be appointed by Huron County to petitioner's board and all board members owe an independent duty and ethical obligation to act in the best interests of petitioner, the county does not have the ability to control or substantially influence petitioner.

Respondent previously asserted before the circuit court that the county can dismiss petitioner's board members at will and that authority gives the county the ability to control or substantially influence petitioner. We disagree. The relevant sentence of the statute reads as follows:

> A board member may be removed from office by the appointing board of commissioners or, if the board member was appointed by the chief executive officer of a county or a city under [MCL 330.1216], by the chief executive officer who appointed the member for *neglect of official duty or misconduct in office* after being given a written statement of reasons and an opportunity to be heard on the removal. [MCL 330.1224 (emphasis added).]

Respondent argues that the clause set off by commas severs the beginning of the sentence from the "for cause" qualifier that follows. This argument is without merit because it leaves the conjunction "or" hanging without an explanation. As this Court noted in *Mason Co*, 293 Mich App at 484:

> [T]he clause cited is an essential interrupting dependent clause that must be set off by commas. It interrupts the flow of the sentence to explain that the power of a chief executive officer (CEO) to remove a board member exists only when the CEO has appointed the member pursuant to MCL 330.1216. Thus, the sentence identifies two authorities with the power of removal, "the appointing board of commissioners" and the appointing CEO, and then, following the interrupting clause, identifies the grounds for

> which each authority may remove the member—"for neglect of official duty or misconduct in office after being given a written statement of reasons and an opportunity to be heard on the removal." Thus, whichever authority is involved, board members may only be removed for cause and after a hearing.

The county also does not have the ability to control or substantially influence through its power to dissolve petitioner. A CMH authority may dissolve itself or be dissolved by the county board of commissioners. MCL 330.1205(2)(b); MCL 330.1220. If it were to be dissolved, however, the county's community mental-health program would no longer be protected by the "capping" provision of MCL 330.1308(2)(a), and the county's share of costs would increase back to 10 percent of the net costs. See *Mason Co*, 293 Mich App at 485 n 6.

In reality, respondent has more control over petitioner than Huron County. Although, as noted, the CMH authority must provide a copy of its annual audit to the county and get county approval for county-provided funds, it is the state's duty to review the CMH authority's annual needs assessment, plan, and budget and to approve or disapprove state funding. MCL 330.1205(5); MCL 330.1226(1)(a), (c), (d), and (f); MCL 330.1232. In fact, because petitioner receives state funds and because "[e]ligibility for state financial support shall be contingent upon an approved contract and operating budget and certification in accordance with [MCL 330.1232a]," MCL 330.1232, petitioner is entirely dependent on respondent's approval of its budget, service plan, and performance. In contrast, a county agency's annual needs assessment, plan, and budget are approved by the county. MCL 330.1226(1)(c). While a county agency and a CMH authority both appoint their own executive directors, a county agency's appointment can be rejected by a $^2/_3$ vote of the county board of

commissioners. MCL 330.1226(1)(k) and (3). It is difficult to see how Huron County could influence or control petitioner in any significant way that would not impinge on respondent's area of control.

Respondent further argues that the circuit court erred by failing to defer to the administrative agency's reading of the statute. Generally, " 'the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.' " *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), quoting *Boyer-Campbell Co v Fry*, 271 Mich 282, 296-297; 260 NW 165 (1935). "However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Rovas Complaint*, 482 Mich at 103. Because we conclude that the Legislature's intent as expressed in the statute did not grant the county the ability to control petitioner, we reject respondent's argument.

The trial court did not err by concluding that Huron County was not able to control or significantly influence petitioner and that the lease was an arm's-length transaction.

Affirmed.

SAAD, P.J., and JANSEN and K. F. KELLY, JJ., concurred.

LANSING SCHOOLS EDUCATION ASSOCIATION, MEA/NEA v LANSING BOARD OF EDUCATION (ON REMAND)

Docket No. 279895. Submitted September 7, 2010, at Lansing. Decided August 9, 2011, at 9:00 a.m.

The Lansing Schools Education Association, MEA/NEA, and four of its member teachers who alleged that they were physically assaulted by students in grade six or above brought an action in the Ingham Circuit Court against the Lansing Board of Education and the Lansing School District. Plaintiffs sought a declaratory judgment regarding the parties' rights and legal relations under MCL 380.1311a, which concerns physical assaults at school by students in Grade 6 or above against a person employed by or engaged as a volunteer or contractor by a school board. Plaintiffs also sought a writ of mandamus ordering defendants to expel, rather than suspend, the students and a permanent injunction prohibiting defendants from allegedly violating the statute in the future. The court, Thomas L. Brown, J., granted summary disposition for defendants, ruling that the school board had the discretion to determine whether a physical assault occurred within the meaning of MCL 380.1311a(12)(b) and concluding that the court should not oversee the individual disciplinary decisions of a local school board. Plaintiffs appealed, and the Court of Appeals, SAAD, C.J., and FITZGERALD and BECKERING, JJ., affirmed, holding that plaintiffs lacked standing to maintain their lawsuit because they had failed to establish the elements for constitutional standing under *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001). 282 Mich App 165 (2009). The Supreme Court reversed, overruling *Lee* and its progeny, and held that plaintiffs had standing and remanded the case to the Court of Appeals to determine whether plaintiffs met the requirements of MCR 2.605 for a declaratory judgment and to determine the issues not previously reached. 487 Mich 349 (2010).

On remand, the Court of Appeals *held*:

1. MCR 2.605(A)(1) provides that a court may declare the rights and relations of an interested party seeking declaratory judgment, whether or not other relief is or could be sought or granted. An actual controversy is a condition precedent to the grant of declaratory relief. An actual controversy exists when

declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights. The purpose of declaratory judgment is to obtain an adjudication of the parties' rights before actual injury occurs, to settle matters before they ripen into a violation of law or a breach of contractual duty, to avoid a multiplicity of actions, or to avoid the strictures associated with obtaining coercive relief that is neither desired nor necessary to resolve the matter. All interested parties must be present in an action seeking declaratory judgment.

2. There was no actual controversy in this case because declaratory relief would serve none of the identified purposes. The alleged injuries have already occurred. Plaintiffs did not seek to prevent a violation of a criminal law, there was no contractual issue for which the parties needed guidance, and declaratory relief did not appear necessary to guide plaintiffs' future conduct in order to preserve their legal rights. Moreover, declaratory relief could not be granted when the accused students were not parties to the action and an order declaring them permanently expelled would deprive them of their protected right to an education without due-process protections, at a minimum notice and an opportunity to be heard.

3. MCL 380.1311a(1) requires a school board to permanently expel students who commit a physical assault against a school employee, volunteer, or contractor. The school board has discretion to determine whether a student has committed a physical assault. A "physical assault" is defined under MCL 380.1311a(12)(b) as intentionally causing or attempting to cause physical harm through force or violence. The school board only had a legal duty to expel the students if it reached the legal conclusion that a physical assault occurred. Summary disposition was appropriate under MCR 2.116(C)(8) because the school board determined that the students' actions did not constitute physical assaults; accordingly, no factual development could justify recovery.

4. A writ of mandamus is an extraordinary remedy. A plaintiff must show that he or she has a clear legal right to performance of the specific duty sought and that the defendant has a clear legal duty to perform the act requested. The act sought to be compelled must be ministerial, involving no exercise of judgment or discretion. Plaintiffs were not entitled to a writ of mandamus or other injunctive relief because the school board had no duty to expel the students. Further, the decision to expel a student was not a ministerial act for which an order compelling such action was

appropriate in the absence of clear and indisputable legal grounds under the statute and without the students themselves being parties to the action.

Affirmed.

BECKERING, J., concurred in the result only. While it was not improper to consider whether granting declaratory judgment in this case served any of the purposes listed by the majority, she would not have limited her analysis to that inquiry alone. Rather, she would have carefully examined whether plaintiffs fully met the essential requirements for an actual controversy, that is, whether they pleaded and proved facts that indicated an adverse interest necessitating the sharpening of the issues raised. Judge BECKERING would also not have rested the conclusion that plaintiffs failed to meet the requirements of MCR 2.605 solely on the fact that some of the interested parties (the students) were not parties because that defect could generally be cured by amending the pleadings and joining the necessary parties. She agreed, however, that summary disposition under MCR 2.116(C)(8) was appropriate because the school board concluded that the students' actions did not rise to the level of physical assaults, and the board was therefore not required to expel them.

1. JUDGMENTS — DECLARATORY JUDGMENTS — PURPOSE — ACTUAL CONTROVERSY.

A court may declare the rights and relations of an interested party seeking declaratory judgment, whether or not other relief is or could be sought or granted; an actual controversy is a condition precedent to the grant of declaratory relief; an actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights; the purpose of declaratory judgment is to obtain an adjudication of the parties' rights before actual injury occurs, to settle matters before they ripen into a violation of law or a breach of contractual duty, to avoid a multiplicity of actions, or to avoid the strictures associated with obtaining coercive relief that is neither desired nor necessary to resolve the matter; all interested parties must be present in an action seeking declaratory judgment (MCR 2.605[A][1]).

2. SCHOOLS — SCHOOL BOARDS — EXPULSION OF STUDENT — PHYSICAL ASSAULT.

A school board must permanently expel a student who commits a physical assault against a school employee, volunteer, or contractor while at school; the school board has discretion to determine whether a student has committed a physical assault: a "physical

assault" is defined as intentionally causing or attempting to cause physical harm to another person through force or violence (MCL 380.1311a[1], [12][b]).

3. EQUITY — REMEDIES — MANDAMUS — LEGAL DUTY.

A writ of mandamus is an extraordinary remedy; a plaintiff must show that he or she has a clear legal right to performance of the specific duty sought and that the defendant has a clear legal duty to perform the act requested; the act sought to be compelled must be ministerial, involving no exercise of judgment or discretion.

White, Schneider, Young & Chiodini, P.C. (by *Michael M. Shoudy* and *Dena Lampinen Lorenz*), for plaintiffs.

Thrun Law Firm, P.C. (by *Donald J. Bonato* and *Margaret M. Hackett*), for defendants.

ON REMAND

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

SAAD, P.J. Our Supreme Court remanded this case for consideration of issues raised but not addressed in this Court's previous opinion, *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed*, 282 Mich App 165; 772 NW2d 784 (2009), rev'd 487 Mich 349 (2010). Plaintiffs appeal the trial court's order that granted summary disposition to defendants on plaintiffs' claims for a declaratory judgment, mandamus, and other relief under MCL 380.1311a(1) of the Revised School Code. For the reasons set forth in this opinion, we again affirm.

I. FACTS AND PROCEDURAL HISTORY

The facts and procedural history were set forth in our previous opinion:

> Plaintiffs, Lansing Schools Education Association, MEA/NEA, Cathy Stachwick, Penny Filonczuk, Ellen Wheeler, and Elizabeth Namie, filed their complaint for a

declaratory judgment, a writ of mandamus, and injunctive relief on April 9, 2007. Stachwick, Filonczuk, Wheeler, and Namie are teachers in the Lansing public school system and are members of the Lansing Schools Education Association, MEA/NEA, which is the exclusive bargaining representative for Lansing public school teachers. According to plaintiffs' complaint, students hit two of the teachers with a chair, one student slapped one of the teachers, and one student threw a wristband toward one of the teachers and it struck the teacher in the face. Plaintiffs further assert that school administrators were informed of each incident and the students were suspended, but they were not expelled.

Plaintiffs alleged in their complaint that the expulsion of the students is required by § 1311a(1) of the Revised School Code (RSC), MCL 380.1311a(1). Plaintiffs asked the trial court for a declaratory judgment on the rights and legal relations of the parties under the statute. Plaintiffs asserted that each incident constituted a physical assault by a student in grade six or above and that expulsion of each student was mandatory. In addition to a declaratory judgment, plaintiffs asked the trial court for a writ of mandamus ordering defendants to follow the statute and expel the students and to issue a permanent injunction to enjoin defendants from future violations of MCL 380.1311a(1). Plaintiffs further asked the court to find the school officials who failed to follow the statute guilty of a misdemeanor and to cancel the contract of the school superintendent or principal who failed to comply with the statute.

In lieu of an answer, defendants filed a motion for summary disposition under MCR 2.116(C)(8). Defendants argued that plaintiffs lack standing to assert their claims under the RSC because they have no legally protected interest in the district's decision to suspend or expel students under MCL 380.1311a(1). Defendants further argued that the RSC does not create a private cause of action by teachers or education associations, but merely sets forth the powers and duties of the school board in disciplinary proceedings. According to defendants, a private cause of action cannot be inferred under the statute because exclusive remedies are set forth in MCL 380.1801

to 380.1816. Defendants maintain that, if plaintiffs had standing to bring their claim, MCL 380.1311a(1) provides that the school board has the sole power to determine whether a student physically assaulted a teacher and findings by a school board are generally deemed conclusive by our courts. Defendants claim that plaintiffs are not entitled to a writ of mandamus or declaratory judgment because there is no clear legal right of performance and the decision whether to expel the students involves the exercise of discretion.

In response, plaintiffs asserted that the Legislature enacted MCL 380.1311a(1) to provide safe environments for teachers and, therefore, teachers have a legal interest in teaching in a safe environment. Plaintiffs further asserted that the plaintiff teachers suffered injuries in fact when they were assaulted and their legally protected interest in their own safety was invaded when the assaults occurred. Further, plaintiffs opined, "By refusing to expel students as required by statute, Defendants invaded the Plaintiff Teachers' legally protected interest in having a safe work environment . . . ." According to plaintiffs, they have standing to assert their claims for the above reasons and because, as a remedial statute, MCL 380.1311a(1) should be liberally construed in favor of the teachers. Alternatively, plaintiffs argue that a private cause of action should be inferred because there is no other adequate remedy or procedure to enforce the statute. Plaintiffs also maintained that the school board does not have the exclusive power to determine whether an assault occurred and that its duty to expel a student who commits an assault is not discretionary.

The trial court heard oral argument on June 20, 2007, and granted defendants' motion for summary disposition. The trial court reasoned that, while MCL 380.1311a(1) requires the expulsion of a student who commits a physical assault, the Lansing School Board has the discretion to determine whether a physical assault occurred within the meaning of the statute. The court further concluded that trial courts should not oversee the individual disciplinary decisions of a local school board. Accordingly, the court

> issued a written order that granted summary disposition to defendants. [*Lansing Sch Ed Ass'n*, 282 Mich App at 167-169.]

In our prior opinion, we affirmed the trial court's grant of summary disposition and held that plaintiffs lacked standing to maintain their lawsuit because they had failed to establish the elements for standing under *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), overruled by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). Our Supreme Court reversed, overruling *Lee* and its progeny. The majority formulated a new standing doctrine: "[A] litigant has standing whenever there is a legal cause of action," and "[w]here a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing." *Lansing Sch Ed Ass'n*, 487 Mich at 372. "Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Id*. The Court applied this new test and held that "in this case, plaintiffs have standing because they have a substantial interest in the enforcement of MCL 380.1311a(1) that will be detrimentally affected in a manner different from the citizenry at large if the statute is not enforced." *Id*. at 373. Pursuant to the Supreme Court's remand instructions, we now consider "whether plaintiffs meet the requirements of MCR 2.605" as well as the issues that we did not previously reach. *Id*. at 378.

II. ANALYSIS

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition in an action for a

declaratory judgment. *Farm Bureau Ins Co v Abalos*, 277 Mich App 41, 43; 742 NW2d 624 (2007). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) is appropriately granted "where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' " *Id*. (citation omitted.)

"A trial court's decision whether to issue a writ of mandamus is reviewed for an abuse of discretion." *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006). "But whether defendant had a clear legal duty to perform and whether plaintiff had a clear legal right to the performance of that duty, thereby satisfying the first two steps in the test for assessing the propriety of a writ of mandamus, are questions of law, which this Court reviews de novo." *Id*., citing *Tuggle v Dep't of State Police*, 269 Mich App 657, 667; 712 NW2d 750 (2005). A trial court's decision whether to grant injunctive relief is reviewed for an abuse of discretion. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008).

B. LAW AND ANALYSIS

1. SECTION 1311a OF THE REVISED SCHOOL CODE

MCL 380.1311a(1) mandates the permanent expulsion of a student in Grade 6 or above who commits a

physical assault at school against a person employed by the school board," provided that the assault is reported to school officials. Under the statute, a "physical assault" consists of intentionally causing or attempting to cause physical harm to another through force or violence. MCL 380.1311a(12)(b). The statute specifically provides in pertinent part:

> (1) *If a pupil enrolled in grade 6 or above commits a physical assault at school against a person employed by* or engaged as a volunteer or contractor by *the school board* and the physical assault is reported to the school board, school district superintendent, or building principal by the victim or, if the victim is unable to report the assault, by another person on the victim's behalf, *then the school board*, or the designee of the school board as described in [MCL 380.1311(1)] on behalf of the school board, *shall expel the pupil from the school district permanently,* subject to possible reinstatement under subsection (5). . . .
>
> * * *
>
> (12) As used in this section:
>
> * * *
>
> (b) "Physical assault" means intentionally causing or attempting to cause physical harm to another through force or violence. [MCL 380.1311a (emphasis added).]

Plaintiffs allege that the three students committed assaults against teachers, though they acknowledge that the school board determined that the students' conduct did not constitute physical assaults as defined by MCL 380.1311a(12)(b). Also, plaintiffs do not dispute that the school board has discretion to determine whether an assault occurred. But plaintiffs argue that the mandatory language of the statute requires defendants to expel the students on the facts alleged here,

and they ask this Court to hold that they have a right to compel the students' expulsion.

2. PLAINTIFFS' CLAIM FOR DECLARATORY RELIEF

a. ACTUAL CONTROVERSY

MCR 2.605(A)(1) provides: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." An actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights. *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000). "The existence of an 'actual controversy' is a condition precedent to the invocation of declaratory relief." *PT Today, Inc, v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 127; 715 NW2d 398 (2006). "In the absence of an actual controversy, the trial court lacks subject-matter jurisdiction to enter a declaratory judgment." *Leemreis v Sherman Twp*, 273 Mich App 691, 703; 731 NW2d 787 (2007).

This Court has long recognized that the ability of litigants to obtain declaratory relief serves important purposes:

> Declaratory judgment has been heralded as one of the most significant procedural reforms of the century. Its purpose is to enable parties, in appropriate circumstances of actual controversy, to obtain an adjudication of their rights before actual injury occurs, to settle matters before they ripen into violations of law or a breach of contractual duty, to avoid a multiplicity of actions by affording a remedy for declaring in one expedient action the rights and obligation of all litigants, or to avoid the strictures associ-

> ated with obtaining coercive relief, when coercive relief is neither desired nor necessary to resolve the matter. [*Skiera v Nat'l Indemnity Co*, 165 Mich App 184, 189; 418 NW2d 424 (1987), quoting 3 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), Rule 2.605, p 422.]

See also *Detroit v Michigan*, 262 Mich App 542, 550-551; 686 NW2d 514 (2004) ("[D]eclaratory relief is designed to give litigants access to courts to preliminarily determine their rights. . . . [T]he 'court is not precluded from reaching issues before actual injuries or losses have occurred.' "), quoting *Shavers v Attorney General*, 402 Mich 554, 588-589; 267 NW2d 72 (1978).

We hold that an actual controversy is lacking in this case. Declaratory relief would serve none of the purposes that have been identified as associated with circumstances that constitute an actual controversy appropriate for declaratory judgment. Plaintiffs do not allege imminent injury; the alleged physical injuries have already occurred. They do not seek to prevent a violation of a criminal law, nor is there a contractual issue for which the parties are in need of guidance. Declaratory relief does not appear necessary to guide plaintiffs' future conduct in order to preserve their legal rights. *Citizens for Common Sense*, 243 Mich App at 55.

Perhaps most importantly, we question whether the requested relief can be granted in this case. Our Supreme Court has long recognized the necessity of having all interested parties before it in order to have a case that is appropriate for declaratory judgment. *Central High Sch Athletic Ass'n v Grand Rapids*, 274 Mich 147, 153; 264 NW 322 (1936) ("We have grave doubts that a declaratory judgment would be *res judicata* of anything with only the present parties before us. All interested

parties should be before the court."); see also *Skiera*, 165 Mich App at 188 ("It has . . . been held that, as part of the requirement that there be an actual controversy, it is necessary that all the interested parties be before the court."), citing *Central High* and *Washington-Detroit Theatre Co v Moore*, 249 Mich 673, 677; 229 NW 618 (1930). The declaration of rights that plaintiffs request would necessarily affect the rights of the students whose expulsion plaintiffs seek to compel, and those students are not parties to this action.

Conspicuously absent from this discussion is any concern for the protection of the rights of the students who face permanent expulsion. Student disciplinary proceedings are inherently complex, with various competing interests at stake. To be sure, plaintiffs have a substantial interest in the enforcement of MCL 380.1311a(1). *Lansing Sch Educ Ass'n*, 487 Mich at 374. The Legislature adopted § 1311a(1) "to create a safer school environment and, even more specifically, a safer and more effective working environment for teachers." *Id*. But at least equally substantial are the students' constitutionally protected interests in a public education.

Expulsion proceedings implicate students' rights to due-process protections, the minimum of which are notice and an opportunity to be heard. See *Goss v Lopez*, 419 US 565, 581; 95 S Ct 729; 42 L Ed 2d 725 (1975). In *Goss*, the Supreme Court held that a student must be afforded at least rudimentary due-process protections before even a *temporary* suspension from school. *Id*. The Court cautioned that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *Id*. at 584; see also *Birdsey v Grand Blanc Community Sch*, 130 Mich App 718, 726; 344 NW2d 342 (1983) (applying

Goss and recognizing that "more stringent due process requirements [are] associated with permanent expulsion").[1]

Plaintiffs in this action seek the permanent expulsion of these students without affording them even the most rudimentary due-process protections to which they are entitled. The court cannot grant the requested relief without simultaneously depriving the students of their protected right to an education without due process. In light of the implications of the students' absence from this action, we conclude that plaintiffs failed to present an actual controversy under MCR 2.605(A)(1).

b. FAILURE TO STATE A CLAIM

We further hold that the trial court correctly granted summary disposition under MCR 2.116(C)(8) because plaintiffs failed to state a claim upon which relief may be granted. MCL 380.1311a(1) imposes a duty on defendants to expel students who commit physical assaults against teachers. That statute gives school boards discretion to determine whether a student has committed a physical assault on a school employee, volunteer, or contractor. In its exercise of that discretion, the school board determined that the students' conduct did not rise to the level of "physical assault," which is defined as "intentionally causing or attempting to cause physi-

[1] A student's entitlement to rudimentary due-process protections is well settled. Caselaw in this area after *Goss* has mainly centered on disputes about what process is due under certain circumstances. See, e.g., *Birdsey*, 130 Mich App at 722 (holding that student's confession to principal was admissible in expulsion hearing because the proceeding was civil and not criminal in nature and the warnings required under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 [1966], do not apply); *Newsome v Batavia Local Sch Dist*, 842 F2d 920, 924-925 (CA 6, 1988) (holding that students do not have a federal due-process right to cross-examine witnesses at expulsion hearings).

cal harm to another through force or violence." MCL 380.1311a(12)(b). No further factual development could provide a basis for recovery. *Maiden*, 461 Mich at 119. The finding by the school board that physical assaults did not occur is an unalterable fact that precludes recovery. And because this fact arises from the school board's application of law to a set of facts, we cannot and will not undermine the school board's statutory role by presuming the factual predicate to the legal conclusion that expulsion is mandated.

We disagree that plaintiffs' allegations of physical assaults must be accepted as true for purposes of the MCR 2.116(C)(8) motion. A legal duty to permanently expel the students arises under MCL 380.1311a(1) only upon a legal conclusion that physical assaults, as defined in MCL 380.1311a(12)(b), occurred. The operative issue of whether these physical assaults occurred is a legal conclusion reached only after applying legal standards to a complex set of facts. It is not a factual allegation per se. See e.g., *Capitol Props Group, LLC, v 1247 Ctr Street, LLC*, 283 Mich App 422, 426; 770 NW2d 105 (2009) (noting that a "legal conclusion is insufficient to state a cause of action"); *Davis v Detroit*, 269 Mich App 376, 379 n 1; 711 NW2d 462 (2006) ("[O]nly factual allegations, not legal conclusions, are to be taken as true under [MCR 2.116(C)(8)]."). The plaintiffs failed to allege facts to support a legal duty on the part of defendants to expel the students. Because the school board has already determined that no assaults occurred, no factual development could justify recovery and summary disposition was appropriate under MCR 2.116(c)(8).

3. PLAINTIFFS' CLAIMS FOR MANDAMUS AND INJUNCTIVE RELIEF

A writ of mandamus is an extraordinary remedy. *Citizens for Protection of Marriage v Bd of State Can-*

vassers, 263 Mich App 487, 492; 688 NW2d 538 (2004). It is "an inappropriate tool to control a public official's or an administrative body's exercise of discretion." *Genesis Ctr, PLC v Comm'r of Fin and Ins Servs*, 246 Mich App 531, 546; 633 NW2d 834 (2001). Plaintiffs must show that they have a clear legal right to performance of the specific duty sought and that the defendants have the clear legal duty to perform the act requested. *Tuggle*, 269 Mich App at 668; see also *Baraga Co v State Tax Comm*, 466 Mich 264, 268; 645 NW2d 13 (2002) ("[A] plaintiff [must] prove[] that it has a clear legal right to performance of the specific duty sought to be compelled and the defendant has a clear legal duty to perform such act . . . .") (citations and quotation marks omitted). In addition, the act sought to be compelled must be ministerial, "involving no exercise of discretion or judgment." *Carter*, 271 Mich App at 438.

Plaintiffs are not entitled to a writ of mandamus or other injunctive relief. As discussed, the school disciplinary proceedings resulted in findings by the school board that no physical assaults occurred. In the absence of such findings, no duty to expel the students arose under MCL 380.1311a(1). A student's permanent expulsion is certainly far from being a ministerial task to be ordered in the absence of clear and indisputable legal grounds under the statute and in the absence of the students themselves from this action.

Affirmed.

FITZGERALD, J., concurred with SAAD, P.J.

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

This case is before us for the second time, on remand from our Supreme Court. In their complaint, plaintiffs

alleged that defendants had failed to comply with their mandatory duty under MCL 380.1311a(1) to expel students who physically assaulted teachers. Plaintiffs sought a declaratory judgment, a writ of mandamus, and injunctive relief. In *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed*, 282 Mich App 165; 772 NW2d 784 (2009), rev'd 487 Mich 349 (2010), we affirmed the trial court's award of summary disposition to defendants. We held that plaintiffs had failed to establish the elements for standing under *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 740-741; 629 NW2d 900 (2001), overruled by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). *Lansing Sch Ed Ass'n*, 282 Mich App at 173-174. It was, therefore, unnecessary to address the remaining issues raised by plaintiffs on appeal. *Id*. at 175-176.

Our Supreme Court reversed this Court's decision. The majority expressly overruled the standing test adopted in *Lee* and its progeny, articulating the "proper standing doctrine" as follows:

> We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's longstanding historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [*Lansing Sch Ed Ass'n*, 487 Mich at 372.]

The majority held that plaintiffs have standing to pursue their claims for a writ of mandamus and other injunctive relief because they "have a substantial interest in the enforcement of MCL 380.1311a(1) that is detrimentally affected in a manner distinct from that of the general public if the statute is not enforced." *Id.* at 378. It remanded to this Court "to determine whether plaintiffs meet the requirements of MCR 2.605" and "for consideration of the issues that [the Court of Appeals] did not previously reach." *Id.*

Plaintiffs sought a declaratory judgment under MCR 2.605, which permits a court, "[i]n a case of actual controversy," to "declare the rights and other legal relations of an interested party seeking a declaratory judgment . . . ." MCR 2.605(A)(1). Previously, the standing doctrine articulated in *Lee* and its progeny applied to plaintiffs seeking declaratory relief. *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Dir*, 472 Mich 117, 126-127 & n 16; 693 NW2d 374 (2005), overruled in part by *Lansing Sch Ed Ass'n*, 487 Mich 349. In this case, the Supreme Court majority overruled *Associated Builders & Contractors* "to the extent that it required a litigant to establish the *Lee*/*Cleveland Cliffs*[1] standing requirements in order to bring an action under MCR 2.605." *Lansing Sch Ed Ass'n*, 487 Mich at 371 n 18. The majority further held, however, that the "pre-*Lee*/*Cleveland Cliffs* standard, which was also incorporated into *Associated Builders & Contractors*, remains: " 'The essential requirement of the term "actual controversy" under the rule is that plaintiffs "plead and prove facts which indicate an adverse interest necessitating the sharpen-

[1] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004), overruled by *Lansing Sch Ed Ass'n*, 487 Mich at 378.

ing of the issues raised." ' " *Id*. at 372 n 20, quoting *Associated Builders & Contractors*, 472 Mich at 126, quoting *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978).

In determining whether plaintiffs met the "actual controversy" requirement of MCR 2.605, this Court's majority cites *Skiera v Nat'l Indemnity Co*, 165 Mich App 184, 189; 418 NW2d 424 (1987), to note that several important purposes are served by "the ability of litigants to obtain declaratory relief . . . ." The majority concludes that "an actual controversy is lacking in this case" because "[d]eclaratory relief would serve none of the purposes" listed therein. While it is not improper to consider whether granting plaintiffs declaratory judgment would serve any of the purposes listed in *Skiera*, I would not limit my analysis to that inquiry alone. Given our Supreme Court's holding in this case, determining "whether plaintiffs meet the requirements of MCR 2.605" requires a careful examination of the "pre-*Lee*/*Cleveland Cliffs* standard" as it applied to claims for declaratory judgment and, more specifically, whether plaintiffs met "[t]he essential requirement of the term 'actual controversy,' " i.e., that they pleaded and proved "facts which indicate an adverse interest necessitating the sharpening of the issues raised." *Lansing Sch Ed Ass'n*, 487 Mich at 372 n 20 (citations and quotation marks omitted).

Furthermore, I would not rest a conclusion that plaintiffs did not meet the requirements of MCR 2.605 solely on the fact that some of the interested parties, i.e., the students, were not before the trial court, as such a defect can generally be cured by amending the pleadings and joining the necessary parties.

That said, I agree with this Court's majority that the trial court properly granted defendants summary dis-

position under MCR 2.116(C)(8) for failure to state a claim and that plaintiffs are not entitled to a writ of mandamus or other injunctive relief. As noted by the majority, MCL 380.1311a(1) grants school boards discretion to determine whether a student has committed a physical assault on a school employee, volunteer, or contractor. In this case, the school board reached the legal conclusion, on the basis of the facts presented, that the students' conduct did not rise to the level of "physical assault" as defined by MCL 380.1311a(12)(b). Given this conclusion, the school board had no duty under MCL 380.1311a(1) to expel the students as requested by plaintiffs, and no further factual development could provide a basis for recovery. While I sincerely sympathize with plaintiffs' position, they have not identified any mechanism—statutory or otherwise—by which the courts of this state may review the legal conclusion reached by the school board that no physical assaults took place. Absent such a mechanism, we must not invade the discretionary power the school board has pursuant to MCL 380.1311a(1).

PEOPLE v BROOKS

Docket No. 298299. Submitted July 12, 2011, at Detroit. Decided August 16, 2011, at 9:00 a.m. Vacated in part; leave to appeal denied with respect to remaining issues, 490 Mich 993.

Anthony Brooks asserted his right to self-representation during his preliminary examination on charges of entering without breaking with intent to commit a larceny stemming from incidents at an automotive plant in Detroit in September 2008 and November 2008. The district court granted defendant's request, but defendant allowed his appointed counsel to take over during the proceedings. After defendant was bound over to the Wayne Circuit Court on the charges, he reasserted his right of self-representation during his arraignment. The court, Margie R. Braxton, J., peremptorily denied defendant's request, but defendant continued to assert his desire to represent himself. Following the arraignment, a calendar conference and pretrial hearing was conducted by the court, Daniel P. Ryan, J., during which defendant complained about his attorney but did not express a desire to proceed without counsel. During this period, the court granted defendant's motion to sever the charges and first proceed with the charge regarding the September 2008 incident. At a subsequent final pretrial conference, defendant again expressed his desire to represent himself and Judge Ryan denied the request. When his trial began, defendant again requested that he be allowed to represent himself. Judge Ryan again denied the request. Defendant eventually entered a plea of nolo contendere to the charge arising from the November 2008 incident. A jury convicted defendant of the charge arising from the September 2008 incident and he was sentenced as a fourth-offense habitual offender to life imprisonment by Judge Ryan. Defendant appealed, alleging a violation of his right to self-representation and that the court abused its discretion by imposing a life sentence.

The Court of Appeals *held*:

1. A court may not permit a defendant to make an initial waiver of the right to be represented by counsel without first advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence re-

quired by law, and the risk involved in self-representation. The court must also offer the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer. If the defendant waives counsel, the record of each subsequent proceeding must show that the court advised the defendant of the continuing right to a lawyer's assistance and that the defendant waived that right. Before beginning the proceedings, the court must reaffirm that a lawyer's assistance is not wanted, or, if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one, or, if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

2. In addition to the trial court's responsibility to engage, on the record, in a methodical assessment of the wisdom of self-representation by the defendant, the court must also determine that the defendant's waiver of counsel is unequivocal, that the defendant actually does understand the significance and consequences of self-representation, and that self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business.

3. The trial court failed to meaningfully assess the validity of defendant's waiver of counsel. Neither judge attempted to engage in a methodical assessment of the wisdom of self-representation or pursued a dialogue with defendant testing the unequivocality or voluntariness of his waiver of counsel, or the knowing and understanding nature of his self-representation request.

4. A defendant's technical knowledge of legal matters has no relevance to an assessment of the defendant's knowing exercise of the right to self-representation. Both judges erred in invoking defendant's lack of legal ability as a ground for denying his request for self-representation. Compelling a criminal defendant to demonstrate some level of mastery of court procedures and expert legal erudition effectively eviscerates the constitutional right to self-representation. The denial of defendant's right to self-representation was a structural error that requires vacation of the conviction regarding the September 2008 offense. The matter is remanded to the trial court for a new trial.

5. A trial court may deny self-representation where a defendant does not possess the requisite mental competence to handle the task. Although the trial court legitimately questioned defendant's competence to waive counsel, the court neglected to undertake any competency assessment. The trial court never questioned whether defendant was competent to stand trial and failed to

explore defendant's competency to waive his right to counsel or to conduct his own defense. The trial court did not properly deny self-representation on the basis of defendant's alleged mental incapacity.

6. The trial court did not err by holding that defendant's criminal history and recidivist behavior constituted objective and verifiable factors establishing a firm probability of defendant's future criminal activity and that the sentencing guidelines afforded inadequate weight to defendant's recidivist behavior. However, the trial court abused its discretion by imposing a life sentence for a conviction that otherwise warranted a minimum sentence of less than four years. The life sentence fell outside the range of principled outcomes. If defendant is convicted on retrial, the trial court must impose a proportionate sentence that takes into consideration the offender and the offense

Conviction and sentence vacated and case remanded for a new trial.

CRIMINAL LAW — CONSTITUTIONAL LAW — RIGHT TO COUNSEL — WAIVER.

A criminal defendant's technical knowledge of legal matters has no relevance to a trial court's assessment of the defendant's knowing exercise of the right to self-representation.

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

State Appellate Defender (by *Michael L. Mittlestat*) for defendant.

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

GLEICHER, J. Anthony Brooks, no stranger to the criminal justice system, insisted on representing himself against a charge that he had unlawfully entered a DaimlerChrysler Corporation factory storage area intending to commit a larceny inside. Brooks unsuccessfully asserted his right to self-representation at his arraignment, a pretrial conference, and on the day trial

commenced. A jury ultimately convicted Brooks as charged. Because the trial court denied Brooks's Sixth Amendment right to self-representation without conducting a meaningful inquiry and in reliance on constitutionally impermissible criteria, we vacate Brooks's conviction and remand for a new trial. We further hold that the trial court abused its discretion when it departed from the minimum sentencing guidelines range of 9 to 46 months' imprisonment and imposed a disproportionate life sentence.

I. UNDERLYING FACTS AND PROCEEDINGS

In September 2008 and November 2008, security guards saw Brooks scale a high, barbed-wire-topped fence surrounding a DaimlerChrysler Corporation plant in Detroit. On both occasions, the guards witnessed Brooks run through a storage area housing automotive parts. During the November 2008 incursion, a security guard observed Brooks leave the grounds with two stolen tires. Surveillance video footage of both events supported the guards' trial testimony. The trial court granted Brooks's pretrial motion to sever the September 2008 and November 2008 charges, and Brooks initially proceeded to trial on the September entering event. The jury convicted Brooks of entering without breaking with intent to commit larceny in violation of MCL 750.111. Later, Brooks pleaded nolo contendere to charges arising from the November 2008 plant entry.

Brooks urges this Court to reverse his jury trial conviction because the trial court violated his right to self-representation. Brooks first expressed a desire to waive his right to counsel at his preliminary examination. The district court granted Brooks's request, but

Brooks allowed his appointed counsel to take over midway through the hearing.

Brooks reasserted his right of self-representation at a circuit court arraignment before Wayne Circuit Court Judge Margie R. Braxton. Judge Braxton peremptorily denied Brooks's request, ruling: "Well, I'm not going to let him represent himself. Someone has to assist him and right now [defense counsel] you are assisting him. You can't come here and take over. I'm sorry. No." Shortly thereafter, Brooks interrupted to reiterate his desire to represent himself:

> [*Brooks*]: Okay. But, see, I'm having problems with my lawyer. . . . First of all, he come to me asking me questions with information that . . . . They say I got a plea. He give me no full information on anything. . . . Then he's contesting . . . when I explained to him the time limits and statutes on certain things and --
>
> *The Court*: Oh, so you're going to be the lawyer?
>
> [*Brooks*]: *I asked to represent myself.*
>
> *The Court*: You know more about the statute than he does?
>
> [*Brooks*]: Yeah. Your Honor, I have studied law for a while.
>
> *The Court*: Well, I can tell you've been studying but you only got a little bit of it. You got to get the whole dose.
>
> [*Brooks*]: I got the whole dose. . . .
>
> * * *
>
> *The Court*: What is the problem with your lawyer?
>
> [*Brooks*]: My problem with my lawyer is that it's the responsibility and the duty of the client and the lawyer to put full representation of the defense and he's lacking. . . . The first thing he didn't do at this Court when I asked him to come and explain to me that I had already had time served probation, I had asked him to come here and see

> what the plea agreement was. He didn't give me the full scope of the plea. What am I supposed to do, plea in the blind? . . .
>
> *The Court*: From listening to you, I suspect you didn't give him an opportunity. . . . [To defense counsel] Do you [defense counsel] want to represent him because the information he's given me in terms of what you have not done is insufficient for me to replace you. Do you want to try to work with him or assist him if he chooses to represent himself? That's the only question I need answered from you.
>
> [*Defense Counsel*]: Your Honor, I'll do the best I can working with him. Somebody is going to have to work with him for sure.
>
> *The Court*: In this courtroom I will not let him represent himself without the assistance of an attorney. So, if you want to be that man, you can be.
>
> May I suggest this to you. I know that you're fully versed in the law. What you need to do is to listen to what he has to tell you and in turn not both of you talking at once. You tell him what your perspective is but be courteous enough to listen to what he's trying to tell you and I'm sure he'll do the same for you. [Emphasis added.]

At the arraignment's conclusion Brooks explained to the court, "I take psychotropic drugs because I'm bipolar. Sometimes people think because you take medication, they kind of give you a stigma and that's what I'm feeling from this individual that he feels that I'm mentally deficient in understanding what's going on." Judge Braxton observed that Brooks appeared "pretty smart in some aspects because you're smart enough to use five or six names to be deceptive."

After the arraignment, Brooks and appointed defense counsel attended a calendar conference and pretrial hearing conducted by Wayne Circuit Court Judge Daniel P. Ryan. Although Brooks complained that his attorney had withheld information and failed to file a

motion to sever the charges, Brooks did not voice a desire to proceed without counsel.

At a June 26, 2009 final pretrial conference, Brooks advised Judge Ryan that he had previously sought to represent himself, and "I would like to invoke--I would like the court to know that I wanted to invoke my right--inalienable rights secured by the constitution, but it seems like we get--" Judge Ryan interrupted Brooks, inquiring whether an August 10, 2009 trial date suited appointed counsel. At the conclusion of the conference, Judge Ryan revisited Brooks's self-representation motion and denied it, reasoning as follows:

> The defendant has not convinced the court that he's met the standards as required for self-representation as articulated in both state and federal case law. . . . [T]here are certain requirements that he needs to demonstrate to the court and he has not done so, including familiarity with the court rules, the rules of procedure, the rules of criminal procedure specifically, the rules of evidence as well as familiarity with the substantive law.
>
> . . . [A]lthough the defendant does have a right to self-representation, he only has the right if he meets certain criteria for the case law. So [defense counsel], you're still on the file unless he hires somebody else.[1]

Brooks then advised Judge Ryan that medical personnel at the Wayne County Jail refused to give him necessary psychotropic medications, and appealed for the court's intervention. Judge Ryan replied, "And we can add another reason why he . . . has not met the criteria for self-representation because he has not been receiving

[1] Although the prosecutor insists that Brooks merely mentioned his self-representation right "in the past tense," we construe Brooks's remarks in the same manner as did Judge Ryan: that Brooks sought to emphasize his continuing, ongoing quest to waive representation by counsel.

his medication." Judge Ryan continued that the lack of medication "impacts upon your ability as to making a decision as to whether you want to represent yourself."

When the jury trial began on August 17, 2009, Brooks asserted that defense counsel had been "forced upon [him] as attorney," contended that he had never been arraigned in the district court, and argued that his mental-health advocate should have participated in the selection of appointed defense counsel. "Point two," Brooks enumerated, "I was refused my constitutional right to represent myself by the court who, under the cover of law, attempted to cover these violations and due process of Constitutional Rights." When Judge Ryan asked Brooks if he would like to enter a plea instead of proceeding to trial, Brooks again complained that no one had as yet supplied his psychotropic medication. Judge Ryan continued:

> [B]ased upon my observation, there is absolutely nothing that indicates to me that there's anything wrong with you. You just gave a 15-minute, well-organized by paragraph one, two, three and four argument with reference to various different court rules, case law, federal statutes, federal constitutional provisions. There is absolutely nothing that would indicate to me that you have any issues at all here today. And, in fact, you were standing while you gave that whole presentation so . . . there's nothing that indicates . . . that there's anything physically wrong. You're coherent, you've got organized thoughts, you organized it by paragraph.

After a discussion about various evidentiary issues, Brooks presented the following inquiry:

> [*Brooks*]: . . . If . . . Your Honor feel [sic] that I'm coherent and I was able to address this, then . . . why I'm not able to represent myself to the jury?
>
> *The Court*: Because you don't have a firm grasp of all of the substantive rules of criminal law that apply. Although

> your argument was well-organized, it does not reflect an understanding of what Michigan criminal law is . . . .

Brooks interrupted to ask nonsensical questions concerning whether Michigan is a state or a republic, and Judge Ryan answered, "The State of Michigan, both rules of procedure, rules of evidence and the substantive law which applies in this particular case, you've not demonstrated that you have that particular ability, and so [defense counsel] will represent you in this particular matter. Is there anything else?" Brooks posed further questions regarding the definition of "the State of Michigan" and whether a state court qualified as an "Article 1" court.

> *The Court*: See, the reason you're not representing yourself is that you're misdirected in your efforts. . . . You're more concerned about what the definition of the state is than what the crimes are which are currently pending before you, whether this is an Article 1 court or whether this is a state court.
>
> [*Brooks*]: Because this is a jurisdictional matter, and if I don't bring it up, Your Honor, then when it comes time for appeal, then . . . I'll have no recourse.
>
> *The Court*: And you know what? You're not going to be successful on your appeal. All right. Go ahead.

Before counsel delivered opening statements, Brooks propounded a query about other-acts evidence. Brooks believed that a federal rule of evidence governed the proceeding because he could not locate the corresponding Michigan rule. The court responded simply, "Which is why I didn't let you represent yourself."

Brooks eventually entered a nolo contendere plea to the charges arising from the November 2008 incident. During the plea colloquy, Brooks aired several grievances about his appointed attorney and complained that the court was "steady forcing me to represent him

[sic].” Brooks refused to sign his plea agreement while represented by appointed counsel, but agreed to proceed with the assistance of another attorney who serendipitously had appeared in the courtroom on an unrelated matter. Notably, Judge Ryan readdressed Brooks’s claimed need for medication, informing Brooks that the jail doctor had confirmed “you’re not being treated nor diagnosed for any psychiatric or psychological condition. . . . The doctor said there’s absolutely no need for the medication. . . . [T]here’s no evidence that there’s a psychological issue.”

At the sentencing hearing for the convictions, defense counsel announced that Brooks had refused to speak with him. Brooks reiterated his criticisms about his attorney’s performance and challenged his counsel’s appointment without the advice of his mental-health advocate. Brooks further complained that the jail had withheld his psychotropic medication throughout the proceedings. Brooks then recapped his desire for self-representation:

> Point two, I was refused my constitutional right by the court not to be able to represent myself. Even the court said he find [sic] that I’m quite coherent. And even though I would have took [sic] my chances, I still would have been able to probably ask more [sic] better questions, put up a better defense than the farce that this guy represented as my lawyer. I was refused my constitutional right under the current law and the court said that I couldn’t represent myself, which was violation of my constitutional right, both state and federal.

Brooks later told Judge Ryan that he wanted to proceed *in propria persona* on appeal and asked how to obtain a copy of the lower-court file. Brooks raised the issue as follows a final time before Judge Ryan imposed sentence:

> [*Brooks*]: I just want to know for the record why wasn't I allowed to represent myself?
>
> *The Court*: Because [defense counsel] has a firm grasp on Michigan law, criminal law, Michigan Rules of Evidence and Michigan rules of procedure, which you did not demonstrate to the court that you possessed. Although you have obviously access to a lot of federal things, those are not necessarily the same rules of procedure that we apply. And you did not necessarily demonstrate an ability or competence in the substantive matter which was before the court . . . . [Y]ou did not necessarily meet the standard which would permit you to adequately represent yourself. . . . [Y]ou're extremely bright, you're extremely intelligent, as you noted, you're extremely competent to handle your personal and business affairs, it does not necessarily mean that you're capable and competent of handling your criminal affairs, so [defense counsel] was your court-appointed attorney.
>
> * * *
>
> There's [sic] cases out there . . . which dictate the standard that I'm to apply in assessing a request for self-representation and you did not meet those criteria . . . .

On appeal, Brooks challenges the denial of his right to self-representation and the proportionality of his sentence.

II. ANALYSIS

A. SELF-REPRESENTATION PRINCIPLES

In relation to a defendant's waiver of the right to counsel and invocation of the right to self-representation, this Court reviews for clear error a trial court's findings of fact and de novo the trial court's application of legal and constitutional standards. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). Deprivation of a defendant's Sixth Amendment right of

self-representation constitutes a structural error demanding automatic reversal. *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999), citing *McKaskle v Wiggins*, 465 US 168; 104 S Ct 944; 79 L Ed 2d 122 (1984).

In *Faretta v California*, 422 US 806, 814; 95 S Ct 2525; 45 L Ed 2d 562 (1975), the United States Supreme Court held that the Sixth Amendment implicitly embodies the right of self-representation in criminal proceedings.

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. . . . Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense. [*Id.* at 820-821.]

The Michigan Constitution explicitly protects a defendant's right to self-representation. Const 1963, art 1, § 13.[2] Our Legislature reinforced these dual constitutional protections by enacting MCL 763.1.[3]

The right to present one's own defense correlates with an equally fundamental right—the right to coun-

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[2] The language in Const 1963, art 1, § 13 states, "A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney."

[3] MCL 763.1 reads:

> On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have a right to produce witnesses and proofs in his favor, and meet the witnesses who are produced against him face to face.

sel. *Faretta*, 422 US at 814. In balancing these two essential but potentially conflicting rights, a court must "indulge every reasonable presumption against waiver" of the right to counsel, and should not allow a defendant to proceed without counsel if any doubt casts a shadow on the waiver's validity. *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004) (quotation marks and citations omitted); *People v Adkins (After Remand)*, 452 Mich 702, 721, 727; 551 NW2d 108 (1996), criticized on other grounds in *Williams*, 470 Mich at 641 n 7.

To aid trial courts in ascertaining whether a defendant has knowingly, intelligently, and voluntarily relinquished the assistance of counsel, our court rules set forth guidelines for an effective waiver colloquy. According to the relevant portions of MCR 6.005(D):

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

This court rule embodies the notion that explicit elucidation of a defendant's comprehension of the risks he or she faces by representing himself or herself and the defendant's willingness to undertake those risks reduces the likelihood that a court will inaccurately presume an effective waiver of the right to counsel. If a defendant waives counsel, MCR 6.005(E) instructs that

> the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial, or

> sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
>
> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
>
> (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
>
> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

B. APPLICATION OF THE LEGAL PRINCIPLES

Each of Brooks's three entreaties to proceed *in propria persona* triggered the trial court's responsibility to "engage, on the record, in a methodical assessment of the wisdom of self-representation by the defendant." *Adkins*, 452 Mich at 721. Compliance with MCR 6.005(D) and (E) goes part of the way toward establishing that a defendant has knowingly and voluntarily waived counsel. In addition to conducting an inquiry substantially consistent with the court rules, a court must also determine that (1) the defendant's waiver of counsel is unequivocal, *People v Anderson*, 398 Mich 361, 366-367; 247 NW2d 857 (1976); (2) the defendant actually does understand the significance and consequences of self-representation, *Faretta*, 422 US at 835; and (3) self-representation will not "disrupt, unduly inconvenience, and burden the court and the administration of the court's business." *Russell*, 471 Mich at 190; *Anderson*, 398 Mich at 368. Clearly, " 'the more searching the inquiry at this stage the more likely it is that any decision on the part of the defendant is going to be truly voluntary . . . .' " *Adkins*, 452 Mich at 726 n

26, quoting *United States v McDowell*, 814 F2d 245, 252 (CA 6, 1987) (Engel, J., concurring).

The trial court failed to meaningfully assess the validity of Brooks's waiver of counsel. The record reveals that neither Judge Braxton nor Judge Ryan attempted to engage in the "methodical assessment of the wisdom of self-representation" dictated by the court rules. *Adkins*, 452 Mich at 721. Our Supreme Court has frequently reiterated that substantial compliance with the waiver-of-counsel procedures enumerated in MCR 6.005(D) amply safeguards constitutional standards, but we discern no indication that either judge even consulted the court rules before rejecting Brooks's self-representation request. Nor did either judge pursue a dialogue with Brooks testing the unequivocality or voluntariness of his waiver of counsel, or the knowing and understanding nature of Brooks's self-representation request.

Instead of following the brightly illuminated path paved by the court rules, Judge Braxton and Judge Ryan invoked Brooks's lack of legal ability as a ground for denying his requests for self-representation. Technical knowledge of legal matters simply has no relevance to an assessment of a knowing exercise of the right to self-representation. *Indiana v Edwards*, 554 US 164, 172; 128 S Ct 2379; 171 L Ed 2d 345 (2008). The United States Supreme Court made this point crystal clear in *Faretta*, 422 US at 836:

> We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on *voir dire*. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

The Michigan Supreme Court echoed this sentiment in *Anderson*, 398 Mich at 368, explaining that a defendant's competence to waive counsel "does not refer to legal skills . . . ." Thus, Judge Ryan improperly denied self-representation on the basis of Brooks's inability to show "familiarity with the court rules, the rules of procedure, the rules of criminal procedure specifically, the rules of evidence as well as familiarity with the substantive law."

In summary, Judge Braxton and Judge Ryan contravened the court rules and the caselaw by failing to engage in an appropriate dialogue with Brooks before ruling on his assertion of his right to self-representation. Instead, both judges employed a universally repudiated legal-knowledge test. Contrary to Judge Ryan's ruling, Brooks's inability to display a "firm grasp of all of the substantive rules of criminal law that apply" simply could not serve as a ground for denying his right to represent himself.[4] Compelling a criminal defendant to demonstrate some level of mastery of court procedures and expert legal erudition effectively eviscerates the constitutional right of self-representation. Given that the denial of Brooks's right of self-representation amounts to a structural error, we vacate his jury trial conviction of entering without breaking with intent to commit a larceny and remand for a new trial. On retrial, we caution the trial court to carefully consider the applicable court rule and caselaw

[4] Once a court allows a defendant to proceed *in propria persona*, the defendant must abide by the court rules, rules of evidence, and other rules of procedure. *McKaskle*, 465 US at 173. A defendant's failure or refusal to behave responsibly in the courtroom may justify a trial court's decision to terminate self-representation. *Faretta*, 422 US at 834 n 46. However, our review of the record has uncovered no evidence that Judge Ryan found Brooks's conduct unduly disrupting, inconvenient, or burdensome.

criteria should Brooks again express a desire to waive counsel, and to make sufficient record findings to facilitate future review by this Court.

C. BROOKS'S MENTAL COMPETENCE TO WAIVE COUNSEL

The prosecution contends that despite any error arising from the trial court's disregard of the court rules, Brooks lacked the mental capacity to make a knowing and intelligent decision to waive counsel. The prosecution theorizes that Brooks's frequent references to his unfulfilled need for psychotropic medication prove this point. We readily acknowledge that a court may deny self-representation where a defendant does not possess the requisite mental competence to handle the task.

> [T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. [*Edwards*, 554 US at 177-178.]

In *Edwards*, the United States Supreme Court distinguished between a defendant's competency to stand trial and his "mental capacity to conduct his trial defense" without counsel. *Id.* at 174. Recognizing "the complexity of the problem" presented by a competency determination, *id.* at 175, the Supreme Court proposed that the trial court "will often prove best able to make . . . fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant," *id.* at 177.

Given that Brooks tended to present somewhat irrelevant and confused arguments and insisted on his need for medication, the trial court legitimately questioned Brooks's competence to waive counsel. However, the court neglected to undertake any competency assessment. Specifically, the court never questioned whether Brooks was "competent" to stand trial, and failed to explore Brooks's competency to waive his right to counsel or to conduct his own defense. These distinct competency standards mandate differing inquiries. A defendant may not stand trial if his or her mental incapacity interferes with his or her "ability to consult with his lawyer . . . ." *Edwards*, 554 US at 170 (quotation marks, citation, and emphasis omitted). A defendant may not waive his or her right to counsel if his or her mental incompetency renders him or her unable to understand the proceeding and make a knowing, intelligent, and voluntary decision. *Godinez v Moran*, 509 US 389, 401 n 12; 113 S Ct 2680; 125 L Ed 2d 321 (1993); *Faretta*, 422 US at 835; *Anderson*, 398 Mich at 368. Yet, "[i]n certain instances an individual may well be able to satisfy [the] mental competence standard [to stand trial], for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel." *Edwards*, 554 US at 175-176. The Supreme Court acknowledged that "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant." *Id.* at 176 (quotation marks and citation omitted). The record contains no hint that the trial court recognized these critical distinctions or endeav-

ored to engage in an inquiry intended to meaningfully acquaint itself with any aspect of Brooks's competency at the time of trial.

Moreover, the trial court expressed inconsistent and fundamentally contradictory findings regarding Brooks's mental competency. At the June 26, 2009 pretrial conference, the court stated that Brooks's inability to take his psychotropic medications "impact[ed his] ability as to making a decision as to whether [he] want[ed] to represent [him]self." This statement potentially could have supported a finding that Brooks did not have the requisite competence to knowingly, intelligently, and voluntarily waive his right to counsel.[5] Yet at trial, the court rejected Brooks's complaint that jail medical personnel had improperly withheld his medication, opining that Brooks appeared organized and coherent, and did not require psychotropic medications. And when the trial court finally pursued information relevant to Brooks's mental capacity, it found that "there's absolutely no need for the medication." The court stated, [T]here's no evidence that there's a psychological issue." Nothing in the record suggests that Brooks was severely mentally ill, as was the defendant in *Edwards*, or that Brooks was only borderline competent or was incompetent to waive counsel. By the time of sentencing, the court's earlier concerns about Brooks's mental capacity to offer an unequivocal, knowing, intelligent, and voluntary waiver had apparently evaporated. Consequently, we reject that the trial court properly denied self-representation on the basis of Brooks's alleged mental incapacity.

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[5] We note that Judge Ryan reached this conclusion without the benefit of consultation with any mental health professionals. Judge Ryan did not learn until the sentencing phase that jail medical personnel had denied Brooks's request for psychotropic medication because the jail doctor determined that Brooks suffered from no mental infirmity.

III. SENTENCING DEPARTURE

Brooks also challenges the trial court's reliance on an incorrect sentencing grid and the court's decision to depart from the guidelines range and impose a life sentence for the entering without breaking with intent to commit larceny conviction stemming from the September 2008 incident. Notwithstanding that we are reversing Brooks's conviction, we analyze the sentencing issue to prevent further error on remand.

The prosecution concedes that the trial court incorrectly identified Brooks's conviction as the class D offense of breaking and entering. The jury actually convicted Brooks of entering without breaking, a class E offense. Brooks has a total prior record variable (PRV) score of 100, placing him in PRV level F, and he has a total offense variable (OV) score of 6, placing him in OV level I. The recommended minimum sentencing guidelines range for a fourth-offense habitual offender for a class E offense in the F-I cell is 9 to 46 months. This recommended minimum sentence range falls within a "straddle cell."

> When the upper and lower limits of the recommended minimum sentence range meet certain criteria, a defendant is eligible for an intermediate sanction. If the upper limit of the minimum sentence range exceeds 18 months and the lower limit is 12 months or less, the defendant's sentence range is in a "straddle cell." When the range is in a straddle cell, the sentencing court may elect either to sentence the defendant to a prison term with the minimum portion of the indeterminate sentence within the guidelines range or to impose an intermediate sanction, absent a departure. [*People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007).]

MCL 769.31 governs the imposition of a sentence for straddle cells and provides the following relevant definitions:

> (a) "Departure" means a sentence imposed that is not within the appropriate minimum sentence range . . . .
>
> (b) "Intermediate sanction" means probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed.

The statute enumerates a nonexhaustive list of intermediate sanctions, including mental health treatment. MCL 769.31(b)(*vi*).

Here, the trial court declined to impose an intermediate sanction or a minimum sentence within the guidelines range. Rather, the court imposed a life sentence because Brooks was a "career criminal" and the time had come for him to "retire." The court noted that Brooks had 12 prior felony and three prior misdemeanors convictions dating back to 1982. The court characterized Brooks as an "Habitual 12, well beyond Habitual 4." In relation to Brooks's recidivist behavior, the court stated, "Every time you are released and are in society, you commit another felony." The court additionally cited the fact that Brooks had been on parole when he committed the instant offenses.

MCL 769.34(3) affords the trial court discretion to depart from the minimum sentencing guidelines range "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." A court should only find reason to depart from the recommended sentence in "exceptional cases." *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003) (quotation marks and citation omitted). The court must rely on factors that are "objective and verifiable" and that "keenly or irresistibly grab [the court's] attention . . . ." *Id.* (quotation marks and citation omitted). The factors also must be "of considerable worth in deciding the length of a sentence." *Id.* (quotation marks and citation omitted). The court may only

base its departure "on an offense characteristic or offender characteristic already taken into account" in the sentencing guideline variables if "the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). Moreover, the particular sentence imposed must qualify as proportionate to the specific defendant's conduct and criminal history. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

We review for clear error the trial court's reasons for imposing an upward departure, but consider de novo whether the reasons are objective and verifiable. We review for an abuse of discretion the court's view that substantial and compelling reasons justify a departure. We also review for an abuse of discretion the court's ruling that a particular sentence is proportionate to the crime and the offender. "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.*

The PRVs took into account Brooks's "career of crime," but the trial court believed that the guidelines afforded this characteristic inadequate weight. Brooks had committed a total of 12 prior felonies. In light of Brooks's felony convictions, he scored 50 points for PRV 1 (a defendant with two high-severity felony convictions) and 30 points for PRV 2 (a defendant with four or more low-severity felony convictions). Brooks's three prior misdemeanor convictions formed the basis for his PRV 5 score of 10 points (a defendant with three or four misdemeanor convictions), and his status as a parolee when he committed the current offense dictated his score of 10 points for PRV 6 (offender's relationship to the criminal justice system).

It seems that 6 of Brooks's 10 prior low-severity felony convictions received inadequate weight or consideration in the guidelines because they could not

further increase Brooks's score for PRV 2. When calculating PRV 2, a court scores a defendant 10 points for two prior low-severity felony convictions and an additional 10 points each for a third and fourth conviction. If the Legislature had authorized a court to continue scoring in that pattern, the trial court could have scored PRV 2 at 90 points, giving Brooks a total PRV score of 160. However, the addition of 60 points to Brooks's total PRV score would not have altered his sentence because Brooks already had reached the highest category of repeat offenders—PRV level F.[6]

The extent of Brooks's criminal history and recidivist behavior constitutes an objective and verifiable fact. The court could easily determine from the sentencing information report that Brooks had rapidly committed new criminal offenses on his release from prison for prior offenses. It is well established that a court may consider a defendant's past criminal history and failures at rehabilitation as objective and verifiable factors establishing "a firm probability of future" criminal activity. *People v Horn*, 279 Mich App 31, 45; 755 NW2d 212 (2008); *People v Solmonson*, 261 Mich App 657, 671; 683 NW2d 761 (2004). The excessive number of criminal convictions in this case "keenly or irresistibly grab[s one's] attention" and is of "considerable worth" in fashioning Brooks's sentence for his current offense. *Babcock*, 469 Mich at 257 (quotation marks and citation omitted). We also agree with the trial court that the guidelines afforded inadequate weight to Brooks's recidivist behavior. Scoring 160 points to more accurately portray the extent of Brooks's criminal history, his PRV

[6] In *Smith*, 482 Mich at 306, the Supreme Court observed that a court could justify a particular upward departure by placing "the specific facts of a defendant's crimes in the sentencing grid."

score would reach more than double the highest PRV score considered in the guidelines.

Nevertheless, the trial court abused its discretion by imposing a life sentence for an offense that otherwise warranted a minimum sentence of less than four years. The legislative sentencing guidelines reserve life sentences for murder convictions and class A felonies. Even within class A, which contains the highest severity felonies, only defendants with the highest combinations of OV and PRV scores merit life sentences. To the contrary, for a class E felony the highest possible minimum sentence equals 76 months, or six years and four months. A life sentence falls outside the range of principled outcomes, even for a repeat offender, where the current charge essentially amounted to trespassing. In the event that Brooks is convicted of entering without breaking on retrial, we caution the trial court to impose a proportionate sentence that takes into consideration the offender and the offense.

We vacate Brooks's conviction and sentence for entering without breaking with the intent to commit larceny arising from the September 2008 incident and remand for a new trial consistent with this opinion. We do not retain jurisdiction.

TALBOT, P.J., and HOEKSTRA, J., concurred with GLEICHER, J.

BULLINGTON v CORBELL

Docket No. 297665. Submitted July 12, 2011, at Detroit. Decided August 16, 2011, at 9:05 a.m.

Derek Bullington brought a premises liability action in the Wayne Circuit Court against Craig Corbell, Hunter Homes, Inc., and ChrisJack Properties, L.L.C. Corbell was the resident agent for the corporate defendants. Plaintiff's counsel attempted to serve the defendants by certified mail at an address that did not match the registered addresses for the corporate defendants, but instead appeared to be Corbell's previous personal residence. The mail was refused and returned to plaintiff's counsel, who then moved for alternate service. The court, Gershwin A. Drain, J., granted the motion for alternate service and subsequently entered a default judgment. Defendants then appeared and moved to set aside the default judgment and for relief from the judgment, asserting that they had not received actual or constructive notice of the lawsuit and setting forth defenses to plaintiff's claim. The court denied defendants' motions. Defendants appealed.

The Court of Appeals *held*:

1. MCR 2.612(B) authorizes a court to relieve a party from a default judgment if (1) personal jurisdiction over defendants was necessary and acquired, (2) defendants in fact had no knowledge of the action pending against them, (3) defendants entered an appearance within one year after the final judgment, (4) defendants show a reason justifying relief from the judgment, and (5) granting defendants relief from the judgment will not prejudice innocent third persons. The parties disputed whether defendants had actual knowledge of the action and demonstrated a reason justifying relief from the judgment. With regard to defendants' knowledge of the action, the court rules permit service on an individual by registered or certified mail, return receipt requested, and delivery restricted to the addressee. In violation of the court rule, the certified mail envelope used in this case did not restrict delivery to Corbell. Thus, no evidence existed that it was Corbell who refused receipt of the certified letter. With regard to the corporate defendants, the court rules do not contemplate that a plaintiff may use certified mail as an initial form of service on corporate defendants. Thus, as a matter of law, plain-

tiff's attempted service on Hunter Homes and ChrisJack Properties was also insufficient. Moreover, even if plaintiff's initial efforts to serve process had satisfied the court rules, the circuit court abused its discretion by permitting alternate service when plaintiff failed to provide information substantiating that he could not have personally served Corbell and that he had made diligent inquiry to ascertain defendants' correct addresses. Because plaintiff failed to abide by the service of process procedures outlined in the court rules, defendants lacked actual knowledge of the lawsuit until after the default judgment entered. The existence of a meritorious defense can constitute a reason justifying relief from judgment. In this case, in their motion for relief from the judgment, defendants asserted three defenses to plaintiff's claim, including that the alleged stairway defect was open and obvious. Although the circuit court acknowledged that a photograph showed the stairs to be in obvious disrepair, it denied relief. But contrary to the circuit court's conclusion, the evidence and arguments advanced by defendants demonstrated the existence of at least one meritorious defense and constituted a reason justifying relief from the judgment. Thus, the circuit court abused its discretion by denying defendants' motion for relief from the judgment.

2. Under MCR 2.603, a default judgment may also be set aside if good cause is shown and an affidavit of facts showing a meritorious defense has been filed. The good cause requirement may be satisfied by demonstrating a procedural irregularity or defect. In this case, plaintiff failed to comply with the procedures requisite for entry of a default or default judgment by failing to file an affidavit or other proof indicating that service had actually been made and by failing to give notice of the request for a default judgment. Accordingly, defendants were also entitled to relief under MCR 2.603.

Default judgment vacated and case remanded.

1. JUDGMENTS — DEFAULT JUDGMENTS — RELIEF FROM JUDGMENTS.

A court may relieve a party from a default judgment if (1) personal jurisdiction over defendants was necessary and acquired, (2) defendants in fact had no knowledge of the action pending against them, (3) defendants entered an appearance within one year after the final judgment, (4) defendants show a reason justifying relief from the judgment, and (5) granting defendants relief from the judgment will not prejudice innocent third persons (MCR 2.612).

2. JUDGMENTS — DEFAULT JUDGMENTS — RELIEF FROM JUDGMENTS.

A default judgment may be set aside if good cause is shown and an affidavit of facts showing a meritorious defense has been filed; the

> good cause requirement may be satisfied by demonstrating a procedural irregularity or defect (MCR 2.603).

Law Offices of Dennis G. Vatsis, P.C. (by *Dennis G. Vatsis*), for plaintiff.

Kickham Hanley PLLC (by *Timothy O. McMahon*) for defendants.

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

GLEICHER, J. This garden variety premises liability suit presents a plethora of complicated procedural problems. But at its core, this is simply a case about notice and whether plaintiff's service of process efforts sufficed to inform defendants that they had been sued. Because defendants had no knowledge of the action pending against them until entry of a default judgment resulted in the seizure of their property, we vacate the default judgment and remand for further proceedings.

I. FACTS AND PROCEEDINGS

On December 11, 2009, plaintiff Derek Bullington filed in the Wayne Circuit Court a complaint naming as defendants Craig Corbell, Hunter Homes, Inc. and ChrisJack Properties, L.L.C., doing business as Hunter Homes Rentals. Plaintiff's complaint asserted that when he exited "the rear door-wall" of a home he rented from defendants, he fell from "an improperly constructed and maintained staircase" and suffered serious injuries. According to the complaint, defendants "own, operate, control, manage and lease" the subject property, and allowed the staircase to fall into disrepair.

When plaintiff filed his lawsuit, the clerk of the Wayne Circuit Court issued one or several summonses for plaintiff to use when serving the complaint on

defendants as required by MCR 2.102(A). Copies of the summonses are missing from the record provided to this Court.[1] Lacking copies of the summonses, we cannot ascertain the address plaintiff supplied to the clerk as belonging to the resident agent for the two corporate defendants, Hunter Homes, Inc. and Chris-Jack Properties. The state of Michigan maintains a publicly accessible website permitting any user to easily identify a corporation's resident agent, and the resident agent's address. According to the website, now managed by the Department of Licensing and Regulatory Affairs, Corbell has served as the resident agent for both Hunter Homes, Inc. and ChrisJack Properties since 1993. When this suit was filed and continuing through the present, both corporate entities claimed a corporate address of 3941 Telegraph Road, Suite 207, in Bloomfield Hills.[2]

Plaintiff's counsel, Dennis Vatsis, elected to serve all three defendants by certified mail at a single address on West Pemberton in Bloomfield Hills.[3] From our review of the record, it appears that Vatsis failed to file an affidavit of mailing with the court, or copies of the

[1] A number of other documents and pleadings also seem to be missing. The registry of actions denotes that plaintiff filed certain pleadings that simply do not appear in the record. The parties have supplied this Court with some of the missing materials. The poor condition of the circuit court record has unnecessarily complicated this Court's review.

[2] See Department of Licensing and Regulatory Affairs, Corporate Entity Details <http://www.dleg.state.mi.us/bcs_corp/dt_corp.asp?_nbr=000073&name_entity=HUNTER%20HOMES,%20INC> (accessed August 15, 2011); Department of Licensing and Regulatory Affairs, Corporate Entity Details <http://www.dleg.state.mi.us/bcs_corp/dt_llc.asp?id_nbr=B70054&name_entity=CHRISJACK%20PROPERTIES%20LLC> (accessed August 15, 2011).

[3] Judging from various documents attached to plaintiff's brief on appeal, it appears that the Pemberton address was previously Corbell's personal residence.

certified mail return receipts. With his appellate brief, Vatsis provided this Court with a copy of the envelope containing the process he mailed to defendants. The envelope is marked "CERTIFIED MAIL" and bears the following address:

> Mr. Craig Corbell /
> Hunter Homes, Inc./
> ChrisJack Properties, LLC,
> d/b/a Hunter Homes Rental
> 3711 W. Pemberton
> Bloomfield Hills, MI 48302

On December 18, 2009, the United States Postal Service marked the envelope as follows:

> RETURN TO SENDER
> REFUSED
> UNABLE TO FORWARD

A mere 11 days after filing suit, Vatsis filed with the circuit court a form "Motion and Verification for Alternate Service." The motion identifies the home and business addresses of all three defendants as 3711 West Pemberton in Bloomfield Hills, and avers: "A Summons and Complaint were served by Certified Mail, Return Receipt Requested, on December 11, 2009. Defendants refused service and certified mail was returned." Vatsis signed the form as the "process server." The next day, Wayne Circuit Court Judge Gershwin Drain signed an order permitting alternate service by first class mail, "[t]acking or firmly affixing to the door," or delivery at the Pemberton address.

The record does not include a proof of service substantiating that plaintiff attempted alternate service on defendants in accordance with the circuit court's order. On February 19, 2010, Vatsis filed a "Notice of Entry of Default Judgment." The record also lacks any evidence

that plaintiff attempted to serve defendants with notice that he intended to seek entry of a default judgment. The next documents in the circuit court record are a February 19, 2010 preaecipe order for entry of default judgment signed by Judge Drain, and a judgment in the amount of $200,186.42.

Counsel for defendants appeared on March 9, 2010, and promptly filed motions to set aside the default judgment and for relief from judgment pursuant to MCR 2.612(B). Defendants challenged the order for alternate service, asserting that they had not received actual or constructive notice of the lawsuit and set forth defenses to plaintiff's claim. Defendant Corbell averred in an affidavit that the door through which plaintiff exited the premises "would have been disabled from use by the placement of a wood block." Defendants' counsel contended that Corbell did not personally own the leased premises, and supplied the circuit court with a copy of plaintiff's lease agreement identifying plaintiff's landlord as "hunter homes rental." Defendants further claimed that "the staircase and its condition were open and obvious." Judge Drain denied defendants' motions, stating: "I don't believe there's a meritorious defense here, and so I'm denying the motion. That's my decision."

II. ANALYSIS

We review de novo issues of statutory and court rule application. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). "We review for an abuse of discretion a circuit court's ultimate decision to grant or deny relief from a judgment." *Rose v Rose*, 289 Mich App 45, 49; 795 NW2d 611 (2010). The abuse of discretion standard also governs our review of rulings on motions to set

aside default judgments. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

The record establishes that because plaintiff failed to abide by the service of process procedures outlined in the court rules, defendants lacked actual knowledge of this lawsuit until after the default judgment entered. Defendants also demonstrated "reason justifying relief from the judgment" by propounding credible defenses. MCR 2.612(B). Accordingly, we hold that the circuit court abused its discretion by denying defendants' motion for relief from the judgment.

Deficient notice of a pending claim constitutes a ground for relief from judgment pursuant to MCR 2.612(B):

> A defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, may enter an appearance within 1 year after final judgment, and if the defendant shows reason justifying relief from the judgment and innocent third persons will not be prejudiced, the court may relieve the defendant from the judgment, order, or proceedings for which personal jurisdiction was necessary, on payment of costs or on conditions the court deems just.

Our Supreme Court recently explained that MCR 2.612(B) authorizes a court to relieve a party from a final judgment, including a default judgment, if

> (1) personal jurisdiction over defendants was necessary and acquired, (2) defendants in fact had no knowledge of the action pending against them, (3) defendants entered an appearance within one year after the final judgment, (4) defendants show a reason justifying relief from the judgment, and (5) granting defendants relief from the judgment will not prejudice innocent third persons. [*Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 273; 803 NW2d 151 (2011).]

The parties dispute only whether defendants had actual knowledge of the action and demonstrated a reason justifying relief from the judgment.[4]

A. DEFENDANTS' KNOWLEDGE OF THE ACTION

Defendants contend that the circuit court abused its discretion by permitting alternate service at the Pemberton address, and claim that they never received notice of the plaintiff's lawsuit. We consider this argument bearing in mind that "[t]he fundamental requisite of due process of law is the opportunity to be heard. . . . This right to be heard has little reality or worth unless one is informed that the matter is pending . . . ." *Id.* at 274, quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950).

The court rule governing the manner to serve process, MCR 2.105, describes various methods of service. Generally, the rule organizes the service of process choices according to the individual or corporate nature of the defendant. The methods described in the rule "are intended to satisfy the due process requirement that a defendant be informed of an action by the best means available under the circumstances." MCR 2.105(J)(1). Compliance with the court rules fulfills the constitutional requirement of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 US at 314.

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[4] As our Supreme Court did in *Clarke*, 489 Mich at 275, "we assume arguendo that the trial court acquired personal jurisdiction over defendants because we conclude that defendants are entitled to relief under MCR 2.612(B) and" because we need not reach the constitutional issue of jurisdiction to decide this appeal.

We first consider plaintiff's employment of certified mail as a service of process tool. MCR 2.105(A)(2) permits service on an individual such as Corbell by

> sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, *and delivery restricted to the addressee.* Service is made when the defendant acknowledges receipt of the mail. A copy of the return receipt signed by the defendant must be attached to proof showing service under subrule (A)(2). [Emphasis added.]

The certified mail envelope holding the summons and complaint in this case did not restrict delivery to Corbell. Although someone at the Pemberton address refused to acknowledge receipt of the certified letter, no evidence exists that *Corbell* refused it. By restricting delivery to a specifically identified person, the court rule avoids disputes about whether a *defendant* has deliberately refused service. Thus, plaintiff's decision to attempt certified mail service on Corbell without restricting delivery to Corbell violated MCR 2.105(A)(2).

We next turn our attention to plaintiff's use of certified mail to serve process on the corporate entity defendants. With regard to private corporations, the court rules require personal service on an officer, registered agent, director, trustee, or person in charge of an office or business establishment. MCR 2.105(D)(1) and (2). If service is made by serving a summons and copy of the complaint on a director, trustee, or person in charge of an office or business establishment, the plaintiff must also send a summons and complaint "by registered mail, addressed to the principal office of the corporation." MCR 2.105(D)(2). A plaintiff may employ registered mail to serve process when a corporation "has failed to appoint and maintain a registered

agent . . . .” MCR 2.105(D)(4)(a). Nothing in the record supports that Hunter Homes failed to appoint or maintain a registered agent.

The court rules do not address the proper manner of service on a limited liability company such as ChrisJack Properties. However, MCR 2.105(H)(1) generally permits service of process on “an agent authorized by written appointment or by law to receive service of process.” “The resident agent appointed by a limited liability company is an agent of the company upon whom any process, notice, or demand required or permitted by law to be served upon the company may be served.” MCL 450.4207(2). The court rules simply do not contemplate that a plaintiff may use certified mail as an initial form of service on corporate entities of any kind. Thus, as a matter of law, plaintiff insufficiently served Hunter Homes, Inc. and ChrisJack Properties by sending process through certified mail.

The court rules allow for substituted service “[o]n a showing that service of process cannot reasonably be made as provided by this rule . . . .” MCR 2.105(I)(1). Plaintiff failed to demonstrate that he could not reasonably serve defendants in a manner that complied with the court rules. Accordingly, no factual basis supported the circuit court’s order for substituted service.

Even assuming that plaintiff’s initial efforts to serve process satisfied the court rules, the circuit court abused its discretion by permitting alternate service by regular mail at the Pemberton address. MCR 2.105(I)(2) provides that a motion seeking substituted service

> must set forth sufficient facts to show that process *cannot be served under this rule* and must state the defendant’s address or last known address, or that no address of the defendant is known. If the name or present address of the

> defendant is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it. [Emphasis added.]

Plaintiff failed to provide the circuit court with any information substantiating that it could not have personally served Corbell. Plaintiff's motion for alternate service stated that service had been refused at the Pemberton address and indicated that this was defendants' last known address. Plaintiff completely failed to allege that he actually did not know defendants' addresses or that he had made a "diligent inquiry to ascertain" defendants' correct addresses. *Id*. In fact, had plaintiff conducted even minimal research, defendants' addresses would have been easily discovered. At the time this suit was filed, the Department of Labor and Economic Growth maintained the public website on which plaintiff could have discovered the corporate defendants' shared address on Telegraph Road. The lease agreement, which plaintiff personally signed, includes the Telegraph Road address. Further, plaintiff presented this Court with various City of Livonia documents regarding code violations on the subject property, all identifying Corbell's address as being on Telegraph Road.

The limited information available to the circuit court insufficiently demonstrated defendants' connection to the Pemberton address, and fell well short of establishing any reasonable likelihood that the use of regular mail would notify all three defendants of the pending claim. "A truly diligent search for an absentee defendant is absolutely necessary to supply a fair foundation for and legitimacy to the ordering of substituted service. '[W]hen notice is a person's due, process which is a mere gesture is not due process.' " *Krueger v Williams*, 410 Mich 144, 168; 300 NW2d 910 (1981), quoting

Mullane, 339 US at 315 (alteration in original). Because plaintiff's motion for alternate service lacked any allegations supporting an inability to serve Corbell or the corporate defendants by one of the standard service techniques, the circuit court abused its discretion by ordering substituted service. Accordingly, defendants have satisfactorily shown that they lacked actual knowledge of plaintiff's lawsuit.

B. MERITORIOUS DEFENSE

In their motion to set aside the default, defendants identified several defenses to plaintiff's claim, including (1) Corbell's lack of ownership of the premises, (2) the open and obvious nature of the alleged stairway defect, and (3) the door leading to the stairway had been blocked to prevent its use. In denying defendants' motion to set aside the default, the circuit court observed that from a photograph, the stairs "looked like they were just propped up." The open and obvious danger doctrine arguably affords defendants with a complete defense to this premises liability claim. Corbell's affidavit and the arguments advanced by defendants demonstrate the existence of at least one meritorious defense, and constitute a "reason justifying relief from the judgment . . . ." MCR 2.612(B); *Clarke*, 489 Mich at 273.

C. DEFAULT JUDGMENT PROCEDURE

Defendants contend that procedural irregularities surrounding the circuit court's entry of default judgment provide an additional ground for setting it aside. Pursuant to MCR 2.603(D)(1), "[a] motion to set aside a default or a default judgment . . . shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." "The good cause require-

ment . . . may be satisfied by demonstrating a procedural irregularity or defect or a reasonable excuse for failing to comply with the requirements that led to the default judgment." *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 533; 672 NW2d 181 (2003), citing *Alken-Ziegler*, 461 Mich 219. We choose to briefly address this issue despite our holding that a separate court rule, MCR 2.612, compels relief from the default judgment.

After the circuit court entered the order permitting alternate service, plaintiff failed to file with the court an affidavit or proof that service had actually been made. Nevertheless, the circuit court proceeded to simultaneously enter a default and a default judgment. MCR 2.104 sets forth various methods for making proof of service. Service of process by regular mail, as ordered here, requires proof of service by affidavit, "attach[ing] a copy of the order as mailed, and a return receipt." MCR 2.106(G)(3). In the absence of a proof of service, the circuit court erred by entering a default judgment.[5]

Furthermore, the circuit court failed to follow the default judgment procedures set forth in MCR 2.603. "If 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." MCR 2.603(A)(1). The circuit court record lacks any indication that the clerk entered defendants' default. MCR 2.603(B)(1)(a)(iii) provides that if the pleadings do not state a specific amount demanded, a party seeking a default judgment must notify the defaulted party of the request for a default

[5] Given the horrendous state of the circuit court record, we recognize that plaintiff may have filed a proof of service that never made it to the file, was removed from the file, or lost.

judgment. "The notice required by this subrule must be served at least 7 days before entry of the requested default judgment." MCR 2.603(B)(1)(b). No evidence exists that defendants received notice of plaintiff's intent to seek a default judgment. Failure to give the notice required by MCR 2.603 invalidates the judgment. *Gavulic v Boyer*, 195 Mich App 20, 25; 489 NW2d 124 (1992), overruled on other grounds by *Allied Electric Supply Co, Inc v Tenaglia*, 461 Mich 285 (1999). Accordingly, defendants would be entitled to relief under MCR 2.603 as well.

Default judgment vacated and case remanded for further proceedings. We do not retain jurisdiction.

TALBOT, P.J., and HOEKSTRA, J., concurred with GLEICHER, J.

DAWSON v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN

Docket No. 296790. Submitted May 3, 2011, at Detroit. Decided August 16, 2011, at 9:10 a.m.

Timothy Dawson brought an action in Tuscola Circuit Court against his no-fault insurer Farm Bureau Mutual Insurance Company of Michigan, seeking to recover underinsured-motorist benefits. Plaintiff was a passenger in an automobile driven by Catrina Olinger on June 10, 2006, when the automobile struck a bridge abutment. Plaintiff had initially sued Olinger for negligence and also named Farm Bureau as a defendant on the basis that it had refused to pay him underinsured-motorist benefits as provided in his policy. Plaintiff dismissed Farm Bureau from the action against Olinger after Farm Bureau moved for summary disposition on the ground that the insurance policy prohibited suit for underinsured-motorist benefits until plaintiff had exhausted all other available judgments or settlements. Olinger stipulated the amount of plaintiff's requested damages, $100,000, and did not challenge plaintiff's claim that she was negligent or that he suffered a serious impairment of an important body function. Olinger's policy covered the first $20,000 of the judgment, but Olinger was unable to pay the $80,000 remainder. Plaintiff moved for summary disposition in the instant action, arguing that Farm Bureau was collaterally estopped from denying underinsured-motorist coverage for the accident because liability and damages were litigated in the prior action. The court, Patrick R. Joslyn, J., granted plaintiff's motion for summary. Defendant appealed.

The Court of Appeals *held*:

Insurance policies are subject to the same contract construction principles as any other type of contract. Unambiguous contract provisions are not open to judicial construction and must be enforced according to their unambiguous terms unless to do so would violate the law or one of the traditional defenses to the enforceability of a contract applies. Underinsurance automobile insurance protection is not required by law, so its scope, coverage, and limitations are governed by the insurance contract and the laws pertaining to contracts. The policy provided that for purposes

of underinsured-motorist coverage, Farm Bureau would not be bound by any prior judgment or settlement made without its written consent. The trial court erred by failing to enforce this unambiguous provision.

Reversed and remanded for further proceedings.

INSURANCE — NO-FAULT-UNDERINSURED- AND UNINSURED-MOTORIST BENEFITS — INTERPRETATION OF POLICIES.

Insurance policies are subject to the same contract construction principles as any other type of contract; unambiguous contract provisions are not open to judicial construction, and must be enforced according to their unambiguous terms unless to do so would violate the law or one of the traditional defenses to the enforceability of a contract applies; a court may not modify or refuse to enforce the provisions based on a judicial determination of reasonableness; underinsurance automobile insurance protection, such as uninsured- or underinsured-motorist coverage, is not required by law, so its scope, coverage, and limitations are governed by the insurance contract and the laws pertaining to contracts.

Boyer & Dawson, P.C. (by *William G. Boyer* and *William G. Boyer, Jr.*), for plaintiff.

Willingham & Coté, P.C. (by *Anthony S. Kogut* and *Leon J. Letter*), for defendant.

Before: SAAD, P.J., and JANSEN and K. F. KELLY, JJ.

SAAD, P.J. Defendant, Farm Bureau Mutual Insurance Company of Michigan, appeals the trial court's order that granted summary disposition to plaintiff. For the reasons set forth in this opinion, we reverse and remand for further proceedings.

I. NATURE OF THE CASE

Plaintiff, Timothy Dawson, asserts a contractual right to have his automobile insurance carrier, Farm Bureau, pay for a judgment entered in his prior lawsuit against the driver of the vehicle in which he was a

passenger and wherein he sustained various injuries. In that lawsuit, the driver's automobile insurance carrier, Auto-Owners Insurance Company, did not vigorously defend questions of liability or serious impairment of body function and stipulated the amount of damages requested by plaintiff. The driver's policy limit amounted to only 20 percent of the judgment, and although Farm Bureau did not participate in the prior litigation, the trial court, nonetheless, ruled that Farm Bureau must pay plaintiff $80,000 in underinsured-motorist benefits because issues of liability and damages were litigated in the prior proceeding.

II. FACTS AND PROCEEDINGS

On June 10, 2006, plaintiff was a passenger in the backseat of a vehicle driven by Catrina Olinger when the vehicle struck a bridge abutment. Plaintiff sustained injuries when he was ejected from his seat and crashed through the windshield of the car. Plaintiff sued Olinger for negligence and also named Farm Bureau as a defendant. Plaintiff had an automobile insurance policy through Farm Bureau that contained an underinsured-motorist provision, and plaintiff claimed that Farm Bureau had refused to pay him benefits. Thereafter, plaintiff dismissed Farm Bureau from the lawsuit after Farm Bureau moved for summary disposition and argued that, under the policy, the insured may not sue Farm Bureau for underinsured-motorist benefits until the insured has exhausted all other available judgments or settlements. Plaintiff sued Farm Bureau again, but again dismissed the action because, at the time, he had not obtained a judgment against Olinger.

Though it appears that Olinger's insurer wanted to settle the case for Olinger's policy limit of $20,000,

plaintiff's insurance policy with Farm Bureau required that it approve any settlement, which Farm Bureau declined to do. Therefore, plaintiff's case against Olinger went to trial. The trial lasted 29 minutes and merely consisted of plaintiff's testimony and his submission of medical records to the court. Olinger did not challenge plaintiff's claim that she was negligent or that plaintiff suffered a serious impairment of an important body function. Olinger also stipulated the amount of plaintiff's requested damages, $100,000. The trial court ruled in plaintiff's favor and awarded him $100,000.

Plaintiff then filed this action against Farm Bureau for underinsured-motorist benefits. Olinger signed asset interrogatories stating that she has no nonexempt assets from which plaintiff can collect the remaining $80,000 after her insurance company, Auto-Owners, covered the first $20,000 of the judgment. On August 24, 2009, plaintiff moved for summary disposition, arguing that Farm Bureau is collaterally estopped from denying underinsured-motorist coverage for the accident because the issues of liability and damages were litigated in the prior action. In response, Farm Bureau argued that, under the plain terms of the policy, it is not bound by prior judgments or settlements to which it did not agree in writing. Farm Bureau further asserted that, because it was not a party to the litigation against Olinger, it should not be collaterally estopped from asserting any available defenses in this action.

The trial court granted plaintiff's motion for summary disposition and ruled that Farm Bureau was estopped from relitigating issues of liability or damages in this case. It reasoned that those issues were litigated in the case against Olinger and Farm Bureau could have participated in that action, but chose to not do so.

III. DISCUSSION

We hold that the trial court erred by failing to enforce the unambiguous contractual provision in the policy that expressly stated that, for purposes of underinsured-motorist coverage, Farm Bureau is not bound by any judgment unless it gives written consent. Under the plain language of the policy, Farm Bureau may raise any available defenses in this action.

Plaintiff brought his motion for summary disposition under MCR 2.116(C)(7), (9), and (10).[1] "We review a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law." *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 433; 773 NW2d 29 (2009). This case involves the interpretation of plaintiff's insurance policy with Farm Bureau. "[I]nsurance policies *are* subject to the same contract construction principles that apply to any other species of contract." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Therefore, "unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Id*.

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[1] Summary disposition under MCL 2.116(C)(7) is proper when a claim is barred by a prior judgment. Pursuant to MCR 2.116(C)(9), a trial court should grant summary disposition if the party opposing the action has failed to state a valid defense. And as this Court explained in *Delta Engineered Plastics, LLC v Autolign Mfg Group, Inc*, 286 Mich App 115, 119; 777 NW2d 502 (2009),

> [a] motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered, in a light most favorable to the nonmoving party, when reviewing a motion brought under MCR 2.116(C)(10). *Id*. at 626.

The insurance policy specifically states that Farm Bureau "will not be bound by any judgments for damages or settlements made without [Farm Bureau's] written consent." Like uninsured-motorist benefits, underinsured-motorist coverage is not required by Michigan law, and the terms of coverage are controlled by the language of the contract itself, not by statute. As the Michigan Supreme Court explained in *Rory*, "[u]ninsured motorist coverage is optional—it is not compulsory coverage mandated by the no-fault act. Accordingly, the rights and limitations of such coverage are purely contractual . . . ." *Rory*, 473 Mich at 465-466 (citation omitted).

> Underinsurance automobile insurance protection is not required by law and therefore is optional insurance offered by some, but not all, Michigan automobile insurance companies. Because such insurance is not mandated by statute, the scope, coverage, and limitations of underinsurance protection are governed by the insurance contract and the law pertaining to contracts. *Auto-Owners Ins Co v Leefers*, 203 Mich App 5, 10-11; 512 NW2d 324 (1993). As the Supreme Court stated in *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525; 502 NW2d 310 (1993), regarding substantially similar uninsured motorists benefits:
>
> "PIP [personal protection insurance] benefits are mandated by statute under the no-fault act, MCL 500.3105, and, therefore, the statute is the 'rule book' for deciding the issues involved in questions regarding awarding those benefits. On the other hand, the insurance policy itself, which is the contract between the insurer and the insured, controls the interpretation of its own provisions providing benefits not required by statute. Therefore, because uninsured motorist benefits are not required by statute, interpretation of the policy dictates under what circumstances those benefits will be awarded." [*Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 19-20; 592 NW2d 379 (1998) (citation omitted).]

Again, it is "[a] fundamental tenet of our jurisprudence . . . that unambiguous contracts are not open to judicial construction and must be *enforced as written*." *Rory*, 473 Mich at 468. Further, "[a] mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions." *Id*. at 470. The reason is clear: 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.

As stated, the policy language is unambiguous and clearly provides that plaintiff cannot hold Farm Bureau to any prior judgment without Farm Bureau's express consent. Though plaintiff complains that he tried to involve Farm Bureau in the litigation against Olinger, the policy is also clear that Farm Bureau cannot be sued for underinsured-motorist benefits unless and until other payments or judgments are exhausted. Simply stated, plaintiff is contractually precluded from contending that the tort judgment against Olinger entitles him to collect underinsured-motorist benefits from Farm Bureau.

The policy provisions at issue are intended to ensure that Farm Bureau is not embroiled in litigation before there has been a determination that the responsible driver is actually underinsured and to preserve Farm Bureau's right to litigate issues of liability and damages. This case is a good example of why an insurer would include such terms for this optional coverage. Here, for whatever reason, the driver's insurer chose not to contest in any serious way issues of liability or damages. Because its exposure was only $20,000, the driver's insurer also had no incentive to challenge plaintiff's requested damages of $100,000. Without the disputed policy language here, Farm Bureau might be

bound to pay $80,000 of that judgment with no meaningful opportunity to litigate any of the issues that bear on its obligation to pay benefits. The trial court incorrectly ignored the language of the policy, language to which plaintiff agreed when entering into the contract. Clearly, because the court should have applied the language as written, the trial court erred by granting summary disposition to plaintiff.

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

JANSEN and K. F. KELLY, JJ., concurred with SAAD, P.J.

HERRICK DISTRICT LIBRARY v LIBRARY OF MICHIGAN

Docket No. 300393. Submitted April 12, 2011, at Lansing. Decided August 16, 2011, at 9:15 a.m.

The Herrick District Library brought an action in Ottawa Circuit Court against the Library of Michigan and the Department of Education (DOE), seeking a declaratory judgment that the DOE lacked authority to promulgate Mich Admin Code, R 397.03(d) and 397.31(1)(b), and that they violated Michigan law. The challenged rules required that in order to receive state aid, a public library must provide equal library services to the total population residing within an area designated for and served by a public library, regardless of whether that individual resides in the library's jurisdictional area (the boundaries within which electors can vote on a library millage) or a contractual service area outside the library's jurisdiction. Herrick argued that the rules would force citizens who pay taxes for their local public library to give identical services to people who do not. The court, Calvin L. Bosman, J., granted summary disposition in favor of Herrick, concluding that the DOE lacked authority to promulgate the rules because it did not have a clear and express statutory mandate to do so. The court rejected the DOE and Library of Michigan's argument that the power of an administrative agency to promulgate administrative rules may be derived by inference from the agency's enabling statute. The DOE and the Library of Michigan appealed.

The Court of Appeals *held*:

1. An administrative agency's powers are limited to those expressly granted by the Legislature by clear and unmistakable statutory language. The powers specifically granted to an agency are strictly interpreted. Although an agency may have implied powers, they are limited to those that are necessary to the due and efficient exercise of the powers expressly granted by the enabling statute. This allows the Legislature to delegate some degree of authority to an administrative agency, but ensures that an agency does not expand its powers beyond those that the Legislature intended. The State Aid to Public Libraries Act, MCL 397.551 *et seq.*, did not expressly grant the DOE power to promulgate new rules and regulations controlling the distribution of state aid to

public libraries. The challenged rules were not necessary for the due and efficient exercise of the act; MCL 397.567 mandates only that cooperative and public libraries conform to certification requirements for personnel in order to receive money from the state. The enabling statute does not grant the DOE implied authority to promulgate new rules and regulations controlling additional eligibility requirements for the distribution of state aid to libraries. Accordingly, the DOE had neither express nor implied rulemaking authority to promulgate the challenged rules.

2. Const 1963, art 8, § 9 does not entitle nonresidents who do not contribute support to a library to library privileges identical to those of the taxpayers of the community who do. Local public libraries have the option to provide different services to residents and nonresidents. The challenged rules force citizens who pay taxes for their local public library to give identical services to people who do not, which is contrary to the intent of the drafters of the 1963 Michigan Constitution as interpreted by the Supreme Court in *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554 (2007).

Affirmed.

ADMINISTRATIVE LAW — AGENCIES — RULEMAKING AUTHORITY — EXPRESS AND IMPLIED POWERS.

An administrative agency's powers are limited to those expressly granted by the Legislature by clear and unmistakable statutory language; powers specifically conferred to an agency are strictly interpreted; although an agency may have implied powers, they are limited to those that are necessary to the due and efficient exercise of the powers expressly granted by the enabling statute.

Foster, Swift, Collins & Smith, P.C. (by *Michael D. Homier* and *Laura J. Garlinghouse*), for the Herrick District Library.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *David H. Goodkin*, Assistant Attorney General, for the Library of Michigan and the Department of Education.

Amici Curiae:

Law Weathers (by *Richard W. Butler, Jr.*, and *Crystal L. Morgan*), for the Lakeland Library Cooperative, the

Woodlands Library Cooperative, the White Pine Library Cooperative, and the Superiorland Library Cooperative.

Dykema Gossett PLLC (by *William J. Perrone* and *Courtney F. Kissel*) for the Ann Arbor District Library

Before: METER, P.J., and SAAD and WILDER, JJ.

SAAD, J.

I. NATURE OF THE CASE

The Michigan Supreme Court recently addressed the issue of whether citizens who pay taxes to support their local library are obliged by the Michigan Constitution to provide identical services or library privileges to citizens of another jurisdiction who do not pay any taxes or fees for these library services. *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554; 737 NW2d 476 (2007). In unambiguously answering this question in the negative, our Supreme Court interpreted our Constitution's library provisions and constitutional history to say quite the opposite. That is, our Supreme Court held that the framers of Michigan's Constitution clearly expressed their intent that citizens whose tax dollars support their local public library should not have to provide these library services for free to people who do not contribute to the financial upkeep of the library.

Yet defendant Michigan Department of Education (DOE), by promulgating the rules at issue here, attempts to force by regulation the very result our Supreme Court says is contrary to the framers' intent and the Constitution's provisions concerning local control of libraries. The DOE's position is particularly untenable because it rationalizes its administrative overreach on the ground that the legislation regarding state funding

of libraries gives the DOE this power by implication, notwithstanding that the relevant legislation neither mentions nor hints at such an unprecedented and coercive objective.

For the reasons articulated herein, we agree with Herrick District Library, which challenges the authority of the DOE to promulgate these rules, and hold that the DOE has no authority, express or implied, to force this unprecedented result upon local public libraries by issuing rules that have no basis in the enabling legislation and that our Supreme Court has said run contrary to the letter of our Constitution and the clear intent of its framers.

Indeed, the powers of administrative agencies such as the DOE are limited to those expressly granted by the Legislature. And though an agency may have implied powers, our caselaw narrowly restricts such authority to that " 'necessary to the due and efficient exercise of the powers expressly granted' " by the enabling statute. *Ranke v Corp & Securities Comm*, 317 Mich 304, 309; 26 NW2d 898 (1947) quoting *California Drive-in Restaurant Ass'n v Clark*, 22 Cal 2d 287, 302; 140 P2d 657 (1943). The State Aid to Public Libraries Act (State Aid Act), MCL 397.551 *et seq*., does not expressly grant the DOE the power to promulgate new rules and regulations for the distribution of state aid to public libraries. Nor does the legislation provide that additional eligibility requirements are necessary for the State Aid Act's administration. Accordingly, the DOE lacks the authority to promulgate the rules at issue in this case. If the Legislature had intended that the DOE be able to write new eligibility requirements, it would have included authorizing language in the State Aid Act.

Further, we reiterate that these challenged rules expressly repudiate and violate the intent of the draft-

ers of our state Constitution, as explained recently by the Supreme Court in *Goldstone*. Indeed, despite our Supreme Court's analysis of Michigan's Constitution and its rejection of the policy of providing the same services to all library patrons, regardless of their financial contribution to that library, this is exactly what the DOE seeks to accomplish by what it regards as its implied rulemaking authority. Because such a policy conflicts with our state Constitution as interpreted by *Goldstone*, it is indeed questionable whether even the Legislature would have the ability to enact such a statute. Thus, it strains credulity, at best, to suggest as the DOE does that an administrative agency has an implied power to do the same by issuing regulations. This effort by the DOE—which ignores the will of the drafters of our Constitution and the Michigan Supreme Court's recent interpretation of our state Constitution—illustrates why our courts have historically strictly constrained the implied authority of administrative agencies. Accordingly, we uphold the trial court's grant of summary disposition to plaintiff, the Herrick District Library.

II. FACTS AND PROCEDURAL HISTORY

A. HOW LIBRARIES ARE FUNDED AND HOW THEY OPERATE

Plaintiff, the Herrick District Library, is a public library located in Holland, Michigan. It was established pursuant to the District Library Establishment Act, MCL 397.171 *et seq*. Public libraries in Michigan provide services to individuals who live in one of two areas: (1) the library's jurisdictional service area and, if it chooses to create one, (2) the library's contractual service area. A jurisdictional service area encompasses the territory within a library's legal boundaries where the electors are authorized to vote on a library millage

and may be eligible to be library board members. A contractual service area is created by the library and a municipality outside the library's jurisdictional service area and provides residents of that municipality with some level of library services, typically for an agreed-upon fee. Michigan's Legislature has passed numerous statutes allowing these arrangements to promote the "establishment of a system in which communities with public libraries can enter into agreements with communities without public libraries in order to extend access to such libraries."[1] *Goldstone*, 479 Mich at 562. Also, district libraries, like Herrick, are expressly authorized to enter into library-service contracts with municipalities not located in the library's jurisdictional service area. MCL 397.182(g).

Though jurisdictional and contractual service areas are similar because both expand library access, the two arrangements entail different responsibilities for the residents of each respective area. Residents of a library's jurisdictional service area are always a library's prime financial benefactors—they pay the taxes that provide their local library its essential funding. Individuals who live in contractual service areas have no such financial obligation—they simply pay an agreed-upon amount to secure specific services outlined in the agreement.

Accordingly, residents of a contractual service area typically have different—and often less comprehensive—library privileges than those who live in the library's jurisdictional service area. Because they pay taxes to fund the library, residents in the jurisdictional service area are entitled to full library services. Individuals residing in the contractual service area may receive full library services

[1] For a listing of statutes permitting the use of contractual service areas, see *Goldstone*, 479 Mich at 562 nn 7 and 8.

or partial library services, depending on the level of services specified in the contract. In brief, residents in the jurisdictional service area pay taxes for their library, and people in the contractual service area pay for specific services according to the contract.[2]

Like many other libraries in Michigan, Herrick serves individuals living in its jurisdictional area and maintains outside-service contracts with outlying municipalities. In some cases, Herrick offers different library services to residents of the contractual service areas than those provided to residents of its district.

B. STATE AID

To offer its patrons additional library services, Herrick belongs to the Lakeland Library Cooperative, a network of libraries in Western Michigan that agree to share books, periodicals and other media. As a member of a library cooperative, Herrick is eligible for state funding under the State Aid Act and has received state aid for some time.

The state-aid program is managed by defendant Library of Michigan, a subsidiary agency of the DOE.[3]

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[2] For an example of the wide-ranging services offered to residents of contractual service areas, compare *Goldstone* with the case at bar. In *Goldstone*, Bloomfield Hills maintained a contract with Bloomfield Township Public Library that allowed city residents "full access to the library" for a fee, *Goldstone*, 479 Mich at 557, while, in contrast, the residents of Herrick's contractual service areas receive different services than those who live in Herrick's jurisdictional service area.

[3] The Library of Michigan was initially part of the Michigan Department of History, Arts and Libraries (HAL). As such, the State Aid Act mentions HAL as the department responsible for managing the library-aid program. In October 2009, HAL was abolished by Executive Order 2009-36. The organization's responsibilities—including authority over the Library of Michigan—were assumed by the DOE. HAL promulgated the rules at issue in this case before its abolition; DOE has now assumed the burden of defending them.

Section 17 of the State Aid Act requires that each "cooperative library and public library" conform to "certification requirements for *personnel* as established by [the Michigan Department of History, Arts and Libraries (HAL)] in order to qualify for state aid." MCL 397.567 (emphasis added). In 2009, HAL promulgated the rules challenged in this case (State Aid Rules), which aimed to create further, nonpersonnel related eligibility requirements for public libraries to receive state funds. These new requirements sparked a public outcry, as libraries across the state challenged the authority of HAL to involve itself in their day-to-day operations and force citizens who pay taxes for their local library to give identical services to people who do not.[4]

Two rules—3(d) and 31(1)(b)—were particularly controversial. Mich Admin Code, R 397.03(d) and 397.31(1)(b). Together, they require that, in order to receive state aid, a public library must provide equal library services to each individual within the library's "legal service area population." Rule 3(d) defines "legal service area population" as "the total population residing within an area designated for and served by a public library, including the jurisdictional area and any contractual service area." Mich Admin Code, R 397.03(d). In other words, under the changed rules, libraries must provide the same services to every individual they serve, regardless of whether that individual resides in the library's jurisdictional area or a contractual service area outside the library's jurisdiction.

These State Aid Rules, if upheld, would change the long-established framework for state aid and outside-

[4] During the public-comment period before HAL formally adopted the State Aid Rules, eight Michigan library cooperatives sent HAL a joint letter protesting the new regulations.

service contracts. Herrick's current outside-service contracts—which provide different library privileges depending on where an individual resides—are clearly valid under the current statutory framework and existing caselaw. But the DOE's rules would render such arrangements unacceptable for purposes of distributing state aid. Concerned that the new rules would deprive it of all state funding, Herrick filed a complaint against the Library of Michigan, HAL, and the DOE and sought a declaratory judgment in October 2009. It alleged that the State Aid Rules would deprive Herrick of all state funding if it refused to offer identical services to both residents of its district and residents of its contractual service areas. Herrick asked the trial court to hold that defendants do not have authority to promulgate the State Aid Rules and that the rules violate Michigan law.

The trial court ruled that defendants did not have the authority to promulgate the State Aid Rules because defendants did not have a clear and express statutory mandate to do so. The court rejected defendants' contention that the power of an administrative agency to promulgate administrative rules may be derived by inference from a statute or statutes governing an agency.

Defendants assert that administrative agencies can infer rulemaking authority from the express authorities granted to them by statute. Specifically, they say that an agency has an implied power to adopt rules that are necessary to exercise the power expressly granted to the agency. Thus, while defendants acknowledge that the State Aid Act does not grant them express rulemaking authority, they suggest it gives them implied rulemaking authority.

Plaintiff counters that the Legislature must expressly grant rulemaking authority to administrative

agencies—"a doubtful power does not exist"—and that agencies cannot extend their powers by inference. *Mason Co Civil Research Council v Mason Co*, 343 Mich 313, 326–327; 72 NW2d 292 (1955). Further, plaintiff states that even if agencies may infer rulemaking authority, the State Aid Act does not grant implied rulemaking authority to defendants, particularly for the rules in issue.

III. ANALYSIS[5]

A. EXPRESS AND IMPLIED POWERS OF ADMINISTRATIVE AGENCIES

It is "one of the axioms of modern government[]" that a Legislature "may delegate to an administrative body the power to make rules and decide particular cases . . . ." *West Virginia ex rel Dyer v Sims*, 341 US 22, 30; 71 S Ct 557; 95 L Ed 713 (1951). If it were unable to delegate certain tasks to subsidiary state organizations, the Legislature would be consumed in endless rounds of debate on minutiae.[6] As such, the Legislature routinely

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[5] We review de novo a trial court's decision on a motion for summary disposition. *King v Michigan*, 488 Mich 208, 212; 793 NW2d 673 (2010). When reviewing a motion brought under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). A motion for summary disposition under MCR 2.116(C)(10) may be granted, as here, when there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Dep't of Human Servs*, 286 Mich App 230, 235; 780 NW2d 586 (2009).

[6] See, for example, *Ranke*, 317 Mich at 309-310 (describing the inability of the Legislature to spend time engaged in the details of real-estate regulation, and thus the need to empower an administrative agency to do so, and stating that "[i]t would be quite impossible for the legislature to enumerate all the specific acts which would constitute dishonest or unfair dealing upon the part of those engaged in the sale of real estate"); see also *United States v Grimaud*, 220 US 506, 516; 31 S Ct 480; 55 L Ed 563 (1911)

empowers state agencies through statutes to perform certain governmental functions. *York v Detroit* (*After Remand*), 438 Mich 744, 767; 475 NW2d 346 (1991).

This labor-saving compact, however, comes with great risks. Administrative agencies frequently exercise judicial, executive, and legislative powers.[7] This blending of governmental roles creates a tension within our system of governance, which specifically delineates different and separate tasks for the separate branches of government. Our federal and state constitutions "divide the governmental power into three branches." *J W Hampton, Jr, & Co v United States*, 276 US 394, 406; 48 S Ct 348; 72 L Ed 624 (1928). Each branch is intended to have its own specific role, and it is the duty of the Legislature to make legislation. This power "cannot be exercised by anyone other than [the Legislature], except in conjunction with the lawful exercise of executive or judicial power." *Mistretta v United States*, 488 US 361, 417; 109 S Ct 647; 102 L Ed 2d 714 (1989) (Scalia, J., dissenting).

(discussing the need for the Department of Agriculture—as opposed to Congress—to regulate animal grazing at a federal forest reserve, stating that "[i]n the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management"); *J W Hampton, Jr, & Co v United States*, 276 US 394, 407; 48 S Ct 348; 72 L Ed 624 (1928) (noting that although Congress is empowered to regulate "rates to be exacted by interstate carriers for the passenger and merchandise traffic," [t]he "rates to be fixed are myriad," and, accordingly, Congress must delegate the power to set rates—otherwise "it would be impossible [for Congress] to exercise the power at all").

[7] See 1 Pierce, Administrative Law, § 2.3 (5th ed), p 47 ("Agencies, both pure Executive Branch and independent, make legislative rules based on agency policy decisions virtually every day. Agencies of both types execute the laws in every conceivable sense of the word. Agencies also adjudicate far more disputes involving individual rights than all of the federal courts combined—a function that would seem to bear most comfortably the label 'judicial.' These powers routinely are combined in a single agency, and the same individuals—Cabinet Secretaries, Administrators, or Commissioners—are responsible for the agency's many functions.").

Accordingly, our cases carefully limit the powers of administrative agencies to ensure that they do not abuse or make baseless expansions of the limited powers delegated to them by the Legislature. Therefore, being creations of the Legislature, they are only allowed the powers that the Legislature chooses to delegate to them through statute. *York*, 438 Mich at 767. Administrative agencies have no common-law powers. *McKibbin v Mich Corp & Sec Comm*, 369 Mich 69, 82; 119 NW2d 557 (1963). The "legislature, within limits defined in the law, may confer authority on an administrative officer or board to make rules as to details, to find facts, and to exercise some discretion, in the administration of a statute." *Argo Oil Corp v Atwood*, 274 Mich 47, 52; 264 NW 285 (1935). The agency's authority to adopt rules (if it has any such authority) is usually found " 'in the statute creating the agency and vesting it with certain powers.' " *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 237; 501 NW2d 88 (1993), quoting Bienenfeld, Michigan Administrative Law (2d ed), ch 4, pp 18-19.

The powers of administrative agencies are thus inherently limited. Their authority must hew to the line drawn by the Legislature. Our Supreme Court has repeatedly stressed the importance of this limitation on administrative agencies, stating that " '[t]he power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist.' " *Mason*, 343 Mich at 326–327 (citation omitted).[8] Further, powers " 'specifically conferred' " on an agency " 'cannot be

[8] *See* also *Lake Isabella Dev, Inc v Village of Lake Isabella*, 259 Mich App 393, 401; 675 NW2d 40 (2003) (" '[A] statute that grants power to an administrative agency must be strictly construed and the administrative authority drawn from such statute must be granted plainly, because doubtful power does not exist.' "), quoting *In re Procedure & Format for*

extended by inference'; . . . no other or greater power was given than that specified." *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 247; 590 NW2d 586 (1998), quoting *Eikhoff v Detroit Charter Comm*, 176 Mich 535, 540; 142 NW 746 (1913).

The general rule in Michigan, then, is that the power and authority of an agency must be conferred by clear and unmistakable statutory language. And if a statute does explicitly grant an agency a power, that power is subject to "strict interpretation." *Mason*, 343 Mich at 326. An administrative agency that acts outside its statutory boundaries usurps the role of the legislature. This type of administrative overreach of course conflicts with our federal and state constitutions, which specifically indicate that "in the actual administration of the government Congress or the Legislature should exercise the legislative power. . . ." *J W Hampton*, 276 US at 406. As such, the role of an administrative agency terminates wherever the Legislature chooses to end it. See *York*, 438 Mich at 767.

However, our Supreme Court has said in dicta that agencies may gain rulemaking power through statutory implication. For example, in *Coffman v State Bd of Examiners in Optometry*, the Court stated that an administrative agency's " 'powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication.' " *Coffman v State Bd of Examiners in Optometry*, 331 Mich 582, 590; 50 NW2d 322 (1951) (citation omitted). And in *Ghidotti v Barber* and *Clonlara*, the Court quoted Bienenfeld, Michigan Administrative Law (2d ed), ch 4, pp 18-19 with approval: " 'Rulemaking authority may . . . be inferred from other statutory authority granted to an

Filing Tariffs Under the Mich Telecom Act, 210 Mich App 533, 539; 534 NW2d 194 (1995).

agency.' " *Ghidotti v Barber*, 459 Mich 189, 202; 586 NW2d 883 (1998); *Clonlara*, 442 Mich at 237.

Defendants would argue that, *Coffman*, *Ghidotti*, and *Clonlara* are united by their suggestion that administrative agencies always possess implied rulemaking power. Yet the statements on implied rulemaking power from these cases share one other common aspect—they are all dicta.[9] Accordingly, defendants reliance on *Coffman*, *Ghidotti*, and *Clonlara* is misplaced. None of these cases created binding precedent that recognizes a rulemaking power in administrative agencies gained solely through statutory implication.

Defendants cite one case to support their position that an agency may have implied rulemaking power

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[9] In *Coffman*, an enabling statute gave the State Board of Examiners in Optometry the power to promulgate rules and regulations governing the practice of optometry, particularly the qualifications required for an applicant to take the Michigan examination in optometry. *Coffman*, 331 Mich at 585-587. Under this express authority, the state board sought higher standards for would-be optometrists than the baseline rules already established by the Legislature. *Id.* at 588, 591. Because the Legislature expressly granted authority by statute to the agency, the Court's discussion of implied authority was irrelevant to the outcome of the case. *Id*. at 586–587.

Similarly, in *Ghidotti*, the Legislature expressly delegated authority to an administrative agency, rendering the Court's comments on implied authority unnecessary. *Ghidotti*, 459 Mich at 196–197, 202. The statute at issue gave the Friend of the Court Bureau license to develop a formula used to determine child-support and health-care obligations. *Id*. at 196–197. Thus, *Ghidotti* did not involve implied authority and the Court's comment that rulemaking power can be inferred from statutory authority granted to an administrative agency is dicta. *Id.* at 202.

As in this case, the *Clonlara* Court considered a set of compliance procedures published by the DOE. *Clonlara*, 442 Mich at 233–234. However, *Clonlara* addressed whether those DOE procedures were promulgated in accordance with the Administrative Procedures Act. *Id*. The Court explicitly noted that neither party claimed an implied rulemaking authority. *Id.* at 237 n 14. As in *Coffman* and *Ghidotti*, the Court's comments on implied rulemaking authority were unnecessary to the final outcome of the case.

conferred by statute: *Ranke*. In *Ranke*, the Michigan Corporation and Securities Commission suspended the plaintiff's real-estate brokerage license. *Ranke*, 317 Mich at 306-307. Ranke challenged the suspension, arguing that the securities commission did not have the power to make rules and regulations regarding the suspension of real-estate licenses. *Id*. at 308.

The enabling statute, however, enumerated "conditions under which licenses [could] be cancelled or revoked" by the commission, including "[a]ny other conduct whether of the same or a different character than hereinbefore specified, which constitutes dishonest or unfair dealing." *Id*. at 308-309. The Court explained that the language of the statute clearly intended the commission to exercise some discretion. It would be "quite impossible" for the Legislature to "enumerate all the specific acts which would constitute dishonest or unfair dealing upon the part of those engaged in the sale of real estate." *Id*. at 309-310. By mentioning "any other conduct" constituting "dishonest or unfair dealing," the Legislature purposely created an opening for the commission to determine what "other conduct" constituted "dishonest or unfair dealing." *Id*. at 308.

In other words, the securities commission had the implied authority to define other conduct that constituted "dishonest or unfair dealing." *Id*. The power of classifying certain behavior as "dishonest and unfair dealing" was a necessary element of the "due and efficient exercise of the powers expressly granted" to the securities commission by the enabling statute. *Id*. at 309. While affirming the securities commission's limited implied powers, the Court relied on a rule created by the California Supreme Court:

> "It is true that an administrative agency may not, under the guise of its rule-making power, abridge or enlarge its authority or exceed the powers given to it by the statute, the source of its power. * * * However, 'the authority of an administrative board or officer, * * * to adopt reasonable rules and regulations, *which are deemed necessary to the due and efficient exercise of the powers expressly granted* cannot be questioned. This authority is implied from the power granted.' " [*Id.*, quoting *California Drive-in*, 22 Cal 2d at 302-303 (emphasis added).]

Accordingly, there is authority that Michigan administrative agencies can infer a degree of rulemaking authority from an enabling statute. But an administrative agency may do so only when that implied authority is "necessary to the due and efficient exercise of the powers expressly granted" by the enabling statute. *Ranke*, 317 Mich at 309. This standard is a carefully crafted compromise that allows the Legislature to delegate some degree of authority to administrative agencies, but ensures that the an agency does not expand its powers beyond those that the Legislature intended.

Defendants argue that the rulemaking authority to promulgate the State Aid Rules may be inferred from two sections of the State Aid Act, MCL 397.567 and MCL 397.573.[10] These two sections do not give the DOE

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[10] MCL 397.567 states: "A cooperative library and public library shall conform to certification requirements for personnel as established by the [DOE] in order to qualify for state aid." MCL 397.573 provides that the DOE must consider the following "needs" when exercising its powers to meet its responsibilities under the State Aid Act:

> (a) Library facilities shall be provided to residents of the area covered by a cooperative library without needless duplication of facilities, resources, or expertise.
>
> (b) Establishment of a local public library may be approved for state aid purposes where local conditions require an additional local public library.

the express power to formulate rules for eligibility to receive state aid. MCL 397.567 provides for one eligibility requirement for libraries to receive state aid: "certification requirements for personnel." It does not provide the DOE with express authority to promulgate additional eligibility requirements.

Nor do MCL 397.567 and MCL 397.573 grant the DOE implied rulemaking authority to promulgate rules that establish eligibility requirements for state aid to libraries. Such rules are not "necessary to the due and efficient exercise of [the DOE's] powers expressly granted" by the State Aid Act. *Ranke*, 317 Mich at 309. The State Aid Act does not say or imply that additional eligibility requirements for libraries receiving state funds are necessary for its administration.

The State Aid Act is also dissimilar from the law at issue in *Ranke*, in which the Court held that an administrative agency had an implied rulemaking power. The *Ranke* statute necessarily required the Michigan Corporation and Securities Commission to define "other conduct" constituting "dishonest and unfair dealing." *Id*. at 308-309. The State Aid Act, however, leaves no opening for the DOE—nowhere does it stipulate that the DOE can determine "other" eligibility requirements for state aid. Instead, it lists only one eligibility requirement in MCL 397.567, which mandates that libraries seeking state aid must meet the DOE's certi-

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(c) Existing public libraries and new public libraries shall cooperate to provide adequate library services at a reasonable cost.

(d) Increased effort shall be made to provide residents the right to read, with added emphasis on areas which normally cannot provide those services.

(e) Local responsibility, initiative, and support for library service shall be recognized and respected when provision is made for adequate local and cooperative library service.

fication requirements for personnel. If the Legislature had intended the DOE to be able to write new eligibility requirements, it would have included some language to that effect in the State Aid Act. *Wolverine*, 233 Mich App at 247 (noting that the express mention of one thing in a statute implies the exclusion of other similar things). Accordingly, the DOE does not have express or implied rulemaking authority to promulgate the State Aid Rules at issue in this case.

B. STATE AID RULES CONFLICT WITH CONSTITUTIONAL INTENT

The substance and purpose of the State Aid Rules that DOE seeks to issue and enforce is an equally compelling reason to reject defendant's position. In effect, the DOE's rules force any library receiving state funds to provide equal privileges to each person it serves. The DOE claims the implied authority to do so comes from the State Aid Act, passed by the Legislature. But the Legislature enacted the State Aid Act pursuant to article 8, § 9 of our state Constitution, which gives the Legislature an obligation to promote the establishment of public libraries. *Goldstone*, 479 Mich at 563. Moreover, importantly and dispositively, the drafters of article 8, § 9 sought to ensure that local public libraries would not be required to make the same services available to individuals outside their jurisdiction as they provide to residents within their jurisdiction. Indeed, the drafters used article 8, § 9 to prevent the Legislature from exercising exactly the power DOE now seeks to gain through implication. *Id.* at 559–560. As such, the State Aid Rules conflict with the intent of the state Constitution and are an attempt by the DOE to exercise a power never granted to it by the Legislature.

For more than a century, the Michigan Constitution has sought to promote library construction throughout

the state. *Goldstone*, 479 Mich at 559-560. To this end, the 1908 Constitution required that every community maintain a library. Const 1908, art 11, § 14. This policy was unrealistic and unsuccessful. See *Goldstone*, 479 Mich at 566. In 1962, at the time delegates met to draft the current constitution, only 7 percent of cities and townships in Michigan maintained a public library. *Id*. More than one million Michigan residents had no access to a public library. *Id.* at 566 n 11.

Recognizing the failure of this "1908" approach, the Committee on Education at the 1961–1962 Constitutional Convention emphasized a program of local control over library services, with each local library making "reasonable rules for the use and control of its books." 1 Official Record, Constitutional Convention 1961, p 822. Further, the committee encouraged local libraries to expand their services through "cooperation, consolidation, branches and bookmobiles," presumably on an as-needed basis through deals with other municipalities. *Id.*

The committee's desire to promote local control of libraries was echoed by the convention delegates, who were determined to avoid a constitutional provision that mandated that each individual library provide equal privileges to each Michigan resident—the very policy that the DOE advocates here by implication. Delegate Karl Leibrand, himself a trustee of Bay City's public library, stressed the need for libraries to offer different services to different citizens. *Id.* at 834. It would be an "undue burden" to require a library to offer the same services to a "tourist or traveling salesman" as it would to a permanent resident of the town in which the library was located. *Id*. Delegate Vera Andrus noted that this concern reflected the will of the people: "One of the first problems that came up was, people said, '*We*

don't want to have to pay for our library and then have other people use it.' We don't mean that by this language [the proposed draft of article 8, § 9]." *Id.* at 835 (emphasis added).[11]

The final wording of article 8, § 9 reflects these concerns and enshrines local control of library resources and privileges in Michigan law. It states:

> The legislature shall provide by law for the establishment and support of public libraries which shall be available to all residents of the state under regulations adopted by the governing bodies thereof. All fines assessed and collected in the several counties, townships and cities for any breach of the penal laws shall be exclusively applied to the support of such public libraries, and county law libraries as provided by law. [Const 1963, art 8, § 9.]

Delegate Alvin Bentley explained that the clause "adopted by the governing bodies thereof" was purposefully added by the Committee on Style and Drafting to expressly allow local regulation of library resources:

> [T]he intent of the committee on style and drafting would be that local governing bodies of these various public libraries would be able to pass reasonable regulations regarding the accessibility and the availability of their individual libraries to residents of the state; particularly, I suppose, in cases where the applicant for a book or a periodical was not an immediate resident of the locality. [2 Official Record, Constitutional Convention 1961, p 2561.]

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[11] This concern—that nonresidents, who do not bear the financial burden of supporting libraries, will be allowed to use the library services of another community—is still prevalent throughout the state. See Steele, *Odds Stacked Against Libraries as Cities Feel Pinch*, Detroit News, March 26, 2011, p A1 (describing the resistance of Birmingham residents to allowing Troy residents to use Birmingham's library for free: " 'The residents of Birmingham have told us they don't want us giving away services,' said Baldwin library director Doug Koschik.").

Further, responding to Delegate Leibrand's concerns that libraries would be required to provide equal privileges to nonresidents at no cost, Delegate Andrus pointed out that the draft of article 8, § 9 used the word "available" instead of "free." 1 Official Record, Constitutional Convention 1961, p 835. Thus, the Constitution's word choice affords local libraries the freedom to enter into service contracts—which might provide different services to residents and nonresidents—at their choosing.

The Constitution and this constitutional history underscores two points regarding public libraries. First, the best way to encourage communities to build and maintain libraries is to place public libraries under local control. *Goldstone*, 479 Mich at 562. Second, local control of public libraries necessarily entails the possibility that, through service contracts or other mechanisms, libraries will offer different privileges to individuals depending on where they live and how much they pay for services. *Id.*

In *Goldstone*, our Supreme Court emphasized and endorsed both points. It rejected the claim of a nonresident plaintiff who, without paying for the service, sought equal privileges at another community's library. In other words, *Goldstone* held that a nonresident has no constitutional claim to gain library-subsidization rights from the taxpayers in another community. *Id*. at 569. And the Supreme Court reasoned that to hold otherwise creates no incentive for communities to build and maintain libraries. *Id*. at 564. Nor would communities have an incentive to "make improvements and new accessions" to existing libraries, as any additions would be "identically available to persons who had and who had not paid for them[.]" *Id.*

The message of *Goldstone* is clear: local control of libraries, and the different privileges it may entail, is

not only constitutionally permissible, but clearly reflects the intent of the delegates who drafted the current Constitution. The drafters believed it to be the best way to provide access to a library to the greatest number of Michigan citizens. And as *Goldstone* notes, this policy has largely achieved its aim: In 2007, less than 1/5 of 1 percent of the state population lacked library access—an enormous improvement from the 1 million Michigan residents who had no access to public libraries in 1963.[12] *Id.* at 565, 566 n 11.

Thus, the Legislature, which is presumed to know the meaning of our Constitution, explicitly afforded local public libraries a large degree of autonomy in their operations.[13] According to *Goldstone*, this independence—which gives libraries the option of providing different services to residents and nonresidents—was the policy preference of the drafters of our Constitution. See *id.* at 559–560. Therefore, any act by the Legislature requiring that libraries provide equal services to all individuals, regardless of where they live and their financial contribution, would be of dubious constitutionality. If the Legislature's authority to pass such a statute is highly questionable, then an administrative agency certainly cannot claim an implied ability to do so.

IV. CONCLUSION

The DOE does not have an implied power to adopt rules to govern its distribution of state aid to public

[12] Specifically, less than 1/5 of 1 percent of the state population lacked library access "either directly through their communities or through a cooperative agreement." *Goldstone*, 479 Mich at 565.

[13] See *People v Cash*, 419 Mich 230, 241; 351 NW2d 822 (1984) ("[A] general rule of statutory construction is that the Legislature is 'presumed to know of and legislate in harmony with existing laws.' "), quoting *People v Harrison*, 194 Mich 363, 369; 160 NW 623 (1916).

libraries. In Michigan, administrative agencies only possess the powers expressly granted to them by the Legislature. And an agency is allowed implied powers only when such authority is "necessary to the due and efficient exercise of the powers expressly granted" by the enabling statute. *Ranke*, 317 Mich at 309. The DOE's State Aid Rules are unnecessary to the "due and efficient exercise" of its statutorily granted powers. As such, the DOE lacks the authority to promulgate the challenged rules. Further, the content of these rules runs contrary to the intent of the drafters of our state Constitution as interpreted by our Supreme Court in *Goldstone*.

Accordingly, the trial court properly awarded plaintiff, the Herrick District Library, summary disposition, and we affirm.

METER, P.J., and WILDER, J., concurred with SAAD, J.

MONROE v STATE EMPLOYEES' RETIREMENT SYSTEM

Docket No. 297220. Submitted May 3, 2011, at Marquette. Decided June 28, 2011. Approved for publication August 18, 2011, at 9:00 a.m.

Sandra Monroe, a former nurse at the Alger Maximum Correctional Facility, applied for nonduty disability retirement benefits from the Office of Retirement Services (ORS), which administers four Michigan retirement systems including the State Employees' Retirement System—the retirement plan from which Monroe sought benefits. Monroe asserted, in relevant part, that she was disabled because of depression. The ORS referred Monroe to psychiatrist Lynn Miller for an independent psychiatric evaluation. Miller opined that Monroe was currently unable to work because of depression, but that her condition might be remedied by available treatment. An independent medical advisor to the ORS, Ashok Kaul, then assessed Monroe's mental condition by reviewing the medical records of Monroe's treating health-care providers, the report prepared by Miller, and reports prepared by two additional independent psychiatric evaluators. Kaul opined that although Monroe might have been currently disabled, with ongoing psychiatric care her condition could improve to the point that she could return to work. The ORS denied Monroe's application for nonduty disability retirement benefits. Monroe requested a contested case hearing. Following the hearing, the State Employees' Retirement System Board (SERSB) issued a decision and order denying Monroe's appeal. The SERSB concluded that because no medical advisor had certified that Monroe was totally and permanently disabled, the board did not have the discretion to find her so disabled and, thus, her application for nonduty disability retirement benefits had been properly denied. Monroe sought review of the SERSB's decision in the Alger Circuit Court. The court, William W. Carmody, J., affirmed the decision of the SERSB. Monroe appealed by leave granted.

The Court of Appeals *held*:

1. There are four situations that present a constitutionally intolerable risk of actual bias and warrant the disqualification of a decision-maker: (1) the decision-maker has a pecuniary interest in the outcome, (2) the decision-maker has been the target of

personal abuse or criticism from the party before him or her, (3) the decision-maker is enmeshed in other matters involving the petitioner, and (4) the decision-maker might have prejudged the case because of prior participation as an accuser, investigator, fact-finder, or initial decision-maker. In this case, the SERSB had included a member of the Attorney General's office, and that office had also served as the advocate opposing her application for benefits. However, the Assistant Attorney General who sat on the SERSB had no pecuniary interest in the proceeding, had not been the target of abuse or criticism by Monroe, was not enmeshed in other matters with Monroe, and was not involved previously as an accuser, investigator, fact-finder, or initial decision-maker. Rather, the members of the Attorney General's office involved in this case served different functions for different entities. Accordingly, Monroe was not deprived of due process.

2. The Attorney General holds unique status under Michigan law, and that status requires accommodation, but not exemption, from the rules of professional conduct. In this case, Monroe suggested that disqualification of the Assistant Attorney General serving on the SERSB was required by the Michigan Court Rules concerning professional discipline. But in the absence of evidence of prejudice to Monroe, the rules did not provide a basis for disqualification.

3. Generally, under MCL 38.24(1)(b), a member of the State Employees' Retirement System who becomes totally incapacitated for duty because of a personal injury or disease which is not the natural and proximate result of the member's performance of duty may be retired if a medical advisor conducts a medical examination of the member and certifies in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that the member should be retired. For the purpose of deciding eligibility for nonduty disability retirement, a medical examination conducted by one or more medical advisors means either a personal medical examination of the member or a review of the application and medical records of the member. In this case, Kaul's review of Monroe's medical records satisfied the statutory requirement that he conduct a medical examination of Monroe.

4. Although the SERSB has discretion in the decision whether to retire a state employee, it cannot exercise that discretion unless and until the medical advisor certifies that the employee is totally and permanently incapacitated from working. In this case, Monroe asserted that the denial of her benefits was not supported by adequate evidence, but the medical advisor did not certify that she

had suffered a permanent and total disability, and thus the board did not have any discretion to grant the benefits. Further, the conclusion that the disability was not permanent was supported by the medical evidence. The circuit court properly affirmed the SERSB.

5. The SERSB is not bound by a determination of disability issued by any other state or federal agency or private entity when the board is determining whether a member is entitled to a disability retirement. In this case, although Monroe had been granted social security benefits and state long-term disability benefits, the grant of those other benefits depended on different criteria and was irrelevant to her eligibility for nonduty disability retirement benefits.

Affirmed.

1. CONSTITUTIONAL LAW — DUE PROCESS — BIAS — DISQUALIFICATION — ATTORNEY GENERAL.

There are four situations that present a constitutionally intolerable risk of actual bias and warrant the disqualification of a decision-maker: (1) the decision-maker has a pecuniary interest in the outcome, (2) the decision-maker has been the target of personal abuse or criticism from the party before him or her, (3) the decision-maker is enmeshed in other matters involving the petitioner, and (4) the decision-maker might have prejudged the case because of prior participation as an accuser, investigator, fact-finder, or initial decision-maker; there is no inherent bias that results from one Assistant Attorney General representing the retirement system in a contested case hearing while another Assistant Attorney General serves on the State Employees' Retirement System Board.

2. ATTORNEY GENERAL — RULES OF PROFESSIONAL CONDUCT — ACCOMODATION.

The Attorney General holds unique status under Michigan law, and that status requires accommodation under, but not exemption from, the rules of professional conduct.

3. CIVIL SERVICE — STATE EMPLOYEES — RETIREMENT — NONDUTY DISABILITY RETIREMENT — MEDICAL EXAMINATIONS.

Generally, a member of the State Employees' Retirement System who becomes totally incapacitated for duty because of a personal injury or disease which is not the natural and proximate result of the member's performance of duty may be retired if a medical advisor conducts a medical examination of the member and certifies in writing that the member is mentally or physically

totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that the member should be retired; for the purpose of deciding eligibility for nonduty disability retirement, a medical examination conducted by one or more medical advisors means either a personal medical examination of the member or a review of the application and medical records of the member (MCL 38.24[1][b]).

4. CIVIL SERVICE — STATE EMPLOYEES — RETIREMENT — NONDUTY DISABILITY RETIREMENT — STATE EMPLOYEES' RETIREMENT SYSTEM BOARD — DISCRETION — CERTIFICATION OF TOTAL AND PERMANENT INCAPACITY.

Although the State Employees' Retirement System Board has discretion in the decision whether to retire a state employee, it cannot exercise that discretion unless and until the medical advisor certifies that the employee is totally and permanently incapacitated from working.

5. CIVIL SERVICE — STATE EMPLOYEES — RETIREMENT — NONDUTY DISABILITY RETIREMENT — STATE EMPLOYEES' RETIREMENT SYSTEM BOARD — EFFECT OF DETERMINATION OF DISABILITY BY ANY OTHER STATE OR FEDERAL AGENCY OR PRIVATE ENTITY.

The State Employees' Retirement System Board is not bound by a determination of disability issued by any other state or federal agency or private entity when the board is determining whether a member is entitled to a disability retirement.

Nino E. Green for Sandra Monroe.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Daphne M. Johnson*, Assistant Attorney General, for the State Employees' Retirement System.

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

PER CURIAM. Petitioner Sandra Monroe appeals by leave granted a circuit court order affirming the denial by the State Employees' Retirement System Board (SERSB) of Monroe's application for nonduty disability retirement benefits. We affirm.

In September 2007, the Alger Maximum Correctional

Facility suspended Monroe, who worked there as a registered nurse, and the prison terminated Monroe's employment in November 2007. Immediately after Monroe's suspension, she sought psychological help and began treatment for a major depressive disorder, post-traumatic stress disorder, as well as generalized anxiety disorder.[1] At some point, Monroe started receiving social security disability benefits. In connection with Monroe's receipt of Michigan long-term disability benefits, she underwent a January 2008 independent medical examination by psychiatrist Dr. Kenneth I. Robbins. Robbins opined that Monroe could not work because of "her Major Depressive Disorder," but he disbelieved that Monroe's depressive disorder qualified as a permanent disability. Robbins predicted that Monroe's "depression will go into remission within 2-3 months . . . ."

In April 2008, Monroe underwent another independent medical examination with psychiatrist Dr. David B. Van Holla. Van Holla confirmed that Monroe "continues to be disabled" because of "her major depressive disorder and resultant anxiety." Van Holla recommended "pharmacological management" and reevaluation in four to six months to ascertain if Monroe had stabilized.

Also in April 2008, Monroe applied for nonduty disability retirement benefits. The Office of Retirement Services referred Monroe for a July 2008 psychiatric evaluation by Dr. Lynn Miller. In Miller's view, Monroe currently remained unable to work, but

> the condition might be remedied by available treatment and I would recommend that she have an opportunity for a treatment assessment by a psychiatrist if possible to assist

[1] Although Monroe also experienced physical ailments, on appeal she focuses solely on her mental conditions in support of her disability claim. Therefore, we do likewise.

> in developing a treatment plan for possible improvement and/or recovery of her depressive condition. The time required to determine if recovery is possible could last from 6 to 12 months.

In October 2008, psychologist and independent medical advisor to the Office of Retirement Services, Dr. Ashok Kaul, assessed Monroe's mental condition through a review of the medical records of Monroe's treating health-care providers, including Monroe's psychologist, and the reports prepared by Robbins, Van Holla, and Miller. In pertinent part, Kaul summarized:

> She has had three independent psychiatric examinations in 2008 and, while all three independent examiners opined that she is currently disabled from returning to her RN position, all three also opined that she may improve significantly with proper psychiatric care. The evidence overall shows that her mental condition may currently be disabling but that with ongoing psychiatric care including medication management her condition could improve to the point to allow her to return to work. Thus, she is not permanently disabled.

The Office of Retirement Services denied Monroe's application for disability retirement benefits in October 2008, prompting Monroe to request a contested case hearing. Following the hearing, the SERSB issued a decision and order emphasizing that "no doctor has opined that [Monroe] is totally and permanently disabled." The SERSB further observed that "every doctor who has examined [Monroe] has concluded that her condition could improve with proper treatment."[2] The SERSB concluded, "Given that no medical advisor has certified that [Monroe] is totally and permanently dis-

[2] The SERSB additionally noted that an independent medical advisor had twice opined that Monroe did "not have a physical condition that would cause her to be totally and permanently disabled."

abled, the Board does not have the discretion to find her so disabled." Monroe then sought circuit court review of the SERSB's denial of disability retirement benefits, and that court affirmed the SERSB.

I

Monroe first avers that the disability eligibility proceedings deprived her of due process because a member of the Attorney General's office was "both the advocate opposing an application for duty disability retirement . . . and a member of the body [SERSB] that denie[d] the application . . . ." Monroe relies on *Crampton v Dep't of State*, 395 Mich 347, 349-350; 235 NW2d 352 (1975), in which the plaintiff's operator's license was revoked when he refused a Lansing police officer's request that he participate in a chemical test to measure blood-alcohol content. The plaintiff "exercised his right to a hearing before the License Appeal Board," a two-member board "composed of a police officer from the Lansing Police Department and a representative of the Secretary of State . . . ." *Id*.[3] The board denied the plaintiff's appeal. *Id*. at 350.

The Michigan Supreme Court summarized its holding as follows: the plaintiff "was denied due process of law. Appeal board panels which are membered by full-time law enforcement officials are not fair and impartial tribunals to adjudge a law enforcement dispute between a citizen and a police officer." *Id*. The Supreme Court commenced its analysis with the observation that "[a]

[3] The Attorney General held a third membership on the License Appeal Board, but did not participate in the review of the plaintiff's license revocation; the Attorney General's participation was not necessary given "that two members constitute a quorum." *Crampton*, 395 Mich at 350 n 3.

hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Id*. at 351. The Court referred to United States Supreme Court precedent as having "disqualified judges and decisionmakers without a showing of actual bias in situations where 'experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' " *Id*., quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). The Michigan Supreme Court identified four situations that presented a constitutionally intolerable risk of actual bias warranting disqualification:

> [W]here the judge or decisionmaker
>
> (1) has a pecuniary interest in the outcome;
>
> (2) has been the target of personal abuse or criticism from the party before him;
>
> (3) is enmeshed in [other] matters involving petitioner . . . ; or
>
> (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker. [*Crampton*, 395 Mich at 351 (quotation marks and citations omitted) (second alteration in original).]

Although none of the presumptive bias situations existed in *Crampton*, the Supreme Court deemed "it . . . impermissible for officials . . . entrusted with responsibility for arrest and prosecution of law violators to sit as adjudicators in a law enforcement dispute between a citizen and a police officer" because "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id*. at 356. The Court highlighted that the Lansing police officer who sat on the License Appeal Board would have to resolve factual issues involving the reasonableness of the arresting Lansing police officer's

actions, and that "[r]esolution of those factual issues will often turn on appraisal of the credibility of the opposing testimony of the officer and the citizen." *Id*. at 357. The Supreme Court concluded with the following analysis:

> Police officers are full-time law enforcement officials trained to ferret out crime and arrest citizens who have violated the law.
>
> Similarly, the Attorney General and prosecuting attorneys are responsible for prosecution of citizens charged with violation of the law. Prosecuting attorneys and their assistants have been designated to represent the Attorney General on License Appeal Boards although they or others in their office are prosecuting the person whose appeal they are hearing for a drunk driving offense arising out of the incident which prompted the revocation hearing. Crampton was prosecuted and, subsequent to this license revocation hearing, was convicted of a drunk driving offense.
>
> We do not suggest that police officers and prosecutors are not fair-minded. But they are deeply and personally involved in the fight against law violators. As law enforcement officials they are identified and aligned with the state as the adversary of the citizen who is charged with violation of the law. Their function and frame of reference may be expected to make them "partisan to maintain" their own authority and that of their fellow officers. The risk that they will be unable to step out of their roles as full-time law enforcement officials and into the role of unbiased decision-maker in a law enforcement dispute between a citizen and a police officer presents a probability of unfairness too high to be constitutionally tolerable. [*Id*. at 357-358 (citations omitted).]

In this case, no indication exists that the Assistant Attorney General who sat as an SERSB member possessed any pecuniary interest in the outcome of Monroe's disability application, faced personal abuse or criticism from Monroe, was enmeshed in any matter

involving Monroe, or had previously served as an accuser, investigator, fact-finder, or an initial decision-maker. See *id.* at 351. Our review of the record simply reveals no evidence of actual bias arising from the Assistant Attorney General's representation of the State Employees' Retirement System in opposition to Monroe's disability retirement application and another Assistant Attorney General's membership in the nine-person SERSB that ultimately denied Monroe's application. MCL 38.3. Nor can we identify a constitutionally intolerable probability of actual bias. Unlike the law enforcement officials who sat in judgment of the "law enforcement dispute between a citizen and a police officer" in *Crampton*, *id*. at 356, the present circumstances are missing such a clear alignment between the decision-maker, the SERSB, one of whose members is an Assistant Attorney General, and the advocate, an Assistant Attorney General, representing the State Employees' Retirement System; notably, the SERSB has a statutory duty to administer and manage the retirement system for the benefit of retirees from state employment. MCL 38.1 *et seq*. Given the absence of actual bias and any probability of bias, we find no due process violation.

And, to the extent that Monroe suggests that the Attorney General's dual roles in this case violated MCR 9.104(A),[4] both this Court and our Supreme Court have

[4] Monroe neglected to specify which subrule in MCR 9.104(A) she intended to reference. Potentially applicable portions of MCR 9.104(A) include the following:

> The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
>
> (1) conduct prejudicial to the proper administration of justice;

recognized the applicability of the rules of professional conduct to government attorneys, including the Attorney General, but have counseled for accommodation in the application of the rules to the Attorney General, in light of that individual's unique status:

> The Attorney General is one of only three constitutionally mandated single executives heading principal departments of state government. Const 1963, art 5, § 3, ¶ 1. An elective official . . . , the Attorney General and her designated assistants provide legal services to the state of Michigan and its hundreds of agencies, boards, commissions, officials, and employees . . . .
>
> * * *
>
> We . . . conclude . . . that the cited preamble and comments to the MRPC appropriately suggest the need for studied application and adaptation of the rules of professional conduct to government attorneys such as the Attorney General and her staff, in recognition of the uniqueness of her office and her responsibility as the constitutional legal officer of the state to represent the various and sometimes conflicting interests of numerous government agencies. In other words, the Attorney General's unique status *requires accommodation, not exemption, under the rules of professional conduct*. [*Attorney General v Pub Serv Comm*, 243 Mich App 487, 496, 506; 625 NW2d 16 (2000).]

The Michigan Supreme Court similarly summarized this proposition:

> The Court of Appeals erred in holding that the Attorney General's office is disqualified from acting as special pros-

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(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;

(3) conduct that is contrary to justice, ethics, honesty, or good morals . . . .

> ecutor. While recognizing that the Attorney General is subject to the rules of professional conduct, we hold that disqualification is not required in this case because accommodation of his unique constitutional and statutory status will not infringe on the defendant's right to a fair prosecution. The Attorney General's unique status "requires accommodation," and *such accommodation is particularly apt where no evidence has been presented of any prejudice that would be suffered by the defendant*. [*People v Waterstone*, 486 Mich 942-943; 783 NW2d 314 (2010) (emphasis added) (citations omitted), quoting *Attorney General*, 243 Mich App at 506.]

In the absence of evidence of prejudice to Monroe, we find no basis for disqualification in the Michigan Rules of Professional Conduct or in the Michigan Court Rules pertaining to professional discipline.

II

Monroe further challenges the SERSB's denial of her application for disability retirement benefits on the ground that MCL 38.24 obligated medical advisor Dr. Kaul to personally examine Monroe before making a recommendation concerning disability qualification, rather than merely reviewing Monroe's medical records. According to MCL 38.24(1):

> Except as may otherwise be provided in sections 33 and 34, a member who becomes totally incapacitated for duty because of a personal injury or disease that is not the natural and proximate result of the member's performance of duty may be retired if all of the following apply:
>
> * * *
>
> (b) A medical advisor *conducts* a medical examination of the member and certifies in writing that the member is mentally or physically totally incapacitated for further

> performance of duty, that the incapacitation is likely to be permanent, and that the member should be retired. [Emphasis added.]

In the previous version of MCL 38.24, the relevant statutory language read, "The medical advisor after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, and such incapacity is likely to be permanent and that such member should be retired." 1955 PA 237. Monroe theorizes that the Legislature's insertion of the word "conducts" signifies that the independent medical advisor must now perform an examination of the member in person.

In *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), our Supreme Court clarified that the interpretation of a statute by an agency charged with its enforcement is entitled to "respectful consideration," and that " 'cogent reasons' for overruling an agency's interpretation" must exist. "However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Id*. While no statutory definition of "conduct" appears in the State Employees' Retirement Act and Monroe offers no authority supporting her contention regarding the import of "conduct," the SERSB has adopted a rule elucidating the proper nature of a medical examination. Specifically, Mich Admin Code, R 38.35(1) explains, "For purposes of deciding eligibility for disability retirement under MCL 38.21 and 38.24 of the act, a medical examination *conducted by 1 or more medical advisors means either a personal medical examination of the member or a review of the application and medical records of the member*." (Emphasis added.) The SERSB's interpretation of MCL 38.24(1)(b), as re-

flected in Rule 38.35(1), does not conflict with the statutory language, and we cannot ascertain any cogent reasons for disregarding the SERSB's interpretation. *Rovas*, 482 Mich at 103.

Consequently, we conclude that Kaul's October 2008 report and recommendation, which he based on his review of three 2008 reports by independent psychiatrists, all of whom evaluated Monroe in person, satisfied the statutory requirement that he "conduct[] a medical examination of the member . . . ." MCL 38.24(1)(b); see also Rule 38.35(1).

III

Monroe lastly disputes that adequate evidence supported the SERSB's decision to deny her disability retirement benefits.

> A circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law. Const 1963, art 6, § 28; MCL 24.306. "Substantial" means evidence that a reasoning mind would accept as sufficient to support a conclusion. Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views. [*Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002) (citations omitted).]
>
> [W]hen reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurispru-

> dence. As defined in numerous other contexts, a finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. [*Boyd v Civil Serv Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996).]

Eligibility for a nonduty disability retirement depends on the applicant's satisfaction of certain prerequisites, including the requirement in MCL 38.24(1)(b) that "[a] medical advisor conducts a medical examination of the member and certifies in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that the member should be retired."

> The plain language of MCL 38.24 seemingly provides that respondent's discretion to retire petitioner does not arise unless and until the medical advisor, in this case Dr. Fenton or Dr. Obianwu, has certified that the applicant is totally and permanently incapacitated from working. Under this interpretation, because Dr. Fenton or Dr. Obianwu did not so certify, the respondent did not have the discretion to retire petitioner, and the circuit court's order compelling it to do so is contrary to the statute. The language of MCL 38.24 clearly provides that, although the Board has discretion in the decision whether to retire a state employee ("may be retired by the retirement board"), it cannot exercise that discretion unless and until the medical advisor certifies that the employee is incapacitated ("Provided, The medical advisor . . . shall certify that such member is . . . incapacitated . . . ."). [*VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 587; 701 NW2d 214 (2005).]

Monroe criticizes the circuit court's finding, premised on Dr. Kaul's report, that multiple doctors had anticipated that she could return to work when her mental conditions abated. Irrespective of whether Kaul accurately characterized the other doctors' re-

ports when he declared that "all three independent [psychiatric] examiners opined that . . . [Monroe] may improve significantly with proper psychiatric care," Kaul did not certify Monroe as totally and permanently disabled, and neither did any of the three independent psychiatrists who evaluated Monroe earlier in 2008. Absent a medical advisor's certification that Monroe suffers permanent and total disability, the SERSB did not possess discretion to retire Monroe. *Id.* at 587.

Furthermore, Kaul's conclusion that Monroe's mental condition could improve and, "[t]hus, she is not permanently disabled," found support in the medical evidence. In January 2008, Dr. Robbins described Monroe's mental condition as "not a permanent disability and it should be anticipated her psychiatric symptoms will go into remission [within two to three months] with proper treatment," allowing Monroe to go back to work. In April 2008, Dr. Van Holla urged for Monroe to begin "pharmacological management" of her mental condition, adding that a reevaluation "in four to six months may be of benefit to determine whether her condition has stabilized." A reasonable person could interpret Van Holla's statements as reflecting his belief that Monroe might improve. Miller expressed in the July 2008 psychiatric assessment that "the condition might be remedied by available treatment," although "[t]he time required to determine if recovery is possible could last from 6 to 12 months." None of the psychiatrists found a total and permanent disability and all believed in the potential for improvement.

In summary, the circuit court did not clearly err when it found the SERSB's denial of Monroe's application for disability retirement benefits consistent with the law and supported by competent, material, and substantial evi-

dence on the whole record. See *Dignan*, 253 Mich App at 576; *Boyd*, 220 Mich App at 234-235.

Monroe additionally takes issue with the failure of the SERSB or the circuit court to take into account as evidence of her disability the fact that she has begun receiving Michigan long-term disability benefits and federal social security disability benefits. The SERSB deemed these facts irrelevant, given that the other awards of benefits depended on different criteria. The SERSB cited Mich Admin Code, R 38.36, which directs, "The board is not bound by a determination of disability issued by any other state or federal agency or private entity when the board is determining whether a member is entitled to a disability retirement provided by MCL 38.21 or 38.24 of the act." Monroe fails to address the administrative rule or the SERSB's explanation that different disability criteria govern the award of disability benefits in different contexts. In light of Rule 38.36 and the lack of authority supporting Monroe's position, the SERSB properly disregarded the other disability determinations.

Affirmed.

RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ., concurred.

BAILEY v SCHAAF

Docket No. 295801. Submitted April 13, 2011, at Detroit. Decided August 18, 2011, at 9:05 a.m. Leave to appeal granted, 491 Mich 924.

Devon S. Bailey brought an action in Genesee Circuit Court against Steven Schaaf, T. J. Realty, Inc., doing business as Hi-Tech Protection, Evergreen Regency Townhomes, Ltd., Radney Management & Investments, and others for injuries suffered on August 4, 2006 while at a friend's apartment in a complex owned by Evergreen and managed by Radney. Hi-Tech security guards William Baker and Chris Campbell were on duty, patrolling the complex on the night Bailey was injured. A resident had informed Baker and Campbell that Schaaf was threatening people with a gun. Bailey alleged that Baker and Campbell ignored the warning and that Schaaf shot Bailey 10 to 15 minutes later. Bailey alleged that Evergreen and others were liable for the shooting under theories of negligence, premises liability, vicarious liability, and third-party beneficiary contract. The court, Joseph J. Farah, J., granted a countermotion brought by all defendants but Schaaf for partial summary disposition pursuant to MCR 2.116(C)(10) and (I)(2) concluding that Evergreen had no duty to provide security guards and that liability did not attach because the security guards' actions in handling the emergency were deficient. The court subsequently dismissed Bailey's negligence claims against all defendants except Schaaf. Finally, Bailey's contract claim was dismissed because the unsigned documents that formed the basis of Bailey's third-party beneficiary claim did not constitute a contract. Bailey appealed.

The Court of Appeals *held*:

1. In response to Bailey's request for admissions, Evergreen and Radney admitted that a draft contract with an effective date preceding the shooting was a copy of a security agreement. The court subsequently allowed them to amend their responses to deny that claim after they discovered additional contract documents. Within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a matter within the scope of MCR 2.302(B), including the genuineness of documents described in the request. MCR 2.312(A). A

matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of an admission for good cause. MCR 2.312(D)(1). The trial court's decision to allow Evergreen and Radney to amend their responses to Bailey's requests for admissions to include recently discovered security contracts was not an abuse of discretion because Bailey had ample opportunity to conduct discovery after the court's decision, the court reopened discovery several months later at Bailey's request to permit a deposition, and there was no evidence that Evergreen's and Rodney's initial failure to discover the documents was not inadvertent.

2. A contract is formed when there is an offer, an acceptance in conformance with the offer, and a meeting of the minds on all essential terms. An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his or her assent to that bargain is invited and will conclude it. An objective standard is used to determine whether there has been a meeting of the minds, and the express words of the parties and their visible acts must be examined, not their subjective states of mind. The trial court did not abuse its discretion when it dismissed Bailey's claim that he was a third-party beneficiary of a contract between Hi-Tech and Evergreen to provide security services because there was no contract in effect on the date Bailey was shot that imposed an obligation on Hi-Tech with respect to guests of Evergreen's tenants. Taken together, evidence consisting of a fax cover page that referred to a July 28, 2006, proposed contract as a "draft which included most of the discussed items" and pages marked "draft," along with other qualifying comments, did not constitute an offer: the documents did not manifest a willingness on Hi-Tech's part to enter into a bargain with Evergreen in such a way as to justify another person in understanding that assent to that bargain was invited and would conclude it.

3. Premises possessors owe certain duties to visitors on their land. Under certain circumstances, landlords have a duty to protect invitees from forseeable criminal acts of third parties in common areas. However, the government is in the business of public safety, and a premises possessor has no duty to make the premises safer than the community at large. A premises possessor may not be held liable for voluntarily undertaking additional, but failed, safety precautions. As in the context of merchants and their invitees, a landlord has a duty to take reasonable efforts to contact the police in response to a situation presently occurring on the premises that poses a foreseeable and imminent risk of harm to

identifiable invitees. If security personnel Campbell and Baker were agents of Evergreen and Radney, they had a duty to contact the police on behalf of them once the resident informed them of the foreseeable and imminent risk of harm posed by Schaaf to lawful invitees on Evergreen's premises. The trial court did not err by dismissing Bailey's claims related to a duty by Evergreen and Radney to make the premises safe from criminal activity, but erred by dismissing Bailey's premises liability claim against Evergreen and Radney for failure to respond properly to the threat.

4. Bailey's negligence claim against Hi-Tech was properly dismissed because Bailey failed to identify a duty that was separate and distinct from Hi-Tech's duties under its contract with Evergreen. Hi-Tech's duties were created by the terms of the contract, and Bailey could not rely on those duties as he was not a party to or an intended beneficiary of the contract.

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

1. PRETRIAL PROCEDURES — REQUEST FOR ADMISSIONS — WITHDRAWAL OF ADMISSIONS.

MCR 2.312(A) provides that within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a matter within the scope of MCR 2.302(B), including the genuineness of documents described in the request; a matter admitted under MCR 2.312 is conclusively established unless the court on motion permits withdrawal or amendment of an admission for good cause under MCR 2.312(D)(1); when determining whether to allow amendment, the court should consider (1) whether allowing the amendment will aid in the presentation of the action, (2) whether the other party would be prejudiced by the amendment, and (3) the reason for the failure, that is, whether it was inadvertent.

2. LANDLORD AND TENANT — PREMISES LIABILITY — CRIMINAL ACTIVITIES — FORESEEABLE AND IMMINENT RISK OF HARM — DUTY TO SUMMON POLICE.

A landlord may be liable for creating, maintaining, or failing to rectify a condition on the land that the landlord should foresee will enhance the likelihood that his or her invitees will be exposed to criminal assaults; however, the government is in the business of public safety, and a landlord has no duty to make the premises open to the public safer than the community at large; a landlord may not be held liable for voluntarily undertaking additional, but failed, safety precautions, but a landlord has a duty to take reasonable efforts to contact the police in response to a situation

presently occurring on the premises that poses a foreseeable and imminent risk of harm to identifiable invitees.

Donald M. Fulkerson and *Robinson & Associates, P.C.* (by *David A. Robinson* and *Racine Michelle Miller*), for Devon S. Bailey.

Pedersen, Keenan, King, Wachsberg & Andrzejak, P.C. (by *Thomas E. Keenan*), for Evergreen Regency Townhomes, Ltd, T. J. Realty, Inc. doing business as Hi-Tech Protection, Radney Management & Investments, Timothy Johnson, William B. Baker, and Christopher L. Campbell.

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM. In this suit seeking damages for injuries sustained in a shooting, plaintiff, Devon Scott Bailey, appeals as of right the trial court's final order entering a default judgment against defendant Steven Gerome Schaaf. We affirm in part and reverse in part the trial court's order and remand for further proceedings.

I. OVERVIEW

There are three separate issues on appeal. The first is whether the trial court abused its discretion when it allowed defendant Evergreen Regency Townhomes, Ltd., the owner of the premises in question, and defendant Radney Management & Investments, the manager of the premises, to amend their responses to Bailey's requests for admissions. We conclude that the trial court's decision was not an abuse of discretion.

The second issue is whether the trial court abused its discretion when it dismissed Bailey's claim that he was a third-party beneficiary of a contract between Ever-

green and defendant T.J. Realty, Inc., doing business as Hi-Tech Protection, Inc., the company that provided "courtesy patrolling services" to the premises. We conclude that the trial court did not abuse its discretion because the evidence does not establish a question of fact regarding whether there was an agreement in effect on August 4, 2006 (the date on which Bailey was shot on the Evergreen premises), that imposed any obligation on Hi-Tech with respect to guests of Evergreen's tenants.

The third issue concerns the extent to which a premises possessor has a duty to respond to criminal acts. Relying on *MacDonald v PKT, Inc*,[1] we conclude that a premises possessor has a duty to take reasonable measures in response to an ongoing situation that is occurring on the premises, which means expediting the involvement of, or reasonably attempting to notify, the police. Our basic premise is that public safety is the business of the government,[2] and we emphasize that under the circumstances at issue, the *only* duty the owners and managers of apartment complexes have is to summon the police when, either directly or through their agents, they observe criminal acts in progress that pose a risk of imminent harm to identifiable invitees, whether tenants or guests, who are lawfully on their premises.

II. BASIC FACTS

Evergreen owns the apartment complex where the shooting at issue occurred. In February 2003, Radney entered into a written agreement with Hi-Tech on behalf of Evergreen (the 2003 Contract). In the 2003

[1] *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001).

[2] See *Johnston v Harris*, 387 Mich 569, 576; 198 NW2d 409 (1972) (BRENNAN, J., dissenting).

Contract, Hi-Tech agreed to provide Evergreen with "courtesy patrolling services." The 2003 Contract provided that it would "run for an initial period of one year from the date of this contract." Defendant, Timothy Johnson, the owner of Hi-Tech, signed on his company's behalf, John Barineau III signed on behalf of Evergreen and Radney, and Barbara Warren signed as the district supervisor for Radney.

In 2006, Johnson began to negotiate a new contract for security services with Mark Barineau, who was the vice president of Evergreen's general partner, Barineau GP, Inc. On August 21, 2006, and August 22, 2006, respectively, Barineau and Johnson signed a new agreement for security services with an effective date of August 28, 2006 (the 2006 Contract).

On August 4, 2006, before the date the 2006 contract was signed, Bailey went to a gathering at a friend's apartment in a complex owned by Evergreen. Defendants William Baker and Christopher Campbell were the Hi-Tech security guards on duty that day. Evergreen resident Laura Green went to Baker and Campbell and informed them that there was a man on the premises with a gun. She told them that he was waving the gun and threatening to shoot the guests and asserted later that she pointed to the area of the gathering and identified the man with the gun. Despite Green's warning Baker and Campbell chose instead to drive an intoxicated resident back to his apartment. However, they stated that they looked for a person fitting the description given by Green. Approximately 10 or 15 minutes after they dropped off the intoxicated resident, Campbell and Baker heard two gunshots. They then drove to the gathering, where they observed a man, later identified as Bailey, lying face down with two gunshot wounds in his upper back. Bailey suffered

severe injuries, including a spinal cord injury, a pulmonary contusion, and paraplegia.

Bailey sued Schaaf (the shooter), Hi-Tech, Johnson, and two unknown security guards in November 2007. Bailey alleged that defendants were liable for the shooting under theories of negligence, premises liability, and vicarious liability. Bailey later amended his complaint to specifically identify Campbell and Baker as the guards and state negligence claims against Evergreen and Radney. Bailey also added a third-party beneficiary contract claim against Hi-Tech, Radney, and Evergreen.

In February 2009, defendants[3] moved for partial summary disposition under MCR 2.116(C)(8). They argued that, with respect to the negligence claims, Bailey had failed to state a claim upon which relief could be granted because defendants did not owe him the legal duties identified in the complaint. Defendants argued that Campbell, Baker, and Johnson owed no legal duty to aid or protect Bailey; Evergreen owed no duty to provide security guards and did not voluntarily assume any duties to Bailey by hiring security guards; and Hi-Tech and Radney had no legal relationship to Bailey on which to premise a duty and did not have a derivative duty through Evergreen because Evergreen had no duty to a guest on its premises.

In March 2009, Bailey moved for partial summary disposition under MCR 2.116(C)(10). He asked the trial court to determine, as a matter of law, that Evergreen, Radney, and Hi-Tech owed him a duty on August 4, 2006. Bailey acknowledged that, under the 2003 Contract, it was clear that Hi-Tech had no duty to a tenant's guests. However, he argued that in July 2006, "there

[3] The motion was filed by all defendants, other than Schaaf. Any reference to "defendants" throughout the remainder of the opinion refers to all defendants other than Schaaf.

was a clear shift in position as to a specific duty or responsibility owed to the guest of a tenant." Bailey presented evidence that on July 26, 2006, Barineau sent a final draft contract, to be effective on July 28, 2006, that indicated the parties' intent to implement an "enhanced property protection plan." Barineau also included a signed authorization for Hi-Tech to increase its patrol hours. Bailey claimed that by virtue of these modifications, which were later incorporated into the 2006 Contract, Evergreen, Radney, and Hi-Tech voluntarily assumed duties to guests. Bailey also responded to defendants' motion under MCR 2.116(C)(8) by arguing that a landowner has a duty of reasonable care to protect identifiable invitees from the foreseeable criminal acts of third parties; the duty is triggered by specific acts occurring on the premises that pose a risk of imminent foreseeable harm to an identifiable invitee.

Following arguments on the motions in March 2009, the trial court dismissed the individual defendants after Bailey essentially declined to argue that there was any basis for holding them individually liable. The trial court also concluded that a landlord is under no duty to provide security guards. It further reasoned that if a landlord provides security guards who handle an emergent situation deficiently, liability does not arise from their actions because the voluntary provision of security does not create a greater responsibility on the part of the landlord. Thus, the trial court granted defendants' motion under MCR 2.116(C)(8). Without hearing arguments on the issue, the trial court also concluded that there was no contract in existence at the time of the shooting that extended Hi-Tech's responsibility to guests because only an unsigned draft existed at the relevant time. For these reasons, the trial court granted

defendants' countermotion for summary disposition under MCR 2.116(C)(10) and (I)(2) and denied Bailey's motion.

In May 2009, the trial court granted summary disposition in favor of defendants and ordered the dismissal of Bailey's negligence claims—counts 1 to 8—under MCR 2.116(C)(8). The trial court also denied Bailey's motion for partial summary disposition and granted defendants' motion with respect to count 9, Bailey's final claim, which involved a claim for breach of contract. The trial court noted that the order dismissed the case with respect to all defendants except Schaaf, to whom the order did not apply.

Bailey moved for reconsideration, arguing that the trial court had erred because defendants owed him a duty as a matter of law. He also argued that summary disposition on his contract claim was improper because defendants' "counter-motion," included with their response to Bailey's, was really a new motion that was not properly filed as such. Bailey asked the trial court to order defendants to refile their motion. The trial court denied Bailey's motion for reconsideration, but vacated the portion of its May 2009 order that dismissed Bailey's contract claim and ordered defendants to file a motion for summary disposition of that claim. Over defendants' objection, the trial court also subsequently reopened discovery to permit Bailey to depose Barineau.

In November 2009, defendants moved for summary disposition of Bailey's contract claim under MCR 2.116(C)(10). They argued that Bailey was unable to demonstrate that he was an intended third-party beneficiary of any contract between Evergreen and Hi-Tech because the documentary evidence conclusively showed that the only contract mentioning "guests" was not entered into until August 28, 2006. Bailey argued that

the contractual relationship between Evergreen and Hi-Tech was not limited to the 2003 and 2006 Contracts "but [was defined by] the series of negotiations including increasingly detailed contracts, each of which were legally binding as the undertaking progressed."

The trial court affirmed its earlier ruling and concluded that the documents circulated in July 2006 were in contemplation of the contract that was eventually executed in August 2006. It rejected the argument that the unsigned documents constituted a contract. Accordingly, the trial court entered an order dismissing Bailey's contract claim. The trial court also entered a default judgment against Schaaf for $1.5 million. This order resolved all claims and closed the case. This appeal followed.

III. AMENDMENT OF ADMISSIONS

A. STANDARD OF REVIEW

We first address Bailey's argument that the trial court abused its discretion by permitting Evergreen and Radney to amend their responses to his requests for admission. This Court reviews for an abuse of discretion a trial court's decision on a party's motion to amend its admissions under MCR 2.312(D)(1).[4] A trial court abuses its discretion when it selects an outcome that falls outside the range of principled outcomes.[5]

B. ANALYSIS

In response to Bailey's requests for admission, Evergreen and Radney admitted that a copy of a "draft" contract showing an effective date of July 28, 2006, "is

[4] *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991).

[5] *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

a copy of the Contract Agreement Between [the parties].” They subsequently moved to amend their answers. They claimed that 45 days after their responses to Bailey’s requests for admissions, they discovered two additional documents: the 2003 and 2006 Contracts. The trial court granted the motion, finding that Evergreen and Radney became aware of the 2006 Contract through “legitimate discovery in a timely fashion” and that Bailey would not be prejudiced if the motion were granted. Evergreen and Radney subsequently filed amended responses in which they denied that any of the July 2006 documents were binding agreements.

“Within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a matter within the scope of MCR 2.302(B) stated in the request that relates to statements or opinions of fact or the application of law to fact, including the genuineness of documents described in the request.”[6] “A matter admitted under [MCR 2.312] is conclusively established unless the court on motion permits withdrawal or amendment of an admission.”[7] The court may allow a party to amend or withdraw an admission for good cause.[8]

In *Radtke v Miller, Canfield, Paddock & Stone*,[9] the Michigan Supreme Court addressed the distinction between “judicial” admissions and “evidentiary” admissions. In so doing, it explained that the “two vital purposes” of MCR 2.312 are “ ‘to facilitate proof with respect to issues that cannot be eliminated from the case,’ ” and “ ‘to narrow the issues by eliminating those

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[6] MCR 2.312(A).

[7] MCR 2.312(D)(1).

[8] *Id*.

[9] *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420-421; 551 NW2d 698 (1996).

that can be.' "[10] The Court further explained that the purpose of a request for admission is to " 'establish some of the material facts in a case without the necessity of formal proof at trial,' "[11] and, unlike the evidentiary admission, "the judicial admission, *unless allowed by the court to be withdrawn*, is conclusive in the case . . . ."[12]

In *Janczyk v Davis*,[13] this Court considered the standards by which a trial court should decide a party's motion to file *late* answers. It characterized the trial court's task as "balanc[ing] between the interests of justice and diligence in litigation."[14] Therefore, it stated, the trial judge is to

> balance three factors in determining whether or not to allow a party to file late answers. First, whether or not allowing the party to answer late "will aid in the presentation of the action." In other words, the trial judge should consider whether or not refusing the request will eliminate the trial on the merits. . . . Second, the trial court should consider whether or not the other party would be prejudiced if it allowed a late answer. Third, the trial court should consider the reason for the delay: whether or not the delay was inadvertent.[15]

In light of the purposes of MCR 2.312 that the Court articulated in *Radtke*[16] and the considerations it mentioned in *Janczyk*,[17] we conclude that the trial court's decision to allow Evergreen and Radney to amend their

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[10] *Id*. at 419-420 (citation omitted).

[11] *Id*. at 420 n 6 (citation omitted).

[12] *Id.* at 421 (emphasis added; citations omitted).

[13] *Janczyk v Davis*, 125 Mich App 683, 689-694; 337 NW2d 272 (1983).

[14] *Id*. at 691.

[15] *Id*. at 692-693 (citation omitted).

[16] *Radtke*, 453 Mich at 419-421.

[17] *Janczyk*, 125 Mich App at 692-693.

answers was not an abuse of discretion. Bailey had ample opportunity to conduct discovery after the trial court's decision. And the trial court also reopened discovery several months later—at Bailey's request and over defendants' objection—to permit Bailey to depose Barineau.

Nor is there any indication that defendants' initial failure to uncover the 2003 and 2006 Contracts was anything but inadvertent. The provision for trial court discretion to allow amendment or withdrawal shows that the rule's purpose of expediting and streamlining an action is not absolute. The situation here—in which two parties later learned that timely, initial responses had inadvertently failed to account for critical documents—is precisely the kind of possibility the reservation of trial court discretion in MCR 2.312(D)(1) addresses.

In summary, we conclude that the trial court did not abuse its discretion by permitting Evergreen and Radney to amend their responses to Bailey's requests for admissions.

IV. THIRD-PARTY BENEFICIARY

A. STANDARD OF REVIEW

We next address Bailey's argument that the trial court erred when it dismissed his claim that he was a third-party beneficiary of the contract between Evergreen and Hi-Tech. This Court reviews de novo a trial court's decision to grant summary disposition.[18] We also review de novo the existence and interpretation of a contract as a question of law.[19]

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[18] *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

[19] *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

B. ANALYSIS

In order for a contract to be formed, there must be an offer, an acceptance in conformance with the offer, and a meeting of the minds on all essential terms.[20] An offer is " ' "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." ' "[21] "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind."[22]

On July 27, 2006, Barineau faxed Johnson several documents with a cover sheet that stated: "See attached letter in follow-up to our meeting of 7.25.06 along with draft contract which includes most of the items we discussed and written authorization to add additional patrol hours for the next 30 days." The "attached letter" was from Barineau to Johnson and was dated July 26, 2006. Also included in the faxed documents was a "Contract Agreement" bearing an effective date of July 28, 2006, marked "DRAFT" on each page and with notes in the margins, and "Post Orders" that are also marked "DRAFT" and bear an effective date of July 28, 2006. Finally, the documents include an "Authorization to Increase Patrol Hours," signed by Barineau and dated July 27, 2006, authorizing Hi-Tech to add additional patrol hours as specified in the document. Johnson ultimately signed a "draft" contract agreement bearing an effective date of July 28, 2006. Notably, in the signed copies that are part of the record, the spaces for the various fees on the second page are either

[20] *Id.* at 452-453.

[21] *Id.* at 453, quoting *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997).

[22] *Kloian*, 273 Mich App at 454 (citation and quotation marks omitted).

blank or have been obscured. Johnson's signature on this document is not dated. Johnson also signed, but did not date, the "DRAFT" "Post Orders" "[e]ffective July 28, 2006."

We agree with Bailey that Barineau and Johnson did have a "meeting of the minds" concerning certain obligations that would begin immediately, such as additional patrol hours and the rate increase for that service. But the dispositive question is whether there is a genuine issue of material fact regarding the existence, on August 4, 2006, of a specific obligation on the part of Hi-Tech with respect to Evergreen guests. That is, the question generally is whether the agreement clearly identified guests on Evergreen's property as third-party beneficiaries of the agreement. The only language in the relevant documents that mentions a duty to "guests" appears in the August 28, 2006, contract, which, by its terms, did not become effective until August 28, 2006, and in the July 28, 2006, "DRAFT" patrol services agreements. Thus, the question becomes whether there was an offer, acceptance, and a meeting of the minds, so that the "Duties" provision of the July 28, 2006, drafts constituted a contract between Evergreen and Hi-Tech on August 4, 2006.

The fax cover page refers to the attached "*draft* contract which includes *most of the items we discussed*," suggesting that it was not complete or final. In addition, the "property protection plan," which Evergreen and Hi-Tech were to implement "[e]ffective immediately," called for Evergreen to "[e]xecute [a] new one-year term contract" with Hi-Tech, "to include new provisions such as . . . ." This language suggests that the new contract had to be executed. The final paragraph of the letter again refers to a "final draft contract" and says, "Let me know your thoughts." In addition, Barineau

informed Johnson that he had sent a copy of the contract to Evergreen's insurance agent, who "may come back with a thought or two that we may have to include." This suggests that Barineau did not consider the language of the "draft" agreement he was sending to Johnson to have been finalized. Indeed, Barineau wrote that he "would like to finalize the contract no later than the week of July 31st." And, as repeatedly noted, the "contract" Barineau sent was marked "DRAFT" on each page and was not signed by Barineau.

Taken together, these documents did not manifest a willingness on Barineau's part to enter into a bargain in such a way as to justify another person in understanding that his or her assent to that bargain was invited and would conclude it.[23] Thus, the documents did not constitute an offer and we agree with the trial court that there is no genuine issue of fact concerning the existence of an agreement that specifically incorporated a duty to guests on August 4, 2006.

We note that we did not rely on Johnson's affidavit, to which Bailey objects on the basis that it contradicted Johnson's earlier deposition testimony. "[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."[24] Even if we agreed that Johnson's affidavit contradicted his deposition testimony, it would not affect our analysis of whether Barineau made an offer that Johnson could accept with his signature given that we did not rely on the affidavit.

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[23] See *Kloian*, 273 Mich App at 453.

[24] *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006).

V. THE DUTY TO RESPOND TO CRIMINAL ACTS

A. STANDARD OF REVIEW

We next address Bailey's argument that the trial court erred when it granted defendants' motion for partial summary disposition under MCR 2.116(C)(8) as to all his negligence claims and erred when it denied his motion for partial summary disposition under MCR 2.116(C)(10). This Court reviews de novo a trial court's decision to grant summary disposition.[25] Whether the common law imposes a duty on a party is also a question of law that this Court reviews de novo.[26]

The trial court dismissed Bailey's negligence claims under MCR 2.116(C)(8) because it concluded that Evergreen, Radney, and Hi-Tech owed no duty to Bailey that was distinct from any contractual duty. (Bailey has not appealed the trial court's order to the extent that it dismissed the claims against Johnson, Baker, and Campbell.) A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint using the pleadings alone.[27]

B. OVERVIEW

At the outset, we note the extreme nature of the ongoing situation at Evergreen on August 4, 2006. This was not an animated discussion among friends. It was not a domestic quarrel. It was not an argument in which fighting words were exchanged. It was not a sod-throwing incident similar to the one the *MacDonald*

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[25] *Barnard Mfg*, 285 Mich App at 369.

[26] *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992).

[27] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001); MCR 2.116(G)(5).

Court considered. It was not an occasion on which one person threatened another with a set of barbeque tongs or even a baseball bat. It was not a fistfight or a brawl. It was the most deadly circumstance of all: a man brandishing a gun—apparently in full view of two security guards—who threatened to fire, and ultimately did fire, that gun with near fatal consequences.

That being said, it is generally accepted that premises possessors owe certain duties to visitors on their land.[28] More specifically, under certain circumstances, as noted in *Stanley v Town Square Coop*,[29] landlords have a duty to protect their invitees from the foreseeable criminal acts of third parties in the common areas of the landlord's premises. That is, a landlord must exercise reasonable care to protect invitees from known or discoverable unreasonably dangerous conditions on the land, including using "reasonable care to protect tenants and their guests from foreseeable criminal activities in common areas inside the structures they control."[30] Accordingly, a landlord may be liable for creating, maintaining, or failing to rectify a condition on the land that the landlord should foresee will enhance the likelihood that his or her invitees will be exposed to criminal assaults.[31] But this duty is not absolute; it does not generally apply to areas that, although on the landlord's premises, are open to the public:

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[28] *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).

[29] *Stanley v Town Square Coop*, 203 Mich App 143, 148-150; 512 NW2d 51 (1993).

[30] *Id.*; see *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 502 n 17; 418 NW2d 381 (1988) (noting that "[s]hould a dangerous condition exist in the common areas of a building which tenants must necessarily use, the tenants can voice their complaints to the landlord").

[31] *Stanley*, 203 Mich App at 149-150 ("[L]andlords have a duty to take reasonable precautions, such as installing locks on doors and providing adequate vestibule lighting, and may be liable in tort if they fail to do so.").

"a landlord does not owe a duty to invitees to make open parking lots safer than the adjacent public streets."[32] This is because "we do not require the possessor of land to anticipate and protect against the general hazard of crime in the community."[33] And in the merchant context, in *MacDonald v PKT, Inc*[34] the Michigan Supreme Court adopted the basic principle that public safety is the business of the government and that a merchant's *only* responsibility when directly confronted with criminal activities is to summon the police. Today, we extend that principle to situations involving apartment complexes.

C. THE EVOLUTION OF THE DUTY

1. "PUBLIC SAFETY IS THE BUSINESS OF THE GOVERNMENT"

That premises possessors have no duty to make their premises safer than the community at large is not a recent idea. Justices and judges have enunciated it for decades. In his 1972 dissenting opinion in *Johnston v Harris*,[35] for example, Justice BRENNAN articulated a theme that the Court would pick up in later decisions. He said:

> Public safety is the business of government.
>
> Today's decision concedes the failure of government to make the streets and homes of certain areas reasonably safe and, in effect, transfers the governmental function of public protection to the unfortunate owners of real property in such places.[36]

Similarly, Justice LEVIN in his 1975 dissent in *Samson v Saginaw Prof Bldg, Inc*[37] sounded his concern that

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[32] *Id.* at 151.

[33] *Id*.

[34] *MacDonald*, 464 Mich at 334-337.

[35] *Johnston*, 387 Mich 569.

[36] *Id.* at 576.

[37] *Samson v Saginaw Prof Bldg, Inc*, 393 Mich 393, 421; 224 NW2d 843 (1975) (LEVIN, J., dissenting).

imposing certain duties on landlords to protect their tenants would discourage landlords from renting because of an inability to predict potential criminal activity. He stated that

> "[e]veryone can foresee the commission of crime virtually anywhere and at any time. If foreseeability itself gave rise to a duty to provide 'police' protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arms of the owner. And since hijacking and attack upon occupants of motor vehicles are also foreseeable, it would be the duty of every motorist to provide armed protection for his passengers and the property of others. Of course, none of this is at all palatable.
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> "The question is not simply whether a criminal event is foreseeable, but whether a *duty* exists to take measures to guard against it. Whether a *duty* exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution."[38]

2. *WILLIAMS*: NO DUTY TO PROVIDE SECURITY PERSONNEL

Subsequent decisions have picked up on these themes, thus narrowing the window of premises possessors' liability for the criminal acts of others. In *Williams v Cunningham Drug Stores, Inc*, the Michigan Supreme Court faced a question of first impression regarding whether a store-owner must provide armed, visible security guards to protect customers from the criminal acts of third parties.[39] Pointing out that a premises possessor's duty is not absolute, such that it does not make a possessor of land an insurer of the safety of invitees, the Court declined to

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[38] *Id.* at 420, quoting *Goldberg v Housing Auth of Newark*, 38 NJ 578, 583; 186 A2d 291 (1962).

[39] *Williams*, 429 Mich at 497.

extend a merchant's duty to exercise reasonable care to the extent requested by the plaintiff-invitees.[40] The Court stated:

> The duty advanced by plaintiffs is essentially a duty to provide police protection. That duty, however, is vested in the government by constitution and statute. . . . [N]either the Legislature nor the constitution has established a policy requiring that the responsibility to provide police protection be extended to commercial businesses.
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> * * *
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> [I]mposing the duty advanced by plaintiffs is against the public interest. The inability of government and law enforcement officials to prevent criminal attacks does not justify transferring the responsibility to a business owner . . . . To shift the duty of police protection from the government to the private sector would amount to advocating that members of the public resort to self-help. Such a proposition contravenes public policy.[41]

Thus, the Court made clear that despite the duty that merchants owe to protect their invitees, this duty is not so broad as to require merchants to step into the role of serving as a law enforcement equivalent.

3. *SCOTT*: NO DUTY TO PREVENT CRIME

In a later case, the Supreme Court held that even when a merchant *chooses* to provide security to its patrons there is no increased liability for failing to actually prevent crime. In *Scott v Harper Recreation, Inc*,[42] the plaintiff, who was shot while walking to his car in a fenced, lighted parking lot owned by Harper

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[40] *Id.* at 500-501.

[41] *Id.* at 501-504.

[42] *Scott v Harper Recreation, Inc*, 444 Mich 441, 442; 506 NW2d 857 (1993).

Recreation, Inc., sued on the basis of a representation that Harper provided "Free Ample Lighted Security Parking." On the night of the shooting security guards were also present.[43] The plaintiff alleged that Harper had failed to fulfill its voluntarily assumed duty of protection.[44] The Court observed that the plaintiff was essentially seeking to avoid the rule in *Williams*.[45] In rejecting the plaintiff's argument and reversing this Court's decision to the contrary, the Court stated:

> Common sense is required in approaching a case like this. A promise to take specific steps to reduce danger is a promise to do just that—not a promise to eliminate the danger. Manufacturers of safety equipment, for instance, normally promise, expressly or by implication, that the danger of injury will be *reduced*—rarely, if ever, do they promise that all danger of injury will be eliminated. Likewise, neither this defendant's advertising nor the measures it put in place constituted a guarantee of the plaintiff's personal safety.
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> * * *
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> We reject the notion that a merchant who makes property visibly safer has thereby "increased the risk of harm" by causing patrons to be less anxious. In 1988, we held in *Williams* that a merchant ordinarily has no obligation to provide security guards or to protect customers against crimes committed by third persons. Today, we decline to adopt a theory of law under which a merchant would be effectively obliged *not* to take such measures.[46]

The *Scott* Court stated its agreement with *Tame v A L*

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[43] *Id.* at 443.

[44] *Id.* at 444.

[45] *Id.* at 448.

[46] *Id.* at 450-451. The Court also noted that "providing a measure of security does not oblige a merchant to continue the practice." *Id.* at 451 n 14, citing *Lee v Borman's, Inc*, 188 Mich App 665; 470 NW2d 653 (1991); *Theis v Abduloor*, 174 Mich App 247; 435 NW2d 440 (1988).

Damman Co,[47] in which this Court

> "decline[d] to adopt a policy that imposes liability on a merchant who, in a good faith effort to deter crime, fails to prevent all criminal activity on its premises." It said that "[s]uch a policy would penalize merchants who provide some measure of protection, as opposed to merchants who take no such measures."[48]

The *Scott* Court concluded that "the rule of *Williams* remains in force, even where a merchant voluntarily takes safety precautions."[49] "Suit may not be main-

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[47] *Tame v A L Damman Co*, 177 Mich App 453; 442 NW2d 679 (1989).

[48] *Scott*, 444 Mich at 451-452, quoting *Tame*, 177 Mich App at 457.

[49] *Scott*, 444 Mich at 452. We note that in so ruling, the Supreme Court rejected the continued validity of this Court's decisions in *Scott v Harper Recreation, Inc*, 192 Mich App 137, 142; 480 NW2d 270 (1991), rev'd 444 Mich 441 (1993), and *Rhodes v United Jewish Charities of Detroit*, 184 Mich App 740, 743; 459 NW2d 44 (1990).

In *Scott*, 192 Mich App at 142, this Court stated that because the defendant-merchant provided secure parking "and allegedly advertised this fact in order to attract patrons, it voluntarily assumed the duty to provide security." However, as noted, the Supreme Court in *Scott*, 444 Mich at 452, reversed this Court's decision. And in *Rhodes*, 184 Mich App at 743, this Court stated that when the defendant-merchant "voluntarily assumed the duty of providing police protection in the form of guards . . . , it became incumbent upon them to provide that protection in a non-negligent manner." But in *Scott*, 444 Mich at 452, the Supreme Court rejected that holding, expressly stating that "[t]o the extent that *Rhodes* implies that an agreement to provide security is an actionable warranty that the guarded area will be safe from all criminal activity, it is inconsistent with Michigan law."

We also note that the Supreme Court in *Scott*, 444 Mich at 452 n 15, declined to discuss *Holland v Liedel*, 197 Mich App 60, 64-65; 494 NW2d 772 (1992), in which this Court stated that "although defendant, generally, may have had no duty to provide parking lot security guards for the tenants of the apartment complex, if [defendant] voluntarily assumed the duty to provide security, a cause of action could exist if [defendant] was negligent in the discharge of this voluntarily assumed duty" because *Holland* dealt with the area of landlord-tenant law. Indeed, similarly, in *Holland* this Court declined to decide whether *Williams* applied in a landlord-tenant case. *Id.* at 63.

tained on the theory that the safety measures are less effective than they could or should have been."[50]

4. *MASON*: ADDING A FORESEEABILITY REQUIREMENT

The Supreme Court revisited the issue of whether merchants have a common-law duty to protect their patrons from the criminal acts of third parties in *Mason v Royal Dequindre, Inc*.[51] The Court noted that in a previous decision, *Manuel v Weitzman*,[52] it had recognized that merchants may have a common-law duty to protect their patrons from the criminal acts of other patrons.[53] It then concluded that *Williams* and *Scott* did not overrule the law established in *Manuel*.[54] It reasoned that "*Williams* and *Scott* involved random un-

[50] *Scott*, 444 Mich at 452; see also *Krass v Tri-County Security, Inc*, 233 Mich App 661, 684; 593 NW2d 578 (1999) ("As did the Court in *Scott*, we hold that a merchant, and the security company it hires, who voluntarily take safety precautions related to the general threat of crime cannot be sued on the theory that the safety precautions were less effective than they could or should have been."); *Abner v Oakland Mall, Ltd*, 209 Mich App 490, 493; 531 NW2d 726 (1995) (holding that "[t]he Supreme Court's decision in *Scott* clearly precludes recovery" when "[t]he essence of plaintiff's claims is that the safety measures voluntarily undertaken by defendants were less effective than they could or should have been").

[51] *Mason v Royal Dequindre, Inc*, 455 Mich 391, 393; 566 NW2d 199 (1997).

[52] *Manuel v Weitzman*, 386 Mich 157, 163-166; 191 NW2d 474 (1971). In *Manuel*, the Court stated:

> "As invitor the defendant owed the duty to its customers and patrons, including the plaintiff, of maintaining its premises in a reasonably safe condition and of exercising due care to prevent and to obviate the existence of a situation, *known to it or that should have been known*, that might result in injury." [*Id.* at 163, quoting *Torma v Montgomery Ward & Co*, 336 Mich 468, 476; 58 NW2d 149 (1953) (emphasis added).]

[53] *Mason*, 455 Mich at 399-400.

[54] *Id.* at 401.

foreseeable assaults on an invitee by third parties. The plaintiffs were not readily identifiable as foreseeably endangered. The merchants had had no previous contact with the assailants and could not have determined that the plaintiffs were in danger."[55]

With this distinction in mind, the Court held that merchants can be liable for failing to take reasonable measures to protect their invitees from foreseeable harm caused by the criminal acts of third parties.[56] "[I]n order for a special-relationship duty to be imposed on a defendant, the invitee must be 'readily identifiable as [being] foreseeably endangered.' 'Readily' is defined as 'promptly; quickly; easily.' "[57]

More specifically, the Court in *Mason* concluded that a bar owner had no duty to take reasonable measures to protect one of its patrons from an unforeseeable attack by another patron.[58] And in *Goodman v Fortner*, the companion case decided with *Mason*, the Court found that a bar owner did have a duty to take reasonable measures to protect one of the bar's patrons from an attack by another patron when the bar's bouncers were on notice that Goodman was in danger. Goodman had requested that the bouncers call the police, and the harm was foreseeable, particularly since two previous shootings had occurred in the bar's parking lot not long before the shooting of the patron.[59] The Court specifically noted that the bouncers failed to call the police when requested by the patron.[60] Thus, the *Mason* Court further stated that, while under *Williams* and *Scott*, a merchant

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[55] *Id.* at 401-402.

[56] *Id.* at 393, 403-404.

[57] *Id.* at 398 (citations omitted).

[58] *Id.* at 403-404.

[59] *Id.* at 404-405.

[60] *Id.* at 405.

does not have a duty to protect its patrons from or prevent *unforeseeable* criminal acts, a merchant does have "a duty to take reasonable measures to protect" its patrons when the harm is foreseeable.[61]

5. *MACDONALD*: CLARIFYING AND NARROWING THE DUTY TO RESPOND AND FORESEEABILITY REQUIREMENTS

The Supreme Court took yet another hard look at the liability of merchants for the criminal acts of third parties in *MacDonald*.[62] The combined cases involved sod-throwing incidents in 1994 and 1995 at Pine Knob Music Theater in which the plaintiffs suffered injuries.[63] The Court first acknowledged that in *Mason* it had held that a merchant has a "duty to respond reasonably to situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees."[64] However, the Court narrowed the scope of *Mason*, concluding that a merchant's duty to respond reasonably is limited to reasonably expediting the involvement of the police when a situation presently occurring on the premises poses a risk of imminent and foreseeable harm to identifiable invitees.[65] And in so holding, the Court further reaffirmed that, consistent with *Williams* and *Scott*, "merchants are not required to provide security personnel or otherwise resort to self-help in order to deter or quell such occurrences."[66]

On the issue of foreseeability, the Court disavowed its reasoning in the *Goodman* companion case to *Mason*: "To the extent that . . . we relied upon evidence of

[61] *Id.* at 403-405.

[62] *MacDonald*, 464 Mich 322.

[63] *Id.* at 325.

[64] *Id.* at 325-326.

[65] *Id.* at 326, 335, 338.

[66] *Id.* at 326.

previous shootings at the bar in assessing whether a reasonable jury could find that the *Goodman* plaintiff's injury was foreseeable, we now disavow that analysis as being flatly inconsistent with *Williams* and *Scott*."[67] The Court explained, "Subjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten" because "criminal activity is irrational and unpredictable, [and] it is in this sense invariably foreseeable everywhere."[68] "It is only a present situation on the premises, not any past incidents, that creates a duty to respond."[69] "[T]here is no duty to otherwise anticipate and prevent the criminal acts of third parties."[70]

The Court then made its basic holding explicit. It stated that the duty to respond requires *only* that a merchant make reasonable efforts to contact the police.[71] Citing *Williams*, but echoing Justice BRENNAN, the Court stated that the duty to provide police protection is vested in the government and then articulated the public policy reasons for its decision:

> To require a merchant to do more than take reasonable efforts to expedite the involvement of the police, would essentially result in the duty to provide police protection, a concept that was rejected in *Williams*. Merchants do not have effective control over situations involving spontaneous and sudden incidents of criminal activity. On the contrary, control is precisely what has been lost in such a situation. Thus, to impose an obligation on the merchant to do more than take reasonable efforts to contact the police is at odds with the public policy principles of *Williams*.[72]

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[67] *Id.* at 334-335.

[68] *Id.* at 335.

[69] *Id.*

[70] *Id.* at 326.

[71] *Id.* at 336.

[72] *Id.* at 337.

Thus, at least in the merchant context, the Court has adopted the basic principle that Justice BRENNAN articulated in his dissent in *Johnston*: public safety is the business of the government.[73] And picking up in part the principle that Justice LEVIN articulated in his dissent in *Samson*,[74] it is only the present situation on the premises, not any past incidents, that creates a duty to respond by calling the police. Consequently, under the holding of *MacDonald*, as a matter of law, the *only* obligation that a merchant has when confronted with criminal acts of third parties presently occurring on that merchant's premises is to make reasonable efforts to contact the police.[75]

D. RECONCILING THE DUTIES OF MERCHANTS AND LANDLORDS

In reconciling the preceding decisions, we must address a critical question: Does the *Williams*/*Scott*/*Mason*/*MacDonald* line of cases—which deal, respectively, with the owners of a drug store, a nightclub, two bars, and a large entertainment venue—even apply to an apartment complex?

To our knowledge, this is an issue of first impression.[76] Notably, in *Scott* the Supreme Court referred to

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[73] *Johnston*, 387 Mich at 576.

[74] *Samson*, 393 Mich at 421.

[75] See also *Jackson v White Castle Sys, Inc*, 205 Mich App 137, 142; 517 NW2d 286 (1994) (rejecting the plaintiffs' claim that the defendant failed to protect its patrons from criminal conduct simply because incidents had occurred near the premises in the past, but stating that the plaintiff stated a claim upon which relief could be granted by alleging, in part, that the defendant failed to notify the police when it knew or should have known that its patrons were in peril); *Mills v White Castle Sys, Inc*, 167 Mich App 202; 421 NW2d 631 (1988) (reversing the grant of summary disposition in the defendant's favor when the defendant-merchant was informed of ongoing criminal activity and was asked, but refused, to summon the police).

[76] Our research reveals only one prior case on point. In a 2005 unpublished decision, a panel of this Court assumed, but failed to address

Holland v Liedel (a case involving a tenant who was assaulted in the parking lot of her apartment building), but specifically limited the principles it enunciated in *Scott*, stating, "We reserve our opinion regarding the application, in the case of landlord-tenant law, of the principles discussed in the present case."[77]

Because this issue involves the propriety of the trial court's decision to dismiss Bailey's claims under MCR 2.116(C)(8), we limit our analysis to a discussion of the basic facts that Bailey set out in his pleadings. We express no opinion about whether Evergreen or Radney might be able to show—through evidentiary submissions—that one or the other was not the premises possessor for purposes of premises liability.

In his second amended complaint, Bailey alleged that Green informed Baker and Campbell that Schaaf had a gun and was threatening to shoot people. Green even pointed at Schaaf, who was visible to Baker and Campbell along with the people in Schaaf's vicinity, which included Bailey. Bailey further alleged that Baker and Campbell did nothing in response. Finally, Bailey alleged that Baker and Campbell were, at all relevant times, acting within the scope of their employment or agency with Evergreen and Radney. On the basis of

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specifically, that *MacDonald* applies in the landlord/tenant context. In *Loper v Doe*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2005 (Docket No. 252675), pp 3-4, a panel of this Court, simply stated:

> "The duty [to protect] exists only when the landlord created a dangerous condition that enhances the likelihood of exposure to criminal assaults." [*Stanley*, 203 Mich App] at 150. While this duty includes taking reasonable measures in response to an ongoing situation that is taking place on the premises, it does not include an obligation to otherwise anticipate the criminal acts of third parties. *MacDonald*, [464 Mich] at 338.

[77] *Scott*, 444 Mich at 452 n 15.

these alleged facts, Bailey claimed that Evergreen and Radney breached their duty of care to him as the guest of an Evergreen tenant. Bailey's claim implicated a landlord's general duty to take reasonable steps to protect his or her invitees from criminal acts within its common areas. But it also arguably implicated a merchant's duty to involve the police when the criminal acts of a third party endanger a readily identifiable invitee. We disagree that the former applies, but adopt the latter as applying under the circumstances.

Bailey alleged that Schaaf was "on the premises in a common outdoor area" threatening to shoot someone. Thus, this case clearly does not involve a condition *on the land* that placed Bailey at a heightened risk of harm at the hands of third parties. As such, to the extent that Bailey alleged that Evergreen and Radney had a general duty to protect him from the criminal acts of third-parties simply because this outdoor common area was on the premises *as a condition on the land*, he necessarily failed to state a claim. A premises possessor has no such duty.[78] Further, although Evergreen voluntarily provided security guards, Evergreen cannot be liable for voluntarily undertaking additional safety precautions that ultimately fail to prevent criminal activity on its premises.[79]

Turning to a merchant's duty to involve the police, we believe that the limited duty that *MacDonald* imposes on merchants must necessarily apply to landlords in light of a landlord's closer relationship to its tenants and their guests. As *Williams* noted, "[A] landlord has more control in his relationship with his tenants than does a merchant in his relationship with his invitees."[80]

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[78] *Stanley*, 203 Mich App at 150-151.

[79] See *Scott*, 444 Mich at 452.

[80] *Williams*, 429 Mich at 502 n 17. The Court in *Williams* further explained:

If a merchant—with lesser ability or responsibility to control or protect its invitees than a landlord—is nevertheless required to take reasonable efforts to contact the police in response to a situation presently occurring on the premises that poses an imminent risk of harm to identifiable invitees, then surely it is logical to hold a landlord, who is in a relationship of higher control, to the same standard.

Thus, extending the *MacDonald* principles, Evergreen and Radney as premises proprietors, clearly had a duty to "respond[] reasonably to situations occurring on the premises," which included a duty to call the police when required.[81] Although Baker and Campbell were not employees of Evergreen or Radney, Bailey did allege that Baker and Campbell were agents of Evergreen or Radney for purposes of responding to safety issues. If Baker and Campbell were serving as agents of Evergreen and Radney,[82] once Green identified a criminal threat to an identifiable class of invitees, Baker and Campbell had a duty to involve the police on behalf of

> Should a dangerous condition exist in the common areas of a building which tenants must necessarily use, the tenants can voice their complaints to the landlord. Thus, in *Samson v Saginaw Professional Building, Inc*, 393 Mich 393, 408-411; 224 NW2d 843 (1975), we upheld a landlord's duty to investigate and take available preventive measures when informed by his tenants that a possible dangerous condition exists in the common areas of the building, noting that the landlord's duty may be slight. The relationship between a merchant and invitee, however, is distinguishable because the merchant does not have the same degree of control. When the dangerous condition to be guarded against is crime in the surrounding neighborhood, as it is in the present case, the merchant may be the target as often as his invitees. Therefore, there is little the merchant can do to remedy the situation, short of closing his business. [*Id.*]

[81] *MacDonald*, 464 Mich at 335-336.

[82] We note that Green testified at her deposition that management had instructed the residents to call security to report any crimes.

Evergreen and Radney. Reading Bailey's allegations as a whole and taking them as true,[83] we conclude that Bailey stated a claim against Evergreen and Radney premised on the failure of their agents to respond appropriately to criminal activities on their principal's property.

In sum, we conclude that the trial court did not err to the extent that it dismissed Bailey's claims premised on a duty of Evergreen or Radney to provide security or otherwise make the premises safe from criminal activity. But applying *MacDonald*, we conclude that the trial court erred when it determined that Bailey had failed to state a claim against Evergreen and Radney when they did not respond properly—through their agents—to the imminent threat that Schaaf posed to lawful invitees. Evergreen or Radney had the duty to call the police once they had knowledge of an ongoing emergency that posed a foreseeable risk of imminent harm to an identifiable invitee or class of invitees.[84]

E. HI-TECH'S DUTY

The court, however, did not err when it dismissed Bailey's negligence claims against Hi-Tech because Bailey had failed to identify a duty that was separate and distinct from Hi-Tech's duties under its contract with Evergreen.[85] Hi-Tech had no common-law duty to prevent Schaaf from hurting Bailey or otherwise to take any steps to aid Bailey. Rather, Hi-Tech's duties were created by the terms of the contract. A plaintiff cannot

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[83] See *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[84] *MacDonald*, 464 Mich at 337-339.

[85] See *Fultz v Union-Commerce Assoc*, 470 Mich 460, 461-462; 683 NW2d 587 (2004). Bailey also argues that *Fultz* was wrongly decided. However, this Court is bound by *Fultz* and lacks the authority to overrule it. *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006).

rely on a duty imposed solely under a contract to which he is not a party or an intended beneficiary in order to establish a claim for negligence. Therefore, the trial court properly dismissed Bailey's negligence claims against Hi-Tech.

F. CONCLUSION

In summary, we conclude that the trial court erred when it concluded that Bailey had failed to state a claim against Evergreen and Radney and dismissed that claim. A premises possessor has a duty to take reasonable measures in response to an ongoing situation that is occurring on the premises, which means calling the police when circumstances require. But because public safety is the business of the government, calling the police is the landlord's *only* duty under such circumstances. The trial court did not err when it dismissed Bailey's remaining claims.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Having considered the issues and results on appeal, we order that none of the parties may tax costs.[86]

BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ., concurred.

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[86] See MCR 7.219(A).

STATE OF MICHIGAN v McQUEEN

Docket No. 301951. Submitted June 7, 2011, at Lansing. Decided August 23, 2011, at 9:00 a.m. Leave to appeal granted, 491 Mich 890.

On behalf of the state of Michigan, the Isabella County Prosecuting Attorney filed a complaint for a temporary restraining order, a show cause order, a preliminary injunction, and a permanent injunction, seeking to enjoin the operation of the Compassionate Apothecary, LLC (CA), a medical-marijuana dispensary that was owned and operated by Brandon McQueen and Matthew Taylor. McQueen was a registered qualifying patient and a registered primary caregiver for three qualifying patients under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. Taylor was the registered primary caregiver for two qualifying patients. They operated CA as a membership organization. To be a member of CA, an individual had to be either a registered qualifying patient or a registered primary caregiver. Caregivers could only be members of CA if a qualifying patient to whom he or she was connected through the Department of Community Health's registration process was also a member. Patients and caregivers who were members of CA could rent lockers from CA. A patient who rented a locker from CA had grown more marijuana than the patient needed to treat his or her debilitating medical condition and wanted to make the excess available to other patients. Caregivers would rent lockers when the caregiver's patients did not need all of the marijuana that the caregiver had grown. Patients and caregivers desiring to purchase marijuana from CA could view the available marijuana strains in CA's display room. After the patient or caregiver had made their selection, a CA employee would retrieve the marijuana from the appropriate locker, weigh and package the marijuana, and record the purchase. The price of the marijuana would be set by the member who rented the locker, but CA kept a service fee for each transaction. The prosecuting attorney alleged that McQueen and Taylor's operation of CA did not comply with the MMMA, was contrary to the Public Health Code (PHC), MCL 333.1101 *et seq*., and, thus, was a public nuisance. The court, Paul H. Chamberlin, C.J., denied the prosecuting attorney's requests for a temporary restraining order and a show cause order. After a hearing, the court further denied the

prosecuting attorney's request for a preliminary injunction and closed the case, concluding that the operation of CA was in compliance with the MMMA because the patient-to-patient transfers of marijuana that CA facilitated fell within the act's definition of the "medical use" of marijuana. The prosecuting attorney appealed.

The Court of Appeals *held*:

1. The trial court clearly erred when it concluded that McQueen and Taylor did not possess the marijuana stored at CA because they did not have an ownership interest in it. A person can possess a controlled substance without owning it. McQueen and Taylor were in possession of the marijuana that was stored in the lockers because they exercised dominion and control over that marijuana when they showed it to prospective purchasers, retrieved and packaged it for purchasers, and provided it to the purchasers in exchange for monetary payment.

2. The MMMA operates under the framework established by the PHC that it is illegal to possess, use, or deliver marijuana, but sets forth limited circumstances in which persons involved with the medical use of marijuana may avoid criminal liability. Under MCL 333.26424(d), if a qualifying patient or primary caregiver is in possession of a registry identification card and an amount of marijuana that does not exceed that allowed by the MMMA, the act presumes that the qualifying patient or the primary caregiver is engaged in the medical use of marijuana in accordance with the act. However, the presumption may be rebutted by evidence that the conduct of the patient or caregiver was not in accordance with the act. The definition of the "medical use" of marijuana under the MMMA includes the "delivery" and "transfer" of marijuana, but does not include the "sale" of marijuana. A "sale" is the transfer of property or title for a price. In this case, the presumption of medical use was rebutted because McQueen and Taylor, through their operation of CA, engaged in patient-to-patient sales of marijuana. CA's members delivered or transferred marijuana to other members for a price, and CA also charged a minimum twenty percent share of the price for facilitating the transfer. McQueen and Taylor engaged in the sale of marijuana when they made possible and actively engaged in the sale of marijuana between CA members.

3. Under MCL 333.26424(i), the MMMA affords immunity to those who are in the presence or vicinity of the medical use of marijuana and to those who are assisting a registered qualifying patient with using or administering marijuana. The "use or administration" of marijuana is more limited in meaning than is

"medical use." A person assists a registered qualifying patient with using or administering marijuana when the person assists the patient in preparing the marijuana to be consumed in any of the various ways in which marijuana is commonly consumed or by physically aiding the patient in consuming the marijuana. In this case, McQueen and Taylor's sale of marijuana was not encompassed within the use or administration of marijuana under the MMMA.

4. Actions in violation of law constitute a public nuisance, and the public is presumed harmed by the violation of a statute enacted to preserve public health, safety, and welfare. The PHC is designed to protect the health, safety, and welfare of the people, and the public is thus presumed to have been harmed by its violation. In this case, McQueen and Taylor violated the PHC, and their conduct was presumed to be a public nuisance. Under the circumstances, the trial court improperly denied injunctive relief.

Reversed and remanded for entry of judgment in favor of plaintiff.

1. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — MEDICAL-USE PRESUMPTION — SALE OF MARIJUANA.

Under the Michigan Medical Marihuana Act, if a qualifying patient or primary caregiver is in possession of a registry identification card and an amount of marijuana that does not exceed that allowed by the act, the qualifying patient or the primary caregiver is presumed to be engaged in the medical use of marijuana in accordance with the act; the presumption may be rebutted by evidence that the conduct of the patient or caregiver was not in accordance with the act; the definition of the "medical use" of marijuana under the act includes the "delivery" and "transfer" of marijuana, but does not include the "sale" of marijuana; a "sale" is the transfer of property or title for a price; one who engages in patient-to-patient sales of marijuana is not acting in accordance with the act and is not entitled to the presumption of medical use (MCL 333.26424[d]).

2. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — IMMUNITY FROM PROSECUTION — ASSISTING A REGISTERED QUALIFYING PATIENT WITH THE MEDICAL USE OF MARIJUANA.

The Michigan Medical Marihuana Act affords immunity to those who are in the presence or vicinity of the medical use of marijuana and to those who are assisting a registered qualifying patient with using or administering marijuana; the "use or administration" of marijuana is more limited in meaning than is "medical use;" a person assists a registered qualifying patient with using or admin-

istering marijuana when the person assists the patient in preparing the marijuana to be consumed in any of the various ways in which marijuana is commonly consumed or by physically aiding the patient in consuming the marijuana (MCL 333.26424[i]).

3. NUISANCE — VIOLATIONS OF THE PUBLIC HEALTH CODE — PRESUMPTION OF HARM.

Actions in violation of law constitute a public nuisance, and the public is presumed harmed by the violation of a statute enacted to preserve public health, safety, and welfare; the Public Health Code is designed to protect the health, safety, and welfare of the people, and the public is presumed to be harmed by its violation. (MCL 333.1101 *et seq*.)

Larry J. Burdick, Prosecuting Attorney, for plaintiff.

Hall, Lewis, & Bolles, P.C. (by *John W. Lewis*), for defendants.

Amici Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Heather S. Meingast* and *Allison M. Dietz*, Assistant Attorneys General, for the Attorney General.

Newburg Law, PLLC (by *Matthew R. Newburg*), for the Michigan Association of Compassion Centers.

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

HOEKSTRA, J. This case requires us to decide whether the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., permits the selling of marijuana.[1] Defendants Brandon McQueen and Matthew Taylor own and operate Compassionate Apothecary, LLC (CA), a medical-marijuana dispensary. It is a place where CA members, who are either registered qualifying patients

[1] Although the Legislature spells the word "marihuana" we use the more common "marijuana."

or their primary caregivers, purchase marijuana that other CA members have stored in lockers rented from CA. Through their operation of CA, defendants provide the mechanism for the sale of marijuana and retain at least 20 percent of the sale price. Plaintiff, through the Isabella County Prosecuting Attorney, filed a complaint against defendants for injunctive relief. It claimed that defendants' operation of CA was not in accordance with the provisions of the MMMA and, therefore, was a public nuisance because it violated the Public Health Code (PHC), MCL 333.1101 *et seq*. After a two-day hearing, the trial court held that defendants operated CA in accordance with the provisions of the MMMA. Consequently, it denied plaintiff's request for injunctive relief. We hold that defendants' operation of CA is an enjoinable public nuisance. The operation of CA violates the PHC, which prohibits the possession and delivery of marijuana. Defendants' violation of the PHC is not excused by the MMMA because defendants do not operate CA in accordance with the provisions of the MMMA. Specifically, the "medical use" of marijuana, as defined by the MMMA, MCL 333.26423(e), does not include patient-to-patient sales of marijuana, and no other provision of the MMMA can be read to permit such sales. Therefore, defendants have no authority to actively engage in and carry out the selling of marijuana between CA members. Accordingly, we reverse the trial court's order denying plaintiff's request for a preliminary injunction and remand for entry of judgment in favor of plaintiff.

I. FACTS AND PROCEDURAL HISTORY

The facts regarding defendants' operation of CA are generally undisputed. They were established at a two-day hearing at which both McQueen and Taylor testified.

McQueen is a "qualifying patient," MCL 333.26423(h), who has been issued a "registry identification card," MCL 333.26423(i), by the Michigan Department of Community Health (MDCH). He is also the registered "primary caregiver," MCL 333.26423(g), for three qualifying patients.[2] Taylor is not a qualifying patient, but he is the registered primary caregiver for two qualifying patients. Together, McQueen and Taylor operate CA, which can be described as a medical-marijuana dispensary.[3] The goal of CA is to provide an uninterrupted supply of marijuana to registered qualifying patients. According to defendants, it does this by facilitating patient-to-patient transfers of marijuana between its members.

There are approximately 345 members of CA. To be a member of CA, an individual must either be a qualifying patient or a primary caregiver and must possess a registry identification card from the MDCH. In addition, a caregiver can only be a member if a qualifying patient to whom he or she is connected through the MDCH registration process is a member. A CA membership costs $5 a month. CA retains the right to revoke a membership if the member uses marijuana for a purpose other than the treatment of a medical condition.

CA has 27 lockers that it rents to its members. The cost to rent one locker is $50 a month.[4] Either patients or caregivers may rent lockers, but the majority of CA members that rent lockers are patients. A patient who

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[2] McQueen was the primary caregiver for a fourth patient but that patient "lapsed." The record does not indicate when the patient lapsed.

[3] During the course of the proceedings below, defendants learned that the word "apothecary" can legally only be used in the name of pharmacies. Thus, they changed the name of their operation to "C.A., LLC."

[4] Additional lockers may be rented at a lower monthly price.

rents a locker has grown more marijuana than the patient needs to treat his or her debilitating medical condition and the patient wants to make the "excess" marijuana available to other patients. Similarly, a caregiver rents a locker when the caregiver's patient does not need all the marijuana that was grown by the caregiver.[5] When a caregiver rents a locker, the caregiver's patient must provide an attestation giving the caregiver permission to store the marijuana in the locker and allowing CA to distribute the marijuana to other members. CA limits the amount of marijuana that a patient or caregiver can place in a locker. A patient may store 2.5 ounces of marijuana, while a caregiver may store 2.5 ounces of marijuana for each of his or her patients. According to McQueen and Taylor, the marijuana placed in the rented lockers belongs to a patient—either the patient who rented the locker or the patient of the caregiver who rented the locker. CA does not purchase marijuana from its members or from third parties.

When a patient comes to CA to purchase marijuana, one of CA's four employees verifies that the patient has been issued a registry identification card by the MDCH and is a CA member. A caregiver may also purchase marijuana from CA for his or her patients. The patient or caregiver is escorted into the display room by a CA employee, where the member is permitted to view, smell, and touch samples of the different strains of marijuana that are currently stored in the lockers.[6] The

[5] McQueen testified that he assumes the marijuana placed in a locker by a member was grown by that patient or caregiver. However, he admitted that he could not be sure that the member did not obtain the marijuana from some other place or source.

[6] "Strains" of marijuana refer to different genetic varieties of marijuana. Taylor explained that each strain of marijuana requires different growing conditions and, therefore, it is "very ineffective" for a person to

member, however, may not smoke the marijuana at CA; CA is a no-grow and no-smoke facility. The number of marijuana strains available to CA members fluctuates. The number of available strains has been as high as 26 and as low as 5 or 6. After the patient or caregiver selects a strain of marijuana to purchase, a CA employee retrieves the marijuana from the locker, weighs and packages the marijuana, and records the purchase. CA limits the amount of marijuana that a member may purchase to 2.5 ounces in a 14-day period. The price of the marijuana is set by the member who rented the locker, but CA keeps, at a minimum, a 20 percent "service fee" for each transaction.

Defendants opened CA in May 2010. In the first 2 1/2 months of its operation, it sold approximately 19 pounds of marijuana. Its "farmers" made more than $76,000.[7] Before expenses were paid, CA earned approximately $21,000.

In July 2010, plaintiff, through the Isabella County Prosecuting Attorney, filed a complaint for a temporary restraining order, preliminary injunction, and permanent injunction against defendants. Plaintiff alleged that defendants' operation of CA did not comply with the provisions of the MMMA because the MMMA does not allow patient-to-patient transfers or sales of marijuana, nor does it allow marijuana taken from one caregiver to be dispensed to patients who are not the registered qualifying patients of the caregiver. Plaintiff claimed that defendants' operation of CA was a public

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grow more than one or two strains of marijuana. By making different strains available to its members, CA allows patients to use a "trial and error" method to determine which strain works best for him or her.

[7] McQueen used the term "farmers" while speaking before the Mount Pleasant City Commission, and he did not explain the term. It appears that the term "farmers" refers to the members who rent lockers and allow CA to distribute their marijuana to other members.

nuisance because it was contrary to the provisions of the MMMA and, therefore, in violation of the PHC.

The trial court denied plaintiff's request for a temporary restraining order. Then, after a two-day hearing, it denied the request for a preliminary injunction. According to the trial court, defendants' operation of CA was in compliance with the MMMA because the patient-to-patient transfers of marijuana that CA facilitates fall within the scope of the medical use of marijuana. The trial court stated that its order resolved the last pending claim and closed the case.[8]

II. ANALYSIS

On appeal, plaintiff argues that the trial court erred by denying it injunctive relief. According to plaintiff, the provisions of the MMMA do not authorize patient-to-patient sales of marijuana. Therefore, plaintiff claims that defendants' operation of CA, which carries out patient-to-patient sales of marijuana, is not in accordance with the provisions of the MMMA. Plaintiff asserts that, without the protection of the MMMA, defendants' operation of CA is an enjoinable nuisance because it violates the PHC.

A. STANDARDS OF REVIEW

We review a trial court's denial of injunctive relief for an abuse of discretion. *Mich Coalition of State Employee Unions v Civil Serv Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). An abuse of discretion occurs when

[8] At the conclusion of the two-day hearing, defendants urged the trial court that if it viewed its order on plaintiff's request for a preliminary injunction to be a final order, such that it only intended to issue one opinion regarding whether any injunctive relief was available to plaintiff, to indicate in its order that it was a final order so that the losing party could immediately exercise its appellate rights.

the trial court's decision falls outside the range of principled outcomes. *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008). We review a trial court's factual findings for clear error. *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). We review de novo the trial court's interpretation of the MMMA. *People v Redden*, 290 Mich App 65, 76; 799 NW2d 184 (2010).

> "The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). We presume that the meaning as plainly expressed in the statute is what was intended. *Id.* [*Redden*, 290 Mich App at 76.]

B. PRELIMINARY ISSUES

In its opinion, the trial court made two findings of fact that were critical to its determination that defendants operated CA in accordance with the MMMA. First, it found that even though defendants, in their operation of CA, owned the lockers that CA rents to its members, it was the members who rent the lockers, and not defendants, who possess the marijuana stored in the lockers. Second, it found that defendants did not own, purchase, or sell the marijuana stored in the lockers but merely facilitated its transfer from "patient to patient." Reviewing these two findings under the proper definitions for "possessing" and "selling," we are left with a definite and firm conviction that the trial court made mistakes.

1. POSSESSION

The term "possession," when used in regard to controlled substances, "signifies dominion or right of control over the drug with knowledge of its presence and character." *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000) (quotation marks and citation omitted). Possession may be actual or constructive, and may be joint or exclusive. *People v McKinney*, 258 Mich App 157, 166; 670 NW2d 254 (2003). "The essential issue is whether the defendant exercised dominion or control over the substance." *Id.* A person can possess a controlled substance and not be the owner of the substance. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992).

In this case, defendants exercise dominion and control over the marijuana that is stored in the lockers that CA rents to its members. A member, either a patient or a caregiver, rents a locker when the member has excess marijuana that he or she wants to make available for purchase by other CA members. The member gives consent to CA to convey the marijuana to other members. Defendants, while they may not actually own the marijuana that is stored in the lockers, have access to and control over the marijuana. When a member comes to CA to purchase marijuana, the member, under the supervision of a CA employee, inspects samples of the available strains of marijuana, and after the member selects a strain of marijuana to purchase, the CA employee retrieves the marijuana from the respective locker, weighs and packages the marijuana, and provides it to the member in exchange for monetary payment. Under these circumstances, defendants, in their operation of CA, exercise dominion and control over the marijuana. They possess the marijuana that is stored in the lockers. The trial court's finding to the

contrary, that defendants did not possess the marijuana because they did not have an ownership interest in it, was clearly erroneous.

2. SELLING

Likewise, defendants are engaged in the selling of the marijuana that CA members store in the rented lockers. See part II(C)(3)(b), later in this opinion, in which we define a "sale" as the transfer of property or title for a price. Admittedly, defendants do not sell marijuana that they themselves own, but they intend for, make possible, and actively engage in the sale of marijuana between CA members. Defendants rent lockers to members who want to sell their excess marijuana. They, or another CA employee, supervise members' inspections of the samples of the marijuana strains stored in the lockers, and after a member selects a strain of marijuana to purchase, they weigh and package the marijuana. They also collect the purchase price. After a 20 percent service fee is deducted for CA, the remainder of the purchase money is given to the CA member who supplied the marijuana. Without defendants' involvement, there would be no sales. Under these circumstances, defendants are not just facilitating the transfers of marijuana between CA members, they are full participants in the selling of marijuana.

C. THE SELLING OF MARIJUANA

The heart of this case is whether patient-to-patient sales of marijuana are in accordance with the provisions of the MMMA. To answer this question, we must examine not only the provisions of the MMMA but also article 7 of the PHC, MCL 333.7101 *et seq*., which governs the manufacturing, distributing, prescribing, and dispensing of controlled substances.

1. THE PUBLIC HEALTH CODE

The PHC is designed to protect the health, safety, and welfare of the people of the state of Michigan. MCL 333.1111(2); *People v Derror*, 475 Mich 316, 329; 715 NW2d 822 (2006), overruled on other grounds *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010). In furtherance of that mandate, article 7 of the PHC regulates "controlled substances." "Controlled substances" are those drugs, substances or immediate precursors included in schedules 1 to 5 of part 72 of the PHC. MCL 333.7104(2).

Controlled substances are assigned to one of five schedules according to their potential for abuse, the level of dependency to which abuse may lead, and medically accepted uses. The controlled substances listed in schedule 1 have been found by the Michigan Board of Pharmacy to have a "high potential for abuse" and have "no accepted medical use in treatment in the United States or lack[] accepted safety for use in treatment under medical supervision." MCL 333.7211. Schedule 2 controlled substances have "currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions." MCL 333.7213(b). They have a high potential for abuse, and abuse of them may lead to severe psychic or physical dependence. MCL 333.7213(a) and (c). The controlled substances listed in schedules 3, 4, and 5 have currently accepted medical use in treatment in the United States and have less potential for abuse and dependence. MCL 333.7215; MCL 333.7217; MCL 333.7219.

The PHC regulates who may manufacture, distribute, prescribe, or dispense controlled substances. See, e.g., MCL 333.7303(1) (requiring that anyone who engages in these activities shall obtain a license issued by

the Michigan Board of Pharmacy); MCL 333.7331(1) (stating that only a "practitioner" who holds a license to prescribe or dispense controlled substances may purchase from a licensed manufacturer or distributor a schedule 1 or 2 controlled substance). Specifically, we note that a "practitioner"[9] may dispense a schedule 2 controlled substance upon the receipt of a prescription of a practitioner on a prescription form. MCL 333.7333(2). A practitioner may dispense schedule 3, 4, or 5 controlled substances upon the receipt of a written or oral prescription of a practitioner. MCL 333.7333(4). However, MCL 333.7333 contains no provision for the dispensing of schedule 1 controlled substances.

The PHC prohibits a person from knowingly or intentionally possessing or using a controlled substance unless the substance "was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article." MCL 333.7403(1); MCL 333.7404(1). In addition, the PHC prohibits a person, unless authorized by article 7, from manufacturing, creating, delivering, or possessing a controlled substance, or possessing the substance with the intent to do any of those acts. MCL 333.7401(1). The PHC imposes criminal sanctions for

[9] A "practitioner" is defined as:

> (a) A prescriber or pharmacist, a scientific investigator as defined by rule of the administrator, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state . . . .
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> (b) A pharmacy, hospital, or other institution or place of professional practice licensed, registered, or otherwise permitted to distribute, prescribe, dispense, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state. [MCL 333.7109(3).]

the unauthorized possession, use, manufacture, creation, and delivery of controlled substances. The severity of the sanctions generally depends on which schedule applies to the controlled substance and the amount (in grams) of the controlled substance. See MCL 333.7401(2); MCL 333.7403(2); MCL 333.7404(2).

The PHC classifies marijuana as a schedule 1 controlled substance. MCL 333.7212(1)(c). This means that the Michigan Board of Pharmacy has found that marijuana "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." MCL 333.7211. Except as authorized by article 7 of the PHC, which allows, under certain circumstances, a practitioner to conduct research with schedule 1 controlled substances, MCL 333.7306(3), the possession and use of marijuana are misdemeanor offenses, MCL 333.7403(2)(d); MCL 333.7404(2)(d), and the manufacture, creation, and delivery of marijuana are felony offenses, MCL 333.7401(2)(d).

2. THE MICHIGAN MEDICAL MARIHUANA ACT

The MMMA stands in sharp contrast to the PHC. Unlike the PHC's classification of marijuana as a schedule 1 controlled substance, the MMMA, which was enacted as the result of an initiative adopted by voters in the November 2008 election, *Redden*, 290 Mich App at 76, declares that as discovered by modern medical research there are beneficial uses for marijuana in treating or alleviating the symptoms associated with a variety of debilitating medical conditions. MCL 333.26422(a). Nonetheless, the MMMA operates under the framework, established by the PHC, that it is illegal to possess, use, or deliver marijuana. The MMMA did not legalize the possession, use, or delivery of mari-

juana. *People v King*, 291 Mich App 503, 508-509; 804 NW2d 911 (2011); see also *Redden*, 290 Mich App at 92 (O'CONNELL, P.J., concurring) ("The MMMA does not repeal any drug laws contained in the Public Health Code, and all persons under this state's jurisdiction remain subject to them."). Rather, the MMMA sets forth very limited circumstances in which persons involved with the use of marijuana, and who are thereby violating the PHC, may avoid criminal liability. *King*, 291 Mich App at 509; see also *People v Anderson*, 293 Mich App 33, 48-57; 809 NW2d 176 (2011) (M. J. KELLY, J., concurring).

To provide a limited exemption from the PHC's regulations and criminal sanctions for the possession, use, and delivery of marijuana, the MMMA provides that "[t]he medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of th[e] act." MCL 333.26427(a). It further provides that "[a]ll 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." MCL 333.26427(e). The MMMA broadly defines the "medical use" of marijuana as "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." MCL 333.26423(e).[10]

[10] The MMMA does not allow for the medical use of marijuana in all circumstances. See MCL 333.26427(b). A person may not possess marijuana or engage in the medical use of marijuana in a school bus, on the grounds of a preschool or a primary or secondary school, or in a correctional facility, MCL 333.26427(b)(2); a person may not smoke

The MMMA provides a registration system for "qualifying patients" and "primary caregivers." The MDCH shall issue a "registry identification card" to a "qualifying patient," defined as "a person who has been diagnosed by a physician as having a debilitating medical condition," MCL 333.26423(h), and who submits the necessary application and information, MCL 333.26426(a) and (c). If the qualifying patient has a "primary caregiver," defined as "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana," MCL 333.26423(g), the qualifying patient shall inform the MDCH of the primary caregiver and state whether the qualifying patient or the primary caregiver will possess marijuana plants for the qualifying patient's medical use, MCL 333.26426(a)(5) and (6). If the MDCH approves the qualifying patient's application and the qualifying patient has identified a primary caregiver, the MDCH shall also issue a registry identification card to the primary caregiver. MCL 333.26426(d). The registry identification cards must have a clear designation whether the qualifying patient or the primary caregiver is allowed to possess marijuana plants. MCL 333.26426(e)(6). "[E]ach qualifying patient can have no more than 1 primary caregiver, and a primary caregiver may assist no more than 5 qualifying patients with their medical use of marihuana." MCL 333.26426(d).

The issues raised in this appeal directly involve several provisions of § 4 of the MMMA. Section 4 grants immunity to qualifying patients and primary caregivers

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marijuana on any form of public transportation or in a public place, MCL 333.26427(b)(3); a person may not operate a motor vehicle, aircraft, or motor boat while under the influence of marijuana, MCL 333.26427(b)(4); and a person may not use marijuana if the person does not have a serious or debilitating medical condition, MCL 333.26427(b)(5).

who have been issued a registry identification card. MCL 333.26424(a) and (b); see also *Anderson*, 293 Mich App at 45-47 (M. J. KELLY, J., concurring). MCL 333.26424(a) provides:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount.

Similar immunity is granted to a primary caregiver. MCL 333.26424(b) provides:

> A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the [MDCH's] registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of that does not exceed:
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> (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the [MDCH's] registration process; and
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> (2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state

> law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and
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> (3) any incidental amount of seeds, stalks, and unusable roots.

"A registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana." MCL 333.26424(e). This compensation does not constitute the sale of marijuana. *Id.*

If a qualifying patient or primary caregiver is in possession of a registry identification card and an amount of marijuana that does not exceed that allowed by the MMMA, § 4(d) provides a presumption that the qualifying patient or the primary caregiver "is engaged in the medical use of marihuana in accordance with th[e] act . . . ." MCL 333.26424(d)(1) and (2). "The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with th[e] act." MCL 333.26424(d)(2).

In addition, § 4(i) provides immunity for a "person" who assists a registered qualifying patient with "using or administering marihuana." MCL 333.26424(i) provides:

> A person shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana.

Finally, § 4(k) imposes criminal sanctions on any registered qualifying patient or registered primary caregiver who sells marijuana to a person that is not

allowed to use marijuana for medical purposes. MCL 333.26424(k). The patient's or caregiver's registry identification card shall be revoked and the person is guilty of a felony punishable for not more than 2 years' imprisonment or a fine of not more than $2,000, or both, in addition to any other penalties for the distribution of marijuana. *Id.*[11]

3. DEFENDANTS' OPERATION OF CA

Having set forth the relevant statutory provisions of the MMMA and the PHC, we now apply the provisions of the MMMA to defendants' operation of CA to determine whether it is in accordance with the MMMA or remains illegal under the PHC.[12] Unlike the PHC, which contains provisions for dispensing schedule 2, 3, 4, and 5 controlled substances, the MMMA has no provision governing the dispensing of marijuana. While the MMMA indicates that a qualifying patient may obtain marijuana from his or her primary caregiver, see MCL 333.26424(b)(1), the MMMA does not state how a primary caregiver or a qualifying patient, if the patient does not have a primary caregiver, is to obtain marijuana. Specifically, in regard to this case, the MMMA does not authorize marijuana dispensaries. In addition, the MMMA does not expressly state that patients may sell their marijuana to other patients. Defendants, therefore, are left with inferring the authority to operate a dispensary from various provisions of the MMMA.

[11] Section 8 of the MMMA provides an affirmative defense of "medical purpose" for any prosecution involving marijuana. MCL 333.26428. Defendants do not rely on § 8 in arguing that their operation of CA is in accordance with the provisions of the MMMA and, therefore, it is not at issue in this case.

[12] Defendants do not dispute that the operation of CA is prohibited by the PHC.

Defendants rely on various provisions of § 4 to argue that the MMMA authorizes patient-to-patient sales of marijuana and that they, as registered primary caregivers and a registered qualifying patient may actively participate in and carry out those sales and receive compensation for their assistance through their operation of CA. Defendants argue that because the medical use of marijuana permits the "delivery" and "transfer" of marijuana, patients can transfer marijuana between themselves. MCL 333.26423(e). They assert that § 4(i) entitles them to assist registered qualifying patients with patient-to-patient transfers and that § 4(e) allows them to be compensated for their assistance. Defendants also assert that they are entitled to the presumption of § 4(d) that they are engaged in the medical use of marijuana.

a. THE MEDICAL-USE PRESUMPTION

Initially, we address defendants' contention and the trial court's finding that defendants are entitled to the presumption under § 4(d) that they are engaged in the medical use of marijuana when operating CA. Under § 4(d), there is a presumption that a qualifying patient or a primary caregiver is engaged in the medical use of marijuana in accordance with the MMMA if the patient or caregiver is in possession of (1) a registry identification card and (2) an amount of marijuana that does not exceed the amount allowed by the MMMA. MCL 333.26424(d).

However, the presumption may be rebutted. It "may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, *in accordance with this act*." MCL 333.26424(d)(2)

(emphasis added). It is well established that in construing a statute a court must give effect to every provision, if possible. *Wolverine Power Supply Coop, Inc v Dep't of Environmental Quality*, 285 Mich App 548, 558; 777 NW2d 1 (2009). In order to give meaning to the phrase "in accordance with this act," we hold that the presumption may be rebutted with evidence that the conduct of the patient or the caregiver was not in accordance with the provisions of the MMMA. The inclusion of the phrase "in accordance with this act" reiterates the overarching principle of the MMMA, stated in § 7(a), that the medical use of marijuana is only permitted to the extent that it is carried out in accordance with the provisions of the MMMA.

Assuming that defendants, who are in possession of registry identification cards, possess an amount of marijuana that does not exceed the amount allowed under the MMMA,[13] the resulting presumption that

[13] The trial court held that defendants were entitled to the presumption in light of its erroneous finding that defendants do not possess the marijuana that CA members place in the rented lockers. We observe that although there were no findings by the trial court on whether the amount of marijuana stored in the lockers ever exceeded the amount that defendants are entitled to possess under the MMMA, given the evidence presented, it could reasonably be inferred that defendants possessed more marijuana than allowed by the MMMA.

McQueen, as a registered qualifying patient and the current primary caregiver for three qualifying patients, may possess 10 ounces of usable marijuana. Taylor, as the primary caregiver for two qualifying patients, may possess 5 ounces of marijuana. CA has 27 lockers available for rent. If each locker is rented, and each member renting a locker places 2.5 ounces of marijuana in the locker, then defendants could possess as much as 67.5 ounces of marijuana. This greatly exceeds the amount of marijuana that defendants are allowed to possess. However, McQueen testified that the number of lockers rented fluctuates; the number of rented lockers has been as high as 23 or 24 and as low as 7 or 10. Taylor testified that he did not believe the amount of marijuana placed in the lockers ever exceeded the amounts that he and McQueen were allowed to

defendants are engaged in the medical use of marijuana is rebutted. It is rebutted because defendants' conduct relating to marijuana is not in accordance with the MMMA. As this opinion establishes, *infra*, defendants, through their operation of CA, are actively engaged in patient-to-patient sales of marijuana, and the MMMA does not authorize those sales. Accordingly, defendants are not entitled to the presumption that they are engaged in the medical use of marijuana.[14]

b. THE SALE OF MARIJUANA

Although defendants are not entitled to the presumption that they are engaged in the medical use of

possess. Nonetheless, there was no evidence that defendants have instituted any procedure or plan to ensure that the amount of marijuana stored in the lockers does not exceed the amount that defendants may possess. In addition, the evidence established that in the first 2½ months of operating CA, defendants sold 19 pounds—or 304 ounces—to CA members. This large amount of marijuana that has passed through defendants' possession provides a strong inference that defendants in their operation of CA have, in fact, possessed more marijuana than they are authorized to possess under the MMMA.

[14] We note that, although not raised below or on appeal, there is evidence from which one could conclude that defendants' operation of CA is for a purpose other than alleviating patients' debilitating medical conditions. Defendants organized CA as a limited liability company and implemented a business plan whereby they operate CA by obtaining possession of and selling marijuana. Although defendants make members' excess marijuana available to other patients who may not have the ability to grow marijuana themselves, the evidence shows that this occurs through defendants' operation of CA as a business. The operation of CA is indistinguishable from the operation of a neighborhood pharmacy. The purpose of both CA and a neighborhood pharmacy is to provide medications to alleviate the medical needs of customers. However, a pharmacy could not continue to operate without charging for its services. Likewise, defendants must and do charge for the services offered by CA. And just as is the case with a neighborhood pharmacy, CA could not continue to operate without charging for its services. This evidence of a business purpose indicates that defendants' purpose for operating CA is pecuniary.

marijuana, we must still determine whether, in fact, their operation of CA is in accordance with the provisions of the MMMA. Defendants' argument for why the operation of CA complies with the MMMA relies on the fact that the "medical use" of marijuana includes the "delivery" and "transfer" of marijuana. MCL 333.26423(e). According to defendants, patients are engaged in the medical use of marijuana when they transfer marijuana to other patients.

The MMMA does not define the terms "delivery" or "transfer." But these two words have been given or have acquired peculiar meanings in regard to controlled substances, and we construe them according to those meanings. MCL 8.3a; *People v Edenstrom*, 280 Mich App 75, 80; 760 NW2d 603 (2008). The "delivery" of a controlled substance is the "actual, constructive, or attempted transfer from 1 person to another of [the] controlled substance, whether or not there is an agency relationship." MCL 333.7105(1); see also *People v Williams*, 268 Mich App 416, 422; 707 NW2d 624 (2005).[15] The "transfer" of a controlled substance is the conveyance of the controlled substance from one person to another. *People v Schultz*, 246 Mich App 695, 703-704; 635 NW2d 491 (2001). In this case, there was no dispute before the trial court that members, using the services that defendants provide in operating CA, deliver or transfer marijuana to other CA members. A member rents a locker and places his or her excess marijuana in the locker because the member wants to make it available to other members, and the member gives CA consent to convey the marijuana to other CA members.

[15] A person constructively delivers a controlled substance when he or she "directs another person to convey the controlled substance under [his or her] direct or indirect control to a third person or entity." *People v Plunkett*, 281 Mich App 721, 728; 760 NW2d 850 (2008), rev'd on other grounds 485 Mich 50 (2010).

However, members, aided by the services of defendants, do not simply deliver or transfer marijuana to other members. Rather, the members and CA employees deliver or transfer the marijuana to other members for a price. A "sale" is "[t]he transfer of property or title for a price." Black's Law Dictionary (7th ed); see also MCL 440.2106(1) (a "sale," as defined by the Uniform Commercial Code,[16] is "the passing of title from the seller to the buyer for a price"). In this case, the marijuana that a member has placed in a CA locker is only delivered to another member if that member pays the purchase price for the marijuana. After a 20 percent service fee is deducted and retained by CA, the remainder of the purchase money is given to the CA member that rented the locker. Accordingly, members of CA that supply the marijuana, by using the services that defendants provide through their operation of CA, are not just delivering or transferring their excess marijuana; they are selling their excess marijuana.

The question becomes whether the medical use of marijuana permits the sale of marijuana. We hold that it does not because the sale of marijuana is not equivalent to the delivery or transfer of marijuana. The delivery or transfer of marijuana is only one component of the sale of marijuana—the sale of marijuana consists of the delivery or transfer *plus* the receipt of compensation. The "medical use" of marijuana, as defined by the MMMA, allows for the "delivery" and "transfer" of marijuana, but not the "sale" of marijuana. MCL 333.26423(e). We may not ignore, or view as inadvertent, the omission of the term "sale" from the definition of the "medical use" of marijuana. See *People v Burton*, 252 Mich App 130, 135; 651 NW2d 143 (2002) ("It is not the job of the judiciary to write into a statute a provision not

[16] MCL 440.1101 *et seq.*

included in its clear language."). Therefore, the "medical use" of marijuana does not include the sale of marijuana, i.e., the conveyance of marijuana for a price.[17]

We note that two other provisions of the MMMA, § 4(e) and § 4(k), refer to the sale or the selling of marijuana. However, neither provision supports defendants' proposition that the MMMA authorizes the sale of marijuana.

First, § 4(e) authorizes a registered primary caregiver to receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marijuana. MCL 333.26424(e). However, § 4(e) goes on to state that "[a]ny such compensation shall not constitute the sale of controlled substances." *Id.* This quoted sentence would not be needed if the definition of the "medical use" of marijuana included the "sale" of marijuana. No statutory provision should be rendered nugatory. *Apsey v Mem Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007). Consequently, § 4(e) actually supports the conclusion that the medical use of marijuana does not include the sale of marijuana.

Second, § 4(k) states that any registered qualifying patient or registered primary caregiver who sells mari-

[17] We emphasize that our conclusion that the medical use of marijuana does not include the sale of marijuana does not lead to the conclusion that the sale of a controlled substance is not prohibited by the PHC, as argued by amicus curiae Michigan Association of Compassion Centers. The PHC does not expressly prohibit a person from engaging in the "sale" of a controlled substance. It only states that, except as authorized by article 7 of the PHC, a person shall not "deliver" or "possess with intent to . . . deliver" a controlled substance. MCL 333.7401(1). However, because the delivery of a controlled substance is a necessary component to the sale of a controlled substance, one cannot engage in the sale of marijuana without violating the PHC. A person who sells a controlled substance necessarily delivers the controlled substance, whether it be an actual, constructive, or attempted delivery, and he or she has, therefore, engaged in a criminal offense if the delivery was not authorized under article 7 of the PHC.

juana to someone who is not permitted to use marijuana for medical purposes shall have his or her registry identification card revoked and is guilty of a felony. MCL 333.26424(k). We agree with Judge O'CONNELL that the fact that § 4(k) "specifies a particular punishment for a specific type of violation does not mean that, by default, the sale of marijuana to someone who *is* allowed to use marijuana for medical purposes under this act is permitted." *Redden*, 290 Mich App at 115 (O'CONNELL, P.J., concurring). If the drafters of the MMMA intended to authorize the sale of marijuana from one qualifying patient to another, "they would have included the term 'sale' in the definition of 'medical use.' " *Id*.

In conclusion, the medical use of marijuana does not include patient-to-patient sales of marijuana, and neither § 4(e) nor § 4(k) permits the sale of marijuana. Defendants, therefore, have no authority under the MMMA to operate a marijuana dispensary that actively engages in and carries out patient-to-patient sales of marijuana.[18] Accordingly, defendants' operation of CA is not in accordance with the provisions of the MMMA.[19]

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[18] In addition, because the medical use of marijuana does not include the sale of marijuana, defendants are not entitled to receive compensation for the costs of assisting in the sale of marijuana between CA members. See MCL 333.26424(e) ("A registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana."). Also, in regard to § 4(e), the parties disagree whether a registered primary caregiver may receive compensation for the costs associated with assisting *any* registered qualifying patient in the medical use of marijuana or whether a registered primary caregiver may only receive compensation for assisting the qualifying patients with whom he or she is connected through the MDCH registry process. Because of our conclusion that the medical use of marijuana does not include the sale of marijuana, we need not, and therefore do not, resolve this dispute.

[19] Plaintiff and the Attorney General, as amicus curiae, ask us to hold that patient-to-patient conveyances of marijuana that are without com-

c. IMMUNITY UNDER § 4(i)

Further, even if the medical use of marijuana included the sale of marijuana, defendants would not be entitled to the immunity afforded under § 4 from arrest, prosecution, penalty in any manner, or the denial of any right or privilege.

We note that §§ 4(a) and 4(b) grant immunity to qualifying patients and primary caregivers who have been issued and possess a registry identification card. And while defendants are primary caregivers who have been issued and possess registry identification cards, and McQueen is also a qualifying patient who has been issued and possesses a registry identification card, defendants do not claim they are entitled to immunity under either § 4(a) or § 4(b). Rather, they claim that they are entitled to immunity under § 4(i).

Under § 4(i),

> [a] person shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege . . . solely for being in the presence or vicinity of the *medical use* of marihuana in accordance with this act, *or* for assisting a registered qualifying patient with *using or administering* marihuana. [MCL 333.26424(i) (emphasis added).]

The word "or" is a disjunctive term. *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011). It indicates a choice between two alternatives. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 148; 783 NW2d

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pensation are not permitted by the MMMA. Their position is that the only conveyance of marijuana permitted by the MMMA is the conveyance of marijuana from a primary caregiver to his or her patients. Because defendants' operation of CA involves the selling of marijuana, and because the selling of marijuana is not permitted by the MMMA, we need not, and do not, reach the issue whether the MMMA permits uncompensated patient-to-patient conveyances of marijuana.

133 (2010). Thus, § 4(i) provides immunity to two distinct persons: (1) the person who is "in the presence or vicinity of the medical use of marihuana" and (2) the person who is "assisting a registered qualifying patient with using or administering marihuana." Defendants do not claim immunity on the basis of being in the vicinity of the medical use of marijuana; they claim immunity on the basis of their assistance to registered qualifying patients with "using or administering" marijuana. According to defendants, they assist registered qualifying patients with using or administering marijuana when they transfer marijuana between CA members.

The MMMA does not define the phrase "using or administering" marijuana. Importantly, the phrase cannot be given the same definition as the "medical use" of marijuana. The inclusion of the phrase "medical use" in the vicinity-clause of § 4(i) and its omission and the presence of the phrase "using or administering" in the assistance-clause must be viewed as intentional. See *People v Barrera*, 278 Mich App 730, 741-742; 752 NW2d 485 (2008) ("The omission of a provision in one part of a statute that is included in another should be construed as intentional, and provisions not included by the [drafters of the statute] should not be included by the courts.") (quotation marks and citation omitted). Accordingly, the phrase "using or administering" marijuana must be given a meaning distinct from the definition of the "medical use" of marijuana.

Because the word "administering" is grouped with the word "using," the two words must be given related meaning. See *Manuel v Gill*, 481 Mich 637, 650; 753 NW2d 48 (2008) (stating that words grouped in a list must be given related meaning). The word "use" is included in the definition of the "medical use" of

marijuana. MCL 333.26423(e). Accordingly, we hold that whatever the phrase "using or administering" marijuana means, the phrase has a more limited meaning than that of the "medical use" of marijuana.

The word "use" has numerous dictionary definitions, as does the word "administer." However, each word has a definition that relates directly to controlled substances or medicines, and we find those definitions to be the most relevant. To "use" means "to drink, smoke, or ingest habitually: *to use drugs*." *Random House Webster's College Dictionary* (1996). To "administer" means "to give or apply: *to administer medicine*." *Id.* This definition of "administer" is consistent with the PHC definition of "administer." The PHC defines "administer" as "the direct application of a controlled substance, whether by injection, inhalation, ingestion, or other means, to the body of a patient or research subject by a practitioner . . . ." MCL 333.7103(1). Employing these definitions, we hold that a person assists a registered qualifying patient with "using or administering" marijuana when the person assists the patient in preparing the marijuana to be consumed in any of the various ways that marijuana is commonly consumed or by physically aiding the patient in consuming the marijuana.

In this case, defendants, through the operation of CA, participate in the sale of marijuana between CA members. There is no evidence that defendants assist patients in preparing the marijuana to be consumed. Likewise, there is no evidence that defendants physically aid the purchasing patients in consuming marijuana. Because defendants are engaged in the selling of marijuana, which is not assistance with the "using or administering" of marijuana, defendants are not entitled to the immunity granted by § 4(i).

D. PUBLIC NUISANCE

For the reasons discussed previously in this opinion, defendant's operation of CA is not in accordance with the provisions of the MMMA. We, therefore, agree with plaintiff that defendants' operation of CA is a public nuisance and must be enjoined.

A public nuisance is "an unreasonable interference with a common right enjoyed by the general public." *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 427; 770 NW2d 105 (2009) (quotation marks and citation omitted). "Unreasonable interference" includes conduct that "(1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting significant effect on these rights." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). Actions in violation of law constitute a public nuisance, and the public is presumed harmed by the violation of a statute enacted to preserve public health, safety, and welfare. *Attorney General v PowerPick Player's Club of Mich, LLC*, 287 Mich App 13, 44; 783 NW2d 515 (2010).

Because defendants possess marijuana, and they possess it with the intent to deliver it to CA members, defendants' operation of CA is in violation of the PHC. Further, their violation of the PHC is not excused by the MMMA because defendants do not operate CA in accordance with the provisions of the MMMA. Through CA, defendants actively participate in the sale of marijuana between CA members, but the medical use of marijuana does not include the sale of marijuana. In addition, even if defendants were engaged in the medical use of marijuana, they would not be entitled to the immunity

granted by § 4(i) because defendants are not assisting registered qualifying patients with using or administering marijuana.

The PHC is designed to protect the health, safety, and welfare of the people of the state of Michigan, MCL 333.1111(2); *Derror*, 475 Mich at 329, and, therefore, the public is presumed harmed by defendants' violation, *PowerPick Player's Club*, 287 Mich App at 44-45. Accordingly, we conclude that defendants' operation of CA is a public nuisance, *id*.; *Cloverleaf Car Co*, 213 Mich App at 190, and the trial court erred by holding otherwise. The trial court's order denying plaintiff's request for a preliminary injunction is reversed. We remand for judgment in favor of plaintiff on its claim that defendants' operation of CA is a public nuisance. The judgment shall include the entry of any order that may be necessary to abate the nuisance and to enjoin defendants' continuing operation of CA. See *PowerPick Player's Club*, 287 Mich App at 48, 54.

Reversed and remanded for entry of judgment in favor of plaintiff and further proceedings not inconsistent with this opinion. We do not retain jurisdiction. This opinion is to have immediate effect. MCR 7.215(F)(2).

No taxable costs pursuant MCR 7.219, a public question being involved.

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

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered July 26, 2011:

In re APPLICATION OF MICHIGAN CONSOLIDATED GAS COMPANY TO INCREASE RATES, Docket Nos. 298830 and 298887. Reported at 293 Mich App 360. The Court orders that the authored published opinion in this case, which was issued on July 21, 2011, be amended to correct a clerical error.

The last sentence of the partial paragraph at the top of page 6* shall read: "For these reasons, we reverse the PSC's order below insofar that it approved more than $5 million in LIEEF funding to come from Mich Con's ratepayers, and remand this case to the PSC for appropriate proceedings consistent with this opinion with respect to the LIEEF, and any remaining implementation regarding the UETM adjustment."

Order Entered August 9, 2011:

In re ELLIS, Docket Nos. 301884 and 301887.** The Court, on its own motion, orders that the June 14, 2011, opinion is hereby amended. The opinion released as an unpublished opinion per curiam is amended to be an opinion per curiam for publication.

The Clerk's Office is directed to provide a copy of this order to the Reporter's Office along with a copy of the opinion per curiam.

In all other respects, the June 14, 2011, opinion remains unchanged and the filing deadline for any additional relief shall run from that date.

Order Entered August 22, 2011:

RICHARD V SCHNEIDERMAN & SHERMAN, PC, Docket No. 297353. On the Court's own motion the August 11, 2011, opinion is hereby vacated. A new opinion will be issued.***

Order Entered August 31, 2011:

In re REVIEW OF CONSUMERS ENERGY COMPANY RENEWABLE ENERGY PLAN, Docket No. 292659. Reported at 293 Mich App 254. The Court orders that the July 12, 2011, opinion is hereby amended so that footnote 1 reads in its entirety: "PSC Case No. U-15805 concerns Consumers Energy's EO and RE plans for its electric division, while PSC Case No. U-15889 concerns Consumers Energy's EO plan for its gas division."

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* Reference to slip opinion. See 293 Mich App 360, 369—REPORTER.

** Opinion and order subsequently vacated, 294 Mich App 801—REPORTER.

*** New opinion reported at 294 Mich App 37, vacated and remanded, 490 Mich 1001—REPORTER.

In all other respects, the July 12, 2011, opinion remains unchanged.

The Clerk is directed to provide a copy of this order to the Reporter's Office so the change can be incorporated into the opinion during the publishing process.

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upon a showing of good cause and if substitution will not unreasonably disrupt the judicial process; if a defendant claims that his or her assigned counsel is not adequate or diligent or is disinterested, the court should hear the defendant's claim and, if there is factual dispute, take testimony and state its findings and conclusions on the record; absent substantial reason, adequate cause does not exist to substitute an attorney on the basis of a defendant's mere allegation of lack of confidence or general unhappiness with his or her representation; substitution is also not warranted on the basis of disagreements about trial strategy or professional judgment. *People v Strickland*, 293 Mich App 393.

discretion to impute income when a parent voluntarily reduces or eliminates income or when it finds that the parent has a voluntarily unexercised ability to earn; the decision to impute income must be supported by adequate fact-finding that the parent has the actual ability and likelihood of earning the imputed income; the formula sets forth a number of equitable criteria that must be considered when determining whether to impute income, including prior employment experience, educational level, physical and mental disabilities, the presence of the parties' children in the individual's home and its effect on the earnings, availability of employment in the local geographical area, the prevailing wage rates in the local geographical area, special skill and training, and whether there is any evidence that the individual in question is able to earn the imputed income (2004 MCSF 2.10[A], [B], and [E]). *Carlson v Carlson*, 293 Mich App 203.

CIRCUIT COURTS—*See*

ADMINISTRATIVE LAW 2

COSTS 1

INJUNCTIONS 1

CIVIL SERVICE

STATE EMPLOYEES

1. Generally, a member of the State Employees' Retirement System who becomes totally incapacitated for duty because of a personal injury or disease which is not the natural and proximate result of the member's performance of duty may be retired if a medical advisor conducts a medical examination of the member and certifies in writing that the member is mentally or physically totally incapacitated for further performance of duty, that the incapacitation is likely to be permanent, and that the member should be retired; for the purpose of deciding eligibility for nonduty disability retirement, a medical examination conducted by one or more medical advisors means either a personal medical examination of the member or a review of the application and medical records of the member (MCL 38.24[1][b]). *Monroe v State Employees' Retirement System*, 293 Mich App 594.
2. Although the State Employees' Retirement System Board has discretion in the decision whether to retire a state employee, it cannot exercise that discretion unless

vidual who is unable to effectively manage his or her property and business affairs for reasons such as mental illness or deficiency, physical illness or disability, chronic intoxication or drug use, confinement, detention by a foreign power, or disappearance; the phrase "for reasons such as" is one of enlargement and does not limit the appointment of conservators only for individuals having one of the listed conditions, but a conservator may only be appointed if the individual is unable to effectively manage his or her property and business affairs because of a condition that is not listed if the condition is of a similar nature and quality as the listed conditions (MCL 700.5401[3][a]). *In re Townsend Conservatorship*, 293 Mich App 182.

STATUTES

2. Under the Social Welfare Act (SWA), to establish that an individual is vulnerable, one must establish that the individual has a mental, physical, or advanced-age-related impairment; this definition of "vulnerability" is sufficiently similar in nature and quality to the conditions listed in the statute permitting the appointment of a conservator to allow the appointment of a conservator for a person meeting the SWA definition of "vulnerable adult" (MCL 400.11; MCL 700.5401[3][a]). *In re Townsend Conservatorship*, 293 Mich App 182.

CONSTITUTIONAL LAW

See, also, CRIMINAL LAW 4
HOMICIDE 2

DOUBLE JEOPARDY

1. The "same-elements" test is applied in order to determine the validity of multiple punishments under the double jeopardy provisions of the United States and Michigan Constitution; a reviewing court must determine whether each crime requires proof of a fact that the other does not (US Const, Am V; Const 1963, art 1, § 15). *People v Strickland*, 293 Mich App 393.

DUE PROCESS

2. There are four situations that present a constitutionally intolerable risk of actual bias and warrant the disqualification of a decision-maker: (1) the decision-maker has a pecuniary interest in the outcome, (2) the decision-maker has been the target of personal abuse

SALE OF GOODS

3. An action that concerns an open account related to the sale of goods is governed by the four-year limitations period in article 2 of the Uniform Commercial Code concerning contracts for sale rather than the six-year limitations period provided in the Revised Judicature Act that is applicable to contract actions generally (MCL 440.2725[1], 600.5807[8]). *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 293 Mich App 66.

WORDS AND PHRASES

4. An "open account" is an unpaid or unsettled account or an account that is left open for ongoing debit and credit entries and that has a fluctuating balance until either party finds it convenient to settle and close, at which time there is a single liability. *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 293 Mich App 66.

CONTROL OF OR SUBSTANTIAL INFLUENCE OVER MENTAL-HEALTH AUTHORITIES—*See*

ADMINISTRATIVE LAW 3

MENTAL HEALTH 1

CONTROLLED SUBSTANCES

MARIJUANA

1. The failure to establish the elements of the medical-purpose defense to a marijuana-related charge under the Michigan Medical Marihuana Act at a pretrial hearing on a motion to dismiss does not necessarily preclude a defendant from reasserting that defense at trial; however, the court may bar the assertion of the defense at trial if the evidence is undisputed and no reasonable jury could find that the defendant established the elements of the affirmative defense (MCL 333.26428). *People v Anderson*, 293 Mich App 33.
2. Under the Michigan Medical Marihuana Act, if a qualifying patient or primary caregiver is in possession of a registry identification card and an amount of marijuana that does not exceed that allowed by the act, the qualifying patient or the primary caregiver is presumed to be engaged in the medical use of marijuana in accordance with the act; the presumption may be rebutted by evidence that the conduct of the patient or caregiver was not in accordance with the act; the defi-

nition of the "medical use" of marijuana under the act includes the "delivery" and "transfer" of marijuana, but does not include the "sale" of marijuana; a "sale" is the transfer of property or title for a price; one who engages in patient-to-patient sales of marijuana is not acting in accordance with the act and is not entitled to the presumption of medical use (MCL 333.26424[d]). *State of Michigan v McQueen*, 293 Mich App 644.

3. The Michigan Medical Marihuana Act affords immunity to those who are in the presence or vicinity of the medical use of marijuana and to those who are assisting a registered qualifying patient with using or administering marijuana; the "use or administration" of marijuana is more limited in meaning than is "medical use;" a person assists a registered qualifying patient with using or administering marijuana when the person assists the patient in preparing the marijuana to be consumed in any of the various ways in which marijuana is commonly consumed or by physically aiding the patient in consuming the marijuana (MCL 333.26424[i]). *State of Michigan v McQueen*, 293 Mich App 644.

COST RECOVERY—*See*

PUBLIC UTILITIES 1, 2, 3

COSTS

APPEAL

1. A prevailing party may tax only the reasonable costs incurred in an appeal in the circuit court, including (1) the cost of an appeal or stay bond, (2) the transcript, (3) documents required for the record on appeal, (4) fees paid to the clerk incident to the appeal, (5) taxable costs allowed by law in appeals in the Supreme Court, and (6) other expenses taxable under applicable court rules or statutes, but these costs are only taxable in civil, rather than criminal, matters (MCL 600.2441[2]; MCR 2.625, MCR 7.101[O]). *People v Rapp*, 293 Mich App 159.

COURTS

See, also, CONSERVATORSHIPS 1

JURISDICTION OVER CHILDREN

1. There is no requirement that the jurors reach a consensus regarding which specific statutory grounds alleged in a petition for jurisdiction in a child protective pro-

ceeding were proved; jurisdiction exists as long as five jurors find that the petitioner proved one or more statutory grounds for jurisdiction (MCR 3.972[E]). *In re VanDalen*, 293 Mich App 120.

CRIMINAL ACTIVITIES ON PREMISES—*See*

LANDLORD AND TENANT 1

CRIMINAL DEFENSES—*See*

CONTROLLED SUBSTANCES 1

HOMICIDE 1

CRIMINAL HISTORY OF DEFENDANTS—*See*

SENTENCES 5

CRIMINAL LAW

See, also, CONSTITUTIONAL LAW 1

CONTROLLED SUBSTANCES 1, 2, 3

COSTS 1

HOMICIDE 1, 2, 3

SENTENCES 1, 5

DUE PROCESS

1. A trial court's denial of an initial jury request to review transcripts of certain testimony without foreclosing the possibility of future requests being granted does not deprive the defendant of due process or violate MCR 6.414(J), which governs jury requests to review evidence. *People v McDonald*, 293 Mich App 292.

FIREARMS

2. Possession of a firearm as an element of an offense is a question of fact for the trier of fact and can be proved by circumstantial evidence and reasonable inferences arising from the evidence; possession of a firearm may be sole or joint and dominion or control over the firearm need not be exclusive; the essential question is one of control. *People v Strickland*, 293 Mich App 393.

FIRST-DEGREE CRIMINAL SEXUAL CONDUCT

3. The phrase "related . . . by blood" used in MCL 750.520b(1)(b)(ii) means being related by descent from a common ancestor; the term "affinity" in the statute refers to a relationship that originates through marriage. *People v Zajaczkowski*, 293 Mich App 370.

self-defense claim to prove that the victim was the probable aggressor, but such character evidence may only be admitted in the form of reputation testimony, not by testimony regarding specific instances of conduct unless the testimony regarding those instances is independently admissible for some other reason or where character is an essential element of a claim or defense (MRE 404[a][2]; MRE 405). *People v Orlewicz*, 293 Mich App 96.

CONSTITUTIONAL LAW

2. It is a violation of double jeopardy protections when a defendant is convicted of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim; the proper remedy is to modify the conviction to specify that it is for a single count of first-degree murder supported by two theories. *People v Orlewicz*, 293 Mich App 96.

FELONY-MURDER DOCTRINE

3. The felony-murder doctrine does not apply if the intent to commit the underlying felony is not formed until after the homicide; a murder committed during the unbroken chain of events surrounding a predicate felony is committed in the perpetration of that felony; the murder and the felony need not be contemporaneous and the defendant need only have intended to commit the underlying felony when the homicide occurred for the felony-murder doctrine to apply. *People v Orlewicz*, 293 Mich App 96.

ILLUSORY CONTRACTS—*See*

CONTRACTS 1

INSURANCE 1

IMMUNITY FROM PROSECUTION UNDER MARIJUANA LAWS—*See*

CONTROLLED SUBSTANCES 3

IMPLIED WAIVERS—*See*

DIVORCE 2

IMPROVEMENTS IMPROPERLY INCLUDED IN TAXABLE VALUE IN YEARS NOT UNDER APPEAL—*See*

TAXATION 3

recommendation on his or her own judgment; a contingency-fee agreement does not prevent an appraiser from being independent (MCL 500.2833[1][m]). *White v State Farm Fire & Casualty Co*, 293 Mich App 419.

NO-FAULT

3. Underinsurance benefit clauses are construed without reference to the no-fault act because that insurance is not required under the act (MCL 500.3101 *et seq*.). *Ile v Foremost Ins Co*, 293 Mich App 309.
4. A claimant's right to personal protection insurance benefits under the no-fault automobile insurance act arises when an allowable expense is incurred, not when an injury occurs; a claimant incurs an expense when the claimant becomes liable for the cost; such benefits become overdue if not paid within 30 days after the insurer receives reasonable proof of the fact and of the amount of the loss sustained; interest begins accumulating and attorney fees become recoverable if benefits are not timely paid after an expense is incurred; the interest-penalty provisions of the act do not apply when the dispute involves two insurers acting in good faith because the purpose of the provisions is to see that the injured party is quickly paid (MCL 500.3142[2] and [3]; MCL 500.3148[1]). *Karmol v Encompass Property & Casualty Co*, 293 Mich App 382.
5. Insurance policies are subject to the same contract construction principles as any other type of contract; unambiguous contract provisions are not open to judicial construction, and must be enforced according to their unambiguous terms unless to do so would violate the law or one of the traditional defenses to the enforceability of a contract applies; a court may not modify or refuse to enforce the provisions based on a judicial determination of reasonableness; underinsurance automobile insurance protection, such as uninsured- or underinsured-motorist coverage, is not required by law, so its scope, coverage, and limitations are governed by the insurance contract and the laws pertaining to contracts. *Dawson v Farm Bureau Mutual Ins Co of Michigan*, 293 Mich App 563.

INSURANCE COMPANY SETTLEMENTS—*See*

EVIDENCE 2

his or her invitees will be exposed to criminal assaults; however, the government is in the business of public safety, and a landlord has no duty to make the premises open to the public safer than the community at large; a landlord may not be held liable for voluntarily undertaking additional, but failed, safety precautions, but a landlord has a duty to take reasonable efforts to contact the police in response to a situation presently occurring on the premises that poses a foreseeable and imminent risk of harm to identifiable invitees. *Bailey v Schaaf*, 293 Mich App 611.

LEGAL DUTY JUSTIFYING MANDAMUS—*See*

EQUITY 1

LIENS—*See*

MECHANICS' LIENS 1, 2, 3

LIMITATION OF ACTIONS

See, also, CONTRACTS 3

MECHANICS' LIENS 3

BANKS AND BANKING

1. Nonnegotiable certificates of deposit are governed by contract law rather than the Uniform Commercial Code; the applicable period of limitations for a nonnegotiable certificate of deposit is six years from the date the claim accrued; the period of limitations begins to run on an action for payment on a nonnegotiable certificate of deposit when a demand for payment is made (MCL 440.3104[4]; MCL 600.5807[8]). *Trader v Comerica Bank*, 293 Mich App 210.

LISTED CONDITIONS REQUIRING CONSERVATOR APPOINTMENT—*See*

CONSERVATORSHIPS 1

LOSS OF HEALTH INSURANCE BENEFITS BY MEMBERS OF COLLECTIVE-BARGAINING UNIT—*See*

INJUNCTIONS 1

LOSSES IN PROPERTY TAXES—*See*

TAXATION 4

of when or by whom the particular work was done or the materials furnished for which a lien is claimed (MCL 570.1103[1]; MCL 570.1119[3]). *Jeddo Drywall, Inc v Cambridge Investment Group, Inc*, 293 Mich App 446.

2. A change in ownership of a construction project does not alter the validity of a construction lien; nothing in the Construction Lien Act alters the priority of a contractor's lien arising out of a construction project when there is a change of ownership of the property to related companies (MCL 570.1107[3]). *Jeddo Drywall, Inc v Cambridge Investment Group, Inc*, 293 Mich App 446.
3. A contractor, subcontractor, laborer, or supplier must file a construction lien within 90 days after the lien claimant last furnished labor or material for an improvement or the right to the lien will cease to exist; a proceeding for the enforcement of a construction lien must be brought no later than one year after the date the claim of lien was recorded (MCL 570.1111[1]; MCL 570.1117[1]). *Jeddo Drywall, Inc v Cambridge Investment Group, Inc*, 293 Mich App 446.

MEDICAL EXAMINATIONS FOR RETIREMENT—*See*

CIVIL SERVICE 1

MEDICAL MALPRACTICE—*See*

NEGLIGENCE 2, 3

MEDICAL MARIJUANA—*See*

CONTROLLED SUBSTANCES 1, 2, 3

MEDICAL-USE PRESUMPTION UNDER MEDICAL MARIHUANA ACT—*See*

CONTROLLED SUBSTANCES 2

MEETING OF THE MINDS—*See*

CONTRACTS 2

MENTAL HEALTH

MENTAL HEALTH CODE

1. Counties do not have the ability to control or substantially influence community mental health authorities given that such authorities are separate governmental entities, have their own boards to set policies and procedures, and have numerous independent powers

knowledge and experience. *Lockwood v Mobile Medical Response, Inc*, 293 Mich App 17.

3. A professional relationship exists, for purposes of a medical-malpractice action, when a defendant licensed health-care professional, licensed health-care facility or agency, or the agents or employees of a licensed health-care facility or agency, are subject to a contractual duty that requires that professional, facility, or agency, or the agents or employees of that facility or agency, to render professional health-care services to the plaintiff (MCL 600.5838a[1]). *Lockwood v Mobile Medical Response, Inc*, 293 Mich App 17.

NO-FAULT—*See*

INSURANCE 3, 4, 5

NONDUTY DISABILITY RETIREMENT—*See*

CIVIL SERVICE 1, 2, 3

NONNEGOTIABLE CERTIFICATES OF DEPOSIT—*See*

LIMITATION OF ACTIONS 1

NONPARTIES SETTLING DISPUTES—*See*

EVIDENCE 2

NOTICE OF ASSESSMENT—*See*

TAXATION 2

NUISANCE

VIOLATIONS OF THE PUBLIC HEALTH CODE

1. Actions in violation of law constitute a public nuisance, and the public is presumed harmed by the violation of a statute enacted to preserve public health, safety, and welfare; the Public Health Code is designed to protect the health, safety, and welfare of the people, and the public is presumed to be harmed by its violation (MCL 333.1101 *et seq*.). *State of Michigan v McQueen*, 293 Mich App 644.

OFFENSE VARIABLE 3—*See*

SENTENCES 3, 4

OFFENSE VARIABLE 7—*See*

SENTENCES 3

a provider whose rates are regulated is entitled to recover the actual costs of implementing its approved energy-optimization plan from all natural gas customers, including those customers who only purchase gas transportation services from the provider (MCL 460.1089). *In re Review of Consumers Energy Co Renewable Energy Plan*, 293 Mich App 254.

2. Eligible electric customers are exempt from charges that the customer would otherwise incur under the cost-recovery provisions of the Clean, Renewable, and Efficient Energy Act if the customer files a self-directed energy-optimization plan with its electric provider and implements the plan; the charges the customer would otherwise incur as part of the cost-recovery plan refers to the customer's electric-optimization plan costs (MCL 460.1093[1]). *In re Review of Consumers Energy Co Renewable Energy Plan*, 293 Mich App 254.

PUBLIC SERVICE COMMISSION

3. Retroactive ratemaking in utility cases is prohibited absent statutory authorization; it does not occur if only future rates are affected with no adjustment to previously set rates; the Public Service Commission (PSC) may approve accounting conventions whereby certain expenses dating from one year are characterized as expenses incurred in a subsequent year to which they are then deferred; the PSC's approval of a tracking mechanism designed to reconcile recovery of a utility's estimated and actual losses stemming from customers from whom the utility cannot collect amounts due on their bills does not constitute retroactive ratemaking as the deferred expense is recovered on a prospective basis. *In re Michigan Consolidated Gas Co To Increase Rates Application*, 293 Mich App 360.

4. The Public Service Commission does not have statutory authority to administer and order funding by utilities of the Low-Income and Energy Efficiency Fund originally created by the Customer Choice and Electricity Reliability Act (MCL 460.10 *et seq*., MCL 460.6a[2]). *In re Michigan Consolidated Gas Co To Increase Rates Application*, 293 Mich App 360.

PURPOSE OF DECLARATORY RELIEF—*See*

JUDGMENTS 1