MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

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COURT OF APPEALS

FROM

January 25, 2018 through April 19, 2018

KATHRYN L. LOOMIS

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[2] From February 26, 2018.

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JUDGE
JONATHAN TUKEL

Jonathan Tukel was appointed to the Court of Appeals in December 2017. Before his appointment, he worked for the United States Department of Justice in Detroit as an Assistant United States Attorney, handling a wide variety of cases, including public corruption, narcotics, and fraud. For the ten years prior to his appointment to the bench, he supervised the National Security Unit, handling cases involving international and domestic terrorism and terrorist financing.

Since 2009, Judge Tukel has taught a seminar in Federal Criminal Prosecution and Defense at the University of Michigan Law School. He was voted a "Leader in the Law" for 2012 by the statewide publication Michigan Lawyers Weekly and that same year was a recipient of the Attorney General Award, the Department of Justice's highest, given in recognition of his "Excellence in Furthering the Interest in U.S. National Security." During his career at the Department of Justice, he lectured at the National Counterterrorism Center, the FBI Academy, the Department of Justice's National Security Conference, and at the Public Prosecution Service of Canada. He also has

served as the chairman of a Michigan Attorney Discipline Board Hearing Panel.

Judge Tukel graduated from the University of Michigan in 1982, receiving a Bachelor of Arts Degree with Honors in Philosophy. In 1988 he graduated from the University of Michigan Law School, Magna Cum Laude, and was elected to the Order of the Coif.

COURT OF APPEALS CASES

MAYS v GOVERNOR

Docket Nos. 335555, 335725, and 335726. Submitted January 9, 2018, at Detroit. Decided January 25, 2018, at 9:00 a.m. Leave to appeal granted 503 Mich 1030.

Melissa Mays and other water users and property owners in Flint, Michigan (plaintiffs) brought a class action in the Court of Claims against defendants Governor Rick Snyder, the state of Michigan, the Michigan Department of Environmental Quality (the DEQ), and the Michigan Department of Health and Human Services (collectively, the state defendants) and defendants Darnell Earley and Jerry Ambrose (the city defendants), who are former emergency managers for the city of Flint. Plaintiffs' complaint alleged that from 1964 through late April 2014, the Detroit Water and Sewerage Department (the Detroit water system) supplied Flint water users with their water, which was drawn from Lake Huron. On April 16, 2013, the Governor authorized a contract to explore the development of an alternative water delivery system, and at the time of the contract, the Governor and various state officials knew that the Flint River would serve as an interim source of drinking water for the residents of Flint. Plaintiffs alleged that the Governor and these officials had knowledge of a 2011 study commissioned by Flint officials that cautioned against the use of Flint River water as a source of drinking water. On April 25, 2014, under the direction of Earley and the DEQ, Flint switched its water source from the Detroit water system to the Flint River, and Flint water users began receiving Flint River water from their taps. Plaintiffs alleged that the switch occurred despite the fact that the water treatment plant's laboratory and water quality supervisor warned officials that the water treatment plant was not fit to begin operations and despite the fact that the 2011 study had noted that the water treatment plant would require facility upgrades costing millions of dollars. Less than a month after the switch, state officials began to receive complaints from Flint water users about the quality of the water coming out of their taps. In June 2014, residents complained that they were becoming ill after drinking the tap water. In October 2014, General Motors announced that it was discontinuing the use of Flint water in its Flint plant due to concerns about the

corrosive nature of the water, and in the same month, Flint officials expressed concern about a legionellosis outbreak and possible links between the outbreak and Flint's switch to the river water. In February 2015, the United States Environmental Protection Agency (the EPA) advised the DEQ that the Flint water supply was contaminated with iron at levels so high that the testing instruments could not measure the exact level, and in the same month, the DEQ was advised that black sediment found in some of the tap water was lead. Plaintiffs alleged that during this time, state officials failed to take any significant remedial measures to address the growing health threat and instead continued to downplay the health risk, advising Flint water users that it was safe to drink the tap water while simultaneously arranging for state employees in Flint to drink water from water coolers installed in state buildings. Additionally, plaintiffs alleged that the DEQ advised the EPA that Flint was using a corrosion-control additive with knowledge that the statement was false. Through the summer and fall of 2015, state officials allegedly continued to cover up the health emergency, discredit reports that confirmed the presence of lead in the water system and a spike in the percentage of Flint children with elevated blood lead levels, and advise the public that the drinking water was safe despite knowledge to the contrary. In early October 2015, the Governor acknowledged that the Flint water supply was contaminated with dangerous levels of lead. On October 8, 2015, the Governor ordered Flint to reconnect to the Detroit water system, and the reconnection occurred on October 16, 2015. On January 21, 2016, plaintiffs brought a four-count class action complaint against all defendants in the Court of Claims for state-created danger (Count I), violation of plaintiffs' due-process right to bodily integrity (Count II), denial of fair and just treatment during executive investigations (Count III), and unconstitutional taking via inverse condemnation (Count IV). The state and city defendants separately moved for summary disposition on all four counts, arguing that plaintiffs had failed to satisfy the statutory notice requirements of MCL 600.6431, failed to allege facts to establish a constitutional violation for which a judicially inferred damage remedy is appropriate, and failed to allege facts to establish the elements of any of their claims. The Court of Claims, MARK T. BOONSTRA, J., granted defendants' motions for summary disposition on plaintiffs' causes of action under the state-created-danger doctrine and the Fair and Just Treatment Clause of the 1963 Michigan Constitution, art 1, § 17, after concluding that neither cause of action is cognizable under Michigan law. However, the

Court of Claims denied summary disposition on all of defendants' remaining grounds. Defendants appealed, and plaintiffs cross-appealed.

The Court of Appeals *held*:

1. MCL 600.6431(1) of the Court of Claims Act (CCA), MCL 600.6401 *et seq*., provides that no claim may be maintained against the state unless the claimant, within one year after such claim has accrued, files in the office of the clerk of the Court of Claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths. MCL 600.6431(3) provides that in all actions for property damage or personal injuries, the claimant shall file with the clerk of the Court of Claims a notice of intention to file a claim or the claim itself within six months following the happening of the event giving rise to the cause of action. The notice requirement of MCL 600.6431 is an unambiguous condition precedent to sue the state, and a claimant's failure to strictly comply warrants dismissal of the claim. In this case, there was no dispute that plaintiffs' action involves personal injury and property damage. Plaintiffs filed their complaint on January 21, 2016, without having filed a separate notice of intention to file a claim. Therefore, to have strictly complied with the notice requirement of MCL 600.6431, plaintiffs' claims must have accrued on or after July 21, 2015, the date six months prior to the date of filing. Defendants argued that plaintiffs' claims accrued, and the statutory notice period began to run, in either June 2013, when plaintiffs alleged that the state ordered and set in motion the use of the Flint River water despite knowledge that the water treatment plant was not ready, or on April 25, 2014, when Flint's water source was switched over to the Flint River and residents began receiving Flint River water from their taps. Accordingly, defendants argued that plaintiffs' complaint was not filed within the six-month statutory notice period. However, for purposes of statutory limitations periods, the Legislature has stated that a claim accrues under MCL 600.5827 at the time the wrong upon which the claim is based was done, and the Michigan Supreme Court has clarified that the "wrong" is the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which the defendant breached his or her duty. Because a claim

does not accrue until each element of the cause of action exists, determination of the time at which plaintiffs' claims accrued requires a determination of the time at which plaintiffs were first harmed. Questions of fact remain regarding whether and when each plaintiff suffered injury and when each plaintiff's claims accrued relative to the filing of plaintiffs' complaint. Accordingly, summary disposition at this stage was premature, and the Court of Claims did not err when it determined that genuine issues of material fact still exist regarding whether plaintiffs satisfied the statutory notice requirements of MCL 600.6431.

2. Michigan courts routinely enforce statutes of limitations when constitutional claims are at issue. However, an exception to enforcement exists when strict enforcement of a limitations period is so harsh and unreasonable in its consequences that it effectively divests a plaintiff of the access to the courts intended by the grant of a substantive right. The harsh-and-unreasonable-consequences exception was extended to statutory notice requirements in *Rusha v Dep't of Corrections*, 307 Mich App 300, 311-312 (2014). Despite defendants' assertion that *Rusha* was incorrectly decided because courts may not create judicial "saving constructions" to avoid the statutory mandate of a legislatively imposed limitations period, the *Rusha* Court properly recognized the longstanding principle that while the Legislature retains the authority to impose reasonable procedural restrictions on a claimant's pursuit of claims under self-executing constitutional provisions, the Legislature may not impose a procedural requirement that would, in practical application, completely divest an individual of his or her ability to enforce a substantive right guaranteed under the Michigan Constitution. Accordingly, the harsh-and-unreasonable-consequences exception is merely a judicial recognition that in limited cases, when the practical application of the Legislature's statutorily imposed procedural requirements is unreasonable or completely divests a claimant of his or her right to pursue a constitutional claim, those procedural requirements are unconstitutional. The *Rusha* Court's recognition of this limitation on legislative power did not conflict with the holdings of the Michigan Supreme Court in *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378 (2007), *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), and *McCahan v Brennan*, 492 Mich 730 (2012), all of which advocated strict compliance with statutory limitations and notice requirements in the context of legislatively granted rights rather than rights granted under the provisions of the Constitution itself. In this case, application of the harsh-and-unreasonable-consequences exception was clearly supported because granting summary dis-

position to defendants at this early stage in the proceedings would deprive plaintiffs of access to the courts and effectively divest them of the ability to vindicate the constitutional violations alleged. The event giving rise to the cause of action was not readily apparent at the time of its happening, the injuries alleged likely became manifest so gradually as to have been well established before becoming apparent to plaintiffs because the evidence of injury was concealed in the water supply infrastructure and in the bloodstreams of those drinking the water, and plaintiffs brought the action within six months of the state's public acknowledgment and disclosure of the toxic nature of the Flint River water. Application of the harsh-and-unreasonable-consequences exception was also supported by the allegations that state actors concealed the fact that the Flint River water was contaminated and hazardous. Accordingly, plaintiffs' constitutional tort claims survived summary disposition on the basis that dismissal would result in a harsh and unreasonable deprivation of the access to the courts intended by the grant of a substantive right.

3. The fraudulent-concealment exception, codified as part of the Revised Judicature Act (RJA), MCL 600.101 *et seq.*, in MCL 600.5855, permits the tolling of a statutory limitations period for two years if the defendant fraudulently concealed the existence of a claim. The Legislature, in crafting the CCA, imported the fraudulent-concealment exception into MCL 600.6452(2), its statute-of-limitations provision. However, the Legislature did not explicitly import the exception into MCL 600.6431, the statutory notice provision of the CCA. In this case, the Court of Claims erred when it rejected plaintiffs' assertion that the fraudulent-concealment exception should apply to the CCA's statutory notice requirement and instead found that the absence of a similar provision directly applicable to MCL 600.6431 was persuasive evidence that the Legislature did not intend for the fraudulent-concealment tolling provision of MCL 600.5855 to be read into the notice provisions of MCL 600.6431. The Legislature did not "omit" from the CCA any language from the statute-of-limitations provisions of the RJA; rather, the Legislature specifically included language mandating application of the RJA's statute-of-limitations provisions—and exceptions—to the statute-of-limitations provisions of the CCA. The RJA contains no statutory notice period, and the Legislature's failure to specifically address the application of the fraudulent-concealment exception to the CCA's statutory notice period could not be presumed intentional. Furthermore, under the rules of statutory construction, reasonable minds could differ regarding whether the plain language of

MCL 600.5855, as applied in the context of claims brought under the CCA, is intended to grant a claimant whose claim has been fraudulently concealed an affirmative right to bring suit within two years of discovery, regardless of prior noncompliance with the statutory requirements, or whether the exception applies only to toll the statutory limitations period. In this case, to read MCL 600.5855, as imported into the CCA, and MCL 600.6431 in harmony requires the conclusion that when the fraudulent-concealment exception applies, it operates to toll the statutory notice period as well as the statutory limitations period. Furthermore, application of the fraudulent-concealment exception to the statutory notice requirement of the CCA is consistent with both the legislative intent behind the exception itself and the purpose of the statutory notice period. Accordingly, the fraudulent-concealment exception applies to toll the statutory notice period commensurate with the tolling of the statute of limitations in situations in which its requirements have been met. In this case, if plaintiffs can prove, as they have alleged, that defendants actively concealed the information necessary to support plaintiffs' causes of action so that plaintiffs could not, or should not, have known of the existence of the causes of action until a date less than six months prior to the date of their complaint, application of the fraudulent-concealment exception will fully apply and plaintiffs should be permitted to proceed regardless of when their claims actually accrued. Summary disposition on this ground was therefore inappropriate because whether plaintiffs can satisfy the exception is a question that involves disputed facts and is subject to further discovery.

4. Under MCL 600.6419(1)(a), the Legislature endowed the Court of Claims with exclusive jurisdiction to hear and determine any claim or demand, statutory or constitutional, against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court. MCL 600.6419(7) provides that "the state or any of its departments or officers" is defined as this state, or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties. Because the CCA provides a definition of "state officer," it was impermissible to look past the CCA for a definition of state officer as employed within the CCA. Regardless of

whether emergency managers might be considered state officers in any context outside the CCA, the city defendants clearly fell within the CCA's own definition and, as intended, within the Court of Claims' jurisdiction. There was no dispute that the city defendants were acting, at all times relevant to plaintiffs' claims, as employees or officers of the state of Michigan and its agencies. The totality of the circumstances indicated that an emergency manager operates as an administrative officer of the state. An emergency manager, as an appointee of the state government, is an employee of the state government. Accordingly, claims against an emergency manager acting in his or her official capacity fall within the well-delineated subject-matter jurisdiction of the Court of Claims.

5. Because the city defendants' status as employees of the state during all times relevant to this appeal satisfied the jurisdictional question, the state defendants' challenge to the Court of Claims' characterization of emergency managers as receivers for the state did not need to be addressed. However, the characterization of emergency managers as receivers for the state provided additional support for the conclusion that claims against an emergency manager fall within the subject-matter jurisdiction of the Court of Claims. Under MCL 141.1542(q), an emergency manager's relationship with a municipality is specifically described as a "receivership." The powers and responsibilities delegated to an emergency manager under the Local Financial Stability and Choice Act, MCL 141.1541 *et seq.*, mirror those of an appointed receiver, and emergency managers act as neutral overseers to help eliminate a financial emergency. Additionally, it has long been recognized that a receiver serves as the administrative arm or officer of the authority exercising the power of appointment, which falls under the definition of "the state or any of its departments or officers" for purposes of Court of Claims jurisdiction under MCL 600.6419(7). The characterization of emergency managers as ministerial arms or officers of the state did not contradict the holding in *Kincaid v City of Flint*, 311 Mich App 76 (2015), because the *Kincaid* Court held that emergency managers do not inherit all the powers of the governor; the Court did not hold that emergency managers could not act as agents of the state. Accordingly, the Court of Claims did not err when it concluded that the city defendants, in their official capacities as emergency managers, operated as arms of the state during all times relevant to the instant suit and therefore fell within the subject-matter jurisdiction of the Court of Claims.

6. To establish a violation of the Constitution, a plaintiff must show that the state action at issue (1) deprived the plaintiff of a substantive constitutional right and (2) was executed pursuant to an official custom or policy. The right to be free of state-occasioned damage to a person's bodily integrity is protected by the Due Process Clause of both the United States and Michigan Constitutions. Violation of the right to bodily integrity involves an egregious, nonconsensual entry into the body that was an exercise of power without any legitimate governmental objective. To survive dismissal, the alleged violation of the right to bodily integrity must be so egregious and so outrageous that it may fairly be said to shock the contemporary conscience. Conduct that is merely negligent does not shock the conscience; at a minimum, proof of deliberate indifference is required. To act with deliberate indifference, a state actor must know of and disregard an excessive risk to the complainant's health or safety. In this case, plaintiffs alleged a nonconsensual entry of contaminated and toxic water into their bodies as a direct result of defendants' decision to pump water from the Flint River into their homes and defendants' affirmative act of physically switching the water source. There was no legitimate governmental objective for this violation. Plaintiffs have alleged facts sufficient to support a constitutional violation by defendants of plaintiffs' right to bodily integrity: plaintiffs alleged that defendants made the decision to switch the city of Flint's water source to the Flint River after a period of deliberation, despite knowledge of the hazardous properties of the water; that defendants neglected to conduct any additional scientific assessments of the suitability of the Flint water for use and consumption before making the switch, which was conducted with knowledge that Flint's water treatment system was inadequate; and that various state actors intentionally concealed scientific data and made false assurances to the public regarding the safety of the Flint River water even after they had received information suggesting that the water supply directed to plaintiffs' homes was contaminated with Legionella bacteria and dangerously high levels of toxic lead. At the very least, plaintiffs have alleged facts sufficient to support a finding of deliberate indifference on the part of the governmental actors involved.

7. The state and its officials will only be held liable for violation of the state Constitution in cases in which a state custom or policy mandated the official or employee's actions. Official governmental policy includes the decisions of a government's lawmakers and the acts of its policymaking officials. These decisions subject governmental officers to liability when a delib-

erate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. The facts of this case as plaintiffs allege, if true, are sufficient to support the conclusion that their constitutional claim of injury to bodily integrity arose from actions taken by state actors pursuant to governmental policy. Plaintiffs alleged that the state and city defendants authorized the adoption of particular courses of action regarding the switch from the Detroit water system to the Flint River as an interim source of drinking water. Plaintiffs further alleged a coordinated effort involving various state officials, including multiple high-level DEQ employees, to mislead the public in an attempt to cover up the harm caused by the water switch. If these allegations are proved true, they also support the conclusion that governmental actors, acting in their official roles as policymakers, considered a range of options and made a deliberate choice to orchestrate an effort to conceal the consequences of the water switch, likely exposing plaintiffs and other water users to unnecessary further harm. Therefore, the allegations in plaintiffs' complaint were sufficient to establish a violation of constitutional rights arising from the implementation of official policy.

8. In determining whether it is appropriate to recognize a damage remedy for the state's violation of Article 1, § 17, of the 1963 Michigan Constitution, the following factors are weighted: (1) the existence and clarity of the constitutional violation itself, (2) the degree of specificity of the constitutional protection, (3) support for the propriety of a judicially inferred damage remedy in any text, history, and previous interpretations of the specific provision, (4) the availability of another remedy, and (5) various other factors militating for or against a judicially inferred damage remedy. Under the first factor, plaintiffs have set forth allegations to establish a clear violation of the Michigan Constitution, which weighed in favor of a judicially inferred damage remedy. However, under the second and third factors, the protections of the Due Process Clause are not as "clear-cut" as specific protections found elsewhere in the Constitution, and while Michigan appellate courts have acknowledged that the substantive component of the federal Due Process Clause protects an individual's right to bodily integrity, there was no Michigan appellate decision expressly recognizing the same protection under the Due Process Clause of the Michigan Constitution or a stand-alone constitutional tort for violation of the right to bodily integrity; therefore, the second and third factors weighed slightly against recognition of a damage remedy for the injuries alleged. Under the fourth factor, whether

plaintiffs have any available alternative remedies against these defendants, the fact that plaintiffs might be pursuing causes of action in another court was largely irrelevant at this stage of the proceedings. Additionally, a judicially imposed damage remedy for the alleged constitutional violation was the only available avenue for obtaining monetary relief in this case: a suit for monetary damages under 42 USC 1983 for violation of rights granted under the federal Constitution or a federal statute cannot be maintained in any court against a state, a state agency, or an official sued in his or her official capacity because the Eleventh Amendment affords the state and its agencies immunity from such liability, and the state and its officials enjoy broad immunity from liability under state law. Contrary to defendants' assertion, the federal Safe Drinking Water Act, 42 USC 300f *et seq*., and the Michigan Safe Drinking Water Act, MCL 325.1001 *et seq*., did not provide a legislative scheme for vindication of the alleged constitutional violations. Additionally, the "availability" of plaintiffs' remedies in a related federal court action in which plaintiffs seek injunctive relief, compensatory damages, and punitive damages did not affect this factor because the availability of those remedies remains to be seen. While the availability of an alternative remedy does not act as a complete bar to a judicially inferred damage remedy, if an alternative remedy does exist, this factor must be strongly weighted against the propriety of an inferred damage remedy; however, no alternative remedy was available in this case, which weighed in favor of a judicially inferred damage remedy. As for the fifth factor, it was appropriate to give significant weight to the degree of outrageousness of the state actors' conduct; the egregious nature of defendants' alleged constitutional violation weighed considerably in favor of recognizing a remedy. On the basis of the totality of the circumstances at this stage of the proceedings, it was appropriate to recognize a judicially inferred damage remedy for the injuries alleged in this case. Accordingly, summary disposition of plaintiffs' injury-to-bodily-integrity claim was inappropriate.

9. The Due Process Clause of the 1963 Michigan Constitution, art 1, § 17, does not require a state to protect its citizens' lives, liberty, and property against invasion by private actors or require a state to guarantee a minimum level of safety and security. The United States Supreme Court in *DeShaney v Winnebago Co Dep't of Social Servs*, 489 US 189 (1989), announced a state-created-danger exception that applies in situations in which an individual in the physical custody of the state, by incarceration or institutionalization or some similar restraint of liberty, suffers harm from third-party violence resulting from an affirmative action of

the state to create or make the individual more vulnerable to a danger of violence. Courts recognizing the state-created-danger exception consistently require some third-party, nongovernmental harm either facilitated by or made more likely by an affirmative action of the state. In this case, however, plaintiffs' state-created-danger cause of action could not be sustained because plaintiffs have not alleged any actions by defendants that created or increased the risk that plaintiffs would be exposed to an act of violence by a third party. Plaintiffs have alleged harms caused directly and intentionally by state actors, which was not the sort of factual situation in which a claim for state-created danger, according to its common conception, could be recognized. The Court of Claims did not err when it concluded that, even if a state-created-danger cause of action is cognizable under Michigan law, plaintiffs have not alleged facts to support it; accordingly, summary disposition in favor of all defendants on plaintiffs' state-created-danger claim was appropriate.

10. The United States Constitution, US Const, Am V, and the Michigan Constitution, Const 1963, art 10, § 2, prohibit the taking of private property for public use without just compensation. Inverse condemnation is a cause of action against a governmental defendant to recover the value of property that has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. A plaintiff alleging inverse condemnation must establish (1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property. Further, the right to just compensation in the context of an inverse-condemnation suit for diminution in value exists only when the landowner can allege a unique or specific injury from the harm suffered by all persons similarly situated. In this case, plaintiffs alleged reduced property values as a result of physical damage to plumbing, water heaters, and service lines after defendants made the decision to switch the water source to the Flint River and after defendants concealed or misrepresented data and made false statements about the safety of the Flint River water in an attempt to downplay the risk of its use and consumption. If proved to be true, these allegations are sufficient to allow a conclusion that the state actors' actions were a substantial cause of the decline of the property's value and that the state abused its powers through affirmative actions directly aimed at the property, i.e., continuing to supply each water user with corrosive and contaminated water with knowledge of the adverse consequences associated with being supplied with such

water. Because questions of fact still exist that, if resolved in plaintiffs' favor, support each element of plaintiffs' inverse-condemnation claim, the Court of Claims did not err when it concluded that summary disposition was inappropriate at this stage of the proceedings.

11. Michigan courts have long recognized suits against state officials in their official capacities for claims arising outside of federal law. Contrary to the state defendants' assertions, nothing in the provisions of Michigan's governmental liability statutes precludes an official-capacity suit, particularly one predicated on allegations of constitutional violations. The governmental immunity statutes do not apply when, as in this case, a plaintiff has alleged violations of the Michigan Constitution. The liability of the state and its officers for constitutional torts is not something the state must affirmatively grant via statute; liability of the state and its officers for constitutional torts is simply inherent in the fact that the Constitution binds even the state government as the preeminent law of the land. In this case, plaintiffs sued Governor Snyder and Emergency Managers Earley and Ambrose in their official capacities only, rather than as individual governmental employees. Because a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office, if plaintiffs are successful in their causes of action against the Governor, Earley, or Ambrose, plaintiffs must look to recover monetary damages from the state; plaintiffs' official-capacity suits cannot result in individual liability. Plaintiffs have leveled specific allegations against the Governor, Earley, and Ambrose, and these defendants' participation in the judicial process is required. Given that Michigan courts have historically recognized official-capacity suits, the Court of Claims did not err by allowing plaintiffs' official-capacity suits against the Governor and the city defendants to proceed.

Affirmed.

RIORDAN, J., dissenting, would have held that because plaintiffs failed to comply with MCL 600.6431(3), the trial court's order should be reversed and remanded with direction for the trial court to enter an order summarily disposing of all plaintiffs' claims and dismissing the case. To the extent that *Rusha v Dep't of Corrections*, 307 Mich App 300 (2014), may have attempted to create, whether as dicta or otherwise, a harsh-and-unreasonable-consequences exception to MCL 600.6431(3), the *Rusha* Court was barred from doing so by the Michigan Supreme Court's holding in *McCahan v Brennan*, 492 Mich 730 (2012), that the notice requirements in MCL 600.6431 must be interpreted and

enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate. Had the Legislature intended the notice provision to be potentially excused by the possibility of harsh and unreasonable consequences, it would have written that into the statute; because the Legislature chose not to do so, there is no such exception and the Court of Claims erred by judicially creating one. Additionally, the plain language of MCL 600.6431 unambiguously established that the Legislature did not intend for the notice period in MCL 600.6431 to be tolled as a result of alleged fraudulent concealment. Under MCL 600.6452(2), the Legislature, in crafting the Court of Claims Act (CCA), MCL 600.6401 *et seq*., imported the fraudulent-concealment exception of the Revised Judicature Act (RJA), MCL 600.101 *et seq*., into its statute-of-limitations provision. MCL 600.6452 provides, in pertinent part, that the provisions of the RJA relative to the limitation of actions shall also be applicable *to the limitation prescribed in this section*; therefore, the language of MCL 600.6452(2) clearly delineates that it is only to apply to the section on limitations, not to the notice provision. MCL 600.6431, the notice provision of the CCA, does not contain a similar clause. Therefore, plaintiffs were not entitled to toll or except themselves from the statutory notice period found in the CCA. Plaintiffs did not file a separate notice of intent before filing the instant claim on January 21, 2016; therefore, in order to have complied with MCL 600.6431(3), the notice provision of the CCA, "the happening of the event giving rise to the cause of action"—i.e., when the claim accrued—must have occurred within six months of January 21, 2016. The CCA does not define when a claim accrues, and adoption of the definition of "accrued" from the statutes of the RJA would be inappropriate. Instead, a claim accrues only when a suit may be maintained thereon, as defined in *Cooke Contracting Co v Dep't of State*, 55 Mich App 336 (1971). Therefore, if plaintiffs first knew or had reason to know of their potential claims against defendants on or after July 21, 2015, then their notice was timely and their claims would be permitted under MCL 600.6431(3); however, if the accrual date fell anywhere before July 21, 2015, plaintiffs failed to comply with MCL 600.6431(3) and their claims must be dismissed. In this case, it was clear that plaintiffs had reason to know that they had suffered harm as a result of defendants' actions—and therefore their claims accrued—well before July 21, 2015: in April 2014, it was public knowledge that Flint water users had been switched over to the water from the Flint River; in June 2014, Flint citizens complained that the water was making them ill; in August and September 2014, the water tested positive for *E. coli* and Flint

issued boil-water advisories; in October 2014, General Motors announced that it would no longer use Flint River water in its Flint plant, which plaintiffs alleged was "clear evidence of serious and significant danger"; in January 2015, a Flint homeowner contacted the United States Environmental Protection Agency regarding the water and plaintiffs received notice that the water contained unlawful levels of a known carcinogen; and in February and March 2015, Flint water users staged public demonstrations demanding that Flint reconnect with the Detroit water system, and the Flint city council voted on the matter. Given these events, plaintiffs' claims clearly accrued before July 21, 2015. Judge RIORDAN also would take judicial notice of complaints filed against the city of Flint in the Genesee Circuit Court and the United States District Court for the Eastern District of Michigan that were filed before July 21, 2015—on June 5, 2015, and July 6, 2015, respectively—and that relied on many of the same facts as the present case. Therefore, plaintiffs' complaint filed on January 21, 2016—more than six months after any reasonably possible, and actually occurring, accrual date—did not satisfy the strict requirements of MCL 600.6431(3), and summary disposition should have been entered in favor of defendants. Additionally, had plaintiffs been reasonably diligent in their attempts to comply with the notice provision of the CCA, any claimed inequitable results could have been entirely avoided because plaintiffs would have had the benefit of the entire three-year statutory period of limitations of the CCA and would not have had to file a complaint until, at the earliest, April 25, 2017, which was three years after the switch occurred. Furthermore, because plaintiffs would then be dealing with the statute of limitations instead of the notice provision, they would have had the benefit of asserting that the limitations period had been tolled as a result of defendants' fraudulent concealment. Finally, the residents of Flint are not left entirely without remedies because related actions in federal court have survived summary judgment.

1. ACTIONS — REVISED JUDICATURE ACT — STATUTORY LIMITATIONS PERIODS — CLAIM ACCRUAL.

For purposes of statutory limitations periods, a claim accrues under MCL 600.5827 of the Revised Judicature Act, MCL 600.101 *et seq*., at the time the wrong upon which the claim is based was done; the "wrong" is the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which the defendant breached his or her duty; because a claim does not accrue until each element of the cause of action exists, determi-

nation of the time at which the plaintiff's claim accrued requires a determination of the time at which the plaintiff was first harmed.

2. ACTIONS — STATUTORY LIMITATIONS PERIODS — HARSH-AND-UNREASONABLE-CONSEQUENCES EXCEPTION.

Michigan courts routinely enforce statutes of limitations when constitutional claims are at issue; an exception to enforcement exists when strict enforcement of a limitations period is so harsh and unreasonable in its consequences that it effectively divests a plaintiff of the access to the courts intended by the grant of a substantive right; while the Legislature retains the authority to impose reasonable procedural restrictions on a claimant's pursuit of claims under self-executing constitutional provisions, the Legislature may not impose a procedural requirement that would, in practical application, completely divest an individual of his or her ability to enforce a substantive right guaranteed under the Michigan Constitution; the harsh-and-unreasonable-consequences exception is a judicial recognition that in limited cases, when the practical application of the Legislature's statutorily imposed procedural requirements is unreasonable or completely divests a claimant of his or her right to pursue a constitutional claim, those procedural requirements are unconstitutional.

3. ACTIONS — REVISED JUDICATURE ACT — COURT OF CLAIMS ACT — FRAUDULENT-CONCEALMENT EXCEPTION TO STATUTORY LIMITATIONS PERIOD ALSO APPLIES TO TOLL THE STATUTORY NOTICE PERIOD.

The fraudulent-concealment exception, codified as part of the Revised Judicature Act, MCL 600.101 *et seq*., in MCL 600.5855, permits the tolling of a statutory limitations period for two years if the defendant fraudulently concealed the existence of a claim; the Legislature, in crafting the Court of Claims Act, MCL 600.6401 *et seq*., imported the fraudulent-concealment exception into MCL 600.6452(2), its statute-of-limitations provision; the fraudulent-concealment exception applies to toll the statutory notice period commensurate with the tolling of the statute of limitations in situations in which its requirements have been met.

4. COURTS — COURT OF CLAIMS — EXCLUSIVE JURISDICTION — CLAIMS AGAINST AN EMERGENCY MANAGER.

Under MCL 600.6419(1)(a), the Legislature endowed the Court of Claims with exclusive jurisdiction to hear and determine any claim or demand, statutory or constitutional, against the state or

any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court; for purposes of the Court of Claims Act, MCL 600.6401 *et seq*., claims against an emergency manager acting in his or her official capacity fall within the well-delineated subject-matter jurisdiction of the Court of Claims.

5. CONSTITUTIONAL LAW — DUE PROCESS CLAUSE — VIOLATION OF THE RIGHT TO BODILY INTEGRITY — PROOF OF DELIBERATE INDIFFERENCE REQUIRED.

The right to be free of state-occasioned damage to a person's bodily integrity is protected by the Due Process Clause of both the United States and Michigan Constitutions; violation of the right to bodily integrity involves an egregious, nonconsensual entry into the body that was an exercise of power without any legitimate governmental objective; to survive dismissal, the alleged violation of the right to bodily integrity must be so egregious and so outrageous that it may fairly be said to shock the contemporary conscience; at a minimum, proof of deliberate indifference is required, and to act with deliberate indifference, a state actor must know of and disregard an excessive risk to the complainant's health or safety.

6. CONSTITUTIONAL LAW — LIABILITY OF THE STATE AND STATE OFFICIALS — STATE CUSTOM OR POLICY.

The state and its officials will only be held liable for violation of the state Constitution in cases in which a state custom or policy mandated the official's or employee's actions; official governmental policy includes the decisions of a government's lawmakers and the acts of its policymaking officials; these decisions subject governmental officers to liability when a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

7. CONSTITUTIONAL LAW — DUE PROCESS CLAUSE — JUDICIALLY INFERRED DAMAGE REMEDY FOR THE STATE'S VIOLATION OF THE DUE PROCESS CLAUSE — AVAILABILITY OF AN ALTERNATIVE REMEDY DOES NOT ACT AS A COMPLETE BAR.

In determining whether it is appropriate to recognize a judicially inferred damage remedy for the state's violation of Article 1, § 17, of the 1963 Michigan Constitution, the following factors are weighted: (1) the existence and clarity of the constitutional violation itself, (2) the degree of specificity of the constitutional protection, (3) support for the propriety of a judicially inferred damage remedy in any text, history, and previous interpretations

of the specific provision, (4) the availability of another remedy, and (5) various other factors militating for or against a judicially inferred damage remedy; under the fourth factor, while the availability of an alternative remedy does not act as a complete bar to a judicially inferred damage remedy, if an alternative remedy does exist, this factor must be strongly weighted against the propriety of an inferred damage remedy.

8. CONSTITUTIONAL LAW — DUE PROCESS CLAUSE — STATE-CREATED-DANGER EXCEPTION — THIRD-PARTY, NONGOVERNMENTAL HARM RESULTING FROM AN AFFIRMATIVE ACTION BY THE STATE IS REQUIRED.

The Due Process Clause of the 1963 Michigan Constitution, art 1, § 17, does not require a state to protect its citizens' lives, liberty, and property against invasion by private actors or require a state to guarantee a minimum level of safety and security; however, a state-created-danger exception exists that applies in situations in which an individual in the physical custody of the state, by incarceration or institutionalization or some similar restraint of liberty, suffers harm from third-party violence resulting from an affirmative action of the state to create or make the individual more vulnerable to a danger of violence; some third-party, nongovernmental harm either facilitated by or made more likely by an affirmative action of the state is required for application of the state-created-danger exception.

9. CONSTITUTIONAL LAW — TAKINGS CLAUSE — INVERSE CONDEMNATION — RIGHT TO JUST COMPENSATION — LANDOWNER MUST ALLEGE A UNIQUE OR SPECIFIC INJURY.

A plaintiff alleging inverse condemnation must establish (1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property; the right to just compensation in the context of an inverse-condemnation suit for diminution in value exists only when the landowner can allege a unique or specific injury from the harm suffered by all persons similarly situated.

10. ACTIONS — ACTIONS AGAINST THE STATE — ALLEGED VIOLATIONS OF THE MICHIGAN CONSTITUTION — LIABILITY OF THE STATE AND STATE OFFICERS FOR CONSTITUTIONAL TORTS.

Michigan courts have long recognized suits against state officials in their official capacities for claims arising outside of federal law; the governmental immunity statutes do not apply when a plaintiff has alleged violations of the Michigan Constitution; the liability of the state and its officers for constitutional torts is not

> something the state must affirmatively grant via statute; rather, liability of the state and its officers for constitutional torts is simply inherent in the fact that the Constitution binds even the state government as the preeminent law of the land.

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William Y. Kim and *Reed E. Eriksson*, Assistant City Attorneys, for Darnell Earley and Jerry Ambrose.

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

JANSEN, P.J. This case involves consolidated appeals from an October 26, 2016 opinion and order of the Court of Claims granting partial summary disposition

in favor of defendants Governor Rick Snyder, the state of Michigan, the Michigan Department of Environmental Quality (DEQ), and the Michigan Department of Health and Human Services (DHHS) (collectively, the state defendants) and defendants Darnell Earley and Jerry Ambrose (the city defendants), who are former emergency managers for the city of Flint, in this putative class action brought by plaintiff water users and property owners in the city of Flint, Michigan. For the reasons that follow, we affirm.

I. FACTS AND PROCEDURE

This case arises from the situation commonly referred to as the "Flint water crisis." The lower court record is only modestly developed, and the facts of the case are highly disputed. Because this is an appeal from an opinion of the Court of Claims partially granting and partially denying defendants' motion for summary disposition, we must construe the factual allegations in a light most favorable to plaintiffs.[1] The Court of Claims summarized the factual allegations in plaintiffs' complaint as follows:

> From 1964 through late April 2014, the Detroit Water and Sewage Department ("DWSD") supplied Flint water

[1] See *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304-305; 788 NW2d 679 (2010) (explaining that in deciding a motion under MCR 2.116(C)(8), this Court must accept the allegations as true and construe them in a light most favorable to the nonmoving party); *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006) (noting that when deciding a motion under MCR 2.116(C)(7), "all well-pleaded allegations must be accepted as true and construed in favor of the nonmoving party" unless contradicted by the submitted evidence) (quotation marks and citation omitted); *Cork v Applebee's of Mich, Inc*, 239 Mich App 311, 315; 608 NW2d 62 (2000) (explaining that genuine issues of material fact regarding a court's subject-matter jurisdiction preclude summary disposition under MCR 2.116(C)(4)).

users with their water, which was drawn from Lake Huron. Flint joined Genesee, Sanilac and Lapeer Counties and the City of Lapeer, in 2009, to form the Karegondi Water Authority ("KWA") to explore the development of a water delivery system that would draw water from Lake Huron and serve as an alternative to the Detroit water delivery system. On March 28, 2013, the State Treasurer recommended to the Governor that he authorize the KWA to proceed with its plans to construct the alternative water supply system. The State Treasurer made this decision even though an independent engineering firm commissioned by the State Treasurer had concluded that it would be more cost efficient if Flint continued to receive its water from the DWSD. Thereafter, on April 16, 2013, the Governor authorized then-Flint Emergency Manager Edward Kurtz to contract with the KWA for the purpose of switching the source of Flint's water from the DWSD to the KWA beginning in mid-year 2016.

At the time Emergency Manager Kurtz contractually bound Flint to the KWA project, the Governor and various state officials knew that the Flint River would serve as an interim source of drinking water for the residents of Flint. Indeed, the State Treasurer, the emergency manager and others developed an interim plan to use Flint River water before the KWA project became operational. They did so despite knowledge of a 2011 study commissioned by Flint officials that cautioned against the use of Flint River water as a source of drinking water and despite the absence of any independent state scientific assessment of the suitability of using water drawn from the Flint River as drinking water.

On April 25, 2014, under the direction of then Flint Emergency Manager Earley and the Michigan Department of Environmental Quality ("MDEQ"), Flint switched its water source from the DWSD to the Flint River and Flint water users began receiving Flint River water from their taps. This switch was made even though Michael Glasgow, the City of Flint's water treatment plant's laboratory and water quality supervisor, warned that Flint's water treatment plant was not fit to begin operations. The

2011 study commissioned by city officials had noted that Flint's long dormant water treatment plant would require facility upgrades costing millions of dollars.

Less than a month later, state officials began to receive complaints from Flint water users about the quality of the water coming out of their taps. Flint residents began complaining in June of 2014 that they were becoming ill after drinking the tap water. On October 13, 2014, General Motors announced that it was discontinuing the use of Flint water in its Flint plant due to concerns about the corrosive nature of the water. That same month, Flint officials expressed concern about a Legionellosis outbreak and possible links between the outbreak and Flint's switch to the river water. On February 26, 2015, the United States Environmental Protection Agency ("EPA") advised the MDEQ that the Flint water supply was contaminated with iron at levels so high that the testing instruments could not measure the exact level. That same month, the MDEQ was also advised of the opinion of Miguel Del Toral of the EPA that black sediment found in some of the tap water was lead.

During this time, state officials failed to take any significant remedial measures to address the growing public health threat posed by the contaminated water. Instead, state officials continued to downplay the health risk and advise Flint water users that it was safe to drink the tap water while at the same time arranging for state employees in Flint to drink water from water coolers installed in state buildings. Additionally, the MDEQ advised the EPA that Flint was using a corrosion control additive with knowledge that the statement was false.

By early March 2015, state officials knew they faced a public health emergency involving lead poisoning and the presence of the deadly Legionella bacteria, but actively concealed the health threats posed by the tap water, took no measures to effectively address the dangers, and publicly advised Flint water users that the water was safe and that there was no widespread problem with lead leaching into the water supply despite knowledge that these latter two statements were false.

> Through the summer and into the fall of 2015, state officials continued to cover up the health emergency, discredit reports from Del Toral of the EPA and Professor Marc Edwards of Virginia Tech confirming serious lead contamination in the Flint water system, conceal critical information confirming the presence of lead in the water system, and advise the public that the drinking water was safe despite knowledge to the contrary. In the fall of 2015, various state officials attempted to discredit the findings of Dr. Mona [Hanna]-Attisha of Hurley Hospital, which reflected a "spike in the percentage of Flint children with elevated blood lead levels from blood drawn in the second and third quarter of 2014."
>
> In early October of 2015, however, the Governor acknowledged that the Flint water supply was contaminated with dangerous levels of lead. He ordered Flint to reconnect to the Detroit water system on October 8, 2015, with the reconnection taking place on October 16, 2015. This suit followed. [*Mays v Governor*, unpublished opinion of the Court of Claims, issued October 26, 2016 (Docket No. 16-000017-MM), pp 3-6 (citation omitted).]

On January 21, 2016, plaintiffs brought a four-count verified class action complaint against all defendants in the Court of Claims "on behalf of Flint water users, which include but are not limited to, tens of thousands of residents . . . of the City of Flint . . . ." Plaintiffs brought their complaint pursuant to the Michigan Constitution's Due Process/Fair and Just Treatment Clause, Const 1963, art 1, § 17, and Unjust Takings Clause, Const 1963, art 10, § 2, alleging that since "April 25, 2014 to the present, [plaintiffs] have experienced and will continue to experience serious personal injury and property damage caused by Defendants' deliberately indifferent decision to expose them to the extreme toxicity of water pumped from the Flint River into their homes, schools, hospitals, correctional facilities, workplaces and public places." Specifically, plaintiffs alleged that defendants (1) "knowingly took from

Plaintiffs safe drinking water and replaced it with what they knew to be a highly toxic alternative solely for fiscal purposes," (2) for more than 18 months, ignored irrefutable evidence that the Flint River water was extremely toxic and causing serious injury to persons and property, (3) failed to properly sample and monitor the Flint River water, (4) knowingly delivered false assurances that the Flint River water was being tested and treated and was safe to drink, and (5) deliberately delayed notification to the public of serious safety and health risks.

Plaintiffs sought class certification and elected to pursue causes of action against all defendants for state-created danger (Count I), violation of plaintiffs' due-process right to bodily integrity (Count II), denial of fair and just treatment during executive investigations (Count III), and unconstitutional taking via inverse condemnation (Count IV). Plaintiffs sought an award of economic and noneconomic damages for, among other things, bodily injury, pain and suffering, and property damage, for "deliberately indifferent fraud" and "unconscionable" deception on the part of defendants while acting in their official capacities.

The state and city defendants separately moved for summary disposition on all four counts, arguing that, among other things, plaintiffs had (1) failed to satisfy the statutory notice requirements of MCL 600.6431, (2) failed to allege facts to establish a constitutional violation for which a judicially inferred damage remedy is appropriate, and (3) failed to allege facts to establish the elements of any of their claims. In a detailed opinion and order, the Court of Claims granted defendants' motions for summary disposition on plaintiffs' causes of action under the state-created-danger doctrine and the Fair and Just Treatment Clause of the

Michigan Constitution after concluding that neither cause of action is cognizable under Michigan law.[2] However, the court denied summary disposition on all of defendants' remaining grounds.

II. STATUTORY NOTICE REQUIREMENTS

On appeal, defendants first argue that the Court of Claims erred when it denied defendants' motions for summary disposition under MCR 2.116(C)(4) and (7) because plaintiffs failed to satisfy the requirement of statutory notice to avoid governmental immunity and seek relief against the state in the Court of Claims. We disagree.

"We review a trial court's decision regarding a motion for summary disposition de novo." *City of Fraser v Almeda Univ*, 314 Mich App 79, 85; 886 NW2d 730 (2016). A motion for summary disposition under MCR 2.116(C)(4) tests the trial court's subject-matter jurisdiction. *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 154; 756 NW2d 483 (2008). "We review a trial court's decision on a motion for summary disposition based on MCR 2.116(C)(4) de novo to determine if the moving party was entitled to judgment as a matter of law, or if affidavits or other proofs demonstrate there is an issue of material fact." *Southfield Ed Ass'n v Southfield Pub Sch Bd of Ed*, 320 Mich App 353, 373; 909 NW2d 1 (2017) (quotation marks and citation omitted). Whether a court has subject-matter jurisdiction over a claim is a question of law this Court reviews de novo. *Jamil v Jahan*, 280 Mich App 92, 99-100; 760 NW2d 266 (2008). Likewise, "whether MCL 600.6431 requires dismissal of a plaintiff's claim

[2] On appeal, plaintiffs take no issue with the Court of Claims' dismissal of their claim for violation of the Fair and Just Treatment Clause.

for failure to provide the designated notice raises questions of statutory interpretation," which this Court reviews de novo. *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012).

Summary disposition under MCR 2.116(C)(7) is appropriate when a claim is barred because of immunity granted by law. *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Id*. "If no material facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006) (quotation marks, citation, and brackets omitted).

We hold that the Court of Claims did not err when it determined that genuine issues of material fact still exist regarding whether plaintiffs satisfied the statutory notice requirements of MCL 600.6431. Further, we hold that the harsh-and-unreasonable-consequences exception relieves plaintiffs from the statutory notice requirements and that, depending on plaintiffs' ability to prove the allegations of their complaint, the fraudulent-concealment exception of MCL 600.5855 may provide an alternative basis to affirm the court's denial of summary disposition.

A. STATUTORY NOTICE REQUIREMENTS

In Michigan, governmental agencies engaged in governmental functions are generally immune from tort liability. *Kline v Dep't of Transp*, 291 Mich App 651, 653; 809 NW2d 392 (2011). The government, by stat-

ute, may voluntarily subject itself to liability and "may also place conditions or limitations on the liability imposed." *McCahan*, 492 Mich at 736. "Indeed, it is well established that the Legislature may impose reasonable procedural requirements, such as a limitations period, on a plaintiff's available remedies even when those remedies pertain to alleged constitutional violations." *Rusha v Dep't of Corrections*, 307 Mich App 300, 307; 859 NW2d 735 (2014). "[I]t being the sole province of the Legislature to determine whether and on what terms the state may be sued, the judiciary has no authority to restrict or amend those terms." *McCahan*, 492 Mich at 732. Thus, "no judicially created saving construction is permitted to avoid a clear statutory mandate." *Id*. at 733. When the language of a limiting statute is straightforward, clear, and unambiguous, it must be enforced as written. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007).

One statutory condition on the right to sue governmental agencies of the state of Michigan is the notice provision of the Court of Claims Act (CCA), MCL 600.6401 *et seq*. *McCahan*, 492 Mich at 736. The provision, MCL 600.6431, provides:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

* * *

> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

Our Supreme Court has directed that "[c]ourts may not engraft an actual prejudice requirement or otherwise reduce the obligation to comply fully with statutory notice requirements." *McCahan*, 492 Mich at 746-747. The notice requirement of MCL 600.6431 is an unambiguous "condition precedent to sue the state," *McCahan v Brennan*, 291 Mich App 430, 433; 804 NW2d 906 (2011), aff'd 492 Mich 730 (2012), and a claimant's failure to strictly comply warrants dismissal of the claim, *McCahan*, 492 Mich at 746-747.

There is no dispute that plaintiffs' action involves personal injury and property damage. Plaintiffs filed their complaint in the instant suit on January 21, 2016, without having filed a separate notice of intention to file a claim. Therefore, to have strictly complied with the notice requirement of MCL 600.6431, plaintiffs' claims must have accrued on or after July 21, 2015, the date six months prior to the date of filing. Defendants argue that plaintiffs' claims accrued, and the statutory notice period began to run, in either June 2013, when plaintiffs allege that the state "ordered and set in motion the use of highly corrosive and toxic Flint River water knowing that the [water treatment plant] was not ready," or on April 25, 2014, when Flint's water source was switched over to the Flint River and residents began receiving Flint River water from their taps. In either circumstance, according to defendants, plaintiffs' complaint was not filed within the six-month statutory notice period and plaintiffs' claims must be dismissed. As the Court of Claims observed, accepting defendants' position would require a finding that plain-

tiffs should have filed suit or provided notice at a time when the state itself claims it had no reason to know that the Flint River water was contaminated. Like the Court of Claims, we are disinclined to accept defendants' position.

At a minimum, summary disposition on this ground is premature. Plaintiffs have alleged personal injury and property damage sustained as a result of defendants' allegedly knowing and deliberate decision to supply plaintiffs with contaminated and unsafe drinking water. Although defendants assert that plaintiffs' causes of action could only have arisen on the date of the physical switch, our Legislature has not defined claim accrual so narrowly. Rather, for purposes of statutory limitations periods, our Legislature has stated that a claim accrues "at the time the wrong upon which the claim is based was done," MCL 600.5827, and our Supreme Court has clarified that "the 'wrong' . . . is the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which defendant breached his duty," *Frank v Linkner*, 500 Mich 133, 147; 894 NW2d 574 (2017) (quotation marks and citation omitted).[3] Therefore, the date on which defendants acted to switch the water is not necessarily the date on which plaintiffs suffered the harm giving rise to their causes of action. Although our Supreme Court has abrogated the application of the discovery doctrine in this state, it has also made clear that it is not until "all of the elements of an action for . . . injury, including the element of damage, are present, [that] the claim accrues and the statute of limitations begins

[3] The Legislature imported this definition of claim accrual into the CCA under MCL 600.6452(2), which states that "[e]xcept as modified by this section, the provisions of [Revised Judicature Act] chapter 58, [MCL 600.5801 *et seq*.,] relative to the limitation of actions, shall also be applicable to the limitation prescribed in this section."

to run." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 290; 769 NW2d 234 (2009), quoting *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972) (quotation marks omitted). In other words, while a claimant's knowledge of each element of a cause of action is not necessary for claim accrual, a claim does not accrue until each element of the cause of action, including some form of damages, *exists*. See *Henry v Dow Chem Co*, 319 Mich App 704, 720; 905 NW2d 422 (2017), rev'd in part on other grounds 905 NW2d 601 (2017). Determination of the time at which plaintiffs' claims accrued therefore requires a determination of the time at which plaintiffs were first harmed. See *id*.

Plaintiffs allege various affirmative actions taken by defendants in this case that resulted in distinct harm to plaintiffs. As plaintiffs concede, not every injury suffered by every user of Flint water is necessarily actionable. However, questions of fact remain regarding whether and when each plaintiff suffered injury and when each plaintiff's claims accrued relative to the filing of plaintiffs' complaint. For example, plaintiffs have alleged economic damage in the form of lost property value that did not occur on the date of the water switch. Plaintiffs' claim for lack of marketability did not accrue until the values of their homes decreased, which would have occurred when the water crisis became public and marketability of property in Flint became significantly impaired in October 2015. Further, it is not clear on what date plaintiffs suffered actionable personal injuries as a result of their use and consumption of the contaminated water. Plaintiffs should be permitted to conduct discovery and should be given the opportunity to prove the dates on which their distinct harms first arose before summary disposition

may be appropriate.[4] This is especially true where, as here, there are multiple events giving rise to plaintiffs' causes of action.[5] "[T]he fact that some of a plaintiff's claims accrued outside the applicable limitations period does not time-bar all the plaintiff's claims." *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 28; 896 NW2d 39 (2016).

Thus, even if strict compliance with the statutory notice provision is required, summary disposition, at least at this juncture, is premature. Further, as the Court of Claims observed, there are factual questions that, if resolved in plaintiffs' favor, would justify "relieving [plaintiffs] from the requirements of" MCL 600.6431(3). *Rusha*, 307 Mich App at 312 (quotation marks and citation omitted).

B. HARSH AND UNREASONABLE CONSEQUENCES

Plaintiffs have asserted only constitutional claims against the state and various agencies. In *Rusha*, 307 Mich App at 311, the Court of Appeals acknowledged

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[4] Defendants argue that the Court of Claims erred by relying "only" on hypothetical claims of putative class members to find remaining issues of fact. It is true that a plaintiff who has not suffered an injury "cannot maintain the cause of action as an individual [and] is not qualified to represent [a] proposed class." *Doe v Henry Ford Health Sys*, 308 Mich App 592, 604; 865 NW2d 915 (2014) (quotation marks and citation omitted). However, the issue of class certification has not yet been raised, and in any case, defendants' argument is not supported by the record. The Court of Claims fully considered plaintiffs' complaint and cited specific allegations by plaintiffs in this case before concluding that questions of fact remained regarding plaintiffs' ability to establish claims accruing later than the date of the water switch.

[5] The Court of Claims did not err by recognizing that plaintiffs' complaint alleges multiple harms resulting from distinct tortious acts rather than a continuing harm resulting from the single tortious act of switching the water source. For purposes of accrual, each of plaintiffs' individual causes of action must be considered separately. See *Joliet v Pitoniak*, 475 Mich 30, 42; 715 NW2d 60 (2006).

that "Michigan courts routinely enforce statutes of limitations where constitutional claims are at issue." However, the Court also acknowledged an exception to enforcement when strict enforcement of a limitations period is so harsh and unreasonable in its consequences that it "effectively divest[s]" a plaintiff "of the access to the courts intended by the grant of [a] substantive right." *Id*. (quotation marks and citation omitted). The Court then noted that there is no obvious reason not to extend this exception, typically applied to relieve a plaintiff of the effects of statutory limitations periods, to statutory notice requirements. Specifically considering MCL 600.6431(3), the *Rusha* Court opined:

> We see no reason—and plaintiff has provided none—to treat statutory notice requirements differently [than statutes of limitations]. Indeed, although statutory notice requirements and statutes of limitations do not serve identical objectives, both are *procedural* requirements that ultimately restrict a plaintiff's remedy, but not the substantive right. [*Rusha*, 307 Mich App at 311-312 (citations omitted).]

Defendants argue that *Rusha* was incorrectly decided and should not influence our decision here. Specifically, defendants assert that the *Rusha* Court's conclusions, first that a harsh-and-unreasonable-consequences exception may relieve plaintiffs from the statute of limitations and second that the same exception applies to statutory notice requirements, are directly contradicted by three earlier decisions of the Michigan Supreme Court: *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007); *Rowland*, 477 Mich 197, and *McCahan*, 492 Mich 730. Defendants argue that these cases unequivocally prohibit the application of any type of judicial "saving construction" to avoid the "clear statutory mandate" of a legislatively imposed limitations

period. Defendants are correct that these cases stand for the proposition that a court may not craft an exception to the statutory notice or limitations periods by recognizing viability of a substantially compliant notice, engrafting a prejudice requirement, or similarly reducing the requirements of the statute, even when constitutional claims are at issue. Indeed, the Court in *Rusha* acknowledged that "a claimant's failure to comply strictly with [the notice provision of MCL 600.6431] warrants dismissal of the claim, even if no prejudice resulted." *Rusha*, 307 Mich App at 307, citing *McCahan*, 492 Mich at 746-747. However, the Court also recognized that the strict compliance requirement must be set aside when its application completely divests a plaintiff of the opportunity to assert a substantive right. *Id*. at 311. Despite defendants' assertion to the contrary, *Rusha* should not be read as advocating for the creation of a judicial saving construction to supplement an otherwise valid statute. Rather, it seems that the *Rusha* Court properly recognized the longstanding principle that while the Legislature retains the authority to impose *reasonable* procedural restrictions on a claimant's pursuit of claims under self-executing constitutional provisions, "the right guaranteed shall not be curtailed or any undue burdens placed thereon." *Id*. at 308 (quotation marks and citation omitted).[6]

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[6] The Due Process Clause of the Michigan Constitution proscribes specific conduct and sets forth "a sufficient rule by means of which the right which it grants may be enjoyed and protected" and is therefore self-executing. See *Rusha*, 307 Mich App at 309 (quotation marks and citation omitted); see also *Santiago v New York State Dep't of Correctional Servs*, 945 F2d 25, 27 (CA 2, 1991) (considering the coextensive clause of the United States Constitution and opining that the substantive provisions of the Fourteenth Amendment are self-executing in nature). Indeed, the presumption is that all provisions of the Constitu-

The Michigan Constitution is the preeminent law of our land, and its provisions restrict the conduct of the state government. See *Burdette v Michigan*, 166 Mich App 406, 408; 421 NW2d 185 (1988). Indeed, the Due Process Clause of the Michigan Constitution, as a Declaration of Rights provision, "ha[s] consistently been interpreted as *limited* to protection against state action." *Sharp v Lansing*, 464 Mich 792, 813; 629 NW2d 873 (2001) (quotation marks and citation omitted; emphasis added). The Legislature may not impose a procedural requirement that would, in practical application, completely divest an individual of his or her ability to enforce a substantive right guaranteed thereunder. The harsh-and-unreasonable-consequences exception is merely a judicial recognition that in limited cases, when the practical application of the Legislature's statutorily imposed procedural requirements is unreasonable or completely divests a claimant of his or her right to pursue a constitutional claim, those procedural requirements are unconstitutional.

The *Rusha* Court's recognition of this limitation on legislative power does not conflict with the holdings in *Trentadue*, *Rowland*, or *McCahan*.[7] Importantly, these cases advocate strict compliance with statutory limitations and notice requirements in the context of legislatively granted rights rather than rights granted under the provisions of our Constitution itself. See *McCahan*, 492 Mich at 733 (considering the statutory notice period in relation to a claim for personal injury

tion, unless drafted only to reflect mere general principles, are self-executing. *Detroit v Oakland Circuit Judge*, 237 Mich 446, 450; 212 NW 207 (1927).

[7] Because we find no conflict between *Rusha* and the earlier Michigan Supreme Court cases cited by defendants here, we decline defendants' request to convene a conflict panel under MCR 7.215(J).

and property damage arising from a motor vehicle accident); *Trentadue*, 479 Mich at 386-387 (considering the statute of limitations on a wrongful-death action); *Rowland*, 477 Mich at 200 (considering the statutory notice period for a claim against a county defendant under a statutory exception to governmental liability). The right to pursue the tort claims involved in each case arose from enumerated exceptions to the governmental tort liability act (GTLA), MCL 691.1401 *et seq*.—allowances structured by the Legislature's own authority and therefore subject to the Legislature's discretion. Additionally, *Rusha* was decided years after each of these cases and is supported by precedent that has not been overruled.[8]

Applying the harsh-and-unreasonable-consequences exception to the facts presented in *Rusha*, the Court

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[8] The state defendants direct this Court's attention to *Bacon v Michigan*, unpublished opinion of the Court of Claims, issued June 7, 2017 (Docket No. 16-000312-MM), in which the court suggested in a footnote that "defendants appear correct in their argument that the statement [from *Rusha* recognizing a harsh-and-unreasonable-consequences exception] is no longer a valid statement of the law as it pertains to statutes of limitations . . . ." *Id*. at 8 n 5. The Court of Claims correctly noted that in *Curtin v Dep't of State Hwys*, 127 Mich App 160; 339 NW2d 7 (1983), the case cited by *Rusha*, the Court relied on a now-abrogated opinion, *Reich v State Hwy Dep't*, 386 Mich 617; 194 NW2d 700 (1972), abrogated by *Rowland*, 477 Mich at 206-207, for this language. *Bacon*, unpub op at 8 n 5. However, the Court of Claims incorrectly concluded that because *Curtin* cited bad caselaw, the principle announced in *Rusha* is "no longer . . . valid." *Id*. Our courts have recognized a harsh-and-unreasonable-consequences exception to the Legislature's statute of limitations in various lines of cases that have not been overruled. Most recently, this Court affirmed the application of the exception in *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 332-333; 869 NW2d 635 (2015), with the same language employed by the Court in *Rusha*. *Rusha*'s detailed discussion of the exception and its application to the statutory notice period remains valid despite the citation error.

We note that the Michigan Supreme Court denied leave to appeal the *Rusha* decision. *Rusha v Dep't of Corrections*, 498 Mich 860 (2015).

concluded that there was no reason to relieve the plaintiff from the requirement of strict compliance with the statutory notice requirement. *Rusha*, 307 Mich App at 312-313. The Court explained:

> Here, it can hardly be said that application of the six-month notice provision of § 6431(3) effectively divested plaintiff of the ability to vindicate the alleged constitutional violation or otherwise functionally abrogated a constitutional right. Again, plaintiff waited nearly 28 months to file his claim. But § 6431(3) would have permitted him to file a claim on this very timeline had he only provided notice of his intent to do so within six months of the claim's accrual. Providing such notice would have imposed only a minimal procedural burden, which in any event would be significantly less than the "minor 'practical difficulties' facing those who need only make, sign and file a complaint within six months." To be sure, providing statutory notice " 'requires only ordinary knowledge and diligence on the part of the injured and his counsel, and there is no reason for relieving them from the requirements of this [statutory notice provision] that would not be applicable to any other statute of limitation.' " [*Id*. (citations omitted; alteration by the *Rusha* Court).]

In this case, unlike in *Rusha*, application of the harsh-and-unreasonable-consequences exception is clearly supported. To grant defendants' motions for summary disposition at this early stage in the proceedings would deprive plaintiffs of access to the courts and effectively divest them of the ability to vindicate the constitutional violations alleged. As the Court of Claims observed, this is not a case in which an ostensible, single event or accident has given rise to a cause of action, but one in which the "event giving rise to the cause of action was not readily apparent at the time of its happening." *Mays*, unpub op at 10. "Similarly, a significant portion of the injuries alleged to persons and property likely became manifest so gradually as to

have been well established before becoming apparent to plaintiffs because the evidence of injury was concealed in the water supply infrastructure buried beneath Flint and in the bloodstreams of those drinking the water supplied via that infrastructure." *Id.* at 10-11. Plaintiffs in this case did not wait more than two years after discovering their claims to file suit. Rather, they filed suit within six months of the state's public acknowledgment and disclosure of the toxic nature of the Flint River water to which plaintiffs were exposed.

Further supporting the application of the harsh-and-unreasonable-consequences exception to the requirement of statutory notice are plaintiffs' allegations of affirmative acts undertaken by numerous state actors, including named defendants, between April 25, 2014 and October 2015 to conceal both the fact that the Flint River water was contaminated and hazardous and the occurrence of any event that would trigger the running of the six-month notice period. Under these unique circumstances, to file statutory notice within six months of the date of the water source switch would have required far more than ordinary knowledge and diligence on the part of plaintiffs and their counsel. It would have required knowledge that defendants themselves claim not to have possessed at the time plaintiffs' causes of action accrued.[9]

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[9] We flatly reject defendants' contention that the burden on plaintiffs to file statutory notice within six months of the water switch would have been "minimal" because plaintiffs only needed to know that a claim was possible, not that a claim was fully supported, in order to provide timely notice. Defendants assume that plaintiffs had any knowledge of a possible claim during the period when, as plaintiffs allege, defendants were actively concealing information that a claim had accrued and the notice period had begun. If plaintiffs' allegations are proved true, filing notice within six months after the physical water switch would have placed more than a "minimal" burden on

Should plaintiffs' allegations be proved true, defendants' affirmative acts of concealment and frustration of plaintiffs' discovery of the alleged causes of action should not be rewarded. It would be unreasonable to divest plaintiffs of the opportunity to vindicate their substantive, constitutional rights simply because defendants successfully manipulated the public long enough to outlast the statutory notice period. Although circumstances such as these will undoubtedly be few, we believe that in this unique situation, we must not set a standard whereby the state and its officers may completely avoid liability if they manage to intentionally delay discovery of a cause of action until the six-month statutory notice period has expired. Plaintiffs must be afforded the opportunity to support the allegations of their complaint before dismissal of their claims may be deemed appropriate.

Because application of the harsh-and-unreasonable-consequences exception to strict compliance with the statutory notice requirements is appropriate under the unique factual circumstances of this case, this Court need not consider whether, as defendants have asserted, plaintiffs improperly rely on the now-abrogated doctrines of discovery and continuing wrongs. Despite the unavailability of these previously accepted principles, see *Henry*, 319 Mich App at 719-720, plaintiffs' constitutional tort claims survive summary disposition on the nonconflicting basis that dismissal would result in a harsh and unreasonable deprivation "of the access to the courts intended by the grant of [a] substantive right," see *Rusha*, 307 Mich App at 311 (quotation marks and citation omitted).

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plaintiffs and their counsel. Indeed, it would have required clairvoyant recognition of circumstances that the state was working to convince the public did not actually exist.

Finally, we briefly address the dissent's mention of similar pending federal district court and circuit court actions. The dissent argues that even though plaintiffs are precluded from recovery due to their alleged failure to provide proper notice, "the residents of Flint are not left entirely without remedies" due to several pending actions in the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit, including some actions in which a named plaintiff in this case is also involved. However, until those actions are fully resolved, any recovery is speculative. Further, while many federal statutory remedies are limited, the Court of Claims is able to fashion any reasonable remedy necessary to adequately address the constitutional violations plaintiffs have alleged. Accordingly, we disagree with the dissent that plaintiffs are able to avoid any "harsh consequences" by seeking relief in the federal courts.

C. FRAUDULENT CONCEALMENT

In a footnote, the Court of Claims rejected plaintiffs' argument that the fraudulent-concealment exception of MCL 600.5855 applied to toll the statute of limitations and the statutory notice period in this case. *Mays*, unpub op at 11 n 4. We hold that the Court of Claims erred by reaching this conclusion; the fraudulent-concealment exception may provide an alternative basis for affirming the denial of defendants' motions for summary disposition.

The fraudulent-concealment exception is a legislatively created exception to statutes of limitation. The exception is codified as part of the Revised Judicature Act (RJA), MCL 600.101 *et seq.*, in MCL 600.5855, which states:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

This statutory section permits the tolling of a statutory limitations period for two years if the defendant has fraudulently concealed the existence of a claim. For the fraudulent-concealment exception to apply, a "plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment" and "prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery." *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996).

The Legislature, in crafting the CCA, imported the fraudulent-concealment exception into its statute-of-limitations provision. MCL 600.6452(2). However, as defendants point out, the Legislature did not explicitly import the exception into the statutory notice provision of the CCA. See MCL 600.6431. The Court of Claims rejected plaintiffs' assertion that the fraudulent-concealment exception should apply to the CCA's statutory notice requirement, finding the absence of a similar provision directly applicable to MCL 600.6431 "persuasive evidence that the Legislature did not intend for the fraudulent concealment tolling provision of MCL 600.5855 to be read into the notice provisions of MCL 600.6431." *Mays*, unpub op at 12 n 4. We disagree.

It is a basic tenet of statutory construction that the omission of a statutory provision should be construed as intentional. *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009). "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Id*. (quotation marks and citation omitted). However, in this case, the Legislature did not "omit" from the CCA any language from the statute-of-limitations provisions of the RJA. Rather, the Legislature specifically *included* language mandating application of the RJA's statute-of-limitations provisions—and exceptions—to the statute-of-limitations provisions of the CCA. See MCL 600.6452(2).

The RJA contains no statutory notice period, and neither the Legislature nor our courts have ever had the occasion to consider whether the fraudulent-concealment exception might apply to such a provision. The Legislature's failure to specifically address the application of the fraudulent-concealment exception to the CCA's statutory notice period therefore cannot be presumed intentional under the rules of statutory construction. While "the Legislature is presumed to be aware of, and thus to have considered the effect [of a statutory enactment] on, all *existing* statutes," *GMAC LLC*, 286 Mich App at 372 (quotation marks and citation omitted; emphasis added), it makes no sense to presume knowledge of a potential future conflict without a context in which such knowledge would arise. Indeed, it would make as much sense to presume that the Legislature did not consider the issue whether the fraudulent-concealment exception would apply to the statutory notice provision of the CCA because, had it done so, it would have made its determination explicit.

The Legislature's omission here does not provide dispositive evidence of intent, and we therefore must proceed according to the well-established rules of statutory interpretation and construction.

"The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Dawson v Secretary of State*, 274 Mich App 723, 729; 739 NW2d 339 (2007) (opinion by WILDER, P.J.). "This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute." *McCormick v Carrier*, 487 Mich 180, 191; 795 NW2d 517 (2010). In such cases, "judicial construction is neither required nor permitted." *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 373; 652 NW2d 474 (2002). "However, if reasonable minds can differ concerning the meaning of a statute, judicial construction of the statute is appropriate." *Id.*

We conclude that reasonable minds could differ regarding the meaning of MCL 600.5855 as applied in the context of claims brought under the CCA. First, it must be noted that while MCL 600.5855, a subsection of Chapter 58 of the RJA, is part of the Legislature's statutory scheme for statutory limitations periods, the statutory language does not otherwise express or imply that its exception operates only by exclusively tolling the limitations period. To the contrary, the plain language of the statute provides that an action that has been fraudulently concealed "may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim . . . ." MCL 600.5855. The statute's direction that such an action may proceed notwithstanding that "the action would otherwise

be barred by the period of limitations" does not specifically *limit* the exception's application to those claims barred by the expiration of the limitations period. Considering only the plain language of MCL 600.5855, reasonable minds could differ on the question whether the provision, as imported into the CCA, is intended to grant a claimant whose claim has been fraudulently concealed an affirmative right to bring suit within two years of discovery, regardless of prior noncompliance with the statutory requirements, or whether the exception applies only to toll the statutory limitations period.

The language of MCL 600.5855 becomes more ambiguous when it is practically applied in the context of a claim brought under the CCA. Although MCL 600.5855 clearly permits the commencement of an action within two years after a claimant discovers or should have discovered a fraudulently concealed claim, the statutory notice period of MCL 600.6431 prohibits the commencement of an action without notice filed within six months or one year of the date on which the claim accrued. As previously discussed, the discovery doctrine has been abrogated in this state, see *Trentadue*, 479 Mich at 391-392, and a claim accrues on the date a claimant is harmed, regardless of when the claimant first learns of the harm. If MCL 600.6431 is strictly applied, as it must be, see *McCahan*, 492 Mich at 746-747, then MCL 600.6431 is impossible to reconcile with the Legislature's clear intent to provide claimants with two years from the date of discovery to bring suit on a harm that the liable party has fraudulently concealed.[10]

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[10] We reject defendants' contention that to find a conflict between MCL 600.5855 and MCL 600.6431 one must "wrongly assume[] that a notice of intent is the same as a legal complaint." It is true that a

"[S]tatutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). The Legislature clearly intended to incorporate the statutory limitations periods and exceptions, including the fraudulent-concealment exception of MCL 600.5855, into the CCA. See MCL 600.6452(2). If the fraudulent-concealment exception is not applied equally to the statutory period of limitations and the statutory notice period of the CCA, it cannot be applied at all. See *Apsey v Mem Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007) ("A statute is rendered nugatory when an interpretation fails to give it meaning or effect."). "[C]ourts must interpret statutes in a way that gives effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *O'Connell v Dir of Elections*, 316 Mich App 91, 98; 891 NW2d 240 (2016) (quotation marks and citation omitted). Further, when there is "tension, or even conflict, between sections of a statute," this Court has a "duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them." *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002). In this case, to read MCL 600.5855, as imported into the CCA, and MCL 600.6431 in harmony requires the conclusion that when the fraudulent-concealment exception ap-

claimant requires only minimal information to file a notice of intent and that the knowledge required distinguishes a notice of intent from a legal complaint. However, a claimant who can satisfy the fraudulent-concealment exception will have *no* knowledge of the potential claim prior to the date he or she discovers or should reasonably be expected to discover it. It is simply nonsensical to argue that a claimant may satisfy the notice requirement and still claim the benefit of the fraudulent-concealment tolling provision.

plies, it operates to toll the statutory notice period as well as the statutory limitations period.

Importantly, application of the fraudulent-concealment exception to statutory notice periods does nothing to undermine the purpose of requiring timely statutory notice. As defendants concede, the purpose of the notice provision in MCL 600.6431 is to establish a "clear procedure" for pursuing a claim against the state and eliminate "ambiguity" about whether a claim will be filed. *McCahan*, 492 Mich at 744 n 24. The provision gives the state and its agencies time to create reserves and reduces the uncertainty of the extent of future demands. *Rowland*, 477 Mich at 211-212. But when the state and its officers, having knowledge of an event giving rise to liability and anticipating the possibility that claims may be filed, actively conceal information in order to prevent a suit, the state suffers no "ambiguity" or surprise. In cases in which the fraudulent-concealment exception may be applied, the state possesses the necessary information and the object of the statutory notice requirement is self-executing. Application of the fraudulent-concealment exception to the statutory notice requirement of the CCA is therefore consistent with both the legislative intent behind the exception itself and the purpose of the statutory notice period. In keeping with the principles of statutory construction and the Legislature's clear intent to permit the application of the fraudulent-concealment exception to claims brought under the CCA, we hold that the fraudulent-concealment exception applies at least to toll the statutory notice period commensurate with the tolling of the statute of limitations in situations in which its requirements have been met.[11]

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[11] We recognize that this Court, in two unpublished opinions, has declined to import the fraudulent-concealment provision into

If plaintiffs can prove, as they have alleged, that defendants actively concealed the information necessary to support plaintiffs' causes of action so that plaintiffs could not, or should not, have known of the existence of the causes of action until a date less than six months prior to the date of their complaint, application of the fraudulent-concealment exception will fully apply and plaintiffs should be permitted to proceed regardless of when their claims actually accrued. Whether plaintiffs can satisfy the exception is a question that involves disputed facts and is subject to further discovery. Summary disposition on this ground is therefore inappropriate.

III. JURISDICTION OVER THE CITY DEFENDANTS

Next, the state defendants argue that the Court of Claims erred when it found that it could exercise jurisdiction over claims brought against the city defendants because emergency managers are considered "state officers" under the CCA.[12] We disagree.

MCL 600.6431. See *Brewer v Central Mich Univ Bd of Trustees*, unpublished per curiam opinion of the Court of Appeals, issued November 21, 2013 (Docket No. 312374); *Zelek v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued October 16, 2012 (Docket No. 305191). These opinions are not binding on this Court. MCR 7.215(C)(1). Additionally, in both *Brewer* and *Zelek*, the panel's conclusion that the fraudulent-concealment exception did not apply to toll the statutory notice period was reached without recognition that the Legislature specifically imported the fraudulent-concealment exception into the statute-of-limitations provision of the CCA and without consideration of the practical conflict created when the fraudulent-concealment exception is applied to the statutory limitations period without also being applied to the statutory notice period. Because both cases also involved strikingly dissimilar factual situations, we find them unpersuasive.

[12] In the lower court and in this Court on appeal, the city defendants argue that in their official capacities as emergency managers, they were state officers subject to the jurisdiction of the Court of Claims under MCL 600.6419. However, the state defendants argued in the lower

"Jurisdiction is a court's power to act and its authority to hear and decide a case." *Riverview v Sibley Limestone*, 270 Mich App 627, 636; 716 NW2d 615 (2006). "The Court of Claims is created by statute and the scope of its subject-matter jurisdiction is explicit." *O'Connell*, 316 Mich App at 101 (quotation marks and citation omitted). "A challenge to the jurisdiction of the Court of Claims presents a statutory question that is reviewed de novo as a question of law." *Id*. at 97 (quotation marks and citation omitted).

With MCL 600.6419(1)(a), the Legislature endowed the Court of Claims with exclusive jurisdiction "[t]o hear and determine any claim or demand, statutory or constitutional, . . . *against the state or any of its departments or officers* notwithstanding another law that confers jurisdiction of the case in the circuit court." (Emphasis added.) In the same statutory section, the Legislature specified that

> [a]s used in this section, "the state or any of its departments or officers" means this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties. [MCL 600.6419(7).]

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court, and argue again on appeal, that the Court of Claims lacks subject-matter jurisdiction over plaintiffs' claims against Earley and Ambrose because neither, in his official capacity, was a state officer. Although neither the state defendants nor the city defendants raise the issue of standing on appeal, we note that because an official-capacity suit against the city defendants is, for practical purposes, a suit against the state, *Carlton v Dep't of Corrections*, 215 Mich App 490, 500-501; 546 NW2d 671 (1996), the state defendants have a significant interest in the outcome of plaintiffs' case.

The jurisdiction of the Court of Claims does not extend to local officials. *Doan v Kellogg Community College*, 80 Mich App 316, 320; 263 NW2d 357 (1977).

Whether an emergency manager falls within the definition of state "officer" provided in MCL 600.6419(7) is a question of statutory interpretation. When interpreting a statute, "[o]ur duty is to ascertain and effectuate the intent behind the statute . . . from the language used in it." *Attorney General v Flint*, 269 Mich App 209, 211-212; 713 NW2d 782 (2005). "Undefined statutory terms must be given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions." *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). "When statutory language is unambiguous, we must presume that the Legislature intended the meaning it clearly expressed and further construction is neither required nor permitted." *Attorney General*, 269 Mich App at 213 (quotation marks and citation omitted).

The state defendants acknowledge that the Michigan Supreme Court has determined that the question whether an official is a state officer in a particular circumstance is "governed by the purpose of the act or clause in connection with which it is employed." *Schobert v Inter-Co Drainage Bd*, 342 Mich 270, 282; 69 NW2d 814 (1955). The state defendants assert that it is 2012 PA 436,[13] the act creating and governing the office of an appointed emergency manager, that is the focus of this inquiry, and the state defendants devote substantial portions of their appellate briefs to explaining the purported distinction between state officers and emergency managers on the basis of the language of that act. The state defendants have either

[13] 2012 PA 436 created the Local Financial Stability and Choice Act, MCL 141.1541 *et seq*.

offered this Court a red herring or confused an otherwise straightforward determination. The question is not, as the state defendants contend, whether the Legislature in passing 2012 PA 436 intended to make emergency managers state officers. While 2012 PA 436 and its characterization of emergency managers may be relevant in another context, the question presented here is one of jurisdiction, and it is the intent behind the Legislature's grant of jurisdiction to the Court of Claims, through MCL 600.6419 in particular, that must direct this Court's analysis. See *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 521; 821 NW2d 117 (2012) ("[T]he first step of statutory interpretation is to review the language of the statute at issue, not that of another statute."). Thus, in determining whether claims against an emergency manager fall within the jurisdiction of the Court of Claims, we begin by examining the plain language of MCL 600.6419(7).

This Court need not, and in fact may not, look past the CCA for a definition of "state officer" as employed therein. "Where a statute supplies its own glossary, courts may not import any other interpretation but must apply the meaning of the terms as expressly defined." *People v Schultz*, 246 Mich App 695, 703; 635 NW2d 491 (2001). The Legislature has provided a definition of the term in the CCA. That definition includes "an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties." MCL 600.6419(7). But the state defendants have not bothered to address this definition. Regardless of whether emergency man-

agers might be considered state officers in any context outside the CCA, the city defendants clearly fall within the act's own definition and, as intended, within the Court of Claims' jurisdiction.

There is no dispute that the city defendants made the decision to switch the city of Flint's water supply to the Flint River while acting within the scope of their official authority and in the discharge of a government function. Further, there is no doubt that the city defendants were acting, at all times relevant to plaintiffs' claims, as employees or officers of the state of Michigan and its agencies. As the Court of Claims observed,

> "[a]n emergency manager is a creature of the Legislature with only the power and authority granted by statute. *Kincaid v City of Flint*, 311 Mich App 76, 87; 874 NW2d 193 (2015). An emergency manager is appointed by the governor following a determination by the governor that a local government is in a state of financial emergency. MCL 141.1546(1)(b); MCL 141.1549(1). The emergency manager serves at the governor's pleasure. MCL 141.1549(3)(d); *Kincaid*, 311 Mich App at 88. The emergency manager can be removed by the governor or by the Legislature through the impeachment process. MCL 141.1549(3)(d) and (6)(a). The state provides the financial compensation for the emergency manager. MCL 141.1549(3)(e) and (f). All powers of the emergency manager are conferred by the Legislature. MCL 141.1549(4) and (5); MCL 141.1550 – MCL 141.1559; *Kincaid*, 311 Mich App at 87. Those powers include powers not traditionally within the scope of those granted municipal corporations. See MCL 141.1552(1)(a) – (ee). The Legislature conditioned the exercise of some of those powers upon the approval of the governor or his or her designee or the state treasurer. MCL 141.1552(1)(f), (x), (z) and (3); MCL 141.1555(1). The Legislature has also subjected the emergency manager to various codes of conduct otherwise applicable only to public servants, public officers and state

officers. MCL 141.1549(9). Through the various provisions within the act, the state charges the emergency manager with the general task of restoring fiscal stability to a local government placed in receivership – a task which protects and benefits both the state and the local municipality and its inhabitants. The emergency manager is statutorily obligated to create a financial and operating plan for the local government that furthers specific goals set by the state and to submit a copy of the plan to the state treasurer for the treasurer's 'regular[] reexamin[ation].' MCL 141.1551(2). The emergency manager is also obligated to report to the top elected officials of this state and to the state treasurer his or her progress in restoring financial stability to the local government. MCL 141.1557. Finally, the Act tasks the governor, and not the emergency manager, with making the final determination whether the financial emergency declared by the governor has been rectified by the emergency manager's efforts. MCL 141.1562(1) and (2). Under the totality of these circumstances, the core nature of the emergency manager may be characterized as an administrative officer of state government." [*Mays*, unpub op at 15-16, quoting *Collins v Flint*, unpublished opinion of the Court of Claims, issued August 25, 2016 (Docket No. 16-000115-MZ), pp 13-14 (citation omitted).][14]

We agree that the totality of the circumstances indicates that an emergency manager operates as an administrative officer of the state.[15] Further, it is

[14] Neither the Court of Claims opinion in this case nor the quoted opinion is binding on this Court. However, we adopt the court's accurate summary of the law as stated.

[15] The state defendants argue that this Court should find persuasive a recent opinion, *Gulla v Snyder*, unpublished opinion of the Court of Claims, issued August 16, 2017 (Docket No. 16-000298-MZ), in which the Court of Claims judge concluded that emergency managers are not state officers for purposes of the CCA. This Court is not bound to follow the opinion of the Court of Claims, which directly conflicts with the Court of Claims opinion at issue here. Further, we note that the Court of Claims judge who considered the issue in *Gulla* had analyzed the

beyond dispute that at a minimum, an emergency manager must be characterized as an employee of the state. Although the CCA does not provide a specific definition for "employee," this Court may look to dictionary definitions to "construe undefined statutory language according to common and approved usage." *In re Casey Estate*, 306 Mich App 252, 260; 856 NW2d 556 (2014). *Black's Law Dictionary* (10th ed) defines "employee" as "[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." Emergency managers, who are appointed by the Governor, serve at the Governor's pleasure, are subject to review by the State Treasurer, and operate only within the authority granted by the state government, easily fall within this definition. Indeed, our Court has recognized that political appointees, like the emergency managers here, serve as at-will employees of the governmental agency that appointed them. See *James v City of Burton*, 221 Mich App 130, 133-134; 560 NW2d 668 (1997). An emergency manager, as an appointee of the state government, is an employee of the state government. Claims against an emergency manager acting in his or her official capacity therefore fall within the well-delineated subject-matter jurisdiction of the Court of Claims.

We note that if this Court were to accept the state defendants' suggestion that the Court must consider whether 2012 PA 436 authorizes the Court of Claims to assume subject-matter jurisdiction over claims against emergency managers, the result would be the

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issue according to the provisions of 2012 PA 436 rather than the jurisdictional provision of the CCA—an erroneous approach this Court, as discussed in this opinion, specifically disavows.

same. The state defendants argue that 2012 PA 436 does not contemplate suits against emergency managers in the Court of Claims. However, while 2012 PA 436 does not expressly authorize suits against emergency managers in the Court of Claims, it specifically contemplates proceedings involving emergency managers in that court. Under 2012 PA 436, an emergency manager is granted the express authority to bring suits in the Court of Claims "to enforce compliance with any of his or her orders or any constitutional or legislative mandates, or to restrain violations of any constitutional or legislative power or his or her orders." MCL 141.1552(1)(q). This authorization acknowledges the status of an emergency manager as a state officer and is consistent with the CCA, which grants the Court of Claims jurisdiction over all claims brought by the "state or any of its departments or officers against any claimant . . . ." MCL 600.6419(1)(b).

Because the city defendants' status as employees of the state during all times relevant to this appeal satisfies the jurisdictional question, we need not address the state defendants' challenge to the Court of Claims' characterization of emergency managers as receivers for the state. However, we believe that the analogy is quite apt and provides additional support for the conclusion that claims against an emergency manager fall within the subject-matter jurisdiction of the Court of Claims. Under 2012 PA 436, an emergency manager's relationship with a municipality is specifically described as a "receivership." MCL 141.1542(q) (" 'Receivership' means the process under this act by which a financial emergency is addressed through the appointment of an emergency manager."). MCL 141.1549(2) provides, in pertinent part:

> Upon appointment, an emergency manager shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government. The emergency manager shall have broad powers *in receivership* to rectify the financial emergency and to assure the fiscal accountability of the local government and the local government's capacity to provide or cause to be provided necessary governmental services essential to the public health, safety, and welfare. [Emphasis added.]

Additionally, the powers and responsibilities delegated to an emergency manager under 2012 PA 436 mirror those of an appointed receiver:

> A receiver is sometimes said to be the arm of the court, *appointed to receive and preserve the property* of the parties to litigation and in some cases *to control and manage it* for the persons or party who may be ultimately entitled thereto. A receivership is primarily to preserve the property and not to dissipate or dispose of it. [*Westgate v Westgate*, 294 Mich 88, 91; 292 NW 569 (1940) (emphasis added).]

The state defendants argue that emergency managers cannot be compared to court-appointed receivers because unlike court-appointed receivers, emergency managers are appointed to represent the city rather than to act as neutral arbiters. The state defendants mischaracterize the relationship between emergency managers and the municipalities whose finances they are appointed to oversee. In their appellate brief, the city defendants aptly summarize the role of an appointed emergency manager:

> The concept behind emergency management is that the State needs to appoint a neutral party to help eliminate a financial emergency because local officials have proven (in the State's view) unable to govern in a financially responsible way. An [emergency manager]'s job is to create and implement a financial plan that assures full payment to

> creditors while still conducting all aspects of a municipality's operations. Once the Governor agrees that the emergency has been sustainably resolved, power passes from the neutral receiver back to local officials. [Citations omitted.]

The city defendants' characterization of emergency managers as neutral overseers is supported by the provisions of 2012 PA 436. See MCL 141.1551(1)(a) and (b); MCL 141.1562(3); MCL 141.1543.

It has long been recognized that a receiver serves as the administrative arm or officer of the authority exercising the power of appointment. See *In re Guaranty Indemnity Co*, 256 Mich 671, 673; 240 NW 78 (1932) ("Generally speaking a receiver is not an agent, except of the court appointing him . . . . He is merely a ministerial officer of the court, or, as he is sometimes called, the hand or arm of the court.") (quotation marks and citation omitted); *Arbor Farms, LLC v GeoStar Corp*, 305 Mich App 374, 392-393; 853 NW2d 421 (2014) (noting that a receiver is both an officer and an administrative arm of the appointing court); *Hofmeister v Randall*, 124 Mich App 443, 445; 335 NW2d 65 (1983) (explaining that "a receiver is the arm of the court, appointed to receive and preserve the litigating parties' property"); *Cohen v Bologna*, 52 Mich App 149, 151; 216 NW2d 586 (1974) (explaining that a receiver "function[s] as officer of the court" that appointed him). Again, the definition of "the state or any of its departments or officers" for purposes of Court of Claims jurisdiction includes any "arm, or agency of the state," or any officer or employee of an "arm, or agency of this state . . . ." MCL 600.6419(7). The Court of Claims did not err when it concluded that the city defendants, in their official capacities as emergency managers, operated as arms of the state during all times relevant to the instant suit.

The state defendants argue that the characterization of emergency managers as ministerial arms or officers of the state "directly contradicts" this Court's holding in *Kincaid*, 311 Mich App 76, in which we concluded that an act of an emergency manager cannot be considered an act of the Governor. In *Kincaid*, the Court considered whether an emergency manager could exercise power textually granted to the Governor on a theory that an act of the emergency manager, as a gubernatorial appointee, was an act of the Governor himself. *Id*. at 87-88. This Court rejected the city's argument that an emergency manager acts on behalf of the Governor after considering the role of an emergency manager as described in 2012 PA 436. *Id*. at 88. Specifically, this Court held that 2012 PA 436 in no way authorized the Governor to delegate his or her authority to an emergency manager, who could act "only on behalf of numerous *local* officials" and whose "authority is limited to the local level." *Id*. The state defendants argue that this holding precludes a finding that emergency managers are arms or agents of the state. However, the state defendants divorce this Court's holding from its context. The issue in *Kincaid* was not whether an emergency manager is a state official subject to the subject-matter jurisdiction of the Court of Claims, but whether the range of power granted to an emergency manager includes the Governor's power to ratify. While the *Kincaid* Court held that emergency managers do not inherit all the powers of the Governor, the Court did not hold that emergency managers cannot act as agents of the state. The fact that an emergency manager is not authorized to act *as* the Governor does not mean that an emergency manager is not authorized to act as an *agent* of the Governor.

More importantly, the *Kincaid* holding in no way precludes a finding that emergency managers are

employees of the state subject to the jurisdiction of the Court of Claims under MCL 600.6419, regardless of whether they are also considered agents acting on behalf of the Governor. For these reasons, we hold that the Court of Claims did not err when it concluded that plaintiffs' claims against the city defendants, sued in their official capacities as employees and administrative officers of the state, are within the subject-matter jurisdiction of the Court of Claims.

IV. INJURY TO BODILY INTEGRITY

Next, defendants argue that the Court of Claims erred when it concluded that plaintiffs had pleaded facts that, if proved true, established a constitutional violation of plaintiffs' substantive due-process right to bodily integrity for which a judicially inferred damage remedy is appropriate. We disagree.

Defendants moved for summary disposition of plaintiffs' injury-to-bodily-integrity claims under MCR 2.116(C)(8). Summary disposition is proper under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted. *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings." *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). "For purposes of reviewing a motion for summary disposition under MCR 2.116(C)(8), all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). A motion under MCR 2.116(C)(8) may only be granted "where the claims alleged are so clearly unenforceable as a matter of law

that no factual development could possibly justify recovery." *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004) (quotation marks and citation omitted). This Court reviews constitutional questions de novo. *Associated Builders & Contractors v Lansing*, 499 Mich 177, 183; 880 NW2d 765 (2016).

A. GENERAL PRINCIPLES OF CONSTITUTIONAL TORTS

"Typically, a constitutional tort claim arises when a governmental employee, exercising discretionary powers, violates constitutional rights personal to a plaintiff." *Duncan v Michigan*, 284 Mich App 246, 270; 774 NW2d 89 (2009), rev'd on other grounds 486 Mich 1071 (2010). The Michigan Supreme Court has held that "[a] claim for damages against the state arising from [a] violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987). "The first step in recognizing a damage remedy for injury consequent to a violation of our Michigan Constitution is, obviously, to establish the constitutional violation itself." *Marlin v Detroit (After Remand)*, 205 Mich App 335, 338; 517 NW2d 305 (1994) (quotation marks and citation omitted).

Following *Smith*, this Court held that to establish a violation of the Constitution, a plaintiff must show that the state action at issue (1) deprived the plaintiff of a substantive constitutional right and (2) was executed pursuant to an official custom or policy. *Carlton v Dep't of Corrections*, 215 Mich App 490, 505; 546 NW2d 671 (1996), citing *Monell v New York City Dep't of Social Servs*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978). The Court further directed that "[t]he policy or custom must be the moving force behind the

constitutional violation in order to establish liability." *Carlton*, 215 Mich App at 505.

We note at the outset that the Court of Claims articulated the proper test before engaging in a thorough analysis of the viability of plaintiffs' constitutional tort claim for injury to bodily integrity. However, we must review the matter de novo, giving no deference to the lower court decision, in order to determine whether defendants were entitled to judgment as a matter of law. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Thus, before we may decide whether it is appropriate to recognize a cause of action under the Due Process Clause of the Michigan Constitution for violation of plaintiffs' rights to bodily integrity, we must first determine whether plaintiffs have alleged facts that, if proved true, are sufficient to establish such a violation.

B. SUBSTANTIVE RIGHT TO BODILY INTEGRITY

The Due Process Clause of the Michigan Constitution provides, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. "The due process guarantee of the Michigan Constitution is coextensive with its federal counterpart." *Grimes v Van Hook-Williams*, 302 Mich App 521, 530; 839 NW2d 237 (2013). "The doctrine of substantive due process protects unenumerated fundamental rights and liberties under the Due Process Clause of the Fourteenth Amendment." *Gallagher v City of Clayton*, 699 F3d 1013, 1017 (CA 8, 2012), citing *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258; 138 L Ed 2d 772 (1997).

"The substantive component of due process encompasses, among other things, an individual's right to

bodily integrity free from unjustifiable governmental interference." *Lombardi v Whitman*, 485 F3d 73, 79 (CA 2, 2007); see *Glucksberg*, 521 US at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to bodily integrity . . . ."); *Alton v Texas A&M Univ*, 168 F3d 196, 199 (CA 5, 1999) ("[T]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process.") (quotation marks and citation omitted). As early as 1891, the United States Supreme Court recognized that "[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac R Co v Botsford*, 141 US 250, 251; 11 S Ct 1000; 35 L Ed 734 (1891). The Court has since recognized a liberty interest in bodily integrity in circumstances involving such things as abortions, *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973), end-of-life decisions, *Cruzan v Dir, Missouri Dep't of Health*, 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990), birth control decisions, *Griswold v Connecticut*, 381 US 479; 85 S Ct 1678; 14 L Ed 2d 510 (1965), corporal punishment, *Ingraham v Wright*, 430 US 651; 97 S Ct 1401; 51 L Ed 2d 711 (1977), and instances in which individuals are subject to dangerous or invasive procedures that restrain their personal liberty, see, e.g., *Rochin v California*, 342 US 165; 72 S Ct 205; 96 L Ed 183 (1952) (determining that a detainee's bodily integrity was violated when police ordered doctors to pump his stomach to obtain evidence of drugs); *Screws v United States*, 325 US 91; 65 S Ct 1031; 89 L Ed 1495 (1945)

(holding that an individual's bodily integrity was violated when he was beaten to death while in police custody).

Violation of the right to bodily integrity involves "an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective." *Rogers v Little Rock, Arkansas*, 152 F3d 790, 797 (CA 8, 1998), citing *Sacramento Co v Lewis*, 523 US 833, 847 n 8; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). In this case, plaintiffs clearly allege a nonconsensual entry of contaminated and toxic water into their bodies as a direct result of defendants' decision to pump water from the Flint River into their homes and defendants' affirmative act of physically switching the water source. Furthermore, we can conceive of no legitimate governmental objective for this violation of plaintiffs' bodily integrity. Indeed, defendants have not even attempted to provide one. However, to survive dismissal, the alleged "violation of the right to bodily integrity must be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Villanueva v City of Scottsbluff*, 779 F3d 507, 513 (CA 8, 2015) (quotation marks and citation omitted); see also *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 198; 761 NW2d 293 (2008) (explaining that in the context of individual governmental actions or actors, to establish a substantive due-process violation, "the governmental conduct must be so arbitrary and capricious as to shock the conscience").

"Conduct that is merely negligent does not shock the conscience, but 'conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.' " *Votta v Castellani*, 600 F Appx 16, 18

(CA 2, 2015), quoting *Sacramento Co*, 523 US at 849. At a minimum, proof of deliberate indifference is required. *McClendon v City of Columbia*, 305 F3d 314, 326 (CA 5, 2002). A state actor's failure to alleviate "a significant risk that he should have perceived but did not" does not rise to the level of deliberate indifference. *Farmer v Brennan*, 511 US 825, 838; 114 S Ct 1970; 128 L Ed 2d 811 (1994). To act with deliberate indifference, a state actor must " 'know[] of and disregard[] an excessive risk to [the complainant's] health or safety.' " *Ewolski v City of Brunswick*, 287 F3d 492, 513 (CA 6, 2002), quoting *Farmer*, 511 US at 837. "The case law . . . recognizes official conduct may be more egregious in circumstances allowing for deliberation . . . than in circumstances calling for quick decisions . . . ." *Williams v Berney*, 519 F3d 1216, 1220-1221 (CA 10, 2008).

We agree with the Court of Claims' conclusion that "[s]uch conduct on the part of the state actors, and especially the allegedly intentional poisoning of the water users of Flint, if true, may be fairly characterized as being so outrageous as to be 'truly conscience shocking.' " *Mays*, unpub op at 28. Plaintiffs allege that defendants made the decision to switch the city of Flint's water source to the Flint River after a period of deliberation, despite knowledge of the hazardous properties of the water. Additionally, plaintiffs allege that defendants neglected to conduct any additional scientific assessments of the suitability of the Flint water for use and consumption before making the switch, which was conducted with knowledge that Flint's water treatment system was inadequate. According to plaintiffs' complaint, various state actors intentionally concealed scientific data and made false assurances to the public regarding the safety of the Flint River water even after they had received information suggesting

that the water supply directed to plaintiffs' homes was contaminated with Legionella bacteria and dangerously high levels of toxic lead. At the very least, plaintiffs' allegations are sufficient to support a finding of deliberate indifference on the part of the governmental actors involved here.

Plaintiffs have alleged facts sufficient to support a constitutional violation by defendants of plaintiffs' right to bodily integrity.[16] We therefore proceed to consider whether the deprivation of rights resulted from implementation of an official governmental custom or policy.

C. OFFICIAL CUSTOM OR POLICY

"[T]his Court has held that liability for a violation of the state constitution should be imposed on the state only where the state's liability would, but for the Eleventh Amendment, render it liable under the standard for local governments as set forth in 42 USC 1983 and articulated in [*Monell*]." *Reid v Michigan*, 239 Mich App 621, 628; 609 NW2d 215 (2000). Thus, the

[16] Defendants ask this Court to rely on an extrajurisdictional opinion, *Coshow v City of Escondido*, 132 Cal App 4th 687, 709-710; 34 Cal Rptr 3d 19 (2005), as support for the conclusion that plaintiffs' right to bodily integrity is not implicated in the context of public drinking water because the Due Process Clause does not guarantee a right to contaminant-free drinking water. While the California court noted that "the right to bodily integrity is not coextensive with the right to be free from the introduction of an allegedly contaminated substance in the public drinking water," *id*. at 709, it did not hold that the introduction of contaminated substances could never form the basis of a claim for injury to bodily integrity. Additionally, this Court finds *Coshow* unpersuasive as factually dissimilar. The alleged "contaminant" in that case was fluoride, which is frequently introduced into water systems. *Coshow* did not address whether substantive due-process protections might be implicated in the case of intentional introduction of known contaminants by governmental officials, and its reasoning is inapplicable here.

state and its officials will only be held liable for violation of the state Constitution " 'in cases where a state "custom or policy" mandated the official or employee's actions.' " *Carlton*, 215 Mich App at 505, quoting *Smith*, 428 Mich at 642 (BOYLE, J., concurring in part). Official governmental policy includes "the decisions of a government's lawmakers" and "the acts of its policymaking officials." *Johnson v Vanderkooi*, 319 Mich App 589, 622; 903 NW2d 843 (2017) (quotation marks and citation omitted). See also *Monell*, 436 US at 694 (stating that a governmental agency's custom or policy may be "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy"). A "single decision" by a policymaker or governing body "unquestionably constitutes an act of official government policy," regardless of whether "that body had taken similar action in the past or intended to do so in the future[.]" *Pembaur v Cincinnati*, 475 US 469, 480; 106 S Ct 1292; 89 L Ed 2d 452 (1986). In *Pembaur*, the United States Supreme Court explained:

> To be sure, "official policy" often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. That was the case in *Monell* itself, which involved a written rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary. However . . . a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the [govern-

> ment] is equally responsible whether that action is to be taken only once or to be taken repeatedly. [*Id*. at 480-481.]

The Court clarified that not all decisions subject governmental officers to liability. *Id*. at 481. Rather, it is "where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id*. at 483.

The facts of this case as plaintiffs allege, if true, are sufficient to support the conclusion that their constitutional claim of injury to bodily integrity arose from actions taken by state actors pursuant to governmental policy. Plaintiffs allege that various aspects of Flint's participation in the KWA project and the interim plan to provide Flint residents with Flint River water during the transition were approved and implemented by the Governor, the State Treasurer, the emergency managers, and other state officials, including officials employed by the DEQ. These allegations implicate the state and city defendants, state officers, and authorized decision-makers in the adoption of particular courses of action that ultimately resulted in violations of plaintiffs' substantial rights. Likewise, as the Court of Claims observed,

> the alleged decisions of various state officials to defend the original decision to switch to using the Flint River as a water source, to resist a return to the Detroit water distribution system, to downplay and discredit accurate information gathered by outside experts regarding lead in the water supply and elevated lead levels in the bloodstreams of Flint's children, and to continue to reassure the Flint water users that the water was safe and not contaminated with lead or Legionella bacteria, played a role in the alleged violation of plaintiffs' constitutional rights . . . . [*Mays*, unpub op at 27.]

Plaintiffs allege a coordinated effort involving various state officials, including multiple high-level DEQ employees, to mislead the public in an attempt to cover up the harm caused by the water switch. If these allegations are proved true, they also support the conclusion that governmental actors, acting in their official roles as policymakers, considered a range of options and made a deliberate choice to orchestrate an effort to conceal the awful consequences of the water switch, likely exposing plaintiffs and other water users to unnecessary further harm. The allegations in plaintiffs' complaint are therefore sufficient to establish a violation of constitutional rights arising from the implementation of official policy.

D. AVAILABILITY OF DAMAGE REMEDY

Because plaintiffs' allegations, if proved true, are sufficient to sustain a claim for injury to bodily integrity, we must determine whether this case is one for which it is appropriate to recognize a damage remedy for the state's violation of Article 1, § 17, of the 1963 Michigan Constitution. We conclude that this is such a case.

As our appellate courts have done, the Court of Claims correctly addressed the propriety of an inferred damage remedy under the multifactor balancing test first articulated in an opinion by Justice BOYLE in *Smith*, 428 Mich at 648 (BOYLE, J., concurring in part). See, e.g., *Jones v Powell*, 462 Mich 329, 336-337; 612 NW2d 423 (2000); *Reid*, 239 Mich App at 628-629. To apply the test, we consider the weight of various factors, including, as relevant here, (1) the existence and clarity of the constitutional violation itself, (2) the degree of specificity of the constitutional protection, (3) support for the propriety of a judicially inferred dam-

age remedy in any "text, history, and previous interpretations of the specific provision," (4) "the availability of another remedy," and (5) "various other factors" militating for or against a judicially inferred damage remedy. See *Smith*, 428 Mich at 648-652 (BOYLE, J., concurring in part).

We have already determined that plaintiffs have set forth allegations to establish a clear violation of the Michigan Constitution. Like the Court of Claims, we conclude that the first factor weighs in favor of a judicially inferred damage remedy. However, Justice BOYLE rightly opined that the protections of the Due Process Clause are not as "clear-cut" as specific protections found elsewhere in the Constitution. *Id*. at 651. Michigan appellate courts have acknowledged that the substantive component of the federal Due Process Clause protects an individual's right to bodily integrity, see, e.g., *People v Sierb*, 456 Mich 519, 527, 529; 581 NW2d 219 (1998); *Fortune v City of Detroit Pub Sch*, unpublished per curiam opinion of the Court of Appeals, issued October 12, 2004 (Docket No. 248306), p 2, but this Court is unaware of any Michigan appellate decision expressly recognizing the same protection under the Due Process Clause of the Michigan Constitution or a stand-alone constitutional tort for violation of the right to bodily integrity. Although our Due Process Clause is interpreted coextensively with the Due Process Clause of the United States Constitution, *Cummins v Robinson Twp*, 283 Mich App 677, 700-701; 770 NW2d 421 (2009), we do not believe that the federal courts' application and interpretation of the right to bodily integrity provides an appropriate degree of claim specificity under our own prior jurisprudence. We therefore conclude that the second and third factors weigh slightly against recognition of a damage remedy for the injuries alleged.

In considering the fourth factor, the availability of an alternative remedy, we note that we agree with the Court of Claims' conclusion that the question posed is whether plaintiffs have any *available* alternative remedies against these specific defendants. See *Jones*, 462 Mich at 335-337 (contrasting claims against the state and state officials with claims against municipalities and individual municipal employees). Thus, at this stage of the proceedings, the fact that plaintiffs might be pursuing causes of action in another court is largely irrelevant. We proceed to determine whether plaintiffs are presented with alternative avenues for pursuit of remedies for the violations alleged.

It seems clear that a judicially imposed damage remedy for the alleged constitutional violation is the only available avenue for obtaining *monetary* relief. A suit for monetary damages under 42 USC 1983 for violation of rights granted under the federal Constitution or a federal statute cannot be maintained in any court against a state, a state agency, or a state official sued in his or her official capacity because the Eleventh Amendment affords the state and its agencies immunity from such liability. *Howlett v Rose*, 496 US 356, 365; 110 S Ct 2430; 110 L Ed 2d 332 (1990); *Bay Mills Indian Community v Michigan*, 244 Mich App 739, 749; 626 NW2d 169 (2001). The state and its officials also enjoy broad immunity from liability under state law. "[T]he elective or highest appointive executive official of all levels of government" is absolutely immune from "tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority." MCL 691.1407(5).[17] It is undisputed that this applies to the

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[17] MCL 141.1560(1) of the Local Financial Stability and Choice Act, MCL 141.1541 *et seq*., specifically grants emergency managers immu-

Governor, *Duncan*, 284 Mich App at 271-272, and for the reasons articulated by the Court of Claims, we conclude that it also applies to the city defendants for actions taken in their official roles as emergency managers, see *Mays*, unpub op at 37-40. Absent the application of a statutory exception, state agencies are also "immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1); *Duncan*, 284 Mich App at 266-267. Governmental employees acting within the scope of their authority are immune from tort liability unless their actions constitute gross negligence, MCL 691.1407(2), and even if governmental employees are found liable for gross negligence, the state may not be held vicariously liable unless an exception to governmental immunity applies under the GTLA. *Yoches v Dearborn*, 320 Mich App 461, 476-477; 904 NW2d 887 (2017), citing MCL 691.1407(1). Further, there is no exception to governmental immunity for intentional torts committed by governmental employees exercising their governmental authority, *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 328; 869 NW2d 635 (2015), and governmental employers may not be held liable for the intentional tortious acts of their employees, *Payton v Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995).

We have already determined that plaintiffs' alleged constitutional violations occurred as a result of policy implementation by defendants in their official capacities. Like the Court of Claims, we hold on the basis of the aforementioned principles that "the state, its agencies, and the Governor and former emergency manag-

nity from liability as provided in MCL 691.1407, which grants complete immunity to "the elective or highest appointive executive official of all levels of government . . . ."

ers acting in an official capacity, are not 'persons' under 42 USC 1983 and enjoy sovereign immunity under the Eleventh Amendment and statutory immunity under MCL 691.1407 from common law claims, [and] plaintiffs have no alternative recourse to enforce their respective rights against them." *Mays*, unpub op at 42, citing *Jones*, 462 Mich at 335-337.

Defendants argue for the first time on appeal that plaintiffs' constitutional tort claims, arising from plaintiffs' alleged exposure to toxic drinking water, may be vindicated under the federal Safe Drinking Water Act (SDWA), 42 USC 300f *et seq*., and the Michigan Safe Drinking Water Act (MSDWA), MCL 325.1001 *et seq*. Defendants do not cite specific provisions of the statutes to support their argument. Generally, this Court will not address issues that were not raised in or addressed by the trial court, *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 330; 539 NW2d 774 (1995), or those that are insufficiently briefed, *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). However, we would note that while the SDWA contains a citizen-suit provision allowing for a private action against any person violating its terms, the statutory scheme provides for injunctive relief only. *Boler v Earley*, 865 F3d 391, 405-406 (CA 6, 2017), citing 42 USC 300j-8. The MSDWA, as defendants concede, does not contain a citizen-suit provision.

Contrary to defendants' assertion, the SDWA and its Michigan counterpart do not provide a legislative scheme for vindication of the alleged constitutional violations that would " 'militate against a judicially inferred damage remedy' " under *Jones*. *Jones*, 462 Mich at 337, quoting *Smith*, 428 Mich at 647 (BOYLE, J., concurring in part). Indeed, in a related federal case,

the Sixth Circuit Court of Appeals considered whether Congress intended for the SDWA to preclude remedies for constitutional violations and concluded that it did not. *Boler*, 865 F3d at 409. The court explained:

> Under some circumstances, actions that violate the SDWA may also violate the . . . Due Process Clause. The Defendants argue that this is necessarily the case, and that the Plaintiffs' [constitutional] claims could not be pursued without showing a violation of the SDWA. But as noted, that is often not the case, particularly where the SDWA does not even regulate a contaminant harmful to public drinking water users. The contours of the rights and protections of the SDWA and those arising under the Constitution, and a plaintiff's ability to show violations of each, are "not . . . wholly congruent." This further supports the conclusion that Congress did not intend to foreclose [constitutional claims under 42 USC 1983] by enacting the SDWA. [*Id*. at 408-409 (citation omitted).]

Additionally, neither the SDWA nor the MSDWA addresses the conduct at issue in this case, which includes knowing and intentional perpetuation of exposure to contaminated water as well as fraudulent concealment of the hazardous consequences faced by individuals who used or consumed the water. These statutes therefore do not provide an alternative remedy for plaintiffs' claim of injury to bodily integrity.

We note here that plaintiffs seek injunctive relief against several of the named defendants in a related federal court action. Plaintiffs' complaint in that action indicates that plaintiffs seek "prospective relief only" against the Governor and the state, but the complaint "describes the equitable relief sought as an order 'to remediate the harm caused by defendants [sic] unconstitutional conduct including repairs or [sic] property, [and] establishment of as [sic] medical monitoring fund . . . .' " *Mays*, unpub op at 35 n 11. Plaintiffs also

seek an award of compensatory and punitive damages. The "availability" of these remedies remains to be seen, and as previously noted, the fact that plaintiffs seek alternative remedies does not affect our decision regarding the *availability* of alternative remedies. We will not opine on the merits of plaintiffs' federal cause of action. However, we agree with the Court of Claims' observation that "[d]evelopments in that and other Flint Water Crisis litigation, including the extent to which any 'equitable' relief awarded may essentially equate to an award of monetary damages, may impact this Court's future conclusions both with regard to the availability of alternative remedies and other matters, including the remedies, if any, that may be appropriate in this action." *Id*.

Defendants argue that this fourth factor must be considered dispositive and that the availability of any other remedy should foreclose the possibility of a judicially inferred damage remedy. Although the Supreme Court in *Jones*, 462 Mich at 337, stated that "*Smith* only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy," we agree with the Court of Claims' conclusion that the *Jones* Court's use of the word "only" referred to the sentence that followed, distinguishing claims against the state and specifically limiting the Court's holding to cases involving a municipality or an individual defendant. *Mays*, unpub op at 32, citing *Jones*, 462 Mich at 337. In *Smith*, Justice BOYLE described the availability of an alternative remedy only as a " 'special factor[] counselling hesitation,' . . . which militate[s] against a judicially inferred damage remedy." *Smith*, 428 Mich at 647 (BOYLE, J., concurring in part), quoting *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 480 US 388, 396; 91 S Ct 1999; 29 L Ed 2d 619 (1971). We therefore decline to hold that the

availability of an alternative remedy acts as a complete bar to a judicially inferred damage remedy. However, given the cautionary nature of Justice BOYLE's language, we conclude that this factor, if satisfied, must be strongly weighted against the propriety of an inferred damage remedy.

Finally, we agree with the Court of Claims' conclusion that it is appropriate to give significant weight "to the degree of outrageousness of the state actors' conduct as alleged by plaintiffs . . . ." *Mays*, unpub op at 43. If plaintiffs' allegations are proved true, "various state actors allegedly intentionally concealed data and made false statements in an attempt to downplay the health dangers posed by using Flint's tap water, despite possessing scientific data and actual knowledge that the water supply reaching the taps of Flint water users was contaminated with Legionella bacteria and dangerously high levels of toxic lead . . . ." *Id*. We agree that the egregious nature of defendants' alleged constitutional violations weighs considerably in favor of recognizing a remedy.

On the basis of the totality of the circumstances presented, this Court holds that at this stage of the proceedings, it is appropriate to recognize a judicially inferred damage remedy for the injuries here alleged. Summary disposition of plaintiffs' injury-to-bodily-integrity claim is therefore inappropriate.

V. STATE-CREATED DANGER

On cross-appeal, plaintiffs argue that the Court of Claims erred when it granted defendants' motion for summary disposition of plaintiffs' constitutional claims under the state-created-danger doctrine. We disagree.

This Court has never before considered whether a cause of action for state-created danger is cognizable

under Michigan law. However, plaintiffs assert that this Court may recognize such a cause of action arising from "the broad protections of the Due Process Clause of the Michigan Constitution . . . ." The Due Process Clause of the Michigan Constitution commands that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. This constitutional provision is nearly identical to the Due Process Clause of the United States Constitution, see US Const, Am XIV, § 1, and "[t]he due process guarantee of the Michigan Constitution is coextensive with its federal counterpart." *Grimes*, 302 Mich App at 530. "The substantive component of the due process guarantee 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' " *Id*. at 531, quoting *Glucksberg*, 521 US at 720. As the Court of Claims aptly explained, "[s]ubstantive due process protects the individual from arbitrary and abusive exercises of government power; certain fundamental rights cannot be infringed upon regardless of the fairness of the procedures used to implement them." *Mays*, unpub op at 19-20, citing *Sierb*, 456 Mich at 523. However, in general, "the due process clause does not require a state to protect its citizens' lives, liberty and property against invasion by private actors . . . [or] require a state to guarantee a minimum level of safety and security." *Markis v Grosse Pointe Park*, 180 Mich App 545, 554; 448 NW2d 352 (1989). Our courts have been reluctant to broaden the protections of the Due Process Clause without legislative guidance. *Sierb*, 456 Mich at 531-532; *Collins v Harker Hts*, 503 US 115, 125; 112 S Ct 1061; 117 L Ed 2d 261 (1992) (warning against expansion of "the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered [sic] area are scarce and open-ended").

Plaintiffs ask this Court to recognize and allow plaintiffs to pursue a cause of action under the so-called state-created-danger theory, first recognized by the United States Supreme Court in *DeShaney v Winnebago Co Dep't of Social Servs*, 489 US 189; 109 S Ct 998; 103 L Ed 2d 249 (1989). As the Court of Claims noted, "the very name of the theory, i.e. state-created danger, facially suggests that it could implicate what happened in Flint . . . ." *Mays*, unpub op at 24. However, the moniker "state-created danger" is somewhat misleading. The doctrine has been applied in all contexts as a narrow exception to the general rule that while the state may be held liable under the Due Process Clause for its own actions, the state has no affirmative obligation to protect people from *each other*. In *DeShaney*, the Court considered whether a minor who had been beaten by his father had been deprived of a due-process liberty interest by state social workers who failed to remove the minor from his father's custody despite receiving complaints of abuse. *DeShaney*, 489 US at 191. After noting that the Due Process Clause of the United States Constitution imposes no affirmative duty on the state to protect individuals from private violence, the Court recognized a necessary exception to this general rule in cases in which the state has undertaken some responsibility for an individual's care and well-being or in which the state has deprived an individual of the freedom to care for himself or herself:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and

> at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. *In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means*. [*Id*. at 199-200 (citations omitted; emphasis added).]

The Court explained that it is only in "certain limited circumstances [that] the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals" acting other than on behalf of the state. *Id*. at 198. Applying the foregoing principles to the facts in that case, the *DeShaney* Court found no due-process violation by the state because the minor's injuries were sustained while he was in his father's custody, rather than in the custody of the state, and the danger of abuse had not been made greater by any affirmative action of the state. *Id*. at 201.

Although the United States Supreme Court did not explicitly adopt a cause of action for "state-created danger," various federal appellate courts have relied on the Court's language to support a constitutional claim for state-created danger under 42 USC 1983 and the Due Process Clause of the United States Constitution. *McClendon*, 305 F3d at 330 (acknowledging that various federal circuit courts have "found a denial of due

process when the state create[d] the . . . dangers faced by an individual") (quotation marks and citation omitted). See also *TD v Patton*, 868 F3d 1209, 1221-1222 (CA 10, 2017); *Kennedy v Ridgefield*, 439 F3d 1055, 1061-1062 (CA 9, 2006); *Bright v Westmoreland Co*, 443 F3d 276, 280-282 (CA 3, 2006); *Pena v DePrisco*, 432 F3d 98, 108-109 (CA 2, 2005); *Gregory v City of Rogers, Arkansas*, 974 F2d 1006, 1009-1010 (CA 8, 1992); but see *Doe v Columbia-Brazoria Indep Sch Dist*, 855 F3d 681, 688-689 (CA 5, 2017) (noting that a state-created-danger exception has not yet been recognized in the Fifth Circuit).

According to the principles announced by the United States Supreme Court in *DeShaney*, the state-created-danger exception applies in situations in which an individual in the physical custody of the state, by incarceration or institutionalization or some similar restraint of liberty, suffers harm from third-party violence resulting from an affirmative action of the state to create or make the individual more vulnerable to a danger of violence. So the state-created-danger theory arose, and so it has been consistently applied. Although the elements of a state-created-danger cause of action vary slightly between federal circuits, courts consistently require some third-party, nongovernmental harm either facilitated by or made more likely by an affirmative action of the state. See, e.g., *Patton*, 868 F3d at 1222 (recognizing a constitutional violation when a "state actor affirmatively act[s] to create or increase[] a plaintiff's vulnerability to danger from private violence") (quotation marks and citation omitted); *Gray v Univ of Colorado Hosp Auth*, 672 F3d 909, 921 (CA 10, 2012) (describing the state-created-danger theory as a "*narrow exception*, which applies only when a state actor affirmatively acts to create, or increase[] a plaintiff's vulnerability to, danger from private vio-

lence") (quotation marks and citation omitted); *Kneipp v Tedder*, 95 F3d 1199, 1208 (CA 3, 1996) (noting that a "third party's crime" is an element common to "cases predicating constitutional liability on a state-created danger theory"). Indeed, most federal appellate courts have adopted a test substantially similar to the one employed by the Sixth Circuit Court of Appeals, which enumerates the elements of a state-created-danger cause of action as follows:

> To show a state-created danger, plaintiff must show: 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff. [*Cartwright v City of Marine City*, 336 F3d 487, 493 (CA 6, 2003).]

Additionally, the Michigan Court of Appeals has applied the test articulated by the Sixth Circuit to claims brought under 42 USC 1983. See *Manuel v Gill*, 270 Mich App 355, 365-367; 716 NW2d 291 (2006), aff'd in part and rev'd in part 481 Mich 637 (2008); *Dean v Childs*, 262 Mich App 48, 53-57; 684 NW2d 894 (2004), rev'd in part on other grounds 474 Mich 914 (2005).

As previously discussed, the "first step in recognizing a damage remedy for injury consequent to a violation of our Michigan Constitution is . . . to establish the constitutional violation itself." *Marlin*, 205 Mich App at 338 (quotation marks and citation omitted). In this case, defendants argue that plaintiffs' state-created-danger cause of action cannot be sustained because plaintiffs have not alleged any actions by defendants that "created or increased the risk that . . . plaintiff[s] would be exposed to an act of violence by a third party." *Cart-*

wright, 336 F3d at 493. We agree. While plaintiffs suggest that harm committed by a third party is not a necessary element of a cause of action for state-created danger, no court that has recognized or applied the state-created-danger theory has done so in the absence of some act of private, nongovernmental harm. Indeed, plaintiffs acknowledge that, at the very least, the harm necessary to sustain a constitutional tort claim of state-created danger must spring from a source other than a state actor. Were this Court to recognize a cause of action for state-created danger arising from the Michigan Constitution, it would be narrow in scope and so limited.

In this case, plaintiffs have alleged harms caused directly and intentionally by state actors. This is simply not the sort of factual situation in which a claim for state-created danger, according to its common conception, may be recognized. The Court of Claims did not err when it concluded that, even if a state-created-danger cause of action is cognizable under Michigan law, plaintiffs have not alleged facts to support it. Summary disposition in favor of all defendants on plaintiffs' state-created-danger claim is therefore appropriate.

VI. INVERSE CONDEMNATION

Next, defendants argue that the Court of Claims erred by denying their motion for summary disposition of plaintiffs' inverse-condemnation claims. We disagree.

"Both the United States and Michigan constitutions prohibit the taking of private property for public use without just compensation." *Wiggins v City of Burton*, 291 Mich App 532, 571; 805 NW2d 517 (2011), citing US Const, Am V; Const 1963, art 10, § 2. "A de facto

taking occurs when a governmental agency effectively takes private property without a formal condemnation proceeding." *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 125; 680 NW2d 485 (2004). Inverse condemnation is " 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.' " *In re Acquisition of Land—Virginia Park*, 121 Mich App 153, 158-159; 328 NW2d 602 (1982) (citation omitted). "Inverse condemnation can occur without a physical taking of the property; a diminution in the value of the property or a partial destruction can constitute a 'taking.' " *Merkur Steel Supply, Inc*, 261 Mich App at 125. Further,

> [a]ny injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to compensation. So a partial destruction or diminution of value of property by an act of government, which directly and not merely incidentally affects it, is to that extent an appropriation. [*Peterman v Dep't of Natural Resources*, 446 Mich 177, 190; 521 NW2d 499 (1994) (quotation marks and citation omitted).]

"While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006) (quotation marks and citation omitted). "[A] plaintiff alleging inverse condemnation must prove a causal connection between the government's action and the alleged damages." *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004).

Stated simply, "a plaintiff alleging a de facto taking or inverse condemnation must establish (1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property." *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 277; 792 NW2d 798 (2010). Further, "[t]he right to just compensation, in the context of an inverse condemnation suit for diminution in value . . . exists only where the landowner can allege a unique or special injury, that is, an injury that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated." *Spiek v Dep't of Transp*, 456 Mich 331, 348; 572 NW2d 201 (1998).

Plaintiffs allege that defendants made the decision to switch the city of Flint's water source from Lake Huron to the Flint River despite knowledge of the Flint River's toxic potential and the inadequacy of Flint's water treatment plant. Plaintiffs also allege that immediately after the switch was effected, toxic water flowed directly from the Flint River through the city's service lines to the water plant and then to plaintiffs' properties, where it caused physical damage to plumbing, water heaters, and service lines, leaving the infrastructure unsafe to use even after the delivery of toxic water was halted by the city's reconnection to the DWSD. According to plaintiffs, this damage resulted in reduced property values. Additionally, plaintiffs allege that various state actors concealed or misrepresented data and made false statements about the safety of Flint River water in an attempt to downplay the risk of its use and consumption. We agree with the Court of Claims' conclusion that "[t]he allegations are sufficient, if proven, to allow a conclusion that the state actors' actions were a substantial cause of the decline

of the property's value and that the state abused its powers through affirmative actions directly aimed at the property, i.e., continuing to supply each water user with corrosive and contaminated water with knowledge of the adverse consequences associated with being supplied with such water." *Mays*, unpub op at 49.

Disputing the conclusion reached by the Court of Claims, defendants take specific issue with each element of plaintiffs' inverse-condemnation claim. First, defendants argue that plaintiffs have not alleged any affirmative action to support a claim of inverse condemnation because a failure to license, regulate, or supervise cannot be considered an affirmative act. It is true that "alleged misfeasance in licensing and supervising" does not constitute an affirmative action to support a claim for inverse condemnation. *Attorney General v Ankersen*, 148 Mich App 524, 562; 385 NW2d 658 (1986). However, plaintiffs have not alleged any failure to regulate or supervise; instead, plaintiffs have alleged an affirmative act of switching the water source with knowledge that such a decision could result in substantial harm. Defendants' argument in this regard is unsupported, and we therefore reject it. Further, the state defendants attempt to avoid responsibility for the action of switching Flint's water source by arguing that the city defendants alone made the decision and effectuated the switch. This argument, too, is unsupported. Plaintiffs have alleged both knowledge and action on the part of the state defendants, and while it may ultimately be discovered that the state defendants were not responsible for the injury suffered by plaintiffs, this Court here considers only the propriety of judgment as a matter of law and must therefore accept all of plaintiffs' well-pleaded allegations as true.

Defendants also argue that plaintiffs have not alleged that any actions taken by defendants were directly aimed at plaintiffs' property. Defendants compare the act of changing Flint's water supply to the city's affirmative act of removing adjacent residential neighborhoods and diminishing commercial owners' property values in *Charles Murphy, MD, PC v Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993). In that case, this Court held that no inverse condemnation had occurred because while the city's actions had affected the value of the plaintiffs' commercial property, the city had taken no deliberate action toward the commercial property that deprived the owners of their right to use the property as they saw fit. *Id*. According to defendants, the city's act of demolishing residential neighborhoods, as described in *Murphy*, represents a more egregious allegation of inverse condemnation than that leveled by plaintiffs here. As in *Murphy*, defendants argue, the government's actions merely *affected* plaintiffs' property.

Defendants' reliance on *Murphy* is misplaced. This is not a situation in which plaintiffs have alleged an incidental reduction in property value resulting from some unrelated administrative action by the government. Instead, plaintiffs allege deliberate actions taken by defendants that directly led to toxic water being delivered through Flint's own water delivery system *directly into* plaintiffs' water heaters, bathtubs, sinks, and drinking glasses, causing actual, physical damage to plaintiffs' property and affecting plaintiffs' property rights.

Finally, defendants argue that plaintiffs have not alleged a unique injury, different in kind from harm suffered by all persons similarly situated. According to defendants, plaintiffs' injury, while perhaps different

in degree, is no different from the harm suffered by all property owners exposed to Flint River water during the switch. Although defendants argue that plaintiffs' injuries should be compared only to those suffered by other users of Flint River water, defendants have cited no direct authority for this assertion and, indeed, the assertion is not logically supported by the caselaw on which defendants rely.

In *Richards v Washington Terminal Co*, 233 US 546, 554; 34 S Ct 654; 58 L Ed 1088 (1914), an opinion that the state defendants argue supports their position, the United States Supreme Court held that the plaintiffs, residents situated near a railroad tunnel, could not state a claim of inverse condemnation for cracks in their homes caused by vibrations from nearby trains because risk of such harm, while varying in degree, is shared generally by anyone living near a train. However, as defendants acknowledge, the Court held that the plaintiffs could state a claim for inverse condemnation for damage caused by a fanning system within the tunnel that blew smoke and gases into their homes because this particular harm was suffered uniquely by the plaintiffs. *Id*. at 556. On review, we conclude that the *Richards* holding actually supports plaintiffs' contention that the harm alleged should be compared to the harm suffered by all other municipal water users, rather than compared to all other Flint water users. In *Richards*, the Court did not compare the plaintiffs with all owners of property near a *specific* train, but with all property owners, in general, who own property near *any* train.

Similarly, in *Spiek*, 456 Mich at 333-335, the plaintiffs, who were owners of residential property, alleged entitlement to compensation for damages caused to their property from dust, vibration, and fumes emanat-

ing from a newly constructed interstate expressway. The Michigan Supreme Court rejected the plaintiffs' claim because the damage to the plaintiffs' property was no different than the damage "incurred by all property owners who reside adjacent to freeways or other busy highways." *Id*. at 333. In *Spiek*, as in *Richards*, the Court compared the plaintiffs to all similarly situated property owners, not just the owners of residential property adjacent to the newly constructed expressway at issue in that case.

It follows, therefore, that plaintiffs' injury must be compared to the harm suffered by municipal water users generally, rather than to the harm suffered by other users of Flint River water. As in *Richards* and *Spiek*, plaintiffs have alleged injuries unique among similarly situated individuals, i.e., municipal water users, caused directly by governmental actions that resulted in exposure of their property to specific harm.

Defendants also suggest that because they have taken no affirmative action directly aimed at plaintiffs' property, they cannot possibly have caused plaintiffs' injuries. However, defendants' argument rests on assumptions that this Court, for the reasons discussed, declines to accept. Questions of fact still exist that, if resolved in plaintiffs' favor, support each element of plaintiffs' inverse-condemnation claim. The Court of Claims therefore did not err when it concluded that summary disposition pursuant to MCR 2.116(C)(8) was, at this stage of the proceedings, inappropriate.

VII. OFFICIAL-CAPACITY CLAIMS

Finally, defendants argue that the Court of Claims erred by allowing plaintiffs to proceed with official-capacity claims against the Governor and defendant emergency managers. Again, we disagree.

Defendants argued in the lower court that official-capacity suits against governmental officials for constitutional violations are not recognized in Michigan and, as a matter of law, plaintiffs could not assert their constitutional tort claims against the Governor, Earley, or Ambrose. After considering defendants' argument, the Court of Claims concluded that the relevant caselaw did not preclude a nominal official-capacity constitutional tort claim against these defendants. Because this is a question of law, this Court's review is de novo. *In re Jude*, 228 Mich App 667, 670; 578 NW2d 704 (1998).

As previously discussed, the Michigan Supreme Court held in *Smith* that "[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Smith*, 428 Mich at 544. The *Jones* Court noted that "*Smith* only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy," and continued, explaining that "[t]hose concerns are inapplicable in actions against a municipality or an individual defendant. Unlike states and state officials sued in an official capacity, municipalities are not protected by the Eleventh Amendment." *Jones*, 462 Mich at 337.

The state defendants argue that with the above-cited language, the *Jones* Court acknowledged that state officials have the same immunity from suit under the Eleventh Amendment that the state has when they are sued in their official capacity—a legal "fiction" designed only "to promote the vindication of federal rights." Because the Eleventh Amendment does not apply in state courts, argue the state defendants, the term "official capacity," as employed by the *Jones* Court, has no parallel meaning under Michigan law.

The state defendants misread *Jones*. We agree with the Court of Claims' observation that the *Jones* Court's use of the term "only" derived from the fact that it was addressing claims against municipalities and individual municipal employees, as distinguished from claims against the state or individual state officials who are afforded protection by the Eleventh Amendment. *Mays*, unpub op at 32. The *Jones* Court's conclusions do not preclude a constitutional tort claim against individuals. Rather, the *Jones* Court specifically contemplated the availability of official-capacity suits and was careful to evaluate the availability of alternative remedies against municipalities and municipal employees as "[u]nlike states and state officials sued in an official capacity . . . ." *Jones*, 462 Mich at 337. The Court of Claims correctly observed that "a proper reading of the pertinent caselaw compels the conclusion that the remedy allowed in *Smith*, while narrow, extends beyond the state itself to also reach state officials acting in their official capacity." *Mays*, unpub op at 32. Indeed, the *Jones* Court affirmed an opinion by the Court of Appeals that made even more clear that "the *Smith* rationale simply does not apply outside the context of a claim that *the state* (or a state official sued in an official capacity) has violated individual rights protected under the Michigan Constitution." *Jones*, 227 Mich App at 675.

We are also unconvinced by the state defendants' argument that Michigan's statutes governing governmental liability distinguish between governmental agencies and governmental officials and do not contemplate an official-capacity suit. Michigan courts have long recognized suits against state officials in their official capacities for claims arising outside of federal law. See, e.g., *Bay Mills Indian Community*, 244 Mich App at 748-749; *Jones v Sherman*, 243 Mich App 611,

612-613; 625 NW2d 391 (2000); *Carlton*, 215 Mich App at 500-501; *Lowery v Dep't of Corrections*, 146 Mich App 342, 348-349; 380 NW2d 99 (1985); *Abbott v Secretary of State*, 67 Mich App 344, 348; 240 NW2d 800 (1976). And Michigan law does, in fact, contemplate official-capacity suits against governmental officials. Indeed, the very provisions of the CCA on which the state defendants rely to argue that emergency managers are not state officers expressly contemplate suits against "an officer, employee, or volunteer of this state . . . acting, or who reasonably believes that he or she is acting" in his or her official capacity. MCL 600.6419(7).

Contrary to the state defendants' assertions, nothing in the provisions of our state's governmental liability statutes[18] precludes an official-capacity suit, particularly one predicated on allegations of constitutional violations. The governmental immunity statutes do not apply where, as here, a plaintiff has alleged violations of the Michigan Constitution. *Smith*, 428 Mich at 544 ("Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action."). The fact that no

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[18] The state defendants instruct this Court to "see" MCL 691.1407(1), (2), and (5), provisions of the GTLA, but provide nothing in the way of argument supporting their conclusory assertion that the GTLA "in no way contemplate[s] an 'official capacity' claim." "It is not sufficient for a party simply to announce a position . . . 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 . . . ." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (quotation marks and citation omitted). In any case, the state defendants' argument that the GTLA precludes official-capacity suits is belied by an immediately adjacent provision of the GTLA, which specifically contemplates causes of action "against an officer, employee, or volunteer of a governmental agency for injuries to persons or property . . . ." MCL 691.1408(1).

statute specifically authorizes a suit against the Governor in his official capacity is irrelevant for the same reason. The liability of the state and its officers for constitutional torts is not something the state must affirmatively grant via statute.

> Under *Smith*, [a state] defendant cannot claim immunity where the plaintiff alleges that defendant has violated its own constitution. Constitutional rights serve to restrict government conduct. These rights would never serve this purpose if the state could use governmental immunity to avoid constitutional restrictions. [*Burdette*, 166 Mich App at 408-409.]

Liability of the state and its officers for constitutional torts is simply inherent in the fact that the Constitution binds even the state government as the preeminent law of the land.

Plaintiffs have sued Governor Snyder and emergency managers Earley and Ambrose in their official capacities only, rather than as individual governmental employees. As the Court of Claims noted, " 'a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.' " *Mays*, unpub op at 33, quoting *Will v Mich Dep't of State Police*, 491 US 58, 71; 109 S Ct 2304; 105 L Ed 2d 45 (1989); see also *McDowell v Warden of Mich Reformatory at Ionia*, 169 Mich 332, 336; 135 NW 265 (1912). In other words, if plaintiffs are successful in their causes of action against the Governor, Earley, or Ambrose, plaintiffs must look to recover monetary damages from the state. Plaintiffs' official-capacity suits cannot result in individual liability. As the Court of Claims carefully noted, the Governor, Earley, and Ambrose are merely nominal party defendants, "such that the state and the state

alone . . . [is] accountable for any damage award that may result in this action." *Mays*, unpub op at 33-34.

Official-capacity suits are not merely redundant, as the city defendants suggest. Rather, official-capacity suits, while directed at the state, facilitate an efficient and expedient judicial process. In order to prevail on a constitutional-violation claim against the state, plaintiffs are required to prove that the violation of their rights occurred by virtue of a state custom or policy that governmental actors carried out in the exercise of their official authority. Plaintiffs have leveled specific allegations against the Governor, Earley, and Ambrose, and these defendants' participation in the judicial process is required. It is logical, if not necessary, to name the policymakers as nominal defendants in this case. Should plaintiffs' case be tried before a jury, a clear distinction between plaintiffs' allegations against the state as a party and against the Governor, Earley, and Ambrose in their official capacities will aid the jury in understanding the precise issues involved and prevent unnecessary confusion. Given our courts' history of recognizing official-capacity suits and the Court of Claims' care in explaining that these suits are nominal only, we conclude that the Court of Claims did not err by allowing plaintiffs' official-capacity suits against the Governor and the city defendants to proceed.

VIII. CONCLUSION

In sum, we hold that the Court of Claims did not err when it denied defendants' motion for summary disposition of plaintiffs' constitutional injury-to-bodily-integrity and inverse-condemnation claims. Questions of fact remain that, if resolved in plaintiffs' favor, could establish each of these claims and plaintiffs' compli-

ance with, or relief from, the statutory notice requirements of the CCA. Further, for the reasons described, the Court of Claims did not err when it allowed plaintiffs to proceed with their claims against the Governor, Earley, Ambrose, and all other defendants in the Court of Claims, or when it granted summary disposition in favor of defendants on plaintiffs' constitutional claim for injury to bodily integrity.

Affirmed.

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

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

In this consolidated appeal arising out of a putative class action brought by plaintiff water users and property owners in the city of Flint, Michigan, defendants appeal and plaintiffs cross-appeal the Court of Claims' opinion and order granting in part and denying in part defendants' motions for summary disposition. Because plaintiffs failed to comply with MCL 600.6431(3), the notice provision of the Court of Claims Act (CCA), MCL 600.6401 *et seq*., I would reverse the trial court's order and remand with direction for the trial court to enter an order summarily disposing of all plaintiffs' claims and dismissing the case.

We review de novo motions for summary disposition and questions of statutory interpretation. *Kline v Dep't of Transp*, 291 Mich App 651, 653; 809 NW2d 392 (2011). "When this Court interprets statutory language, our primary goal is to discern the intent of the Legislature as expressed in the text of the statute." *Grimes v Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). "Where the language is clear and unambiguous, our inquiry ends and we apply the statute as written." *Id*.

Governmental agencies in Michigan engaged in governmental functions are generally immune from tort liability. *Kline*, 291 Mich App at 653. It is "the sole province of the Legislature to determine whether and on what terms the state may be sued . . . ." *McCahan v Brennan*, 492 Mich 730, 732; 822 NW2d 747 (2012). Consequently, "because the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed." *Id*. at 736. This Court in *Rusha v Dep't of Corrections*, 307 Mich App 300, 307; 859 NW2d 735 (2014), held that the Legislature is permitted to "impose reasonable procedural requirements, such as a limitations period, on a plaintiff's available remedies even when those remedies pertain to alleged constitutional violations." Considering that the Legislature has the sole power to impose such restrictions, "the judiciary has no authority to restrict or amend those terms." *McCahan*, 492 Mich at 732. Thus, "no judicially created saving construction is permitted to avoid a clear statutory mandate." *Id*. at 733. When the language of a limiting statute is straightforward, clear, and unambiguous, it must be enforced as written. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007).

"One such condition on the right to sue the state is the notice provision of the Court of Claims Act, MCL 600.6431." *McCahan*, 492 Mich at 736. That notice provision, in pertinent part, states:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of

> damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
>
> * * *
>
> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action. [MCL 600.6431.]

The Michigan Supreme Court has been clear that the judiciary is not permitted to "reduce the obligation to comply fully with statutory notice requirements." *McCahan*, 492 Mich at 746-747. It is well established that MCL 600.6431 "is an unambiguous condition precedent to sue the state, and a claimant's failure to comply strictly with this notice provision warrants dismissal of the claim, even if no prejudice resulted." *Rusha*, 307 Mich App at 307 (quotation marks and citations omitted). Michigan appellate courts have consistently held that "the Legislature may impose reasonable procedural requirements, such as a limitations period, on a plaintiff's available remedies even when those remedies pertain to alleged constitutional violations." *Id*. Despite the Michigan Supreme Court's proclamation that courts are not permitted to "reduce the obligation to comply fully with statutory notice requirements," *McCahan*, 492 Mich at 746-747, this Court in *Rusha* indicated, in dicta, that there was an exception to the enforcement of the notice provision "where it can be demonstrated that [such provisions] are so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right." *Rusha*, 307 Mich App at 311 (quotation marks and citation omitted).

Plaintiffs assert, and the Court of Claims agreed, that they should be excused from the strict requirements of MCL 600.6431(3) because the enforcement of that statute would be "so harsh and unreasonable in [its] consequences that [it would] effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right." *Id*. (quotation marks and citation omitted). First, I am not convinced that the application of the strict requirements of the notice provision in this case should be considered "harsh" or "unreasonable" given the sequence of events that took place leading up to plaintiffs' filing of the instant litigation and the number of overlapping lawsuits previously filed concerning this matter.

As discussed later in this opinion, plaintiffs had numerous indications that they were suffering harm within six months of the water source switch and so could have reasonably filed their notice of intent in a timely manner. Even construing the notice provision of the CCA and *Rusha* in a manner most beneficial to plaintiffs, there is nothing in the law that establishes that a harsh-and-unreasonable-consequences claim would result and accrue only when the alleged wrongdoer publically, and clearly, admits that it acted improperly. Further, any action by defendants in attempting to cover their errors does not change the fact that there were abundant events—unrelated, and temporally prior, to defendants' cover-up—that should have alerted plaintiffs to their potential claims. In fact, plaintiffs' pleadings show that those events, or red flags, did alert plaintiffs to their potential claims.

Second, to the extent that this Court in *Rusha* may have attempted to create, whether as dicta or otherwise, a "harsh and unreasonable" consequences exception to MCL 600.6431(3), that Court was barred from

doing so by the Michigan Supreme Court in *McCahan*, 492 Mich at 733. In *McCahan*, the Supreme Court clearly and unequivocally held that the notice requirements found in MCL 600.6431 "must be interpreted and enforced as plainly written and that *no judicially created saving construction is permitted to avoid a clear statutory mandate*." *Id*. (emphasis added). This Court, in both *Rusha* and now in the present appeal, is "duty-bound to follow [the Michigan Supreme Court's] construction" of MCL 600.6431 found in *McCahan*. *Rowland*, 477 Mich at 202. Quite frankly, if the Legislature had intended the notice provision to be potentially excused by the possibility of harsh and unreasonable consequences, it would have written that into the statute. It chose not to do so, and as the law now stands, there is no such exception. Accordingly, in the instant matter, the majority errs, and the Court of Claims erred, by judicially creating one. See *id*.; see also *McCahan*, 492 Mich at 733.

Plaintiffs also assert that the notice provision in MCL 600.6431 should have been tolled due to defendants' alleged fraudulent concealment. Because the plain language of MCL 600.6431 unambiguously establishes that the Legislature did not intend to have the notice period tolled in such a manner, I disagree. The fraudulent-concealment exception is a legislatively created exception to statutes of limitations and does not apply to the notice provision at issue. The statute-of-limitations tolling exception is codified as part of the Revised Judicature Act (RJA), MCL 600.101 *et seq*., in MCL 600.5855, which states:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after

> the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

This statutory section permits the tolling of a statutory limitations period for two years if the defendant has fraudulently concealed the existence of a claim. *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996).

The Legislature, in crafting the CCA, imported the fraudulent-concealment exception into its statute-of-limitations provision. MCL 600.6452(2). In pertinent part, MCL 600.6452, which deals with the "limitation of actions," provides that "the provisions of RJA chapter 58, relative to the limitation of actions, shall also be applicable *to the limitation prescribed in this section*." MCL 600.6452(2) (emphasis added). The notice provision of the CCA does not contain a similar clause. See MCL 600.6431. The language provided in MCL 600.6452(2) clearly delineates that it is *only* to apply to the section on limitations. Statutes of limitations and notice requirements are not the same thing. *Rusha*, 307 Mich App at 311-312. By incorporating the fraudulent-concealment exception from the RJA into the notice requirement of the CCA, the majority ignores the clear intent expressed by the Legislature that such provisions of the RJA apply only "to the limitation prescribed in" MCL 600.6452—the CCA's statute-of-limitations section. Given that the "statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016).

Therefore, considering that plaintiffs were not entitled to toll or except themselves from the statutory notice period found in the CCA, it is next necessary to consider whether plaintiffs' claims complied with MCL 600.6431(3). Because they did not, I would reverse.

Plaintiffs argue, and the Court of Claims and majority agree, that there were questions of fact regarding when plaintiffs' claims accrued, so summary disposition was premature. I disagree. It is undisputed that plaintiffs did not file a separate notice of intent before filing the instant litigation. Instead, plaintiffs filed the instant claim on January 21, 2016. Therefore, in order to have complied with the notice provision of the CCA, MCL 600.6431(3), "the happening of the event giving rise to the cause of action" must have occurred within six months of January 21, 2016, which raises an interesting question that the majority failed to consider: What is "the happening of the event" in the context of the CCA notice provision? Notably, MCL 600.6431(1) provides that "[n]o claim may be maintained against the state unless the claimant, *within 1 year after such claim has accrued*, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim . . . ." (Emphasis added.) Meanwhile, MCL 600.6431(3) provides for a shorter time to file a written claim or notice thereof when the action is one "for property damage or personal injuries." However, instead of using the term "accrued" for describing when the notice clock begins to run, MCL 600.6431(3) uses the phrase "the happening of the event giving rise to the cause of action."

In *McCahan*, 492 Mich at 738, the Michigan Supreme Court addressed an issue involving subtle differences in language between Subsections (1) and (3) of MCL 600.6431. Specifically, the plaintiff in that case

argued that "her claim, being a claim for personal injury, is not subject to the dictates or bar-to-claims language of MCL 600.6431(1)." The Court held that "subsection (3) must be read in light of subsection (1) . . . ." *McCahan*, 492 Mich at 738. The Court provided the following reasoning:

> When undertaking statutory interpretation, the provisions of a statute should be read reasonably and in context. Doing so here leads to the conclusion that MCL 600.6431 is a cohesive statutory provision in which all three subsections are connected and must be read together. Subsection (1) sets forth the general notice required for a party to bring a lawsuit against the state, while subsection (3) sets forth a special timing requirement applicable to a particular subset of those cases—those involving property damage or personal injury. Subsection (3) merely reduces the otherwise applicable one-year deadline to six months. In this regard, subsection (3) is best understood as a subset of the general rules articulated in subsection (1), and those general rules and requirements articulated in subsection (1)—including the bar-to-claims language—continue to apply to *all* claims brought against the state unless modified by the later-stated specific rules. [*Id*. at 739 (citation omitted).]

In sum, the Court concluded that "the only substantive change effectuated in subsection (3) is a reduction in the timing requirement for specifically designated cases." *Id*. at 741. Stated differently, "subsection (3) . . . does not . . . displace the specific requirements of subsection (1) other than the timing requirement for personal injury or property damage cases." *Id*. at 742 (emphasis omitted).

Considering the Court's reasoning and conclusion in *McCahan*, it is only logical to hold that the phrase "the happening of the event giving rise to the cause of action" used in Subsection (3) means the same thing as "accrued" used in Subsection (1). After all, if the phrase

was interpreted differently, such an interpretation would run afoul of the Michigan Supreme Court's holding that "the only substantive change effectuated in subsection (3) is a reduction in the timing requirement for specifically designated cases." *Id.* at 741. Therefore, in order to determine if plaintiffs' claim being filed on January 21, 2016, satisfies MCL 600.6431(3), it is necessary to determine when plaintiffs' claims accrued. See *id.*

Notably, the CCA does not define when a claim accrues. For the reasons discussed when deciding that the fraudulent-concealment provision of the RJA should not apply to the notice provision of the CCA, I believe it would be inappropriate to adopt the definition of "accrued" from that same set of statutes. See MCL 600.5827 (establishing that a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results"). Instead, it would be far more prudent to adopt the definition of "accrued" used by this Court in *Cooke Contracting Co v Dep't of State Hwys #1 (On Rehearing)*, 55 Mich App 336, 338; 222 NW2d 231 (1974), citing *Oak Constr Co v Dep't of State Hwys*, 33 Mich App 561; 190 NW2d 296 (1971), which provided that "a claim accrues only when suit may be maintained thereon." It only stands to reason that a "suit may be maintained" when a plaintiff knows, or should know, about a potential claim. See *Cooke Contracting Co*, 55 Mich App at 338.[1] This, however, is not to say that plaintiffs are permitted to wait to discover the full range of wrongs and harms committed by defendants before plaintiffs' claims accrued. The Michigan

[1] I note that the Court of Claims has reached a similar conclusion. See *Gulla v Snyder*, unpublished opinion of the Court of Claims, issued September 13, 2017 (Docket No. 16-000298-MZ), pp 3-6.

Supreme Court has been clear that "[a]dditional damages resulting from the same harm do not reset the accrual date or give rise to a new cause of action." *Frank v Linkner*, 500 Mich 133, 155; 894 NW2d 574 (2017). In sum, if plaintiffs first knew or had reason to know of their potential claims against defendants on or after July 21, 2015, then their notice was timely and their claims are permitted. MCL 600.6431(3). If the accrual date fell anywhere before July 21, 2015, plaintiffs failed to comply with MCL 600.6431(3) and their claims must be dismissed. See *McCahan*, 492 Mich at 742.

Given that the Court of Claims considered this motion before discovery, this Court must rely on the well-pleaded facts in plaintiffs' pleadings. In examining those facts attested to by plaintiffs, it is clear that plaintiffs had reason to know that they had suffered harm due to defendants' actions—and therefore their claims accrued—well before July 21, 2015. The amended complaint provides that a study commissioned by the city of Flint was published in 2011 and "cautioned against the use of the Flint River water and the dormant Flint Water Treatment Plant . . . ." The original complaint clarified that the "report stated that the water from the Flint River was highly corrosive and could not be used safely without an anti-corrosive agent to prevent lead, copper and other heavy metals from leaching into the water . . . ." Despite that report, on April 25, 2014, "Flint water users began receiving Flint River water from their taps . . . ." In their amended complaint, plaintiffs identify their class as "Flint water users . . . who, since April 25, 2014, were and continue to be injured in person and property because they were exposed to highly dangerous conditions . . . ." Subsequently, "[i]n June 2014, citizen complaints about contaminated water continued," with

"[m]any Flint water users report[ing] that the water was making them ill." The amended complaint acknowledged that "[o]n October 13, 2014, the General Motors Corporation [(GM)] announced that it would no longer use Flint River water in its Flint plant." Plaintiffs referred to that move by GM as "clear evidence of serious and significant danger . . . ." In January 2015, a Flint homeowner contacted the United States Environmental Protection Agency (EPA) regarding the water, informing the federal agency "that she and her family members were becoming physically ill from exposure to the Flint River water coming from her tap." "On February 17, 2015, Flint water users staged public demonstrations demanding that Flint re-connect with [Detroit's water system]." According to the amended complaint, the "Flint City Council voted to re-connect to Detroit's water system" on March 25, 2015.

Plaintiffs also provide additional details in their original complaint that are helpful to this analysis. The original complaint notes that the Flint water failed tests administered by the EPA shortly after the switch due to elevated levels of total trihalomethanes (TTHMs), which are known carcinogens. In August 2014, the water tested positive for *E. coli*. Flint issued "boil water" advisories in September 2014. Plaintiffs then alleged that for the eight months following the switch, or until December 25, 2014, "Flint water users, including Plaintiffs and/or Plaintiff Class members, expressed their concerns about water quality in multiple ways, including letters, emails and telephone calls to Flint and [Michigan Department of Environmental Quality (MDEQ)] officials, the media and through well publicized demonstrations on the streets of Flint." In January 2015, plaintiffs "received a notice . . . stating that the water was not in compliance with the federal Safe Drinking Water Act because of

unlawful levels of TTHMs." The complaint asserted that "[o]n January 20, 2015, citizen protests mounted[,] fueled in part by encouragement from environmental activist Erin Brockovich and her associate, water expert Bob Bowcock." Plaintiffs alleged that those purported experts "offered advice and assistance to the protesting Flint water users due to the serious concerns about the health risks they presented by this toxic water."

The original and amended complaints provide that after July 21, 2015, additional events occurred regarding governmental response to the allegedly toxic water. In August 2015, Dr. Mona Hanna-Attisha, a pediatrician, published a study that "noted and disclosed a dramatic and dangerous spike in elevated blood lead levels in a large cohort of Flint children corresponding with the time of exposure to the highly corrosive Flint River water." Although she published that report in August 2015, she based it on data she accumulated from "blood drawn [from Flint children] in the second and third quarter of 2014." In September 2015, Professor Marc Edwards issued a report that revealed lead in the water supply and that "the Flint River water was 19 times more corrosive than the water pumped . . . by the Detroit water system." On October 8, 2015, Governor Snyder acknowledged that the Flint water was toxic and unsafe, and on October 16, 2015, "Detroit city Water began to flow to Flint water users."

Plaintiffs' claims clearly accrued before July 21, 2015. Prior to that date, it was public knowledge that Flint water users had been switched over to water from the Flint River as of April 25, 2014. The original and amended complaints are rife with statements establishing that from the moment the water was switched, residents indicated that there was something wrong with the water, that it was making them

feel ill, and that it looked and smelled foul. Specifically, plaintiffs' pleadings provided that for the eight months following the switch, Flint residents complained "about water quality in multiple ways, including letters, emails and telephone calls to Flint and MDEQ officials, the media and through well publicized demonstrations on the streets of Flint." Indeed, before 2014 ended, Flint issued a "boil water" advisory regarding bacteria in the water, Dr. Hanna-Attisha discovered that children in Flint showed "a dramatic and dangerous spike in elevated blood lead levels," and GM "announced that it would no longer use Flint River water in its Flint plant." Plaintiffs in their pleadings stated that GM's decision was "clear evidence of serious and significant danger . . . ." The residents' complaints of feeling ill and Dr. Hanna-Attisha's data established that plaintiffs' purported class was undisputedly suffering harm before 2014 ended. Further, plaintiffs should have known of the potential claim, considering that there were "well publicized" public demonstrations occurring and GM had acted in a manner that revealed "clear evidence of serious and significant danger . . . ." Although plaintiffs may have become better informed regarding the specific harms suffered after 2014 and the damages arising therefrom, those more recently discovered harms did "not reset the accrual date or give rise to a new cause of action." *Frank*, 500 Mich at 155. Therefore, by the end of 2014, plaintiffs knew or should have known that they and their property were being harmed by defendants' decision to use water from the Flint River. See *Cooke Contracting Co*, 55 Mich App at 338.

Even giving plaintiffs the benefit of the doubt and observing the events of 2015, plaintiffs' pleadings clearly establish that July 21, 2015, was far past any

date when plaintiffs knew or should have known of their claims. In January 2015, the residents of Flint held a public demonstration where notable public figures were present, and the complaint alleges that those public figures expressed their belief that the water was toxic and harmful. In that same month, Flint residents received a notice in the mail stating that their drinking water was not compliant with federal standards due to the presence of TTHMs. Plaintiffs also allege that a Flint resident called the EPA in January 2015 to specifically express that the water was making her and her family ill. Another public demonstration took place in February 2015. In March 2015, responding to concerns regarding the water, the Flint City Council publically voted to reconnect to the Detroit water system. All these facts alleged by plaintiffs plainly support the conclusion that plaintiffs knew or should have known of their claims well before July 21, 2015.

Finally, I would take judicial notice of complaints filed against Flint in the Genesee Circuit Court, Case No. 15-101900-CZ, and the United States District Court for the Eastern District of Michigan, Case No. 2:15-cv-12084-SJM-DRG.[2] In those cases, both filed before July 21, 2015—on June 5, 2015, and July 6, 2015, respectively—the plaintiff, Coalition for Clean Water, alleged that the residents of Flint had been denied their "basic and human right to clean drinking water – free of contamination" and that "usage of the Flint River as a primary source of drinking water has and continues to pose a major and serious threat to the

[2] This Court is permitted to take judicial notice of public records. *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 649; 873 NW2d 842 (2015), citing MRE 201; see also *Cheboygan Sportsman Club v Cheboygan Co Prosecuting Attorney*, 307 Mich App 71, 73; 858 NW2d 751 (2014).

health, safety and welfare of the residents of the City of Flint[.]" The complaints relied on many of the same facts as the present case, including that the water failed EPA tests, Flint issued notices of that failure, public demonstrations had been conducted involving Erin Brockovich, and GM had switched water sources. Melissa Mays, the lead plaintiff in the instant case, signed both those complaints after attesting that she had "read the foregoing complaint and . . . declare[d] that statements contained therein are true to the best of [her] knowledge, information and belief."

Therefore, by the very latest possible date, July 6, 2015, plaintiffs knew or should have known that they and their property were being harmed by defendants' decision to use water from the Flint River. See *Cooke Contracting Co*, 55 Mich App at 338. They specifically acknowledged that they were aware of the possibility of such a claim by taking the affirmative step to file lawsuits in other courts. Therefore, their complaint filed on January 21, 2016—more than six months after any reasonably possible, and actually occurring, accrual date—did not satisfy the strict requirements of the CCA's notice provision. MCL 600.6431(3). Consequently, all of plaintiffs' claims are barred, and summary disposition should have been entered in favor of defendants in the Court of Claims. *McCahan*, 492 Mich at 742.

I am cognizant of the fact that the statutory notice provision of the CCA as applied in this case creates what plaintiffs have characterized as a harsh result. The harshness of that result, however, lies partially at the feet of plaintiffs. As discussed earlier, within six months of the switch from Detroit water to Flint River water, it was publically known that something was wrong with the water and that the water was making

people sick. The public generally was aware of this danger, especially after GM, within six months of the switch, moved back to Detroit water due to concerns regarding the corrosive nature of the Flint River water. Thus, within six months of the change, the residents of Flint were aware that an emergency manager, who was appointed by Governor Snyder and answerable only to state officials, made the decision to switch water sources and that the new water was corrosive to metal and making people sick. In other words, the Flint residents knew that Michigan officials were involved in the decision to obtain water from the Flint River and suspected that the water was causing harm.

Plaintiffs have not, and likely cannot, explain why they did not file the notice of intent to file a claim at that moment. Any argument that they did not have enough information to actually sustain a claim against defendants due to defendants' alleged fraudulent concealment is not persuasive. The notice requirement of the CCA does not require that a complaint be filed within six months of the claim accruing; it only requires that a "notice of intention to file a claim . . . stat[e] the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained . . . ." MCL 600.6431(1). That notice of intent would not have been held to the more demanding requirements of a complaint pursuant to MCR 2.111(B), would not have been subject to a motion for summary disposition pursuant to MCR 2.116(C)(8) for failure to state a claim for which relief could be granted, and would not have been subject to a motion for sanctions for the filing of a frivolous complaint due to plaintiffs' alleged lack of adequate information to sustain such a complaint at that time pursuant to

MCR 2.114(F). In sum, there was little risk involved in filing a notice of intent pursuant to MCL 600.6431(3).

Had the notice of intent been filed in a timely manner, which "is a minimal imposition, especially considering that § 6431 allows the filing of statutory notice in lieu of filing an entire claim," *Rusha*, 307 Mich App at 310, plaintiffs then would have had the benefit of the entire three-year statutory period of limitations of the CCA. MCL 600.6452(1). Thus, plaintiffs would not have had to file a complaint for the instant action until, at the earliest, April 25, 2017, which was three years after the switch occurred. By that time, plaintiffs, according to their arguments, would have been fully aware of the factual circumstances and alleged deceit by defendants. Furthermore, because they would then be dealing with the statute of limitations instead of the notice provision, they would have had the benefit of asserting that the limitations period had been tolled due to defendants' fraudulent concealment. MCL 600.6452(2); MCL 600.5855. Consequently, had plaintiffs been reasonably diligent in their attempts to comply with the notice provision of the CCA, any claimed inequitable results required in this case could have been entirely avoided.

Even so, it is not within this Court's power to cure legislation of what a party may believe to be inequitable results. See *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 472; 838 NW2d 736 (2013) ("When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so . . . .") (quotation marks and citation omitted). Furthermore, as the Michigan Supreme Court succinctly stated:

> [O]ur judicial oaths require judges to enforce the *Legislature's* policy choices, even when we may personally find the outcome in a given case "unjust," "inequitable," "jarring," "hyper-technical," or contrary to what we intuit an "average person's" sensibilities to be. As this Court has stated, it is a mere "caricature" of judicial restraint for a judge "to assert that her common sense should be allowed to override the language of the statute."
>
> . . . [O]ur judicial duty is more than to "almost always" apply a statute's unambiguous words to the facts presented. The law must *always* guide the outcome, regardless of whether a judge perceives that outcome in a given case to be formalistic or "inequitable."
>
> This Court has prided itself on its commitment to the rule of law, and in particular a return to fundamental constitutional principles regarding judicial interpretation of statutes. This has been true even where, as a personal matter, a Justice may be discomforted by the ultimate result. But in a government characterized by the separation of powers, the people of this state elect judges to enforce the law as the political branches of our government have given it to us.
>
> The rule of law requires a judge to be subservient to the law itself, not the law to be subservient to the personal views of a judge. [*Progressive Mich Ins Co v Smith*, 490 Mich 977, 979-980 (2011) (YOUNG, C.J., concurring) (citations omitted).]

Furthermore, even though the proper application of the notice provision in the instant case would have resulted in what plaintiffs characterize as harsh consequences, I am not unaware of the fact that the residents of Flint are not left entirely without remedies. In the United States District Court for the Eastern District of Michigan, certain Flint water users have survived summary judgment on their "substantive due process bodily integrity" claims against Flint and the emergency managers Earley and Ambrose, as well as several other individual actors. *Guertin v Michigan*, unpublished

opinion of the United States District Court for the Eastern District of Michigan, issued June 5, 2017 (Case No. 16-cv-12412). An appeal of that decision is currently pending before the United States Court of Appeals for the Sixth Circuit. In an opinion staying the Eastern District proceedings pending the outcome of the appeal, the court noted that plaintiffs sought to amend their complaint to allege a class action against city, state, and individual defendants. *Guertin v Michigan*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 30, 2017 (Case No. 16-cv-12412). Furthermore, a class action with Mays as the lead plaintiff was filed against state officials, along with others, and was removed to the Eastern District after originally being filed in state court. That case was consolidated with other class actions in federal court. *Mays v Governor*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 14, 2017 (Case No. 17-cv-10996). The *Guertin* opinion indicated that the Eastern District had "consolidated all other pending Flint water class-action litigation as a single suit in *Waid v. Snyder*, Case No. 16-cv-10444." *Guertin*, unpub op issued October 30, 2017, at 2. Finally, there is also a "state-law professional negligence proposed class action" on behalf of the Flint water users against "civil engineering companies responsible for upgrading Flint's municipal water system." *Mason v Lockwood, Andrews & Newnam, PC*, 842 F3d 383, 385-386 (CA 6, 2016). The Sixth Circuit remanded that case to state court pursuant to the local-controversy exception to the Class Action Fairness Act, 28 USC 1332(d)(4)(A). *Id*. at 386.

While this is by no means an exhaustive list of the multitude of claims that have arisen from the Flint water crisis, it demonstrates that, despite the results

required by strict application of MCL 600.6431(3), plaintiffs and their purported class are not left without a remedy.[3]

I would reverse and remand for entry of summary disposition in favor of defendants on all of plaintiffs' claims.

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[3] A review of public records shows that in federal court alone there have been approximately 50 individual lawsuits and seven class actions filed arising out of the Flint water crisis.

GRIFFIN v GRIFFIN

Docket No. 338810. Submitted December 12, 2017, at Lansing. Decided January 30, 2018, at 9:00 a.m. Amended by order entered on May 25, 2018.

Jason A. Griffin filed a motion in the Ingham Circuit Court to change custody, parenting time, and child support of the child he shares with Rebekah M. Griffin. Jason and Rebekah were divorced by consent judgment in March 2013, and from the time of divorce until this matter arose, they shared equal physical custody using a two-week-on/two-week-off schedule. On January 20, 2016, Rebekah, who is an active-duty member of the United States Coast Guard, received orders to report to a new duty station in Willowbrook, Illinois, approximately 3 hours and 52 minutes from Jason's home in Holt, Michigan. Following a hearing on March 31, 2016, the court entered an order allowing Rebekah to change her legal residence with the child from Auburn Hills, Michigan, to Willowbrook, Illinois. The order stated that the child's legal residence with Jason would remain in Holt and that the parenting-time schedule would continue. On January 19, 2017, Jason filed the instant motion, asserting that the parties' child would start kindergarten in the fall of 2017 and therefore could not continue to split his time between his parents every two weeks while attending school. Jason argued that his son's need to start school was a material change in circumstances warranting review of the custody arrangement and that he should be granted full legal and physical custody of the child. Rebekah filed an answer to the motion and filed her own motion to modify custody, parenting time, and child support. The matter was referred to the Friend of the Court (FOC) for investigation, and the FOC recommended that the child reside with Jason during the school year and that Rebekah be granted parenting time according to a holiday schedule, which included every summer break. Both parties objected to the investigator's recommendation. The court, Richard J. Garcia, J., held a hearing on the parties' objections and subsequently entered a written order and opinion awarding primary custody of the child to Rebekah during the school year and primary custody to Jason during the summer. The court found that the change in custody was in the child's best interests by applying the preponderance-of-

the-evidence standard. The court then considered each of the best-interest factors under MCL 722.23 and found Factors (a), (c), and (e) through (i) equal for both parties; Factors (b), (d), (j), and (k) in favor of Rebekah, and Factor (*l*) in favor of Jason. When weighing the best-interest factors, the trial court noted but did not consider evidence that Rebekah would likely have to relocate in 2020 because of her active-duty status in the Coast Guard. Jason moved for reconsideration of the order, challenging the court's application of a preponderance-of-the-evidence standard and the court's decision not to consider Rebekah's anticipated relocation. The court denied his motion. Jason appealed.

The Court of Appeals *held*:

1. MCL 722.27(1)(c) provides, in relevant part, that the court shall not modify or amend its previous judgments or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interests of the child. Therefore, before a court may enter an order modifying its prior custody order in a fashion that alters the child's custodial environment, the court must first find by clear and convincing evidence that such a change is in the best interests of the child. In this case, despite the clear statutory language, the trial court applied a preponderance-of-the-evidence standard to the best-interest determination. The trial court erred by applying a preponderance-of-the-evidence standard when weighing the best-interest factors in MCL 722.23.

2. While clear and convincing evidence must be presented to justify a change in custody when a custody dispute is between the natural parents of the child, MCL 722.27(1)(c) does not require that one parent's proposed change be better than the other parent's proposal under a clear-and-convincing-evidence standard. Accordingly, the trial court is not tasked with comparing the parties' suggested changes and determining which is better. Rather, in order to make a change to the established custodial environment, the trial court must find that the change is in the child's best interests when compared to the status quo. The child's established custodial environment is the status quo, so in order to modify it the court must find by clear and convincing evidence that the change is in the child's best interests when compared to the status quo, not when compared to every other conceivable or suggested modification. In doing so, the court is free to adopt either party's proposal in whole or in part, but it is equally permissible for the court to fashion an entirely new custody arrangement or to maintain the existing custody arrangement. The key is that the court must first find by clear and

convincing evidence that the new custodial arrangement is in the child's best interests. In this case, the court should have applied the clear-and-convincing-evidence standard when determining whether to maintain the status quo or enter an order changing the child's established custodial environment.

3. MCL 722.27(1)(c) provides, in pertinent part, that if a motion for change of custody is filed while a parent is on active duty, the court shall not consider a parent's absence due to that active-duty status in a best-interest determination. The issue whether this provision precludes a trial court from considering a parent's anticipated future relocation due to his or her active-duty status when making a best-interest determination was an issue of first impression. A parent is absent from his or her child if he or she is not physically present. Under MCL 722.27(1)(c), a trial court is only prohibited from considering a parent's current—not future—absence from the child due to his or her active-duty status. MCL 722.27(4), which applies to parents who are deployed, addresses both a parent's absence due to his or her deployment as well as any future deployments; however, MCL 722.27(1)(c) only addresses a parent's absence due to his or her active-duty status. Therefore, because the omission of a provision in one part of a statute that is included in another part should be construed as intentional, MCL 722.27(1)(c) only prohibits a trial court's consideration of a parent's current absence from a child due to that parent's active-duty status when making a best-interest determination; the trial court is not prohibited from considering a parent's future absence from a child due to that parent's active-duty status. In this case, there was no evidence on the record suggesting the Rebekah was currently absent from the child because of her active-duty status with the Coast Guard; rather, the record reflected that she was fully present in her child's life. Therefore, because MCL 722.27(1)(c) only prohibits the court from considering current absences due to active-duty status, the trial court erred by interpreting and applying MCL 722.27(1)(c) so as to wholly preclude consideration of Rebekah's anticipated future relocation due to her military service.

Reversed and remanded for a new best-interest hearing.

MURPHY, P.J., dissenting, would have affirmed the trial court's custody and evidentiary rulings because—whether under the preponderance-of-the-evidence standard or the clear-and-convincing-evidence standard—an order was necessary so as to allow the child to reside with one of the parties during the school year and attend school at that location; any other ruling would have been contrary to the child's best interests. If the trial court's

ultimate decision did not result in a true change of the established custodial environment—and an argument could be made that the ruling did not necessarily change the child's established custodial environment because the child might very well still look to both parents for guidance, discipline, the necessities of life, and parental comfort even with the parenting division between the school year and summer break—then the court's application of the preponderance-of-the-evidence standard would be legally sound. However, assuming that there was a change in the child's established custodial environment and that the clear-and-convincing-evidence standard was applicable, there would be no need to reverse and remand the case because any error would be harmless. The court itself recognized that a change had to be made, and the child's best interests could only be served by altering the existing custody arrangement. Additionally, considering that the trial court found in favor of Rebekah on four of the child custody best-interest factors, with the remaining factors being even except for one, the court would be forced again to rule in favor of Rebekah, even under the clear-and-convincing-evidence standard. Moreover, Judge MURPHY would have held that the trial court did not err by excluding consideration of Rebekah's possible future absence due to her active-duty status with the Coast Guard because the language of MCL 722.27(1)(c) plainly precluded contemplation of such evidence. The only temporal component of this provision related to a parent being on active duty when a motion for change of custody is filed. The prohibition on considering a parent's absence due to that active-duty status is not limited to consideration of a current absence; the language is broad enough to encompass any absence, including a potential future or planned absence. Accordingly, Judge MURPHY would have affirmed the trial court's custody and evidentiary rulings.

1. PARENT AND CHILD — CHILD CUSTODY — CHANGING A CHILD'S ESTABLISHED CUSTODIAL ENVIRONMENT.

MCL 722.27(1)(c) provides, in relevant part, that the court shall not modify or amend its previous judgments or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interests of the child; in order to make a change to the established custodial environment, the trial court must find that the change is in the child's best interests when compared to the status quo; the child's established custodial environment is the status quo, so in order to modify it the court must find by clear and convincing evidence that the change is in the child's best

interests when compared to the status quo, not when compared to every other conceivable or suggested modification; in doing so, the court is free to adopt either party's proposal in whole or in part, but it is equally permissible for the court to fashion an entirely new custody arrangement or to maintain the existing custody arrangement.

2. PARENT AND CHILD — CHILD CUSTODY — CHANGE OF CUSTODY — PARENT'S ABSENCE DUE TO ACTIVE-DUTY STATUS.

MCL 722.27(1)(c) provides, in pertinent part, that if a motion for change of custody is filed while a parent is on active duty, the court shall not consider a parent's absence due to that active-duty status in a best-interest determination; MCL 722.27(1)(c) only prohibits a trial court's consideration of a parent's current absence from a child due to that parent's active-duty status when making a best-interest determination; the trial court is not prohibited from considering a parent's future absence from a child due to that parent's active-duty status.

Farhat & Story, PC (by *Linda L. Widener*) for Jason A. Griffin.

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Jennifer M. Alberts*) for Rebekah M. Griffin.

Before: MURPHY, P.J., and M. J. KELLY and SWARTZLE, JJ.

M. J. KELLY, J. In this child custody case, plaintiff, Jason Griffin, appeals as of right the trial court order denying his motion to change custody of the parties' minor child and granting the motion to change custody filed by defendant, Rebekah Griffin.[1] Because the trial court erred by applying the preponderance-of-the-evidence standard instead of the statutorily mandated clear-and-convincing-evidence standard to the best-interest determination under MCL 722.23 of the Child

[1] For ease of reference, this Court will refer to the parties by their first names.

Custody Act, MCL 722.21 *et seq*., we reverse and remand for further proceedings.

I. BASIC FACTS

Jason and Rebekah were divorced by consent judgment in March 2013. They have one child, and from the time of divorce until this matter arose, they shared equal physical custody using a two-week-on/two-week-off schedule. On January 20, 2016, Rebekah, who is an active duty member of the United States Coast Guard, received orders to report to a new duty station in Willowbrook, Illinois, approximately 3 hours and 52 minutes from Jason's home in Holt, Michigan. Following a hearing on March 31, 2016, the court entered an order allowing Rebekah to change her legal residence with the child from Auburn Hills, Michigan, to Willowbrook, Illinois. The order stated that the child's legal residence with Jason would remain in Holt and the parenting-time schedule would continue.

On January 19, 2017, Jason filed a motion to change custody, parenting time, and child support. He asserted that the parties' child would turn five years old in February 2017 and would start kindergarten in the fall of 2017. Jason argued that his son could not continue to split his time between his parents every two weeks while attending school and that his son's need to start school was a material change in circumstances warranting review of the custody arrangement. Jason argued that the best-interest factors under MCL 722.23 weighed in favor of granting him full legal and physical custody of Jason and awarding Rebekah reasonable parenting time.

On February 16, 2017, Rebekah filed an answer to Jason's motion. She also filed her own motion to modify custody, parenting time, and child support. Rebekah

contended that the best-interest factors favored her receiving full legal and physical custody of the parties' child, not Jason. The matter was referred to the Friend of the Court (FOC) for investigation, which took place on February 22, 2017, with both parties and their lawyers present. The FOC investigator stated in his report that the parties agreed to the "threshold for modification" but could not otherwise reach an agreement. The investigator recommended that the child reside with Jason during the school year and attend Holt Public Schools, and that Rebekah be granted parenting time according to a holiday schedule, which included every summer break. The investigator recommended that the child go to school in Holt because both parties' extended families lived in the area and Rebekah frequently travels to the area to visit with them.

Both parties filed objections to the investigator's recommendation. Jason argued that it would not be in his son's best interests to be away from him for the entire summer and that his son should be with him every other weekend during summer break and two weeks prior to the start of school. Jason also asserted that he should be awarded alternating holidays and half of the winter break. Rebekah objected to her son's attending a public school in Holt, arguing that the school ranks only in the 58th percentile among Michigan's public schools. She contended that the school the child attends in Illinois—Marquette Manor—was ranked "37th [out] of 119 for the 2017 Best Private High Schools in Illinois" and "15th out of 36 for 2017 Best Private K-12 Schools in Illinois" as well as "3rd out of 32 for 2017 Best Christian High Schools in Illinois." Rebekah argued that Marquette Manor's "A Beka" curriculum was superior to the Michigan public schools' common-core curriculum. Rebekah also argued that the parties had agreed before marrying that

their children would attend a Baptist school, and she asserted that Jason enrolled the child in public school without her consent. She additionally raised concerns about domestic violence committed by Jason against her, about Jason alienating the child from her, and about Jason hindering her ability to receive medical care for her son in Illinois. Finally, she contended that the child did not have an established custodial environment with Jason.

Jason filed a written response to Rebekah's objections, challenging the validity of the school statistics and noting that the sources cited by Rebekah were publications the developers of the A Beka curriculum had published. He also challenged Rebekah's argument that he was attempting to alienate the child from Rebekah and challenged the argument that there was no established custodial environment with him. Jason noted that Rebekah's decision to reenlist in the Coast Guard in 2016 was commendable, but he argued that it would create instability for their child if the child were in her care because she had to move to Illinois and would likely have to move again after 2020. Jason asserted that he intended to stay in Holt, which would provide a more stable environment for the child. Finally, Jason contended that Rebekah's accusations of domestic violence were baseless.

The court held a hearing on the parties' objections in May 2017, and both parties testified. At the conclusion of the hearing, the trial court noted that "it appears that we have two very good parents who care deeply about their child." Thereafter, the court entered a written order and opinion awarding primary custody of the child to Rebekah during the school year and primary custody to Jason during the summer. Jason was also awarded spring break, the entire week of

Thanksgiving, and half of Christmas break. Relevant to this appeal, the trial court found that the change in custody was in the child's best interests by applying the preponderance-of-the-evidence standard. The court then considered each of the best-interest factors under MCL 722.23. The court found Factors (a), (c), and (e) through (i) equal for both parties; Factors (b), (d), (j), and (k) in favor of Rebekah; and Factor (*l*) in favor of Jason. When weighing the best-interest factors, the trial court noted but did not consider evidence that Rebekah would likely have to relocate in 2020 because of her active-duty status in the Coast Guard.

Jason moved for reconsideration of the order, challenging the court's application of a preponderance-of-the-evidence standard and the court's decision not to consider Rebekah's anticipated relocation. The trial court denied his motion.

II. BURDEN OF PROOF

A. STANDARD OF REVIEW

Jason argues that the trial court applied the wrong burden of proof when it evaluated the best-interest factors under MCL 722.23. "The applicable burden of proof presents a question of law that is reviewed de novo on appeal." *Pierron v Pierron*, 282 Mich App 222, 243; 765 NW2d 345 (2009) (quotation marks and citation omitted). Further, we review de novo the proper interpretation and application of a statute. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

B. ANALYSIS

When a parent moves for a change of custody, he or she must first establish that there is a change of

circumstances[2] or proper cause[3] to revisit the custody decision. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003); MCL 722.27(1)(c). If that threshold is satisfied, the trial court must determine whether the child has an established custodial environment.[4] "Where no established custodial environment exists, the trial court may change custody if it finds, by a preponderance of the evidence, that the change would be in the child's best interests." *LaFleche v Ybarra*, 242 Mich App 692, 696; 619 NW2d 738 (2000). "However, where an established custodial environment does exist, a court is not to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." *Id*. See also MCL 722.27(1)(c). Stated differently, "[t]o determine the best interests of the children in child custody cases, a trial court must consider all the factors delineated in MCL 722.23(a)-(*l*) applying the proper burden of proof,"

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[2] "[I]n order to establish a 'change of circumstances,' a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed." *Vodvarka v Grasmeyer*, 259 Mich App 499, 513; 675 NW2d 847 (2003) (emphasis omitted). "[T]he evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id*. at 513-514.

[3] "[P]roper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka*, 259 Mich App at 511.

[4] An established custodial environment exists "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). "The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered." MCL 722.27(1)(c).

Foskett v Foskett, 247 Mich App 1, 9; 634 NW2d 363 (2001), and the proper burden of proof is based on whether or not there is an established custodial environment, *LaFleche*, 242 Mich App at 696.

In this case, the trial court sua sponte decided that although a change in custody would alter the child's established custodial environment—thereby necessitating application of the clear-and-convincing-evidence standard—it was only required to apply a preponderance-of-the-evidence standard.[5] The court reasoned that because Jason and Rebekah "have the same burden [of proof], and a change must be made, it is appropriate to weigh the factors using a preponderance of the evidence." We disagree.

When interpreting a statute, we must ascertain the Legislature's intent. *Kubicki v Sharpe*, 306 Mich App 525, 539; 858 NW2d 57 (2014). "We accomplish this task by giving the words selected by the Legislature their plain and ordinary meanings, and by enforcing the statute as written." *Id*. Here, the relevant statutory language provides: "The court shall not modify or amend its previous judgments or orders or issue a new

[5] The dissent suggests that, arguably, the trial court order did not change the child's established custodial environment. We agree that such an argument, based on the facts before the trial court and applicable caselaw, could *potentially* be made. However, the trial court did, in fact, find that the child's established custodial environment existed with both parents and that the change of the custody would alter it. The parties have not challenged that finding on appeal. And even if they had, our review of a trial court's decision that a change in custody would change a child's established custodial environment is not de novo. Such a decision is reviewed "under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction." *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006) (quotation marks and citation omitted). Therefore, the mere fact that an argument could have been made on this point has no bearing on the outcome of this case.

order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). The words "shall not" indicate a prohibition. *1031 Lapeer LLC v Rice*, 290 Mich App 225, 231; 810 NW2d 293 (2010). Thus, before a court may enter an order modifying its prior custody order in a fashion that alters the child's custodial environment, the court must first find *by clear and convincing evidence* that such a change is in the best interests of the child, and the court is prohibited from applying a lower standard.[6] Despite the clear statutory language, the trial court applied a preponderance-of-the-evidence standard to the best-interest determination.

The court based its decision to apply a lesser burden of proof on this Court's decisions in *Heltzel v Heltzel*, 248 Mich App 1; 638 NW2d 123 (2001), and *Rummelt v Anderson*, 196 Mich App 491; 493 NW2d 434 (1992), abrogated by *Hunter v Hunter*, 484 Mich 247 (2009). Those cases, however, dealt with custody disputes between a natural parent (entitled to the presumption in MCL 722.25(1) that it is in the child's best interests for his or her natural parent to be awarded custody) and a third party with whom the child has an established custodial environment (entitled to the presumption in MCL 722.27(1)(c) that a child's established custodial environment should not be disturbed in the absence of clear and convincing evidence that such a

[6] Cf. *Hunter v Hunter*, 484 Mich 247, 265-266; 771 NW2d 694 (2009) (holding that a natural parent does not have to establish by clear and convincing evidence that disturbing the child's established custodial environment with a third party is in the child's best interests because a third party bears the burden of establishing by clear and convincing evidence that placing the child with the natural parent is *not* in the child's best interests).

disruption is in the child's best interests). *Rummelt*, 196 Mich App at 494-495; *Heltzel*, 248 Mich App at 13-14.[7] Consequently, they are inapposite to the situation at hand, which is a dispute between two natural parents. Further, as recognized in *LaFleche*, 242 Mich App at 699, if a custody dispute "is between the natural parents, clear and convincing evidence must be presented to justify a change in custody."

Having concluded that the trial court applied the wrong standard, we nevertheless recognize that the court was faced with a somewhat unique problem: everyone agreed that maintaining the current custodial arrangement was not in the child's best interests. Both parties moved for a change in custody, advancing their own arguments in favor of receiving primary custody of their son during the school year. Given the facts presented to the trial court, it is arguable that when compared to each other, neither Jason's proposed change nor Rebekah's proposed change was, by clear and convincing evidence, superior to the other's proposal.

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[7] Although *Rummelt* held that a court need only apply a preponderance-of-the-evidence standard when faced with competing, "equal" presumptions under MCL 722.27(1)(c) and MCL 722.25, *Rummelt*, 196 Mich App at 494, our Supreme Court later clarified that because a parent has a constitutional right to parent his or her child, in custody disputes between natural parents and a third party with whom the child has an established custodial environment, the third party must establish by *clear and convincing evidence* that custody with the natural parent is *not* in the child's best interests, *Hunter*, 484 Mich at 265-266. On appeal, Rebekah recognizes that *Hunter* overruled *Rummelt*; however, she argues that in essence *Hunter* stands for the proposition that when two presumptions are not given equal weight, the one that has more weight will prevail. She asserts that in this case, given that both parents have a constitutional interest in parenting their child, the presumption under MCL 722.27(1)(c) is equal, so the reasoning in *Rummelt* should apply. We disagree, however, because that reasoning is contrary to the plain language of the statute.

However, MCL 722.27(1)(c) does not require that one parent's proposed change be better than the other parent's proposal by a clear-and-convincing-evidence standard. See MCL 722.27(1)(c). Accordingly, the trial court is not tasked with comparing the parties' suggested changes and determining which is better. Rather, in order to make a change to the established custodial environment, the trial court must find that the change is in the child's best interests when compared to the status quo. See *Foskett*, 247 Mich App at 8 (stating that when a child has an established custodial environment with both parents, neither parent's "established custodial environment may be disrupted except on a showing, by clear and convincing evidence, that such a disruption is in the children's best interests"); see also MCL 722.27(1)(c). Stated differently, the child's established custodial environment is the status quo, so in order to modify it the court must find by clear and convincing evidence that the change is in the child's best interests when compared to the status quo, not when compared to every other conceivable or suggested modification. In doing so, the court is free to adopt either party's proposal in whole or in part, but it is equally permissible for the court to fashion an entirely new custody arrangement or to maintain the existing custody arrangement. The key is that the court must first find by clear and convincing evidence that the new custodial arrangement is in the child's best interests.

In sum, the trial court erred by applying a preponderance-of-the-evidence standard when weighing the best-interest factors in MCL 722.23.[8] The court

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[8] We do not agree with the dissent that the error was harmless simply because the court found, by a preponderance of the evidence, that four of the best-interest factors favored Rebekah and only one favored Jason. The dissent reasons that under such circumstances the trial court would

should have instead applied the clear-and-convincing-evidence standard when determining whether to maintain the status quo or enter an order changing the child's established custodial environment.[9]

III. ACTIVE DUTY STATUS

A. STANDARD OF REVIEW

Jason argues that the trial court erred as a matter of law when it excluded consideration of Rebekah's likely relocation in 2020 due to her active-duty status with the Coast Guard. Reasoning that the potential move would be due to Rebekah's military service, the court determined that MCL 722.27(1)(c) wholly prohibited it from considering the move. Because this legal issue is likely to recur on remand, we will address it.[10] Again,

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be "forced again" to rule in Rebekah's favor. However, under a clear-and-convincing-evidence standard, it is possible that the trial court would find that factors favoring Rebekah under the preponderance-of-the-evidence standard now favor neither party and that the single factor favoring Jason satisfies the clear-and-convincing-evidence standard. Thus, arguably, the trial court would find that the best-interest factors favor placing the child with Jason during the school year, not with Rebekah. Alternatively, applying the correct standard, the court could find that four factors favor Rebekah, but none favors Jason. It could also find that all the factors are essentially equal, but that under MCL 722.23(*l*), the undisputed need to make a change mandates a new custodial arrangement. Quite simply, applying the clear-and-convincing-evidence standard rather than the less demanding preponderance-of-the-evidence standard can dramatically alter the number of factors favoring either party. Therefore, reversal is both warranted and required under the facts of this case.

[9] We note that if the court felt that inadequate evidence had been presented to establish by clear and convincing evidence that a change in the child's established custodial environment was in the child's best interests, it could have requested that the parties present additional evidence in support of their respective positions.

[10] Jason also challenges several of the trial court's factual findings on the best-interest factors. However, on remand, the trial court must

we review de novo issues relating to the proper application and interpretation of a statute. *Brecht*, 297 Mich App at 736.

B. ANALYSIS

Relevant to this issue, MCL 722.27(1)(c) provides that "[i]f a motion for change of custody is filed while a parent is active duty, the court shall not consider a parent's absence due to that active-duty status in a best interest of the child determination."[11] Whether this provision precludes a trial court from considering

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conduct a new best-interest hearing and apply the correct burden of proof. In doing so, the court must consider all relevant, up-to-date information. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). Consequently, it is possible that in light of the up-to-date information, the court might weigh the best-interest factors differently, rendering any review of them now premature.

[11] Rebekah contends that we should also consider MCL 722.27(4), which provides, in part, that a parent's "[f]uture deployments shall not be considered in making a best interest of the child determination." However, there is no indication in the record that Rebakah will be deployed in the future. The term deployment is defined as follows in MCL 722.22(e):

> (e) "Deployment" means the movement or mobilization of a servicemember to a location for a period of longer than 60 days and not longer than 540 days under temporary or permanent official orders as follows:
>
> (*i*) That are designated as unaccompanied.
>
> (*ii*) For which dependent travel is not authorized.
>
> (*iii*) That otherwise do not permit the movement of family members to that location.
>
> (*iv*) The servicemember is restricted from travel.

Here, there is nothing in the record that indicates Rebekah's future relocation will be to a place where the requirements in MCL 722.22(e)(*i*) through (*iv*) will be satisfied. Accordingly, under the present circumstances, she is accorded no protection by MCL 722.27(4).

a parent's anticipated future relocation due to his or her active-duty status when making a determination of a child's best interests is an issue of first impression. Because the term "absence" is not defined, we may consult a dictionary to determine its common and ordinary meaning. See *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012). According to *Merriam-Webster's Collegiate Dictionary* (11th ed), "absence" is "the state of being absent." In turn, "absent" is defined as "not present or attending: MISSING." *Id*. Therefore, a parent is absent from his or her child if he or she is not physically present.

Moreover, under the language of the statute, a trial court is only prohibited from considering a parent's current—not future—absence from the child due to his or her active-duty status. This is in contrast to MCL 722.27(4), which applies to parents who are deployed, rather than parents who are merely on active duty. MCL 722.27(4) provides, in relevant part:

> If a motion for change of custody is filed after a parent returns from deployment, the court shall not consider a parent's absence due to that deployment in making a best interest of the child determination. Future deployments shall not be considered in making a best interest of the child determination.

Unlike the provision in MCL 722.27(1)(c), which only addresses a parent's "absence due to [his or her] active duty status," MCL 722.27(4) addresses both a parent's "absence due to [his or her] deployment" and any future deployments. The omission of a provision in one part of a statute that is included in another part should be construed as intentional. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Therefore, under MCL 722.27(1)(c) only a

parent's current absence from a child due to that parent's active-duty status may not be considered by the trial court when making a determination about the child's best interests.

Here, there is no evidence on the record suggesting that Rebekah was currently absent from the child because of her active-duty status with the Coast Guard. Instead, the record reflects that the child had an established custodial environment with her and that she cared for him on an alternating two-week-on/two-week-off schedule with the child's father. She testified that she currently lives in Willowbrook, Illinois, and works for the Coast Guard as a yeoman (an administrative assistant). She stated that she works Monday through Friday from 8:00 a.m. to 4:00 p.m. She testified that she lives alone in a two-bedroom condominium. Rebekah testified that the child looks to her for care and comfort and that she is able to meet his needs. She also explained that her son attends preschool at Marquette Manor when she is working. Rebekah stated that in the past she has had to travel for work or training but that she never had to travel when her child was with her. She testified that her command would schedule her trips so that she would not have to be absent from the child. Rebekah further stated that she previously worked overnight shifts but that she is no longer required to do so. From the record, it is apparent that at the time of the hearing, Rebekah was not absent from her child due to her active-duty status. She was fully present in her child's life. Therefore, because the statute only prohibits the court from considering current absences due to active-duty status, we conclude that the trial court erred by interpreting and applying MCL 722.27(1)(c) so as to wholly preclude consideration

of Rebekah's anticipated future relocation due to her military service.[12]

IV. CONCLUSION

In sum, we conclude that the trial court erred by applying a preponderance-of-the-evidence standard when weighing the best-interest factors in MCL 722.23. Therefore, we reverse the court's order awarding custody to Rebekah and remand for further proceedings. On remand, the trial court shall conduct a new best-interest hearing, during which it must consider all relevant, up-to-date information. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). The court shall not grant sole custody of the child to Rebekah unless she can establish by clear and convincing evidence that such placement is in the child's best interests, nor shall the court grant sole custody of the child to Jason unless he can establish by clear and convincing evidence that the change will be in the child's best interests.

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

SWARTZLE, J., concurred with M. J. KELLY, J.

MURPHY, P.J. (*dissenting*). Because I would affirm the trial court's ruling, I respectfully dissent. I begin my analysis by making some observations. In the

[12] We note that although a trial court is not prohibited from considering the fact that a parent might be required to relocate (short of deployment) in the future due to his or her active-duty status, the weight given to that consideration is still within the discretion of the court. We caution courts that although a relocation might occur in the future, the effects of that move on the child will often be speculative, which may compel a court to afford the future move less weight when determining the child's best interests.

situation presented to the trial court on the parties' competing motions to change custody, the following points were inescapable: (1) the minor child needed to begin school; (2) the child could not attend two schools in different states on an alternating biweekly custody schedule; (3) it was effectively logistically impossible under the existing custody arrangement to send the child to one specific school unless he were to regularly miss classes two weeks at a time;[1] (4) the best interests of the child necessarily dictated that he go to a particular school and reside with one of his parents during the school year; and therefore, (5) the status quo was simply unworkable and its continuation would and could not be in the child's best interests; a change had to occur. Faced with these circumstances, and in the context of the analysis pertaining to the established custodial environment, the trial court essentially had the following two options: (1) enter an order that did not change the established custodial environment and find by a preponderance of the evidence that the child's best interests demanded that he live with one of the parties during the school year, or (2) enter an order changing the established custodial environment and find by clear and convincing evidence that the child's best interests could only be served by awarding either plaintiff or defendant custody of the child during the school year. Whether under the preponderance-of-the-evidence standard or the clear-and-convincing-evidence standard, an order was necessary so as to allow the child to reside with one of the parties during the school year and attend school at that location. Any other ruling would be contrary to the child's best interests. In light of these observations, and as explained more fully below, I conclude that the

[1] I note that there is no indication in the record that homeschooling was contemplated or possible, jointly or otherwise.

correct result in this case is to affirm the trial court's ultimate ruling. Further, I also believe that the trial court did not err by excluding consideration of defendant's possible future "absence" in 2020 due to her active-duty status with the United States Coast Guard because MCL 722.27(1)(c) plainly precludes contemplation of such evidence.

In *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006), this Court observed:

> There are three different standards of review applicable to child custody cases. The trial court's factual findings on matters such as the established custodial environment and the best-interests factors are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. In reviewing the findings, this Court defers to the trial court's determination of credibility. A trial court's discretionary rulings, such as the court's determination on the issue of custody, are reviewed for an abuse of discretion. Further, pursuant to MCL 722.28, questions of law in custody cases are reviewed for clear legal error. [Citations and quotation marks omitted.]

We review de novo issues of statutory construction. *Sinicropi*, 273 Mich App at 155. When interpreting a statute, we are obligated to ascertain the legislative intent, which may reasonably be inferred from the words set forth in the statute. *Id*. at 156. And if a statutory provision is unambiguous, judicial construction is not permitted. *Id*.

MCL 722.27 provides, in relevant part, as follows:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:

> (a) Award the custody of the child to 1 or more of the parties involved or to others . . . .
>
> (b) Provide for reasonable parenting time of the child by the parties involved, by the maternal or paternal grandparents, or by others, by general or specific terms and conditions. . . .
>
> (c) . . . [M]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

In *Pierron v Pierron*, 486 Mich 81, 92-93; 782 NW2d 480 (2010), our Supreme Court explained the workings of MCL 722.27(1)(c):

> To summarize, when considering an important decision affecting the welfare of the child, the trial court must first determine whether the proposed change would modify the established custodial environment of that child. In making this determination, it is the child's standpoint, rather than that of the parents, that is controlling. If the proposed change would modify the established custodial environment of the child, then the burden is on the parent proposing the change to establish, by clear and convincing evidence, that the change is in the child's best interests. Under such circumstances, the trial court must consider all the best-interest factors because a case in which the proposed change would modify the custodial environment is essentially a change-of-custody case. On the other hand, if the proposed change would *not* modify the established

> custodial environment of the child, the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests. In addition, under those circumstances, although the trial court must determine whether each of the best-interest factors applies, if a factor does not apply, the trial court need not address it any further. In other words, if a particular best-interest factor is irrelevant to the question at hand, i.e., whether the proposed change is in the best interests of the child, the trial court need not say anything other than that the factor is irrelevant.

"Whether an established custodial environment exists is a question of fact for the trial court to resolve on the basis of statutory criteria." *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995). And a "trial court's custody order is irrelevant to this analysis." *Id*. at 388. Additionally, in *Berger v Berger*, 277 Mich App 700, 706-707; 747 NW2d 336 (2008), this Court observed:

> An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. The existence of a temporary custody order does not preclude a finding that an established custodial environment exists with the noncustodian or that an established custodial environment does not exist with the custodian. A custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order. An established custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort. [Citations omitted.]

MCL 722.27(1)(c) and the caselaw make clear that an established custodial environment is not deter-

mined simply on the basis of the number of days or overnights a child stays with a parent. An argument can be made that the trial court's ruling did not necessarily change the child's established custodial environment.[2] In other words, with the court's ruling and from the child's perspective, he might very well still look to both parents for guidance, discipline, the necessities of life, and parental comfort even with the parenting division between the school year and summer break. I do acknowledge that this Court has generally ruled that a change in the established custodial environment does occur when the parties go from an even or nearly even division of parenting time to one parent having custody during the school year and the other having custody during the summer break. *Yachcik v Yachcik*, 319 Mich App 24, 47-48; 900 NW2d 113 (2017); *Brown v Loveman*, 260 Mich App 576, 592; 680 NW2d 432 (2004).

After indicating that there had existed a joint established custodial environment, the court noted that a party must typically establish by clear and convincing evidence that the best-interest factors favor a change in the established custodial environment. The trial court then stated that "where both parties have the same burden, *and a change must be made*, it is appropriate to weigh the factors using a preponderance of the evidence." (Emphasis added.) This suggested that the court did indeed conclude that granting either party's motion would change the established custodial environment.[3] The trial court indicated in a footnote that "the nature of the joint custodial environment will

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[2] There is no dispute that there had existed a joint established custodial environment.

[3] I do agree with the majority that when a change of the established custodial environment in fact occurs, the proper burden of proof requires clear and convincing evidence.

change but the parties will still be custodial parents once the modification is made to accommodate the child's schooling."

If the trial court's ultimate decision did not result in a true change of the established custodial environment, the court's application of the preponderance-of-the-evidence standard would be legally sound. Assuming that there was a change in the established custodial environment and that the clear-and-convincing-evidence standard was applicable, I fail to see the need to reverse and remand the case, as any error would be harmless. MCR 2.613(A); *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994). As noted earlier, the court itself recognized that a change had to be made, and as indicated in my opening observations, the child's best interests could only be served by altering the existing custody arrangement—sending him to a school where he would miss two weeks of classes for every two weeks attended would be nonsensical and would not be in his best interests as a matter of law. And considering that the trial court found in favor of defendant on four of the child custody best-interest factors, MCL 722.23, with the remaining factors being even except for one,[4] the court would be forced again to rule in favor of defendant, even under the clear-and-convincing-evidence standard. Reversal is unwarranted.

Next, on the evidentiary issue, MCL 722.27(1)(c) provides that "[i]f a motion for change of custody is filed while a parent is active duty, the court shall not consider a parent's absence due to that active duty status in a best interest of the child determination." The only temporal component of this provision relates

[4] I cannot conclude that the trial court erred in its findings on the best-interest factors.

to a parent being on active duty when a motion for change of custody is filed. The prohibition on considering a parent's absence due to that active-duty status is not limited to consideration of a current absence; the language is broad enough to encompass any absence, including a potential future or planned absence. Indeed, it would make little sense to bar consideration of a current absence while allowing consideration of a later absence. The plain and unambiguous language of the statutory provision supports the trial court's ruling on the matter.

In sum, I would affirm the trial court's custody and evidentiary rulings. Accordingly, I respectfully dissent.

RAMOS v INTERCARE COMMUNITY HEALTH NETWORK

Docket No. 335061. Submitted November 8, 2017, at Grand Rapids. Decided January 30, 2018. Convening of special panel declined 323 Mich App 801. Leave to appeal denied 503 Mich 917.

Joel Ramos filed a complaint in the Department of Licensing and Regulatory Affairs against his former employer, Intercare Community Health Network (ICHN), seeking reinstatement to his job and back pay under MCL 408.483(2) of the wages and fringe benefits act, MCL 408.471 *et seq*., for discharge in violation of MCL 408.483(1). ICHN discharged plaintiff from the company in 2015 for falsifying his time sheet. Plaintiff asserted that he had correctly filled out the time sheet, that by filling out the time sheet he had exercised a right under the act to receive wages, and that under MCL 408.483(1), he could not be discharged for correctly filling out the time sheet. Relying in part on *Reo v Lane Bryant, Inc*, 211 Mich App 364 (1995), the department denied plaintiff's claim. The department concluded that regardless of whether plaintiff's time sheet recordings were accurate, the act of filling out a time sheet on his own behalf was not a protected activity listed in MCL 408.483(1). The department reasoned that the statute protects an employee exercising rights under the act on behalf of another employee or other person but that it does not protect an employee exercising those statutory rights on his or her own behalf. The Van Buren Circuit Court, David J. Distefano, J., affirmed the department's denial of plaintiff's claim. Plaintiff appealed.

The Court of Appeals *held*:

MCL 408.483(1) prohibits an employer from discharging or discriminating against an employee who engages in certain activities. In that regard, the statute provides, in part, that an employer shall not discharge an employee or discriminate against an employee because of the exercise by the employee on behalf of an employee or others of a right afforded by the act. Under MCL 408.472, an employee has a right to be paid his or her wages. *Reo* held that for purposes of recovery under MCL 408.483(1), an employee must be exercising a right afforded by the wages and fringe benefits act on behalf of *another* employee or other person,

not exercising a statutory right on his or her own behalf. For that reason, plaintiff was not able to assert a claim for wages on his own behalf under MCL 408.483(1), and the circuit court's order that affirmed the department's denial of plaintiff's claim was affirmed. *Reo*, however, was wrongly decided. The *Reo* Court substituted the phrase "another employee" for the "an employee" language used in MCL 408.483(1). Because the decision that plaintiff was not able to assert a claim on his own behalf was made only because it was required by MCR 7.215(J)(1), a conflict panel should evaluate the *Reo* Court's reasoning under MCR 7.215(J)(2).

Affirmed.

HOEKSTRA, P.J., concurring in part and dissenting in part, agreed with the majority that *Reo* was binding precedent and that plaintiff could not, therefore, assert a claim for wages on his own behalf under MCL 408.483(1). Judge HOEKSTRA disagreed with the majority's call for a conflict panel because *Reo* was correctly decided. While the majority was correct that the statute does not contain the phrase "another employee," the statute's use of the phrase "on behalf of" indicates the existence of an agency or representative relationship in which the employee acts "on behalf of" another, in other words, on behalf of another employee or other person.

Marc Asch for plaintiff.

Bird, Brothers, Scheske & Reed, PC (by *Roger A. Bird*) for defendant.

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

SHAPIRO, J. In this action involving the wages and fringe benefits act, MCL 408.471 *et seq*., plaintiff, Joel Ramos, filed an administrative employment wage complaint against his former employer, defendant, Intercare Community Health Network (ICHN), alleging that he had been illegally discharged for engaging in a protected activity under MCL 408.483(1). The Wage and Hour Program (WHP) of the Department of Licensing and Regulatory Affairs ruled against him in a

determination order, concluding that plaintiff had not been discharged for engaging in any of the protected activities listed in the statute. The circuit court affirmed the decision of the WHP, and plaintiff now appeals in this Court as of right. We affirm the circuit court because we are bound by the precedent of *Reo v Lane Bryant, Inc*, 211 Mich App 364; 536 NW2d 556 (1995). Were we not bound by that opinion, we would reverse and remand for a new determination from the WHP based on the scope of the statute as discussed herein. Accordingly, we call for a conflict panel under MCR 7.215(J)(2).

Plaintiff worked for ICHN for approximately two years. He was discharged from his job on June 26, 2015. At the time of his termination, ICHN informed plaintiff that he was being discharged because he had falsified his time sheet. Plaintiff filed an employment wage complaint with the WHP, asserting that he had a right to be paid his wages under MCL 408.472. He maintained that he had correctly filled out his time sheet and that by accurately filling out the time sheet, he was exercising a right to receive payment of his wages under the wages and fringe benefits act. On the basis of this assertion, plaintiff contended that under MCL 408.483(1), he could not be discharged for correctly filling out his time sheet. He sought reinstatement and back pay under MCL 408.483(2).[1]

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[1] MCL 408.483(2) provides as follows:

> An employee who believes that he or she is discharged or otherwise discriminated against by an employer in violation of this section may file a complaint with the department alleging the discrimination within 30 days after the violation occurs. Upon receipt of the complaint, the department shall cause an investigation to be made. If, upon the investigation, the department determines that this section was violated, the department shall order the rehiring or reinstatement of an employee to his or her former position with back pay.

MCL 408.483(1) prohibits an employer from discharging or discriminating against an employee who engages in certain activities. In particular, the statute provides:

> An employer shall not discharge an employee or discriminate against an employee because the employee filed a complaint, instituted or caused to be instituted a proceeding under or regulated by this act, testified or is about to testify in a proceeding, or because of the exercise by the employee on behalf of an employee or others of a right afforded by this act. [MCL 408.483(1).]

The WHP did not make a substantive determination regarding whether plaintiff had falsified his time sheet. Instead, relying in part on *Reo*, 211 Mich App 364, the WHP concluded that regardless of whether plaintiff's entries were accurate, filling out a time sheet on one's own behalf did not constitute a protected activity because exercising a right on one's own behalf does not bring the individual within the purview of MCL 408.483(1), which only protects employees acting on behalf of another employee or person.

Plaintiff argues that the WHP and the circuit court[2] erred by misinterpreting MCL 408.483(1); specifically, that they erred by concluding that an employee's

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[2] "This Court's review of a circuit court's ruling on an appeal from an administrative decision is limited." *Buckley v Prof Plaza Clinic Corp*, 281 Mich App 224, 231; 761 NW2d 284 (2008). "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." *Id*. (quotation marks and citation omitted). "This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. 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." *Logan v Manpower of Lansing, Inc*, 304 Mich App 550, 555; 847 NW2d 679 (2014) (quotation marks and citation omitted).

exercise of his own rights under the wages and fringe benefits act is not protected under the statute. Plaintiff argues that under the plain language of the statute, the exercise of his own rights under the act is the exercise of rights on behalf of "an employee" because he is "an employee."

Notably, this Court has previously addressed this issue and concluded that to fall within the plain meaning of MCL 408.483(1), "an employee must be exercising a right afforded by the act on behalf of *another* employee or other person. Simply exercising a right on one's own behalf would not bring an employee within the purview of [MCL 408.483]." *Reo*, 211 Mich App at 367. Under *Reo*, plaintiff's exercise of rights on his own behalf is not protected under MCL 408.483(1).[3]

While we are bound by the *Reo* decision, we conclude that it was wrongly decided. MCL 408.403(1) does not refer to "another" or "a different" employee; it refers to "an employee." The word "another" does not even appear in MCL 408.483(1). This substitution of one word for another is inconsistent with the principle that "[t]he statute's words are the most reliable indicator of the Legislature's intent and should be interpreted based on their ordinary meaning and the context within which they are used in the statute." *Burleson v Dep't of Environmental Quality*, 292 Mich App 544,

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[3] We disagree with plaintiff's argument that *Reo*'s consideration of this issue amounted to mere dicta and should not be given precedential authority. "Dictum" is defined as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." *Mount Pleasant Pub Sch v Mich AFSCME Council 25*, 302 Mich App 600, 610 n 2; 840 NW2d 750 (2013) (quotation marks and citation omitted; alteration in original). In *Reo*, 211 Mich App at 366-367, the Court clearly relied on the specific language of the statute at issue in this case to conclude that the plaintiff's claim based upon the exercise of his own rights was not protected.

557-558; 808 NW2d 792 (2011) (GLEICHER, J., dissenting) (quotation marks and citation omitted). Accordingly, this Court "may not substitute . . . a word chosen by the Legislature or assume that the Legislature mistakenly used one word or phrase instead of another." *Id*. at 558. See also *Pohutski v City of Allen Park*, 465 Mich 675, 683-684; 641 NW2d 219 (2002) (holding that courts "may not assume that the Legislature inadvertently made use of one word or phrase instead of another") (quotation marks and citation omitted).

"When a statute does not define a word, we presume the Legislature intended the word to have its plain and ordinary meaning, which we may discern by consulting a dictionary." *Denton v Dep't of Treasury*, 317 Mich App 303, 312; 894 NW2d 694 (2016). In relevant part, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "a"[4] as "used as a function word before singular nouns when the referent is unspecified." The definition of "another," the word substituted in *Reo*, is defined as "different or distinct from the one first considered." *Id*.

We also note that *Reo* stands alone in its holding. The first Court of Appeals case to address the question, *Cockels v Int'l Business Expositions, Inc*, 159 Mich App 30, 34-35; 406 NW2d 465 (1987), applied the protections to a situation in which an employee exercised a right under the wages and fringe benefits act on behalf of herself. *Cockels* was decided before the adoption of MCR 7.215(J)(1), and it was therefore not precedentially binding on the *Reo* Court. However, the *Reo*

[4] MCL 408.483(1) refers to "*an* employee." (Emphasis added.) However, when "an" is used as an indefinite article, *Merriam-Webster's Collegiate Dictionary* (11th ed) refers to the definition of "a" for the usage of "an."

opinion provides little basis to have rejected *Cockels*. The entire discussion of the issue in *Reo* reads:

> We believe that in order to fall within the plain meaning of the above provision an employee must be exercising a right afforded by the act on behalf of *another* employee or other person. Simply exercising a right on one's own behalf would not bring an employee within the purview of [MCL 408.483]. [*Reo*, 211 Mich App at 367.]

As to the decision in *Cockels*, the *Reo* Court only stated, "We believe [the *Cockels* Court's] interpretation to be incorrect." *Id*. at 367 n 3.

We affirm because *Reo* is binding precedent. MCR 7.215(C)(2). However, we conclude that *Reo* was wrongly decided and that a conflict panel should evaluate its reasoning and conclusions. MCR 7.215(J)(2).

Affirmed.

STEPHENS, J., concurred with SHAPIRO, J.

HOEKSTRA, P.J. (*concurring in part and dissenting in part*). I concur in the majority's affirmance of the circuit court's decision on the basis of *Reo v Lane Bryant, Inc*, 211 Mich App 364; 536 NW2d 556 (1995). However, because I believe that *Reo* was correctly decided, I dissent from the majority's call to convene a conflict panel under MCR 7.215(J)(2).

The majority concludes that, but for *Reo*, filling out a time sheet on one's own behalf constitutes a protected activity under MCL 408.483(1). This provision states:

> An employer shall not discharge an employee or discriminate against an employee because the employee filed a complaint, instituted or caused to be instituted a proceeding under or regulated by this act, testified or is about to testify in a proceeding, or *because of the exercise by the*

> *employee on behalf of an employee or others of a right afforded by this act*. [MCL 408.483(1) (emphasis added).]

Plainly, the statute protects an employee who (1) filed a complaint; (2) instituted or caused a proceeding to be instituted under the wages and fringe benefits act, MCL 408.471 *et seq*.; and (3) testified or is about to testify in a proceeding under the wages and fringe benefits act. Additionally, relevant to the present case, the statute prohibits an employer from discharging or discriminating against an employee "because of the exercise by the employee on behalf of an employee or others of a right afforded by this act." MCL 408.483(1).

It is only this last clause that is relevant in this case. That is, plaintiff was not fired for filing a complaint, for instituting or causing a proceeding to be instituted, or for testifying or being about to testify in a proceeding. Instead, plaintiff contends that he personally exercised a right to payment of wages by filling out his time sheet and that defendant violated MCL 408.483(1) by firing him for exercising this right.[1] However, as noted by the majority, this Court previously considered MCL 408.483(1) and held "that in order to fall within the plain meaning of the above provision an employee must be exercising a right afforded by the act on behalf of *another* employee or other person." *Reo*, 211 Mich App at 367. Under *Reo*, plaintiff's exercise of a right, which was not done on behalf of another, is not protected under MCL 408.483(1).

The majority in this case now contends that *Reo* inappropriately added the word "another" to MCL

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[1] Defendant paid plaintiff for the hours that he claimed on his time sheet. Accordingly, plaintiff has not filed a complaint seeking payment of unpaid wages under MCL 408.481(1). Instead, plaintiff seeks reinstatement and back pay under MCL 408.483(2) for discharge in violation of MCL 408.483(1).

408.483(1) and that, because plaintiff is "an employee," he is protected under MCL 408.483(1) when, as "the employee" in question, he exercises a right on his own behalf. However, in my judgment, that interpretation ignores the use of the phrase "on behalf of" as it appears in the context of MCL 408.483(1). In particular, as commonly understood, the word "behalf" means "INTEREST," "BENEFIT," "SUPPORT," or "DEFENSE." *Merriam-Webster's Collegiate Dictionary* (11th ed). And, the phrase "on behalf of" means " 'in the name of, on the part of, as the agent or representative of.' " *Black's Law Dictionary* (10th ed), p 184. See also *Perkovic v Zurich American Ins Co*, 500 Mich 44, 55; 893 NW2d 322 (2017). In other words, while the phrase "another employee" does not appear in MCL 408.483(1), the phrase "on behalf of" plainly acknowledges the existence of an agency or representative relationship in which the employee acts "on behalf of" *another*, be it an employee or other person. Consequently, unlike the majority, I am persuaded that *Reo*, 211 Mich App at 367, correctly held "that in order to fall within the plain meaning of the above provision an employee must be exercising a right afforded by the act on behalf of *another* employee or other person."[2]

Aside from the assertion that *Reo* was incorrect, the majority also suggests that a conflict panel is appropriate because *Reo* "stands alone in its holding." In this regard, the majority faults *Reo* for offering "little basis"

[2] Under this interpretation, the employee is not unprotected given that an employee has the ability to exercise his or her own rights by filing a complaint for employer violations, MCL 408.481(1), and given that the filing of a complaint as well as instituting and testifying in proceedings under the wages and fringe benefits act are protected under MCL 408.483(1). The final provision in MCL 408.483(1) simply makes plain that in addition to these protections, the employee is protected for exercising such rights on behalf of another.

for rejecting *Cockels*,[3] an earlier decision of this Court that considered MCL 408.483(1). However, any reliance on *Cockels* would be misplaced because *Cockels* was decided in 1987. Accordingly, unlike *Reo*, *Cockels* is not binding precedent, and the *Reo* Court had no obligation to follow *Cockels*. MCR 7.215(J)(1). Moreover, while the majority attempts to characterize *Reo* as an incorrectly decided anomaly, I note that *Reo* was decided in 1995 and that it has constituted the rule of law on this issue for more than 20 years, during which the Legislature has not seen fit to address this Court's interpretation of MCL 408.483(1). See *In re Medina*, 317 Mich App 219, 232-233 & n 6; 894 NW2d 653 (2016) (considering legislative acquiescence as a factor weighing against calling a conflict panel under MCR 7.215(J)(2)).

Overall, I am persuaded that *Reo* was correctly decided, and I see no need for a conflict panel under MCR 7.215(J)(2). Adhering to *Reo*, I would simply affirm the circuit court's decision.

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[3] *Cockels v Int'l Business Expositions, Inc*, 159 Mich App 30, 35; 406 NW2d 465 (1987).

SMITH v FORESTER TOWNSHIP

Docket No. 335644. Submitted February 6, 2018, at Lansing. Decided February 13, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich 883.

Wayne A. Smith (petitioner) applied for a poverty exemption from his 2015 property taxes for his principal residence in Forester Township (respondent). Respondent's board of review denied the request. Respondent's poverty-exemption guidelines provided that an exemption would be denied if the applicant's assets exceeded $4,500 or if the applicant's income exceeded the federal poverty guideline for income, which at that time was $11,770 for a household of one. Respondent's guidelines also indicated that reverse-mortgage payments would be "added" to an applicant's income. In his application, petitioner calculated his assets at over $9,000. He also disclosed that he received more than $10,000 in social security retirement payments and that he had received more than $12,000 in reverse-mortgage payments that tax year. Petitioner appealed in the Michigan Tax Tribunal (the MTT), Small Claims Division, contending that respondent's asset limit was unduly restrictive. The hearing referee concluded that reverse-mortgage payments should not constitute income and that while petitioner exceeded the asset limit, a substantial and compelling reason existed to deviate from the guidelines. Respondent filed exceptions to the proposed opinion and order, arguing that reverse-mortgage payments should be treated as income for purposes of the poverty exemption. In its final order and judgment, the MTT concluded that it was irrelevant that reverse-mortgage payments were not taxable income and also concluded that reverse-mortgage payments were available to petitioner to pay his property taxes. The MTT deemed it unnecessary to evaluate petitioner's eligibility under the asset test but nonetheless concluded that there were not substantial and compelling reasons to grant the exemption when considering both the income and the asset tests. Petitioner moved for reconsideration, and the MTT denied the motion. Petitioner appealed.

The Court of Appeals *held*:

MCL 211.7u of the General Property Tax Act, MCL 211.1 *et seq*., provides, in relevant part, that the principal residence of

persons who, in the judgment of the supervisor and board of review, by reason of poverty, are unable to contribute toward the public charges is eligible for exemption in whole or in part from taxation. MCL 211.7u further states that the governing body of the local assessing unit shall determine and make available to the public the policy and guidelines the local assessing unit uses for the granting of exemptions and that the board of review shall follow the policy and guidelines of the local assessing unit in granting or denying an exemption under this section unless the board of review determines that there are substantial and compelling reasons why there should be a deviation from the policy and guidelines and the substantial and compelling reasons are communicated in writing to the claimant. In this case, petitioner argued that the MTT erred by treating reverse-mortgage payments as income rather than assets. However, even if petitioner's reverse-mortgage payments were treated as assets, petitioner's total assets would exceed the asset limit set in respondent's guidelines; therefore, petitioner would fail the asset test and still be precluded from claiming the poverty exemption. Additionally, while the MTT did not expressly address the asset test, the MTT did conclude that there was insufficient information on record to demonstrate that substantial and compelling reasons existed to grant the exemption. Accordingly, even assuming that the MTT erred by considering petitioner's reverse mortgage as income, the MTT's decision would be affirmed because the MTT properly determined that petitioner did not qualify for the poverty exemption. Petitioner's arguments effectively presented moot questions that did not need to be addressed.

Affirmed.

Wayne A. Smith *in propria persona*.

Touma, Watson, Whaling, Coury & Stremers, PC (by *Gregory T. Stremers*) for Forester Township.

Before: RONAYNE KRAUSE, P.J., and FORT HOOD and O'BRIEN, JJ.

PER CURIAM. Petitioner appeals by right the judgment of the Michigan Tax Tribunal (the MTT) denying his request for a poverty exemption from his 2015 property taxes. We affirm.

Petitioner applied for a poverty exemption for his principal residence located in Forester Township. Respondent's poverty-exemption guidelines provided that an exemption would be denied if the applicant's assets exceeded $4,500 or if the applicant's income exceeded the federal poverty guideline, which at that time was $11,770 for a household of one. Respondent's guidelines also indicated that reverse-mortgage[1] payments would be "added" to an applicant's income. In his application, petitioner calculated his assets at over $9,000. He also disclosed that he received over $10,000 in Social Security retirement payments and that he had received over $12,000 in reverse-mortgage payments that tax year. Respondent's board of review denied the request for an exemption on the ground that petitioner had "adequate resources."

Petitioner then appealed in the MTT Small Claims Division, contending that respondent's asset limit was unduly restrictive.[2] Respondent maintained that it denied the exemption because petitioner's income exceeded the poverty-exemption guideline. The hearing referee, relying on IRS Publication 936 (2015),[3] found that reverse-mortgage payments should not constitute income and that petitioner's income was sufficiently

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[1] A "reverse annuity mortgage" is defined as "[a] mortgage in which the lender disburses money over a long period to provide regular income to the (usu. elderly) borrower, and in which the loan is repaid in a lump sum when the borrower dies or when the property is sold." *Black's Law Dictionary* (9th ed), p 1103. "A home equity conversion mortgage, more commonly called a 'reverse mortgage,' allows a homeowner over the age of 62 to borrow money based on his or her home equity." 21 ALR7th Art 4.

[2] Petitioner also challenged the assessment of the property's value for 2015 and 2016. Those issues are not relevant to this appeal.

[3] United States Department of the Treasury, *IRS Publication 936: Home Mortgage Interest Deduction*, Cat. No. 10426G (2015), available at <https://perma.cc/JEA2-2GHL>.

low when those payments were excluded. The referee noted that petitioner still exceeded the asset limit, but the referee nonetheless found a substantial and compelling reason to deviate from the guidelines because it would be unreasonable to require petitioner to sell his vehicle in order to pay his property taxes. Respondent filed exceptions to the proposed opinion and order, primarily arguing that reverse-mortgage payments should be treated as income for poverty-exemption purposes.

In its final order and judgment, the MTT agreed with respondent. Relying on an unpublished opinion from this Court,[4] the MTT concluded that it was irrelevant that reverse-mortgage payments were not taxable income. The MTT found that the reverse-mortgage payments were available to petitioner to pay his property taxes. Given that ruling, the MTT found it "unnecessary to evaluate [petitioner's] eligibility under the asset test" but nonetheless concluded that there were not "substantial and compelling reasons to grant the exemption when considering both the income and the asset tests." Petitioner filed a motion for reconsideration, which the MTT denied because petitioner "failed to demonstrate that he was unable to contribute to the public charge as required by MCL 211.7u and is not eligible for the exemption."

On appeal, petitioner challenges the MTT's final judgment and its denial of his motion for reconsideration. If fraud is not alleged, the MTT's decision is reviewed "for misapplication of the law or adoption of a wrong principle." *Wexford Med Group v City of Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006).

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[4] *Grant v Delta Twp*, unpublished per curiam opinion of the Court of Appeals, issued February 25, 2010 (Docket No. 290220).

The poverty exemption from property taxes on a principal residence is governed by § 7u of the General Property Tax Act (GPTA), MCL 211.1 *et seq*., which provides, in pertinent part, as follows:

> (1) The principal residence of persons who, in the judgment of the supervisor and board of review, by reason of poverty, are unable to contribute toward the public charges is eligible for exemption in whole or in part from taxation under this act. This section does not apply to the property of a corporation.
>
> (2) To be eligible for exemption under this section, a person shall do all of the following on an annual basis:
>
> * * *
>
> (e) Meet the federal poverty guidelines updated annually in the federal register by the United States department of health and human services under authority of section 673 of subtitle B of title VI of the omnibus budget reconciliation act of 1981, Public Law 97–35, 42 USC 9902, or alternative guidelines adopted by the governing body of the local assessing unit provided the alternative guidelines do not provide income eligibility requirements less than the federal guidelines.
>
> * * *
>
> (4) The governing body of the local assessing unit shall determine and make available to the public the policy and guidelines the local assessing unit uses for the granting of exemptions under this section. The guidelines shall include but not be limited to the specific income and asset levels of the claimant and total household income and assets.
>
> (5) The board of review shall follow the policy and guidelines of the local assessing unit in granting or denying an exemption under this section unless the board of review determines there are substantial and compelling reasons why there should be a deviation from the policy and

> guidelines and the substantial and compelling reasons are communicated in writing to the claimant. [MCL 211.7u.]

With respect to the MTT's denial of petitioner's motion for reconsideration, petitioner argues that the MTT erred by not restricting its analysis to whether petitioner satisfied the income and asset tests. With respect to the MTT's final judgment, petitioner argues that the MTT erred by treating reverse-mortgage payments as income rather than assets. Neither argument, however, provides petitioner with a means for appellate relief. If we accept petitioner's arguments, petitioner's resulting assets would exceed the asset limit set in respondent's guidelines and, therefore, he would fail the asset test and still be precluded from claiming the poverty exemption.

On petitioner's application for the poverty exemption, he listed his assets as $9,328.59. In the MTT, he argued that his automobile, which had an estimated value of $6,250, should not be counted in this estimation. If we accept this argument without assessing its merit, then petitioner's assets listed on his application were $3,078.59. Petitioner argues on appeal that his reverse mortgage should have been considered an asset, not income. Petitioner's reverse mortgage was in excess of $12,000. Thus, accepting this argument as well, petitioner's assets totaled over $15,000.[5] This is well in excess of the $4,500 limit. Granted, the MTT

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[5] In the context of arguing that the reverse mortgage was not income, petitioner points out that "the equity of the homestead is treated as a protected or exempted asset," and then rhetorically asks:

> [W]hy does it become non-protected and nonexempt once it is converted into money? And if a petitioner cannot be required to "borrow against the equity to pay the taxes", why would the occurrence of such an event result in a different result as to the right to a poverty exemption?

did not expressly address the asset test, but it did find that "there is insufficient information on record to demonstrate such substantial and compelling reasons to grant the exemption when considering both the income and the asset tests." Petitioner does not challenge that part of the MTT's decision on appeal.

Accordingly, even assuming that the MTT erred by considering petitioner's reverse mortgage as income, we would nevertheless affirm the MTT's decision because it would have properly determined that petitioner did not qualify for the poverty exemption, albeit for the wrong reasons. See *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000). Under these circumstances, petitioner's arguments effectively present moot questions that we need not address. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

Affirmed.

RONAYNE KRAUSE, P.J., and FORT HOOD and O'BRIEN, JJ., concurred.

This may be construed as an argument that a reverse mortgage should be considered a protected asset. Assuming that this argument was properly before this Court, which it is not because petitioner failed to develop the argument, see *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999), we note that treating a reverse mortgage as an asset does not require a property owner to borrow against his or her home equity to pay property taxes. Rather, in the event that a reverse mortgage is executed, the amount would be considered an asset for purposes of the poverty exemption.

Further, not including a reverse mortgage as either an asset or income for purposes of the poverty exemption would undermine the intent of the exemption. Theoretically, a taxpayer could own a $2 million home, have no income and assets below the asset limit, and execute a $100,000 reverse mortgage. Under petitioner's proposed interpretation, this theoretical taxpayer could claim the poverty exemption, despite having the ability to contribute toward the public charges.

MEEMIC INSURANCE COMPANY v BISCHER

Docket No. 335126. Submitted December 8, 2017, at Detroit. Decided February 13, 2018, at 9:05 a.m.

MEEMIC Insurance Company sought a declaratory judgment in the Huron Circuit Court regarding its obligation to indemnify or defend its insureds, Gary and Barbara Bischer, in a negligence action brought against the Bischers by the estate of Brandon Dickert, who was killed in an all-terrain vehicle (ATV) accident involving the Bischers' ATV, which was being driven by the Bischers' son, and on which Dickert was a passenger. The accident occurred on property across the street from the Bischers' property. The property on which the accident occurred was used with the implied permission of the property owner, but it did not belong to and was not resided on by the Bischers. The Bischers' homeowner's policy with MEEMIC provided coverage for bodily injury involving an ATV while the ATV was on the insured premises. The policy defined "insured premises" as any premises used by the insured "in connection with" the insured's residence premises. A "residence premises" was defined as the dwelling used as a private residence, other structures, and land located at the address named in the insurance policy. The trails on which the ATV was driven wound through the Bischers' property and through the property of their neighbors. The parties filed cross-motions for summary disposition, and the court, Gerald M. Prill, J., granted summary disposition in favor of defendants (the Bischers, Dickert's estate, and the personal representative of the estate), agreeing with defendants that because the trails were routinely used by all of the Bischers' neighbors, the accident site was used in connection with the residence premises and, therefore, the site of the accident was part of the insured premises for purposes of the Bischers' homeowner's policy. MEEMIC appealed.

The Court of Appeals *held*:

A neighboring property is not used "in connection with" a residence premises merely because the neighboring property is regularly used by an insured with implied permission from the neighboring property owner. The trial court erred by granting summary disposition in favor of defendants on that basis. Rather,

MEEMIC was entitled to summary disposition because the accident did not occur on premises used by the Bischers in connection with their residence premises. The mere fact of repeated use of other premises does not alone constitute a connection between the residence premises and the premises on which the accident occurred. If it did, an insurer would become liable for a variety of situations, thereby expanding the risk assumed by the insurer when drafting and approving the "in connection with" language. MEEMIC had no duty to indemnify the Bischers or defend them in the negligence action because the property on which the accident occurred did not qualify as property used in connection with the Bischers' residence premises and, therefore, the property did not qualify as insured premises to which the Bischers' homeowner's policy applied.

Reversed and remanded.

SHAPIRO, J., concurring, agreed that the permissive use of the noncontiguous trail at issue here was not in connection with the residence premises but wrote separately to emphasize that the majority opinion did not determine what would constitute a sufficient connection with the residence premises and that he likely would have reached a different conclusion had the accident occurred on a common trail that ran through contiguous properties including that of the policyholder.

INSURANCE — HOMEOWNER'S POLICY — PERSONAL INJURY — INSURED PREMISES.

A neighboring property is not used "in connection with" a residence premises merely because the neighboring property is regularly used by an insured with implied permission from the neighboring property owner.

Collins Einhorn Farrell PC (by *Deborah A. Hebert*) for plaintiff.

Willingham & Coté, PC (by *Kimberlee A. Hillock*) for defendants.

Before: METER, P.J., and SAWYER and SHAPIRO, JJ.

SAWYER, J. We are faced with the question whether an "insured premises" under a homeowner's policy includes property regularly used with permission, but not owned or resided on, by an insured when the

policy's definition of "insured premises" includes "any premises used" by an insured "in connection with" the insured's "residence premises." We conclude that it does not.

The basic facts relevant to this appeal are not in dispute. Brandon Dickert was killed while riding on an all-terrain vehicle (ATV) operated by Bailey Bischer and owned by Bailey's parents, Barbara and Gary Bischer. Dickert's estate filed suit against the Bischers, alleging negligence. The Bischers were insured under a home-owner's policy issued by plaintiff. Plaintiff filed this declaratory-judgment action seeking a determination that it was not obligated to indemnify or defend the suit.

At issue is the following exclusion under the policy, as well as the exception to the exclusion:

> **We** do not cover:
>
> * * *
>
> 6. **bodily injury** or **property damage** arising out of:
>
> A. the ownership, maintenance, occupancy, use, renting, loaning, loading or unloading of *any motorized land vehicle* or trailer;
>
> B. the entrustment by **you** of a motorized land vehicle to any person.
>
> *This exclusion does not apply to*:
>
> A. a motorized land vehicle in dead storage or used exclusively on an **insured premises**;
>
> B. *any motorized land vehicle which is designed principally for recreational use off public roads, not subject to motor vehicle registration, licensing or permits, and owned by* **you**, but only while the vehicle is on the **insured premises**. [Italics added.]

It is not disputed that under the policy the ATV is a "motorized land vehicle" that is designed "for recre-

ational use off public roads . . . .” Thus, the exception under ¶ B would apply if the ATV was being operated on the insured premises. That becomes the essential question in this case.

The accident did not occur on the Bischers’ property. Rather, Bailey and Brandon were riding on trails on a neighboring property. According to Gary Bischer’s deposition testimony, the Bischers own 18 acres with a large wooded area. Trails wind through the property, as well as through the property of other neighbors. According to the deposition testimony, the residents routinely used the trails on each other’s properties.[1] The accident occurred on the property of a neighbor located across the street from the Bischers’ residence.

Thus, to resolve this case we must turn to the policy’s definition of “insured premises.” The definition, in relevant part, is as follows:

> “**INSURED PREMISES**” means:
>
> 1. *the* **residence premises**;
>
> 2. that part of any other premises, other structures and grounds used by **you** as a residence and which is specifically named in the Declarations or acquired by **you** during the policy period for **your** use as a residence, but only for a period of 90 days from the date **you** acquire the property; [or]
>
> 3. *any premises used by* **you** in connection with a premises included in 1. and 2. above[.] [Italics added.]

Furthermore, “residence premises” is defined as “the one or two family dwelling used as a private residence by **you**, other structures *and land* located at the address named on the Declarations.” (Italics added.) Accordingly, coverage exists under the policy for this

[1] Apparently there is one neighbor who does not allow access to his property, but that fact is not relevant here.

accident if the accident occurred on premises used "in connection with" the residence premises; otherwise, the exclusion applies.

The parties filed cross-motions for summary disposition. Plaintiff maintained that there was no coverage because the accident did not occur on the Bischers' property. Defendants argued that because the trails were routinely used by all the neighbors, the accident site was used in connection with the residence premises and, therefore, the site was part of the "insured premises." The trial court agreed with defendants and granted summary disposition in their favor. Plaintiff now appeals. The standard of review for this case was summarized by the Supreme Court in *DeFrain v State Farm Mut Auto Ins Co*:[2]

> A trial court's decision on a motion for summary disposition is reviewed de novo. In reviewing the motion, we view the pleadings, affidavits, depositions, admissions, and other admissible evidence in the light most favorable to the nonmoving party. In addition, the proper interpretation of contracts and the legal effect of contractual provisions are questions of law subject to review de novo. We construe an insurance policy in the same manner as any other species of contract, giving its terms their "ordinary and plain meaning if such would be apparent to a reader of the instrument." [Citation omitted.]

While there are a number of published cases in other jurisdictions interpreting similar policy provisions, there do not appear to be any published cases in Michigan that do so. As for the decisions in other jurisdictions, as the Connecticut Supreme Court observed in *Arrowood Indemnity Co v King*,[3] "courts in other jurisdictions have adopted divergent criteria—

[2] 491 Mich 359, 366-367; 817 NW2d 504 (2012).

[3] 304 Conn 179, 191-192; 39 A3d 712 (2012).

including 'repeated use,' 'integral use,' 'property ownership and legal right to use,' 'foreseeable use' and 'actual use'—to determine whether a location is used in connection with the residence premises." (Citations omitted.)

Defendants would have us focus more on the "repeated use" with "implied permission" from the neighbors of the trails. Defendants maintain that plaintiff's focus on whether there was "ownership and legal right to use" reads language into the policy that is not there. But defendants' proposed interpretation ignores the effect of the word "connection" in the language. That is, the mere fact of "repeated use" does not take into account whether there truly is a connection between the residence premises and the location of the accident.

The Minnesota Court of Appeals, in *Illinois Farmers Ins Co v Coppa*,[4] concluded that there was no use in connection with the residence premises when an ATV accident occurred in a neighbor's hayfield. The Court concluded as follows:

> When examining all the provisions of the policy together, and in particular the nine specifications included in the definition of the "insured location," we are compelled to conclude that "insured location" was not meant to describe adjacent, non-owned land on which an ATV might be used. The hayfield is not part of the residence premises and is not "used in connection with" such premises as are approaches or easements of ingress to or egress from the property. It is not reasonable to expect that every field or pathway in the neighborhood leading to the insureds' residence is property "used in connection with" the residence. We hold that the trial court did not err in finding that coverage was precluded under the policy.[5]

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[4] 494 NW2d 503 (Minn App, 1993).

[5] *Id*. at 506.

Similarly, in *Mason v Allstate Ins Co*,[6] an ATV was being operated in a field located 15 miles from the residence premises, and the Georgia Court of Appeals rejected the argument that the field was used "in connection with" the residence premises:

> Moreover, the Masons' argument that they were using the field "in connection with" their home because they were holding their daughter's birthday party at the field so family members and guests could do activities that they were unable to do at the house is unavailing. Applying that logic would extend the policy's definition of "insured premises" to cover almost *any* family outing or celebration at almost *any* location—a friend's pool, a neighborhood school, a public or private lake or park, etc.—regardless of the distance from or any actual connection with the insureds' residence. Further, if the policy were construed as suggested, insurers would be subjected to virtually endless liability, liability for which neither [they] nor the insureds could have reasonably expected or intended to be covered by the insurance policy. Under such circumstances, how could any insurer possibly draft a policy that would anticipate each and every hobby, interest or future travel decision of each and every insured, weigh the risks thereof, and set premiums accordingly?

In reaching this analysis, the *Mason* court also analyzed earlier decisions that presented even closer connections and still rejected the argument that the property was used in connection with the residence premises. For example, one of the cases included an insured using an adjacent property for storing items, burning garbage, and other chores.[7]

In *Massachusetts Prop Ins Underwriting Ass'n v Wynn*,[8] the court found no connection with the resi-

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[6] 298 Ga App 308, 314; 680 SE2d 168 (2009).

[7] *Id*.

[8] 60 Mass App 824, 830; 806 NE2d 447 (2004).

dence premises in a case involving an ATV accident on a beach the insured frequently used near the residence premises. The court concluded:

> It is not reasonable that the meaning of the language "used in connection with [the residence]," and hence the ambit of the "insured location," should vary depending on the fortuity of an insured's regular use of a field, trail, or recreational area, public or private, in the neighborhood of his residence. See *Allstate Ins. Co. v. Shofner*, 573 So.2d at 48, 49–50 (operation of vehicle on public street one block away from residence constitutes "being used away from an insured premises"); *Allstate Ins. Co. v. Gutenkauf*, 103 Ill.App.3d 889, 892–893, 59 Ill.Dec. 525, 431 N.E.2d 1282 (1981) (declining, as arbitrary and not susceptible to limitation, construction of "insured premises" to include area of lake ten to fifteen feet from shore); *Illinois Farmers Ins. Co. v. Coppa*, 494 NW2d 503, 506 (Minn.Ct.App. 1993). Such a construction would require knowledge by an insurer of not only the insured's property but also of neighboring property and the insured's hobbies and interests. Rather, the term "insured location" is intended and appropriately understood to be limited to the residence and premises integral to its use as a residence. The beach is not integral to the use of 83 Lakeshore Drive as a residence. Accordingly, we affirm the entry of summary judgment for the insurer. [Alteration in original.]

Ultimately, we need not determine what does constitute a sufficient connection with the residence premises. We need only resolve the instant dispute. We might reach a different result had the accident occurred in the common area of a residential development where the property owners, by virtue of that ownership, had the right to use the common areas. Or perhaps coverage would apply if the accident had happened on a driveway located on a neighbor's property but for which the insured had a driveway easement. Or coverage might apply when the adjoining

property was also owned by the insured.[9] None of these situations is present here. Accordingly, we simply conclude that a neighboring property is not used "in connection with" the residence premises merely because the neighboring property is regularly used by an insured with implied permission from the neighboring property owner. To hold otherwise would open up an insurer's liability for a variety of situations—such as an injury caused by ATV use in a large public park located near an insured's land or on the shoulders of public roads miles from a residence—that would expand the risk assumed by an insurer when drafting and approving the "in connection with" language.

Accordingly, we conclude that the trial court erred by denying plaintiff's motion for summary disposition and granting summary disposition to defendants. The ATV accident did not occur on the "insured premises." Therefore, plaintiff had no duty to indemnify or defend the Bischers, and plaintiff was entitled to summary disposition.

Reversed and remanded to the trial court with instructions to enter summary disposition in favor of plaintiff. We do not retain jurisdiction. Plaintiff may tax costs.

METER, P.J., concurred with SAWYER, J.

SHAPIRO, J. (*concurring*). I concur with the majority but write separately to emphasize, as the majority notes, that "we need not determine what does constitute a sufficient connection with the residence prem-

[9] See, e.g., *Utica Mut Ins Co v Fontneau*, 70 Mass App 553, 558-560; 875 NE2d 508 (2007), approving the analysis in *Wynn*, 60 Mass App at 829-830, and distinguishing the facts in *Wynn* from the facts in *Fontneau*.

ises" and that facts distinguishable from those in the instant case might result in different outcomes. Thus, although I agree that the permissive use of the noncontiguous trail at issue here was not "use . . . in connection with," I would likely reach a different conclusion had the accident occurred on a common trail that ran through two or several contiguous properties including that of the policyholder.

BUCHANAN v CRISLER

Docket No. 337720. Submitted February 14, 2018, at Lansing. Decided February 22, 2018, at 9:00 a.m.

Stacia Buchanan filed a petition in the Ingham Circuit Court, seeking an ex parte personal protection order (PPO) under MCL 600.2950a(1) against John K. Crisler on the basis that Crisler had stalked her as defined in MCL 750.411h and MCL 750.411i and that Crisler had posted messages about her through the Internet, contrary to MCL 750.411s. Buchanan, an attorney, was appointed to represent Crisler in 2011 against a criminal charge. Crisler was convicted after a jury trial, and Buchanan withdrew from the case after Crisler was sentenced because of a breakdown in the attorney-client relationship. Crisler asserted that Buchanan had planned his conviction with the prosecutor and certain district court judges. From 2011 through 2016, Crisler e-mailed Buchanan to express his dissatisfaction with her representation; posted comments about Buchanan on his website, on Facebook, and in the comments sections of online news articles; and "tagged" her on Facebook. Buchanan also had a few in-person contacts with Crisler. During that period, two strangers contacted Buchanan by e-mail, informing her of Crisler's posts; three colleagues also notified Buchanan of Crisler's posts. In 2016, Buchanan sent Crisler a letter, demanding that Crisler stop all defamation of Buchanan as well as all harassing and intimidating conduct. In response, Crisler posted the contents of Buchanan's letter on Facebook. In November 2016, the court, Laura Baird, J., granted the PPO to Buchanan, prohibiting Crisler from, in part, posting a message about Buchanan through the Internet or any medium of communication. Crisler moved to terminate the PPO, claiming that his posts were true regarding Buchanan's representation and that under MCL 750.411s(6), because his online speech was constitutionally protected by the First Amendment of the United States Constitution, his posts could not be enjoined under MCL 750.411s(1). The court, Richard D. Ball, J., denied Crisler's motion to terminate the PPO, concluding that Buchanan was entitled to the PPO under MCL 600.2950a(1) because Crisler had stalked Buchanan as defined in MCL 750.411h(1) and MCL 750.411i(1) and had violated MCL 750.411s(1) through the mes-

sages he had posted on Facebook, his website, and online newspaper comments sections. The court reasoned that Crisler's posts were not constitutionally protected speech because the posts were intended to harass or humiliate Buchanan. Crisler appealed.

The Court of Appeals *held*:

1. MCL 600.2950a(1) provides that in nondomestic matters, an individual may petition for a PPO to enjoin a person from posting a message contrary to MCL 750.411s and from stalking as defined in MCL 750.411h or MCL 750.411i. Relief may not be granted under MCL 600.2950a(1) unless the petition alleges facts that constitute stalking as defined in MCL 750.411h or MCL 750.411i or conduct that is prohibited under MCL 750.411s. On appeal, Crisler did not challenge the restrictions placed on his conduct that implicated MCL 750.411h and MCL 750.411i but challenged the PPO to the extent that it enjoined his posting of online messages about Buchanan. MCL 750.411s(1) prohibits a person from posting a message through the use of any medium of communication without the victim's consent if (1) the person knows or has reason to know that posting the message could cause two or more separate noncontinuous acts of unconsented contact with the victim, (2) posting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested, (3) conduct arising from posting the message would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and (4) conduct arising from posting the message causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested; courts must determine that the posted message violated each of the MCL 750.411s(1) elements to qualify as a basis for issuing a PPO under MCL 600.2950a(1). The statute is designed to prohibit cyberstalking by proxy and cyberharassment by proxy, and the focus of the statute is on the unconsented contacts that occur because of the posts—resulting in the harassment of the victim—not the actual posts themselves; a stalker uses other persons to harass the victim when the stalker posts a message that leads to unconsented contact. MCL 750.411s(8)(i) provides that the truthfulness of a posted message is not relevant when determining whether the message was posted in violation of MCL 750.411s(1).

2. The First Amendment of the United States Constitution and Article 1, § 5 of Michigan's 1963 Constitution protect a person's right to freedom of speech, which includes speech over

the Internet. However, speech integral to criminal conduct is not constitutionally protected when the speech serves solely to implement a stalker's criminal purpose in intentionally harassing the victim. Courts must review First Amendment challenges to cyberstalking statutes on a case-by-case basis to determine whether the speech-integral-to-criminal-conduct exception applies. The analysis includes a determination of whether the victim is a public or private figure and whether the topic of the message is one of public concern. In other words, while messages posted to harass a private individual may be enjoined, cyberstalking laws may not be used to restrict speech that relates to a public figure and matters of public concern. In that regard, before a court may enjoin an individual from posting a message in violation of MCL 750.411s, the court must find that a prior posting violates the statute by focusing on (1) the actor's intent when posting the message and (2) the effect of the conduct arising from the message. Posting a message in violation of MCL 750.411s is not protected by the right to freedom of speech because in that situation, the message is integral to the harassment of the victim insofar as it leads to, and is intended to cause, unconsented contacts that terrorize, frighten, intimidate, threaten, harass, or molest the victim. When an actor asserts that the actor's postings involve a matter of public concern, the court must consider the content, form, and context of the online postings to determine whether they involve constitutionally protected speech on a matter of public concern. A court may enjoin an actor from posting messages that violate MCL 750.411s if the court determines that constitutionally protected speech will not be inhibited.

3. In this case, the trial court concluded that Crisler violated MCL 750.411s(1) and on that basis enjoined Crisler's posts regarding Buchanan; the court did not issue the PPO on the basis of a finding that Crisler had defamed Buchanan. Because MCL 750.411s(8)(i) provides that the truthfulness of posted messages is not relevant when determining whether a person has violated MCL 750.411s(1), the trial court did not abuse its discretion by excluding Crisler's evidence regarding Buchanan's representation during his criminal trial. However, the trial court failed to make the requisite factual findings before concluding that Crisler's postings violated MCL 750.411s. The court erred by focusing on the effect the content of Crisler's postings had on Buchanan instead of focusing on the effect of the conduct—specifically, the unconsented contacts—that occurred because of the posts, how those unconsented contacts made Buchanan feel, and how a reasonable person would feel after

receiving those contacts. The trial court also erred as a matter of law to the extent that it concluded it was irrelevant whether Crisler intended to harass Buchanan through the postings. MCL 750.411s(1)(b) plainly mandates that an actor posting a message must intend to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested, and the trial court failed to determine whether by posting the messages Crisler intended to cause conduct that would violate MCL 750.411s and whether Crisler knew or should have known that his posts could cause unconsented contacts. The case was remanded for the trial court to address whether Crisler's postings violated MCL 750.411s.

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

1. PERSONAL PROTECTION ORDERS — STALKING — REQUIREMENTS FOR ISSUING PERSONAL PROTECTION ORDERS.

MCL 600.2950a(1) provides that in nondomestic matters an individual may petition for a PPO to enjoin a person from posting a message contrary to MCL 750.411s if the petition alleges facts that constitute conduct that is prohibited under MCL 750.411s; under MCL 750.411s(1), a person may not post a message through the use of any medium of communication without the victim's consent if (1) the person knows or has reason to know that posting the message could cause two or more separate noncontinuous acts of unconsented contact with the victim, (2) posting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested, (3) conduct arising from posting the message would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and (4) conduct arising from posting the message causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested; the court must determine that a prior posted message violated each of the MCL 750.411s(1) elements before issuing a PPO under MCL 600.2950a(1).

2. PERSONAL PROTECTION ORDERS — STALKING — POSTED MESSAGES — TRUTHFULNESS OF POSTED MESSAGES NOT RELEVANT.

Under MCL 750.411s(8)(i), the truthfulness of a posted message is not relevant for purposes of determining whether a message was posted in violation of MCL 750.411s(1) (MCL 600.2950a(1)).

3. CONSTITUTIONAL LAW — FIRST AMENDMENT — SPEECH-INTEGRAL-TO-CRIMINAL-CONDUCT EXCEPTION — PERSONAL PROTECTION ORDERS — STALKING — CASE-BY-CASE ANALYSIS.

Speech integral to criminal conduct is not constitutionally protected when the speech serves solely to implement a stalker's criminal purpose in intentionally harassing the victim; a court must review First Amendment challenges to cyberstalking statutes on a case-by-case basis to determine whether the speech-integral-to-criminal-conduct exception applies; a court must determine whether the victim is a public or private figure and whether the topic of the message is one of public concern; while messages posted to harass a private individual may be enjoined, cyberstalking laws may not be used to restrict speech that relates to a public figure and matters of public concern; before a court may enjoin an individual from posting a message in violation of MCL 750.411s, the court must find that a prior posting violates the statute by focusing on (1) the actor's intent when posting the message and (2) the effect of the conduct arising from the message; if an actor asserts that the actor's postings involve a matter of public concern, the court must consider the content, form, and context of the online postings to determine whether they involve constitutionally protected speech on a matter of public concern (US Const, Am I; Const 1963, art 1, § 5).

Mallory, Lapka, Scott & Selin (by *Keldon K. Scott*) for Stacia Buchanan.

J. Nicholas Bostic for John K. Crisler.

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

HOEKSTRA, J. In November 2016, petitioner, Stacia Buchanan, obtained an ex parte personal protection order (PPO) against respondent, John Crisler. Crisler filed a motion to terminate the PPO, and his motion was denied in March 2017. Crisler now appeals as of right the denial of his motion to terminate the PPO. For the reasons explained in this opinion, we vacate the trial court's order to the extent it relates to Crisler's online postings, and we remand for a deter-

mination of whether Crisler's posts violated MCL 750.411s(1). In all other respects, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Buchanan is a licensed Michigan attorney. In 2011, she was appointed by the 55th District Court to represent Crisler against a criminal charge of misdemeanor domestic violence. Following a jury trial, Crisler was convicted. Buchanan represented Crisler through sentencing, but she withdrew from the case before the matter of restitution had been resolved because of a breakdown of the attorney-client relationship.

Crisler was highly dissatisfied with Buchanan's representation during the criminal proceedings. After Buchanan withdrew from Crisler's criminal case, Crisler made efforts to communicate this dissatisfaction to Buchanan personally and to broadcast his dissatisfaction on the Internet. Crisler's first such contact with Buchanan occurred on November 10, 2011, when Crisler sent Buchanan an e-mail, which stated:

> Ms. Buchanan:
>
> We have proof positive you aided and abetted the Prosecution.
>
> Do you remember when I promised I would make you famous?
>
> (and all through legal, moral and ethical means).
>
> Be well!
>
> Regards,
>
> John Crisler DO
> Anti-Aging Medicine

Buchanan responded to this e-mail on the same day, informing Crisler that she no longer represented him

and that his e-mail was "unnecessary and unwanted." Buchanan instructed Crisler not to e-mail her again.

Over the next several years, Crisler repeatedly posted comments about Buchanan on his website, on Facebook, and occasionally in the comments sections of online news articles. Briefly stated, in these various online postings, Crisler expressed his dissatisfaction with Buchanan's representation during the criminal proceedings. Crisler believed that Buchanan, along with the prosecutor and district court judges, had "planned" his conviction, and his postings constitute a long list of complaints about Buchanan's performance as his attorney as well as allegations against the district court judges and the prosecutor.

In 2012, Buchanan received e-mails from two strangers, informing her of Crisler's online postings. In particular, on August 16, 2012, someone named Michael Scally e-mailed Buchanan to inform her that Crisler had made a number of defamatory posts about her on the Internet. Scally's e-mail contained links to Internet postings by Crisler. Similarly, on October 7, 2012, someone named Charles Grashow e-mailed Buchanan to ask whether she was aware of what Crisler was posting about her online. Grashow's e-mail contained a link to Crisler's website and a suggestion that Buchanan "go thru it – a fun read." Both Scally and Grashow were strangers to Buchanan.

On February 28, 2013, Crisler again e-mailed Buchanan directly, sending a message with links to his Facebook page and website. The message stated:

> Ms. Buchanan—
>
> You are famous!
>
> [Facebook and website links]

> Is this an "unwanted email"? Well, I didn't "want" you to purposely destroy my life!
>
> You should be thinking about what you are going to do when you are no longer an attorney. Right after my REAL attorney files his Motion with the Circuit Court, I will file my formal complaint against you with the Michigan Attorney Grievance Commission.
>
> . . . you won't have those two corrupt Judges there to protect you. They will be busy fielding their own complaints.
>
> One day you are going to tell me why you decided to destroy my life. There is no way I can ever get back what you have cost me!
>
> Be well!
>
> Regards,
>
> John Crisler DO

Aside from Crisler's electronic postings and messages, Buchanan had a few in-person contacts with Crisler beginning in April 2015, when Buchanan "ran into" Crisler in the parking lot of the courthouse. Crisler did not approach Buchanan, and they did not speak. However, later that day, Buchanan received an e-mail from Facebook, informing her that she had been "tagged" by Crisler. Buchanan immediately adjusted her Facebook privacy settings to prevent Crisler from tagging her in the future.

Beginning in April 2015, Buchanan also noticed Crisler at various running races in which she participated. Initially, nothing occurred at these races between Buchanan and Crisler to make Buchanan uncomfortable. However, on May 6, 2016, Buchanan again saw Crisler in person at a race. According to Buchanan, when the race started Crisler "ran past" her and "got right in front of" her "so that there was no other runner between" them. Eventually, Crisler

slowed down enough that Buchanan was able to pass him and finish the race. After the race, Crisler walked by Buchanan and brushed her arm with his arm. On July 31, 2016, Buchanan saw Crisler at another running race. Crisler did not approach Buchanan, but Crisler "brushed elbows" with Buchanan's husband during the race.

During this time, Crisler's Internet postings continued, and several individuals known to Buchanan alerted her to Crisler's online postings. For instance, in June 2016, Buchanan received a telephone call from a fellow lawyer, informing her that "there was more stuff going on Facebook." In August 2016, Buchanan received an e-mail from another attorney, who informed Buchanan that Crisler had posted several messages about her on Facebook. In October 2016, a prosecutor contacted Buchanan to inform her that Crisler had posted statements about her on the Facebook page of Billie Jo O'Berry, who was, at that time, running for office. In November 2016, Buchanan also received a text message from a probation officer, telling her that there were additional postings about her by Crisler in the comments section of an online newspaper article reporting on how "little work" is done by court-appointed defense attorneys.[1]

In July 2016, Buchanan sent Crisler a cease-and-desist letter, demanding that Crisler cease and desist all defamation of Buchanan as well as all harassing or intimidating conduct. Buchanan asserted in the letter that Crisler's written statements on Facebook and his website were false and defamatory, and Buchanan requested a written retraction. Additionally, Buchanan

[1] Aside from the e-mail contacts from Scally and Grashow in 2012, Buchanan personally knew all the other individuals—i.e., the lawyers and the probation officer—who contacted her about Crisler's posts.

indicated that Crisler's e-mailing her, tagging her on Facebook, and intentionally making physical contact with her in a public place were acts of "harassment and threats." Buchanan indicated that any additional attempt to contact Buchanan "via e-mail, orally or otherwise will be considered harassment and stalking."

On October 15, 2016, Crisler posted the contents of Buchanan's cease-and-desist letter on Facebook. Crisler stated that, since receiving the letter, he had "not Ceased, nor Desisted, in openly publishing the truth about how [Buchanan] purposely sold me out . . . ." Crisler also provided commentary on the letter, stating that he was "so happy" when he received the letter in July and that he was "excited at the prospect" of a lawsuit by Buchanan. Crisler indicated that he had not provided a retraction to Buchanan. He went on to deny all allegations of defamation and to again recount his list of grievances against Buchanan. Crisler also advised his readers not to hire Buchanan as an attorney, noting "[s]he may do to you what she did to me."

In November 2016, Buchanan petitioned the circuit court for an ex parte PPO. In her petition, Buchanan asserted that Crisler stalked her as defined in MCL 750.411h and MCL 750.411i by approaching or confronting her in a public place and sending her mail or other communications. Additionally, relying on MCL 750.411s, Buchanan maintained that Crisler "post[ed] a message" about her through the use of any medium of communication, including the Internet or a computer. Buchanan requested an ex parte order to prevent Crisler from engaging in these activities. On November 9, 2016, the circuit court granted Buchanan's petition and entered an ex parte order prohibiting Crisler from (1) "approaching or confronting

[Buchanan] in a public place or on private property," (2) "sending [Buchanan] mail or other communications," and (3) "posting a message through the use of any medium of communication, including the Internet or a computer . . . ."

On November 21, 2016, Crisler moved to terminate the PPO. A hearing on Crisler's motion was held on January 30, 2017, and March 15, 2017. In seeking the termination of the PPO, Crisler maintained that his postings about Buchanan's asserted misconduct in representing him during his criminal trial were true. Crisler maintained that he had a First Amendment right to post the truth about what happened in his criminal case. On the basis of his contention that his online speech was constitutionally protected, Crisler maintained that under MCL 750.411s(6) his postings could not be enjoined. In support of his argument, Crisler attempted to introduce evidence and testimony relating to the truth of his Internet postings. However, the trial court excluded this evidence, concluding that it was irrelevant, for purposes of MCL 750.411s, whether the posts were true.

Following the hearing, the trial court issued a written opinion and order denying Crisler's motion to terminate the PPO. Relying on MCL 750.411h(1), MCL 750.411i(1), and MCL 750.411s(1), the trial court determined that Crisler stalked Buchanan and that Buchanan was entitled to a PPO under MCL 600.2950a(1). The trial court explained:

> The testimony and evidence in this case show [Crisler] engaged in a pattern and course of unconsented contact and conduct by his continuing internet postings relating to his allegations about the quality of [Buchanan's] legal representation, which contact and conduct continued up to the date [Buchanan] filed her request for a personal protection order.

> In accordance with the broad scope of the definition of "credible threat", the words and actions undertaken by [Crisler] caused [Buchanan] to reasonably fear for her safety. That [Crisler] may not have *intended* to threaten, intimidate or harass Buchanan is of no consequence since the focus of the personal protection order statute and the stalking statutes is on the perception of the victim.
>
> The unpleasant and continuing nature of [Crisler's] conduct and words caused distress for [Buchanan] and caused to [sic] her to feel harassed and intimidated.
>
> [Buchanan] actually suffered emotional distress as a result of the harassment perpetrated by [Crisler].
>
> [Crisler] stalked [Buchanan] within the meaning of the applicable statutes.

The trial court also more specifically addressed Crisler's First Amendment arguments relating to his Internet postings. The trial court recognized that under MCL 750.411s(6), a PPO cannot be used to prohibit constitutionally protected speech. However, referring to definitions from lay Internet sources, the trial court determined that Crisler had engaged in "cyberbullying" and "Facebook stalking." The trial court concluded that Crisler's posts were not constitutionally protected speech because the postings "were obviously intended to harass and/or humiliate" Buchanan. Ultimately, the trial court denied Crisler's motion to terminate the PPO. Crisler now appeals as of right.

II. ANALYSIS

Crisler argues that his online postings about Buchanan are protected by the First Amendment, and Crisler contends that the trial court erred by restricting his online postings without properly considering whether Crisler's posts were protected speech. Specifically, Crisler asserts that he can prove the truthfulness

of his complaints about Buchanan, and he maintains that if his posts are not defamatory, his online speech cannot be restricted because MCL 750.411s(6) prevents courts from using a PPO to restrict constitutionally protected speech. Crisler asserts that the trial court improperly excluded Crisler's evidence regarding the truthfulness of his postings, because the evidence was relevant to determining whether the postings were defamatory. Additionally, Crisler argues that in restricting Crisler's speech, the trial court failed to properly apply MCL 750.411s and erred by using lay definitions from the Internet to define "cyberbullying" and "Facebook stalking." Crisler maintains that his posts regarding the efficacy of public defenders and collusion between Buchanan, the district court judges, and the prosecution involve an important matter of public concern. According to Crisler, before restricting his speech, the trial court should have balanced the interests involved and required Buchanan to articulate a compelling reason to restrict Crisler's posts.

A. STANDARDS OF REVIEW

Issues of constitutional law, including the application of the First Amendment, are reviewed de novo. *Sarkar v Doe*, 318 Mich App 156, 167; 897 NW2d 207 (2016) (quotation marks omitted). Questions of statutory interpretation are also reviewed de novo. *Lear Corp v Dep't of Treasury*, 299 Mich App 533, 537; 831 NW2d 255 (2013). "A trial court's ruling on the admission or exclusion of evidence is reviewed for an abuse of discretion." *Reed v Reed*, 265 Mich App 131, 160; 693 NW2d 825 (2005). "An abuse of discretion occurs when the court's ruling is outside the range of reasonable and principled outcomes." *Barr v Farm Bureau Gen Ins Co*, 292 Mich App 456, 458; 806 NW2d 531 (2011).

B. OVERVIEW OF POSTING A MESSAGE UNDER MCL 750.411s

In this case, the PPO in question prevents Crisler from: (1) "approaching or confronting [Buchanan] in a public place or on private property," (2) "sending mail or other communications" to Buchanan, and (3) "posting a message through the use of any medium of communication, including the Internet or a computer . . . ." On appeal, Crisler does not appear to challenge the restrictions placed on the first two courses of conduct, which consist of conduct aimed directly at Buchanan that implicates MCL 750.411h and MCL 750.411i.[2] The only dispute on appeal relates to whether Crisler's posting of online messages about Buchanan may be enjoined under MCL 750.411s or whether the conduct is protected by the First Amendment.

Under MCL 600.2950a(1), in nondomestic matters, an individual may petition for a PPO to enjoin, among other activities, "posting a message" contrary to MCL 750.411s. In particular, MCL 600.2950a(1) provides:

> [A]n individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin an individual from engaging in conduct that is prohibited under section 411h, 411i, or 411s of the Michigan penal code, 1931 PA 328, MCL 750.411h, 750.411i, and 750.411s. Relief under this subsection shall not be granted

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[2] Both MCL 750.411h(1)(d) and MCL 750.411i(1)(e) prohibit "stalking," which the statutes define as a "willful course of conduct involving repeated or continuing harassment . . . ." The term "harassment" refers to "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact . . . ." MCL 750.411h(1)(c) and MCL 750.411i(1)(d). In both statutes, the term "unconsented contact" includes "[s]ending mail or electronic communications to th[e] individual" and "approaching or confronting th[e] individual in a public place or on private property." MCL 750.411h(1)(e)(*ii*) and (*vi*); MCL 750.411i(1)(f)(*ii*) and (*vi*).

> unless the petition alleges facts that constitute stalking as defined in section 411h or 411i, or conduct that is prohibited under section 411s, of the Michigan penal code, 1931 PA 328, MCL 750.411h, 750.411i, and 750.411s.

MCL 750.411s is a criminal statute, found in the Michigan Penal Code, which, if certain criteria are met, prohibits posting a message about an individual without that individual's consent. In relevant part, the statute states:

> (1) A person shall not post a message through the use of any medium of communication, including the Internet or a computer, computer program, computer system, or computer network, or other electronic medium of communication, without the victim's consent, if all of the following apply:
>
> (a) The person knows or has reason to know that posting the message could cause 2 or more separate noncontinuous acts of unconsented contact with the victim.
>
> (b) Posting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested.
>
> (c) Conduct arising from posting the message would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.
>
> (d) Conduct arising from posting the message causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.
>
> * * *
>
> (6) This section does not prohibit constitutionally protected speech or activity.
>
> * * *

(8) As used in this section:

* * *

(g) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

* * *

(i) "Post a message" means transferring, sending, posting, publishing, disseminating, or otherwise communicating or attempting to transfer, send, post, publish, disseminate, or otherwise communicate information, whether truthful or untruthful, about the victim.

(j) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes any of the following:

(*i*) Following or appearing within sight of the victim.

(*ii*) Approaching or confronting the victim in a public place or on private property.

(*iii*) Appearing at the victim's workplace or residence.

(*iv*) Entering onto or remaining on property owned, leased, or occupied by the victim.

(*v*) Contacting the victim by telephone.

(*vi*) Sending mail or electronic communications to the victim through the use of any medium, including the internet or a computer, computer program, computer system, or computer network.

(*vii*) Placing an object on, or delivering or having delivered an object to, property owned, leased, or occupied by the victim. [MCL 750.411s.]

MCL 750.411s does not prohibit an actor from posting any and all messages of every kind. Rather, as set

forth in MCL 750.411s(1)(a), posting a message about the victim through any medium of communication, without the victim's consent, is prohibited if four basic elements are met. Notably, the focus of these elements is on the conduct the actor intended to cause by posting the message and the effect of that conduct. Specifically, the first and second elements relate to the knowledge and intent of the person posting the message in terms of what conduct would result from the postings, while the third and fourth elements relate to the effect of the conduct that occurs because of the postings. That is, to violate the statute, when posting the message, the actor must know, or have reason to know, that posting the message "could *cause*" 2 or more separate noncontinuous acts of "unconsented contact." MCL 750.411s(1)(a) (emphasis added). Additionally, in terms of the actor's intent, posting the message must be "*intended to cause conduct* that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411s(1)(b) (emphasis added). Regarding the effect of this conduct on the victim, there is both an objective and subjective requirement. The conduct arising from posting the message must be such that (1) it "would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested," MCL 750.411s(1)(c), and (2) it actually "causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, harassed, or molested," MCL 750.411s(1)(d).

Considering these elements, it appears that the statute is designed to prohibit what some legal scholars have referred to as "cyberstalking by proxy" or "cyberharassing by proxy."[3] In other words, as made

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[3] See House Legislative Analysis, HB 6052 (October 4, 2000). See also O'Connor, *Cutting Cyberstalking's Gordian Knot: A Simple and Unified*

plain by the statute, it is not the postings themselves that are harassing to the victim; rather, it is the unconsented contacts arising from the postings that harass the victim. In particular, the statute envisions a scenario in which a stalker posts a message about the victim, without the victim's consent, and as a result of the posting, others initiate unconsented contacts with the victim. These unconsented contacts, arising from the stalker's postings, result in the harassment of the victim. In this manner, by posting a message that leads to unconsented contact, the stalker is able to use other persons to harass the victim.

For example, there have been cases of cyberstalking by proxy in which a stalker posts messages with sexual content about the victim and suggests that the victim is interested in sexual contact. See, e.g., *United States v Sayer*, 748 F3d 425, 428 (CA 1, 2014).[4] In that situation, third parties read the message and contact the victim, expecting sex. See, e.g., *id*. See also O'Connor, *Cutting Cyberstalking's Gordian Knot*, 43 Seton Hall L Rev 1007, 1009 (2013). In a somewhat more benign example, in a Massachusetts case, harassers posted false advertisements online, suggesting that the victims had something for sale or to give away for free; as a result of these advertisements, the victims received numerous phone calls and visits at their home about the items. See *Commonwealth v Johnson*, 470 Mass 300, 303-304; 21 NE3d 937 (2014). In each of these cases, the victim was harassed by the unconsented contacts that arose from the online postings. As

Statutory Approach, 43 Seton Hall L Rev 1007, 1009, 1013 (2013); Fukuchi, *A Balance of Convenience: The Use of Burden-Shifting Devices in Criminal Cyberharassment Law*, 52 B C L Rev 289, 293-294 (2011).

[4] Although not binding, lower federal court decisions may be considered persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

written, MCL 750.411s is designed to address situations in which the victim is harassed by conduct arising from the posts.

Under MCL 600.2950a(1), an individual who engages in stalking as defined in MCL 750.411h and MCL 750.411i or who violates MCL 750.411s may be prohibited from posting messages that violate MCL 750.411s. However, because MCL 750.411s provides specific criteria for what it means to "post a message," the only postings that may be prohibited under MCL 750.411s are those that violate the statute. Consequently, to prohibit postings under MCL 750.411s, there must be a determination that the postings in question violate the elements set forth in the statute.

C. THE FIRST AMENDMENT

"The First Amendment of the United States Constitution provides that " 'Congress shall make no law . . . abridging the freedom of speech . . . .' " *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 255-256; 833 NW2d 331 (2013), quoting US Const, Am I. The Michigan Constitution provides the same protection under Const 1963, art 1, § 5, which states that " '[e]very person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech.' " *Thomas M Cooley Law Sch*, 300 Mich App at 256, quoting Const 1963, art 1, § 5 (alteration in original). Speech over the Internet is protected "to the same extent as speech over other media . . . ." *Sarkar*, 318 Mich App at 174 (quotation marks and citation omitted). However, the freedom of speech is not absolute, and there are "certain categories of speech" that are not protected by the First Amendment. *Thomas M Cooley Law Sch*, 300 Mich App at 256-257. "These historic and traditional categories

long familiar to the bar—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *United States v Stevens*, 559 US 460, 468-469; 130 S Ct 1577; 176 L Ed 2d 435 (2010) (quotation marks and citations omitted).

1. DEFAMATION

In large part, Crisler's First Amendment arguments relate to defamation and the assertion that, if his postings are true, they cannot be restricted. According to Crisler, the trial court abused its discretion by refusing to admit Crisler's evidence regarding Buchanan's representation during his criminal trial. Had this evidence been considered, Crisler maintains that he could have established the truth of his postings and the trial court could not have prohibited him from publishing this truthful information. We disagree.

"A communication is defamatory if it tends to lower an individual's reputation in the community or deters third persons from associating or dealing with that individual." *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998). "Statements that are not protected [by the First Amendment] and therefore are actionable include false statements of fact, i.e., those that state actual facts but are objectively provable as false and direct accusations or inferences of criminal conduct." *Kevorkian v American Med Ass'n*, 237 Mich App 1, 8; 602 NW2d 233 (1999). The elements of defamation vary depending on whether the defamed individual is a public or private figure and on whether the topic is one of public concern. See *Rouch v Enquirer*

& News of Battle Creek (After Remand), 440 Mich 238, 252; 487 NW2d 205 (1992); *Kevorkian*, 237 Mich App at 9.

Although statements that are defamatory are not protected under the First Amendment, *Kevorkian*, 237 Mich App at 8, it does not follow that truth is a defense to a PPO prohibiting postings that violate MCL 750.411s. Quite simply, Crisler's defamation arguments lack merit for the simple reason that defamation is not the only type of speech exempted from First Amendment protections. And in this case, the trial court did not prohibit Crisler's speech because it had concluded that Crisler defamed Buchanan. Rather, the trial court entered a PPO to prevent Crisler from posting a message in violation of MCL 750.411s. Under MCL 750.411s(8)(i), the truthfulness of the messages is irrelevant to whether Crisler violated the statute. In these circumstances, because his speech was not restricted on the basis of a finding of defamation, Crisler's evidence regarding the truthfulness of his postings was not relevant, and it was not admissible. See MRE 401; MRE 402. Instead, as discussed later, regardless of whether the speech is defamatory, speech may be prohibited under the statute when it is integral to the commission of a crime.

2. SPEECH INTEGRAL TO CRIMINAL CONDUCT

Aside from his defamation arguments, Crisler maintains that the trial court failed to properly apply MCL 750.411s and that the court erred by restricting his speech based on the conclusion that Crisler had engaged in "cyberbullying" and "Facebook stalking" as defined by lay dictionary sources. Crisler also contends that his speech relating to Buchanan's performance as a public defender and a conspiracy between Buchanan,

the district court judges, and the prosecutor relates to a matter of significant public concern that should not be restricted absent a compelling reason. Essentially, Crisler argues that the trial court failed to make findings that would warrant the restriction of his speech as a violation of MCL 750.411s. Although Crisler does not refer to the speech-integral-to-criminal-conduct exception, in our judgment, his arguments implicate the exception.

The speech-integral-to-criminal-conduct exception has its origins in *Giboney v Empire Storage & Ice Co*, 336 US 490; 69 S Ct 684; 93 L Ed 834 (1949). In *Giboney*, by picketing with placards bearing written messages, union members attempted to coerce a business into signing an illegal agreement not to do business with nonunion members. *Id*. at 492-493. Reasoning that the picketers' "sole, unlawful immediate objective" was to induce the business to violate the law, the Court rejected the assertion that the picketers' conduct was shielded by the First Amendment, explaining that "placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control." *Id*. at 502. More broadly, the *Giboney* Court stated that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id*. On the basis of this reasoning, courts have recognized that, for example, "there is no First Amendment protection for offers to engage in illegal transactions, offers to provide or requests to obtain unlawful material, and speech in furtherance of a conspiracy." *United States v Matusiewicz*, 84 F Supp 3d 363, 369 (D Del, 2015) (quotation marks and citation omitted).

Relevant to this case, several courts have also relied on the speech-integral-to-criminal-conduct exception in rejecting First Amendment challenges to stalking statutes, including cyberstalking statutes. See, e.g., *Sayer*, 748 F3d at 433-434; *United States v Petrovic*, 701 F3d 849, 855 (CA 8, 2012); *United States v Osinger*, 753 F3d 939, 947-948 (CA 9, 2014); *Matusiewicz*, 84 F Supp 3d at 372-373; *Johnson*, 470 Mass at 310; *United States v Sergentakis*, opinion of the United States District Court for the Southern District of New York, issued June 15, 2015 (Case No. 15-cr-33 (NSR)), p 7. See also *People v White*, 212 Mich App 298, 311; 536 NW2d 876 (1995) (rejecting a free-speech challenge to MCL 750.411h and MCL 750.411i because stalking involved a course of conduct consisting of speech combined with conduct). "The government has a strong and legitimate interest in preventing the harassment of individuals." *Thorne v Bailey*, 846 F2d 241, 243 (CA 4, 1988). See also *United States v Lampley*, 573 F2d 783, 787 (CA 3, 1978) ("Congress had a compelling interest in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives."). And when the government enacts laws to prevent these types of harassment, any expressive aspects of speech are not protected under the First Amendment when the speech, as an integral part of criminal conduct, serves solely to implement the stalker's criminal purpose in intentionally harassing the victim. See *Sayer*, 748 F3d at 434; *Osinger*, 753 F3d at 947.

Similarly, in our judgment, posting a message in violation of MCL 750.411s would not constitute protected speech because the message is integral to the harassment of the victim insofar as it leads to, and is intended to cause, unconsented contacts that terrorize,

frighten, intimidate, threaten, harass, or molest the victim. Analogously to the picketers in *Giboney*, an individual posting a message in violation of MCL 750.411s acts with the unlawful objective to induce a criminal course of conduct by prompting others to engage in unconsented contacts with the victim that amount to harassment. While there may generally be a right to express one's views online, no one has the right to intentionally lead others to engage in unconsented contacts that amount to harassment. See *State v Carpenter*, 171 P3d 41, 58 (Alas, 2007) (finding that under the First Amendment, a radio personality could ridicule local critics on-air but that he could not call on listeners to engage in harassment). Generally speaking, because posting a message in violation of MCL 750.411s constitutes speech integral to criminal conduct, the message is not protected.

However, we note that courts and scholars have cautioned against applying *Giboney*'s speech-integral-to-criminal-conduct exception too broadly, particularly in the context of harassment provisions. "Under the broadest interpretation, if the government criminalized any type of speech, then anyone engaging in that speech could be punished because the speech would automatically be integral to committing the offense." *Matusiewicz*, 84 F Supp at 369. Indeed, read broadly, statutes regarding "criminal harassment would curb speech ranging from a person submitting a Facebook post excoriating an ex-lover for cheating, to the creation of offensive political flyers criticizing a city council member." *State v Burkert*, 444 NJ Super 591, 602; 135 A3d 150 (App Div, 2016). Particular concern is often expressed over harassment laws that could be used to prohibit public discourse about public figures and public concerns:

> Under [the speech integral to criminal conduct] rationale, *any* repeated online speech—including public political ridicule of politicians, journalists, businesspeople, religious figures, and others—that intentionally causes substantial emotional distress would be constitutionally unprotected.
>
> After all, many political attacks, especially if they are successful in revealing their target's misdeeds, can inflict substantial emotional distress. The loss of a place of honor, or even the prospect of such a loss, is naturally extremely distressing. So is the sense that hundreds of thousands of people are being persuaded to view you with contempt.
>
> And many of the most effective attacks come from people who have long been the target's enemy, whether those people are politicians who have fought with the target, or journalists or activists who have long viewed the target as dishonest or evil. Those speakers may well be seen as speaking with the intent of substantially distressing the target (likely intertwined with other motivations). Under the terms of the federal statute, there is nothing to keep this statute from covering such "conduct" in the form of repeated public ridicule, release of damaging facts about the target, and the like. [Volokh, *The "Speech Integral To Criminal Conduct" Exception*, 101 Cornell L Rev 981, 1040-1041 (2016).]

These same concerns hold true for Michigan's cyberstalking statute. For instance, if someone has the intent to harass and cause emotional distress to a politician or other public figure, online postings disparaging the politician's viewpoint and encouraging people to contact the person in question could be criminalized under MCL 750.411s if the unconsented contacts result in the politician feeling harassed. Of course, MCL 750.411s(6) provides that the statute does not prohibit constitutionally protected speech. But this provision merely begs the question of how it should be determined whether speech integral to violating MCL 750.411s is protected.

Faced with similar concerns, courts analyzing First Amendment challenges relating to online postings and harassment often use a case-specific approach to determine whether the speech-integral-to-criminal-conduct exception may be applied. In particular, analogously to the defamation context, this analysis often hinges on whether the victim is a public or private figure and whether the topic is one of public concern. For example, in *United States v Cassidy*, 814 F Supp 2d 574, 583 (D Md, 2011), the court determined that a cyberstalking statute was unconstitutional as applied when the alleged stalker used Twitter and a blog to harass a well-known Buddhist religious leader. In reaching this conclusion, the court repeatedly emphasized that the victim was a public figure and that the content of the posts—which included attacks on her character and qualifications as a religious leader—were matters of public concern. *Id*. at 583, 586. In contrast to *Cassidy*, in cases such as *Sayer*, *Petrovic*, and *Osinger*, which concluded that online postings amounted to cyberstalking and not protected speech, the stalkers posted purely private information—specifically highly personal sexual content—about private individuals. *Osinger*, 753 F3d at 948; *Petrovic*, 701 F3d at 855-856; *Sayer*, 748 F3d at 428. When these various cases are read together, it becomes clear that while messages posted to harass a private individual may be enjoined, cyberstalking laws may not be used to restrict speech that relates to a public figure or matters of public concern. See *Matusiewicz*, 84 F Supp 3d at 371-372; *Sergentakis*, unpub op at 4. We find these cases persuasive, and we hold that when the argument is raised that MCL 750.411s is being used to prohibit constitutionally protected speech relating to a matter of public concern, it must be determined whether the postings are intended solely to cause conduct that will harass a

private victim in connection with a private matter or whether the publication of the information relates to a public figure and an important public concern.[5] See *Matusiewicz*, 84 F Supp 3d at 371-372; *Sergentakis*, unpub op at 4-7.

Relevant to this analysis, the First Amendment affords the highest protection to public speech about public figures. *Locricchio v Evening News Ass'n*, 438 Mich 84, 118; 476 NW2d 112 (1991). With regard to distinguishing between public and private figures, a public figure is someone "who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures . . . ." *Gertz v Robert Welch, Inc*, 418 US 323, 342; 94 S Ct 2997; 41 L Ed 2d 789 (1974). There are two kinds of public figures: a "limited-purpose" public figure, who voluntarily injects himself into a specific public controversy and who is a public figure with respect to limited issues, and a "general-purpose" public figure, "who attains such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Thomas M Cooley Law Sch v Kurzon Strauss, LLP*, 759 F3d 522,

[5] As noted, there are other types of speech that are not constitutionally protected, and these types of speech could also be restricted under MCL 750.411s without raising constitutional concerns. For instance, there is no constitutional protection for "true threats," meaning "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v Black*, 538 US 343, 359; 123 S Ct 1536; 155 L Ed 2d 535 (2003). While the true-threat exception could potentially have application in the PPO context, in this case, Crisler's statements did not contain threats of violence. Likewise, defamation could potentially arise in an action involving cyberstalking, and that type of defamatory speech would not be protected. See, e.g., *Matusiewicz*, 84 F Supp 3d at 371-372. But as discussed, this case did not involve a determination that Crisler defamed Buchanan.

527 (CA 6, 2014) (quotation marks and citation omitted). Public-figure status must exist before information about the person is disclosed to the public and not because of the notoriety arising because such information is made public. *Hodgins Kennels, Inc v Durbin*, 170 Mich App 474, 483; 429 NW2d 189 (1988), rev'd in part on other grounds 432 Mich 894 (1989).

In terms of public versus private concerns, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v Phelps*, 562 US 443, 452; 131 S Ct 1207; 179 L Ed 2d 172 (2011) (quotation marks and citation omitted). In comparison, "where matters of purely private significance are at issue, First Amendment protections are often less rigorous." *Id*. The "boundaries of the public concern test are not well defined"; but there are "some guiding principles" that apply to help distinguish public concern from private matters. *Id*. (quotation marks and citation omitted). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Id*. at 453 (quotation marks and citations omitted). In addition to content, to determine whether the speech deals with a matter of public concern, it is also necessary to consider the form and context of the postings. *Id*. at 454. "In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *Id*. When content is considered along with the form and context of the messages, it will become apparent whether postings involve a matter of public concern or whether the postings are a thinly

veiled attempt to immunize a private harassment campaign as a matter of public concern.[6] See, e.g., *Sergentakis*, unpub op at 4-7.

In sum, to enjoin an individual from posting a message in violation of MCL 750.411s, there must first be a finding that a prior posting violates that statute. This inquiry requires the trial court to make a factual determination regarding the elements of MCL 750.411s, focusing on the actor's intent in posting the message and the effect of the conduct arising from the message. If it is determined that the actor has violated MCL 750.411s, the trial court should then consider the nature of the postings that will be restricted to ensure that constitutionally protected speech will not be inhibited by enjoining an individual's online postings.[7] MCL 750.411s(6). While the government has an interest in preventing the harassment of private individuals in relation to private matters, MCL 750.411s may not be employed to prevent speech relating to public figures on matters of public concern. Consequently, when it is asserted that the postings involve a matter of public concern, the court must consider the content, form, and context of the online postings to determine whether they involve constitutionally protected speech on a matter of public concern. If the court determines that constitutionally protected speech will not be inhibited, posting a message in violation of MCL 750.411s may be enjoined under MCL 600.2950a(1).

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[6] For example, with regard to context, an important consideration may be whether, aside from the online postings, the individual has undertaken other actions to harass the victim. See *Osinger*, 753 F3d at 953 (Watford, J., concurring); *Sergentakis*, unpub op at 4-7.

[7] See generally *Dennis v United States*, 341 US 494, 513; 71 S Ct 857; 95 L Ed 1137 (1951) (opinion by Vinson, C.J.) ("When facts are found that establish the violation of a statute, the protection . . . afforded by the First Amendment is a matter of law.").

D. APPLICATION

Turning to the facts of this case, we agree with Crisler that the trial court failed to make appropriate findings to warrant the restriction of his online postings as a violation of MCL 750.411s. Consequently, we vacate the trial court's order to the extent it implicates Crisler's online postings, and we remand for a determination of whether Crisler's posts violated MCL 750.411s(1).[8] If the trial court concludes that Crisler violated MCL 750.411s, the court should also consider whether Crisler was engaged in constitutionally protected speech involving a matter of public concern that may not be prohibited under MCL 750.411s(6).

As we have discussed, MCL 750.411s criminalizes posting a message in certain circumstances, and to the extent this posting involves speech, that speech may be restricted via a PPO under MCL 600.2950a(1). However, this restriction of speech integral to criminal conduct is only appropriate when the postings in

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[8] On appeal, Crisler also argues that the trial court abused its discretion by admitting samples of his Internet postings without considering whether Buchanan authenticated the documents within the meaning of MRE 901. Crisler objected on this basis at the hearing. However, rather than consider the admissibility of the documents under MRE 901, the trial court admitted the documents on the basis of the court's conclusion that a "somewhat relaxed" version of the rules of evidence applied. We see no reason why the rules of evidence would not apply. See MRE 101; MRE 1101. And we agree that the trial court abused its discretion by admitting the documents in question without ruling on Crisler's authentication objection under MRE 901. Nevertheless, any error in this regard does not entitle Crisler to relief on appeal because, in addition to other indications that the posts were written by Crisler, Crisler fully admitted at the hearing that he had posted complaints about Buchanan's representation of him on his website and Facebook page. Consequently, Crisler is not entitled to relief on the basis of the trial court's failure to address Crisler's objection under MRE 901. See *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 541; 854 NW2d 152 (2014); MRE 103(a); MCR 2.613(A).

question violate MCL 750.411s. In the present case, the trial court failed to make findings that would warrant this restriction.

Relevant to MCL 750.411s, Crisler posted messages about Buchanan on his Facebook page, his website, and in the comments sections of news articles. The comments consisted of Crisler's complaints regarding the quality of Buchanan's representation in 2011, including allegations of unethical conduct, collusion with the prosecutor and trial judges, and more general complaints relating to her purportedly deficient performance as counsel. He also tagged her on Facebook, thereby posting a link to Buchanan's Facebook page. Crisler's comments were clearly posted on the Internet without Buchanan's consent. MCL 750.411s(1). Further, while there is no indication that Crisler encouraged people to contact Buchanan (indeed, he encouraged people *not* to consult her as an attorney), Buchanan did receive several contacts relating to the postings. In 2012, she was contacted by strangers—Scally and Grashow—informing her of Crisler's postings about her. In 2016, she was also contacted by professional colleagues, who informed her that Crisler had posted about her online. Additionally, because Crisler "tagged" her on Facebook in 2015, Facebook sent Buchanan a message informing her that she had been tagged.

However, when considering whether Crisler's online comments should be enjoined for posting a message in violation of MCL 750.411s, the trial court wholly failed to consider the elements for posting a message in violation of MCL 750.411s. First of all, rather than focusing on the plain language of MCL 750.411s, the trial court turned to lay sources on the Internet to conclude that Crisler had engaged in "cyberbullying"

and "Facebook stalking."[9] Neither of these definitions appears in MCL 750.411s, and there is no basis for turning to these definitions instead of applying the statutory criteria to determine whether Crisler posted a message in violation of MCL 750.411s. Second, in finding that the postings were intended to harass Buchanan, the trial court erred by focusing on the effect of Crisler's postings on Buchanan when, as discussed, MCL 750.411s criminalizes cyberstalking by proxy, meaning that the focus should be on the effect of the conduct arising from Crisler's postings. In other words, if Crisler's postings led people to contact Buchanan and if those contacts can be considered unconsented, the correct inquiry for determining whether Crisler's posts violated MCL 750.411s is how the contacts from Scally, Grashow, Facebook, and Buchanan's professional colleagues made Buchanan feel and how a reasonable person would feel after receiving those contacts.[10] See MCL 750.411s(1)(c) and (d). By instead focusing on how the content of Crisler's postings made Buchanan feel, the trial court failed to correctly consider the elements of the statute.

Third, the trial court expressly stated that, even if Crisler may not have intended to threaten, intimidate,

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[9] Specifically, citing information found on the website stopbullying.gov, the trial court defined "cyberbullying" as "bullying that takes place using electronic technology. Examples of cyberbullying include mean text messages or emails, rumors sent by email or posted on social networking sites, and embarrassing pictures, videos, websites, or fake profiles." (Quotation marks omitted.) Likewise, relying on information found on the website nobullying.com, the trial court defined Facebook stalking as "attempting to humiliate [a victim] by posting mean-spirited, offensive, personal, or doctored photos of [the victim] on Facebook, or anywhere online." (Quotation marks omitted; alteration in original.)

[10] Related to this inquiry, the trial court also failed to address whether the contacts were "unconsented contacts" as defined in MCL 750.411s(8)(j).

or harass Buchanan, it was of no consequence "since the focus of the personal protection order statute and the stalking statutes is on the perception of the victim." To the extent that the trial court intended for this finding to apply to MCL 750.411s, the trial court ignored the clear directives in the statute. Specifically, MCL 750.411s(1)(b) makes plain that, to have posted a message in violation of MCL 750.411s, Crisler must have "*intended to cause conduct* that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested." (Emphasis added.) Contrary to the trial court's statement, Crisler's intent is relevant under MCL 750.411s. The trial court therefore erred by failing to determine whether by posting the messages Crisler intended to cause conduct that would meet the criteria of MCL 750.411s. The trial court also failed to decide whether Crisler knew or should have known that his posts could cause unconsented contacts. Overall, while prohibiting Crisler from posting messages about Buchanan online, the trial court did not make findings that support the conclusion that Crisler's postings amounted to a violation of MCL 750.411s.

Absent appropriate findings under MCL 750.411s, it is not clear whether Crisler violated MCL 750.411s or whether his Internet postings could be prohibited under the statute. The trial court's failure to address the elements of MCL 750.411s before restricting Crisler's postings is particularly troubling because whether his online speech may be enjoined as a constitutional matter depends, at least in part, on whether his speech was integral to criminal conduct that violated MCL 750.411s. In short, until the trial court makes findings that support the conclusion that Crisler violated MCL 750.411s, it was improper to use the statute as a basis to restrict Crisler's Internet

postings. In light of the trial court's failure to address whether Crisler's postings violated MCL 750.411s, we vacate the trial court's order regarding Internet postings and remand for a determination of whether Crisler's postings violated MCL 750.411s. If the trial court concludes that Crisler violated MCL 750.411s, before restricting Crisler's speech, the court should also consider Crisler's argument that he was engaged in constitutionally protected speech involving a matter of public concern that may not be prohibited under MCL 750.411s(6).

We affirm the trial court's denial of Crisler's motion to vacate the PPO insofar as the PPO prohibits Crisler from approaching Buchanan and sending her messages directly. However, we vacate the trial court's order to the extent it relates to Crisler's online postings, and we remand for proceedings consistent with this opinion. We do not retain jurisdiction.

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

TAYLOR v TAYLOR

Docket No. 336193. Submitted January 9, 2018, at Lansing. Decided February 22, 2018, at 9:05 a.m.

Dana A. Taylor filed for divorce from William Taylor, Jr., in the Washtenaw Circuit Court. William moved the trial court to determine paternity of the five-year-old child born during the parties' marriage. William also moved to join the person believed to be the child's biological father. The court, Darlene A. O'Brien, J., denied both motions, ruling that the court lacked jurisdiction because William failed to raise the issue of paternity within three years of the child's birth. William appealed by delayed leave granted.

The Court of Appeals *held*:

When a child has a presumed father, MCL 722.1441(2) provides two alternatives for initiating an action to determine paternity of the child: (1) the presumed father may file an action within three years of the child's birth to determine the child's paternity, or (2) the presumed father may raise the issue of paternity in an action for divorce or separate maintenance involving the child's mother and presumed father. The trial court agreed with Dana that William's motion failed because it was not brought within the three-year limitations period. But MCL 722.1441(2) contains the disjunctive word "or," which signifies a choice between two alternatives. MCL 722.1441(2) thus sets forth *two* situations in which a paternity determination may be sought, and William properly moved for determination of paternity in the context of the second situation—an action for divorce or separate maintenance between the presumed father and the mother. The three-year limitations period does not apply when a presumed father raises the issue in an action for divorce or separate maintenance. The trial court erred by denying William's motion on the basis that the issue was raised more than three years after the child's birth; that decision had to be reversed, and the case had to be remanded for further proceedings.

Reversed and remanded.

DIVORCE — CHILDREN — PRESUMED FATHER — CHALLENGING PATERNITY.

Under MCL 722.1441(2), a presumed father may bring an action to challenge the paternity of a child born during his marriage to the child's mother within three years of the child's birth *or* a presumed father may challenge the paternity of a child born during his marriage to the child's mother in an action for divorce or separate maintenance between the presumed father and the mother without regard to the three-year limitations period.

Fraser Legal, PC (by *James Fraser*) for William Taylor, Jr.

Caplan & Associates, PC (by *Matthew A. Caplan* and *David M. Caplan*) for Dana A. Taylor.

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

SAWYER, J. We are asked whether a presumed father may, in a divorce action, challenge his paternity of a child born during the course of the marriage despite the fact that he did not raise the issue within three years of the child's birth. We conclude that he may.

The parties were married in 2000. The youngest child born during the course of the marriage was born in 2011 while the parties were separated. Both parties agree that defendant is not the biological father of the child. In fact, this is supported by a DNA test that established that there is a 0% probability that defendant is the child's biological father.

Plaintiff filed for divorce in 2016, when the child was five years old. Defendant thereafter moved the trial court for a paternity determination pursuant to MCL 722.1443(1). Defendant also moved to join the person believed to be the biological father. The trial court eventually denied both motions, believing that it lacked jurisdiction because defendant had not

raised the issue within three years of the child's birth. Defendant now appeals by delayed leave granted, and we reverse.

Resolution of this case depends on the proper interpretation of this sentence in MCL 722.1441(2):

> If a child has a presumed father, a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if an action is filed by the presumed father within 3 years after the child's birth or if the presumed father raises the issue in an action for divorce or separate maintenance between the presumed father and the mother.[1]

The trial court interpreted this sentence to mean that the issue must always be raised within three years of the child's birth; defendant argues that the three-year limitation does not apply if the issue is raised in a divorce action. We agree with defendant's interpretation.

We review de novo questions of statutory interpretation.[2] The word "or" is disjunctive and indicates a choice between alternatives.[3] Thus, MCL 722.1441(2) presents two alternatives: first, when "an action is filed by the presumed father within 3 years after the child's birth," and second, when "the presumed father raises the issue in an action for divorce or separate maintenance between the presumed father and the mother." The three-year limitation only applies in the first situation, and this case involves the second situation.

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[1] Defendant is the presumed father because he was married to plaintiff at the time of the child's conception or birth. MCL 722.1433(e).

[2] *Demski v Petlick*, 309 Mich App 404, 426; 873 NW2d 596 (2015).

[3] *Stock Bldg Supply, LLC v Crosswinds Communities, Inc*, 317 Mich App 189, 204; 893 NW2d 165 (2016).

It is true that the words "or" and "and" are often used erroneously.[4] But "the words are not interchangeable and their strict meaning 'should be followed when their accurate reading does not render the sense dubious' and there is no clear legislative intent to have the words or clauses read in the conjunctive."[5]

There is no clear indication that the Legislature intended to use the word "and" rather than "or." Indeed, doing so would either make no change to the meaning of the statute or make a dramatic change to the meaning. If we simply conclude that the Legislature intended to use "and" instead of "or" the sentence would read like this:

> If a child has a presumed father, a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if an action is filed by the presumed father within 3 years after the child's birth ~~or~~ and if the presumed father raises the issue in an action for divorce or separate maintenance between the presumed father and the mother.

This reading would seem to present the court with the same two different avenues to determine that a child was born out of wedlock without extending the three-year limitation to divorce and separate maintenance cases.

To extend the three-year limitation to divorce cases, we would have to substitute the word "and" for both "or" and "if" so that the sentence would read as follows:

> If a child has a presumed father, a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if an action is filed by the

[4] *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50; 575 NW2d 79 (1997).

[5] *Id*. at 50-51, quoting *Esperance v Chesterfield Twp*, 89 Mich App 456, 460-461; 280 NW2d 559 (1979) (quotation marks omitted).

> presumed father within 3 years after the child's birth ~~or if~~ <u>and</u> the presumed father raises the issue in an action for divorce or separate maintenance between the presumed father and the mother.

Not only would this reading achieve plaintiff's interpretation of applying the three-year limitation to divorce actions, it would also require that the presumed father raise the issue both in the divorce action and in a paternity action at the same time. That would create the additional restriction that there must be a divorce or separate maintenance action in order to raise the issue; there is nothing in the statute suggesting that this is what the Legislature intended. Indeed, it would take away the husband's option of challenging the paternity of a child born during the course of the marriage without also filing for divorce.

Therefore, we are left with only one rather unremarkable conclusion: the Legislature intended exactly what it said. The presumed father may raise the issue in a paternity action filed within three years of the child's birth OR in a divorce action (without regard to the child's age). Accordingly, the trial court erred by denying defendant's motions on the basis that the issue was raised in a divorce action more than three years after the child's birth.

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

MURPHY, P.J., and BECKERING, J., concurred with SAWYER, J.

PEOPLE v WILLIAMS

Docket No. 332834. Submitted October 4, 2017, at Detroit. Decided February 22, 2018, at 9:10 a.m. Part II(B) reversed and the larceny-in-a-building conviction reinstated 504 Mich ___.

Kathleen L. Williams was convicted of larceny from the person, MCL 750.357, and larceny in a building, MCL 750.360, after a jury trial in the Wayne Circuit Court. The court, Vonda R. Evans, J., sentenced Williams to two years of probation for each conviction. In February 2015, the Michigan State Police conducted a sting operation at the Greektown Casino in Detroit, Michigan, in which a decoy placed a $100 ticket on the deck of a slot machine. The decoy then sat about a foot away from the machine with her back to the ticket and played on her cell phone. Williams passed by the decoy and the ticket twice; she then walked behind the decoy, reached down, took the ticket, and immediately walked away. The police arrested Williams after she had walked approximately five feet with the ticket in hand. Williams was charged, convicted, and sentenced as indicated. She appealed.

The Court of Appeals *held*:

1. A conviction of larceny from the person requires that the defendant take and move someone else's property from the person of another or from that person's immediate presence without consent and with the intent to steal or permanently deprive the owner of the property. Viewed in the light most favorable to the prosecution, the evidence in this case was sufficient for a rational trier of fact to find beyond a reasonable doubt that Williams took property belonging to another person from the immediate presence of the decoy. "Immediate presence" requires immediate proximity between the object and the victim. "Immediate" means having no object or space intervening, nearest, or next; even objects that are relatively close to a person are not considered in the person's immediate presence unless they are *immediately* next to the person. In this case, although the decoy was not facing the ticket and Williams argued that this negated the claim that the ticket was in the decoy's immediate presence, other evidence existed to support the jury's verdict. Williams's encroachment to within one foot of the decoy and the lack of any intervening objects meant that the ticket was taken from the decoy's immediate presence.

2. A defendant's state of mind may be inferred from all the evidence presented. Williams's conduct before she took the ticket was consistent with a larcenous intent—an intent to permanently deprive the decoy of the ticket. Williams surveyed the scene by walking past the decoy twice while looking at the decoy and the ticket, and she moved behind the decoy without disturbing her. Further, after Williams picked up the ticket, she immediately walked away with it, rather than ask if the ticket belonged to the decoy. Moreover, Williams admitted that she knew the ticket was not her own. These facts satisfied the minimal circumstantial evidence required to prove Williams's intent. The fact that Williams did not have time to leave the casino with the ticket, cash it, or use it, did not negate the evidence of intent established by Williams's conduct before she took the ticket.

3. Convictions for larceny from the person, MCL 750.357, and larceny in a building, MCL 750.360, are mutually exclusive rather than merely inconsistent. That is, larceny may be from a person or in a building, but not both at the same time. A guilty verdict on one count logically excludes a finding of guilt on the other. Larceny from the person requires that the stolen item have been under the personal protection of a person who was in the immediate presence of the item. In contrast, larceny from a building occurs when property is *not* within the dominion of the person. Larceny from the person and larceny in a building may be charged in the alternative, but the fact that the victim of a larceny from the person happens to be in a building at the time of the larceny does not also make the larceny a larceny in a building.

Conviction of larceny from the person affirmed, and conviction of larceny in a building vacated.

CRIMINAL LAW — MUTUALLY EXCLUSIVE CONVICTIONS — LARCENY FROM THE PERSON AND LARCENY IN A BUILDING.

Convictions of larceny from the person and larceny in a building for the same act are mutually exclusive because a guilty verdict on one count logically excludes a finding of guilt on the other count; property in a building may be under the protection of a person—i.e., in the immediate presence of the person—or under the protection of the building—i.e., not in the immediate presence of a person—but property may not be both at the same time (MCL 750.357; MCL 750.360).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody* and *B. Eric Restuccia*, Chief Legal Counsel, and *Christopher M. Allen*, Assistant Attorney General, for the people.

State Appellate Defender (by *Katherine L. Marcuz*) for defendant.

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

PER CURIAM. Following a jury trial, defendant appeals her convictions of larceny from the person, MCL 750.357, and larceny in a building, MCL 750.360. The trial court sentenced defendant to two years' probation for each conviction. We vacate defendant's conviction of larceny in a building but affirm her conviction of larceny from the person.

I. FACTS

On February 27, 2015, the Michigan State Police, using a decoy, conducted a sting operation at the Greektown Casino in Detroit, Michigan. The decoy placed a $100 ticket on the deck of a slot machine and sat with her back to the ticket about a foot away from the machine while she played on her cell phone. Ultimately, defendant approached the decoy, twice passed by while looking at the decoy and the ticket, and then walked behind the decoy, reached down, took the ticket with her right hand, and immediately walked away. The police arrested defendant after she walked approximately five feet with the ticket in her hand. She was charged as noted.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE OF LARCENY FROM THE PERSON

Defendant first argues that there was insufficient evidence to convict her of larceny from the person

because the prosecution failed to prove beyond a reasonable doubt that she took property from the person of another. We disagree.[1]

In reviewing the sufficiency of the evidence, this Court must view the evidence " 'in the light most favorable to the prosecutor and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' " *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015) (citation omitted). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). A prosecutor need not negate every reasonable theory of innocence but must only prove the elements of the crime beyond a reasonable doubt "in the face of whatever contradictory evidence the defendant may provide." *Id*. (quotation marks and citation omitted).

The elements of larceny from the person are " '(1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person's immediate area of control or immediate presence.' " *People v Smith-Anthony*, 296 Mich App 413, 423 n 5; 821 NW2d 172 (2012) (citation omitted), aff'd 494 Mich 669 (2013). Defendant questions whether taking the ticket off the slot machine while the victim was one foot away constitutes taking from the victim's immediate presence.

The Michigan Supreme Court "has interpreted the phrase 'from the person of another' to include takings

[1] "This Court reviews de novo [a] challenge to the sufficiency of the evidence." *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

from the possession and immediate presence of the victim." *People v Smith-Anthony*, 494 Mich 669, 681; 837 NW2d 415 (2013). The Court acknowledged that there was "scant [Michigan] caselaw explaining the scope of the immediate presence standard," but it reviewed caselaw from other jurisdictions to define a standard for "immediate presence" that requires "*immediate* proximity between the object and the victim." *Id*. at 687. The Court further elaborated that " 'immediate presence' in the larceny-from-the-person context is consistent with the plain meaning of the word 'immediate,' which means 'having no object or space intervening, nearest or next.' " *Id*. at 688 (citation omitted). During its explanation of "immediate presence," the Supreme Court articulated that "[e]ven objects that are relatively close to a person are not considered to be in the person's immediate presence unless they are *immediately* next to the person." *Id*. at 687.

The trial court instructed the jury on the elements of larceny from the person, including an instruction that "[i]mmediate presence means that the property was physically connected to [the victim], or was right next to her." The testimony and video showed that the ticket was about one foot from the decoy and that there was no intervening object in that space. Defendant points out that the decoy had her back to the ticket for some time before defendant took it, and she argues that this negates any claim that the ticket was in the decoy's "immediate presence." We agree that the fact that the decoy was not facing the object weighs in favor of a finding that it was not in her "immediate presence," but it does not negate the other evidence, which is sufficient to support the verdict. The jury could properly determine that defendant's encroachment within one foot of the decoy and the lack of any intervening

objects meant that the ticket was taken from the decoy's immediate presence.[2]

Defendant next argues that her conviction of larceny from the person should be vacated because the prosecution failed to prove beyond a reasonable doubt that she intended to permanently deprive the decoy of the ticket. We disagree because evidence was presented that defendant acted in a manner consistent with a larcenous intent *before* she took the ticket. She surveyed the scene by walking past the decoy twice while looking at the decoy and the ticket, and she moved behind the decoy without disturbing her. After she picked up the ticket, she did not ask the decoy if it belonged to her; rather, defendant immediately walked away with the ticket. Moreover, defendant admitted that she knew the ticket was not hers. These facts satisfy the minimal circumstantial evidence required to prove intent. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008) ("[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented."). Similarly, defendant's argument that she did not have time to leave the casino with the ticket, cash it, or use it does not negate the evidence of intent established by her conduct before she took the ticket.

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence pre-

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[2] We reject defendant's argument that this case is similar to *People v Smith*, 121 P3d 243 (Colo App, 2005). In *Smith*, the defendant took an item from the victim's shopping cart while the victim was "at the other end of the aisle," a distance estimated at twenty yards. *Id*. at 248. The cases are not similar given the very different distances at issue.

sented for a rational trier of fact to find the essential elements of larceny from the person proved beyond a reasonable doubt.

B. MUTUALLY EXCLUSIVE CONVICTIONS

After oral argument, we directed the parties to brief an additional issue, i.e., "whether, under the circumstances of this case, the convictions for larceny from the person, MCL 750.357, and larceny in a building, MCL 750.360, are inconsistent such that one of the two convictions must be vacated."[3] After a review of the briefs and the record, we conclude that the two convictions require findings that are mutually exclusive, a circumstance resulting in a situation "where a guilty verdict on one count logically excludes a finding of guilt on the other." *United States v Powell*, 469 US 57, 69 n 8; 105 S Ct 471; 83 L Ed 2d 461 (1984).[4]

As noted, in *Smith-Anthony*, the Supreme Court addressed issues related to those in the instant case. In *Smith-Anthony*, a security agent watching on closed circuit television in an office inside the store observed the defendant steal a perfume bottle. *Smith-Anthony*, 494 Mich at 673-674. The Court concluded that in order to be a larceny from the person, the stolen item

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[3] *People v Williams*, unpublished order of the Michigan Court of Appeals, entered November 16, 2017 (Docket No. 332834).

[4] Our order imprecisely used the term "inconsistent" because the issue here does not involve whether the jury's verdicts are inconsistent, but rather whether the two convictions are mutually exclusive. An example of an inconsistent verdict would be a jury convicting a defendant of possessing a firearm during the commission of a felony while acquitting him of the underlying charged felony. See *People v Lewis*, 415 Mich 443; 330 NW2d 16 (1982). A mutually exclusive verdict occurs when a guilty verdict on one count requires a finding of fact that "negatives some fact essential to a finding of guilty on a second count . . . ." See *United States v Daigle*, 149 F Supp 409, 414 (D DC, 1957).

must have been under the "personal protection" of a person who is in the "immediate presence" of the item, *id*. at 690-691, and that "[t]his standard is satisfied when the defendant takes property that is in the physical possession of a victim or property that is in immediate proximity to a victim when the taking occurs," *id*. at 692-693.

The *Smith-Anthony* Court contrasted the situation in which an item is under the protection of a person with the situation underlying the crime of larceny in a building. It stated that the latter occurs when the property is not within the "dominion" of a person and is therefore "only under the 'protection' of the store." *Id*. at 691. In the following excerpt, the Court reviewed relevant common-law doctrine and cited with approval a passage from Perkins & Boyce, Criminal Law (3d ed):

> Finally, there is a related common-law doctrine that provides additional support for our conclusion. At common law, courts treated the taking of merchandise off a shelf or rack as a larceny from a building, not larceny from a person. Such takings were considered larcenies from a person only if an employee had been exercising direct control over the specific property at the time of the taking. As Professor Perkins explains,
>
> > Goods on open shelves, goods standing on the floor, goods arranged on tables or counters are normally treated as within the protection of the building. One distinction, however, is to be noted. If a jewel or other valuable thing, normally kept out of open reach of customers, is placed on the counter under the eye of the storekeeper or clerk while it is being examined by a customer, this is regarded as under the personal protection of the storekeeper or clerk at the moment, rather than under the protection of the building; whereas articles placed on the

> counter with the expectation that they will remain there all day, unless purchased, are under the protection of the building.
>
> [*Smith-Anthony*, 494 Mich at 690-691, quoting Perkins & Boyce, pp 340-341.]

Reference to this treatise provides additional detail concerning the common-law treatment of these two offenses:

> Some of the statutes speak of larceny *from* a building and others refer to larceny *in* a building, but there is no difference in the meaning as interpreted by the courts. . . . The issue is whether the property stolen was under the protection of the [building]. . . . *If property is in the pocket of some person within the building, or under his personal care at the moment in some other way, it is not regarded as within the protection of the building*. *The stealing of such property . . . will be larceny from the person rather than larceny from a building*. [Perkins & Boyce, p 340 (emphasis added).]

We also note that while the body of MCL 750.360 provides that the crime occurs when a person "commit[s] the crime of larceny by stealing *in* any dwelling house," the statute's title reads, "Larceny *from* places of abode, work, storage . . . ," MCLA 750.360 (2004) (emphasis added). See also *People v Klammer*, 137 Mich 399, 400-401; 100 NW 600 (1904).

Recently, in *People v Davis*, 320 Mich App 484, 486; 905 NW2d 482 (2017), we found mutually exclusive guilty verdicts when the defendant was convicted of assault with intent to do great bodily harm and aggravated domestic violence. The aggravated domestic violence statute, MCL 750.81a(2), provides, in pertinent part, that "an individual who assaults . . . an individual with whom he or she has had a dating relationship . . . without intending to commit murder or to in-

flict great bodily harm . . . is guilty" of that offense. At the same time, the statute defining assault with intent to do great bodily harm requires a finding that the defendant acted "with intent to do great bodily harm . . . ." MCL 750.84(1)(a). We concluded in *Davis* that "these two offenses are mutually exclusive from a legislative standpoint," *Davis*, 320 Mich App at 490, where the statutes "reveal[] that a defendant cannot violate both statutes with one act as he or she cannot both intend and yet *not* intend to do great bodily harm," *id*.

Consistent with that principle, we conclude that a larceny may be "from a person" or "in a building," but not both at the same time. The fact that the victim of a larceny from the person is in a building at the time of the larceny is not sufficient to convict of larceny in a building. Therefore, although a defendant may be charged with these offenses in the alternative with regard to the same larceny, he or she may not be convicted of both.

We affirm defendant's conviction of larceny from the person and vacate her conviction of larceny in a building.

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

DROUILLARD v AMERICAN ALTERNATIVE
INSURANCE CORPORATION

Docket No. 334977. Submitted February 6, 2018, at Detroit. Decided February 27, 2018, at 9:00 a.m. Reversed and remanded ___ Mich ___.

Jeremy Drouillard filed an action in the St. Clair Circuit Court against American Alternative Insurance Corporation (AAIC), seeking to recover uninsured motorist benefits for injuries he had suffered in a single-vehicle accident. Plaintiff was injured when the ambulance he was riding in as an emergency medical technician hit building materials that had fallen out of a truck and onto a roadway. According to witnesses, the driver of the truck did not stop after the materials fell out of the truck and the accident occurred mere seconds after the materials landed in the roadway. The insurance policy issued by AAIC to plaintiff's employer contained an endorsement for uninsured motorist coverage. Under the policy, AAIC was obligated to pay all amounts an insured individual was entitled to recover from the owner or driver of an "uninsured motor vehicle." In relevant part, the policy defined the phrase "uninsured motor vehicle" as a land motor vehicle or trailer that is a hit-and-run vehicle and neither the driver nor the owner can be identified. The policy provided that for coverage to apply, the hit-and-run vehicle must hit, or cause an object to hit, an insured, a covered auto, or a vehicle an insured is occupying. Defendant sought summary disposition on the grounds that an uninsured motor vehicle was not involved in the accident, arguing that the truck did not qualify as a hit-and-run vehicle as defined in the policy because the truck did not cause an object to hit the insured ambulance as required by the policy. The court, Michael L. West, J., concluded that it was bound by the decision in *Dancey v Travelers Prop Cas Co of America*, 288 Mich App 1 (2010), and on that basis denied defendant's motion. Defendant appealed by delayed leave granted.

The Court of Appeals *held*:

1. Because an insurance policy is a contractual agreement, a court must determine what the agreement was and effectuate the intent of the parties when interpreting the policy. Although the *Dancey* Court interpreted identical policy language in a case that

involved substantially similar facts, contrary to the trial court's conclusion, the *Dancey* holding was not dispositive of this case because each case focused on different requirements under the respective policies: the *Dancey* Court focused on whether the plaintiff was able to establish a substantial physical nexus between the ladder the plaintiff had hit and the unknown hit-and-run vehicle, while the court in this case assumed that a substantial nexus existed between the truck, the building materials, and the ambulance's impact with the material and instead focused on how to give effect to the language that required the hit-and-run vehicle to have caused the object to hit the insured. Given the grammatical structure of the policy language, coverage was available only if the hit-and-run vehicle caused an object—here, the building materials—to hit the insured ambulance. Plaintiff admitted that the building materials were stationary in the roadway when the ambulance hit them. Plaintiff was not entitled to uninsured motorist benefits because the hit-and-run vehicle did not cause the building materials to hit the insured vehicle, but instead, the ambulance hit the materials. For that reason, the trial court erred by denying defendant's motion for summary disposition.

2. It was unnecessary to determine whether the phrase "hit-and-run vehicle" required the driver to have knowledge of the accident—as common usage of the phrase "hit-and-run" denotes and certain criminal statutes proscribing criminal penalties for such action require—because, even assuming that there is a knowledge requirement, the trial court correctly concluded that there were questions of fact regarding the knowledge issue. Specifically, given the quantity of materials dropped in the roadway and the immediacy of the collision, reasonable minds could have differed regarding whether the truck's driver was aware of the loss of the building materials and the subsequent accident.

Reversed and remanded.

TUKEL, J., concurring, agreed that (1) the trial court erred by denying defendant's motion for summary disposition because the truck did not hit or cause an object to hit the ambulance as required under the policy and (2) summary disposition would have been precluded if the phrase "hit-and-run vehicle" included a knowledge-of-the-accident component given that there was testimony from which that knowledge could be inferred. Judge TUKEL wrote separately to note that the cases relied on by the dissent—*Dancey* and *Berry v State Farm Mut Auto Ins Co*, 219 Mich App 340 (1996)—failed to discuss whether the at-fault

vehicle constituted a "hit-and-run vehicle" for purposes of the relevant insurance policies and to caution courts regarding the effect the underlying assumptions in those cases could have on future cases. Specifically, the opinions in those cases did not consider whether the "hit" had occurred before the "run"—a temporal requirement of the phrase "hit-and-run vehicle." The failure to consider the temporal requirement of the language strained the phrase "hit-and-run vehicle" beyond a reasonable reading.

METER, J., dissenting, agreed with the majority that defendant was not entitled to summary disposition on the issue of whether the truck driver had knowledge of the accident and was required to have that knowledge under the policy but disagreed with the majority's analysis of existing caselaw. Because the *Dancey* and *Berry* Courts implicitly held that the facts in each case satisfied the pertinent "cause an object to hit" language of the respective policies, the cases supported plaintiff's position in this case. In addition, given the dictionary definition of the term "hit" and the plain language of the policy, plaintiff was entitled to uninsured motorist benefits because evidence established that the building materials in the road "hit" the ambulance as required by the policy. Judge METER would have affirmed the trial court's denial of defendant's motion for summary disposition.

Mark Granzotto, PC (by *Mark Granzotto*) and *Fraser & Souweidane* (by *Stuart A. Fraser IV*) for plaintiff.

Kallas & Henk, PC (by *Constantine N. Kallas* and *Michele L. Riker-Semon*) for defendant.

Before: TALBOT, C.J., and METER and TUKEL, JJ.

TALBOT, C.J. Defendant, American Alternative Insurance Corporation (AAIC), appeals by leave granted[1] an order denying its motion for summary disposition in this dispute over uninsured motorist coverage. We reverse and remand for entry of an order granting summary disposition in favor of AAIC.

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[1] *Drouillard v American Alternative Ins Corp*, unpublished order of the Court of Appeals, entered February 23, 2017 (Docket No. 334977).

On the evening of October 13, 2014, plaintiff, Jeremy Drouillard, an emergency medical technician, was involved in a single-vehicle accident while riding as a passenger in an ambulance driven by his partner, Angelica Schoenberg. Schoenberg and Drouillard were traveling westbound on Griswold, in "lights and sirens mode," on their way to a service call near the intersection of Griswold and 14th Street. Schoenberg opined that she was driving less than 45 miles per hour when the ambulance suddenly struck something in the intersection of Griswold and 13th Street. She did not know what she struck until she exited the ambulance and saw drywall dust and debris scattered in the roadway. As a result of the accident, Drouillard suffered injuries to his lumbar spine and was eventually disabled from work.

The events surrounding the accident were witnessed by three bystanders, who resided in homes fronting Griswold near the intersection with 13th Street. According to these bystanders, a white pickup truck driving on 13th Street darted across Griswold in front of the ambulance. The rapid acceleration of the truck caused a large quantity of building materials to fall from the truck's bed or trailer into the roadway, blocking both traveling lanes on Griswold. Shortly thereafter, the ambulance entered the intersection and struck the building materials.

Drouillard's employer maintained insurance for the ambulance through a policy issued by AAIC, which included an endorsement for Michigan uninsured motorist coverage. The endorsement stated that AAIC would pay all amounts an insured individual was entitled to recover from the owner or driver of an "uninsured motor vehicle." Pertinent to this matter, the policy defined "uninsured motor vehicle" as follows:

> 3. "Uninsured motor vehicle" means a land motor vehicle or "trailer":
>
> * * *
>
> d. That is a hit-and-run vehicle and neither the driver nor owner can be identified. The vehicle must hit, or cause an object to hit, an "insured", a covered "auto" or a vehicle an "insured" is "occupying". If there is no direct physical contact with the hit-and-run vehicle, the facts of the "accident" must be corroborated by competent evidence, other than the testimony of any person having a claim under this or any similar insurance as the result of such "accident".

Drouillard filed suit against AAIC on September 21, 2015, seeking uninsured motorist benefits pursuant to the stated policy terms. AAIC admitted that Drouillard was an "insured" who would qualify for uninsured motorist benefits if all other terms and conditions were satisfied, but AAIC maintained that benefits were not available to Drouillard because there was no "uninsured motor vehicle" involved in the accident. AAIC moved for summary disposition on this basis, arguing that the pickup truck did not qualify as a hit-and-run vehicle and that the pickup truck did not cause an object to hit the insured ambulance. The trial court rejected both arguments, and this appeal followed.

This Court reviews de novo rulings on summary disposition motions.[2] AAIC did not identify the subrule under which it brought its motion for summary disposition. However, because AAIC challenged the factual sufficiency of Drouillard's claim and relied on evidence beyond the pleadings, we review the court's ruling

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[2] *Dancey v Travelers Prop Cas Co of America*, 288 Mich App 1, 7; 792 NW2d 372 (2010).

under the standards applicable to MCR 2.116(C)(10).[3] The trial court may grant a motion for summary disposition under MCR 2.116(C)(10) only if "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law."[4] "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ."[5]

"An insurance policy is similar to any other contractual agreement, and, thus, the court's role is to 'determine what the agreement was and effectuate the intent of the parties.' "[6] The Court ascertains the intent of the parties by examining the language employed in the contract.[7] The words and phrases used should be construed in context, and this Court may consult a dictionary in order to ascertain the plain and ordinary meaning of undefined language.[8] "Every word, phrase, and clause in a contract must be given effect, and [an] interpretation that would render any part of the contract surplusage or nugatory must be avoided."[9] "If the contractual language is unambiguous, courts must interpret and enforce the contract as written because

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[3] See *Nuculovic v Hill*, 287 Mich App 58, 61-62; 783 NW2d 124 (2010).

[4] *Dancey*, 288 Mich App at 7, quoting *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) (quotation marks omitted).

[5] *Dancey*, 288 Mich App at 8, quoting *West*, 469 Mich at 183 (quotation marks omitted).

[6] *Hunt v Drielick*, 496 Mich 366, 372; 852 NW2d 562 (2014), quoting *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992).

[7] *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012).

[8] *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004); *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 145; 871 NW2d 530 (2015).

[9] *McCoig Materials, LLC*, 295 Mich App at 694.

an unambiguous contract reflects the parties' intent as a matter of law."[10] "A contract is ambiguous when, after considering the entire contract, its words may reasonably be understood in different ways."[11]

AAIC argues on appeal that it was entitled to summary disposition because there was no evidence that an "uninsured motor vehicle" was involved in the accident in light of the contractual definition of an uninsured motor vehicle as a vehicle that is a "hit-and-run vehicle." Specifically, AAIC argues that the common usage of the phrase "hit-and-run" denotes a knowledge element on the part of the driver, and AAIC calls our attention to various statutes establishing criminal penalties for a " 'driver of a vehicle who knows or who has reason to believe that he or she has been involved in an accident' " but fails to stop at the scene.[12] Drouillard, on the other hand, contends that the phrase "hit-and-run" does not involve a knowledge component and suggests that a hit-and-run vehicle is involved in an accident whenever neither the driver nor the owner of the vehicle can be identified.

We find it unnecessary to determine whether the phrase "hit-and-run vehicle" requires knowledge of the accident on the part of the driver because assuming, without deciding, that knowledge *is* required, the trial court correctly concluded that questions of fact remained as to that issue. On appeal, AAIC argues that the only evidence of the truck driver's knowledge consisted of eyewitness speculation.[13] Although it is

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[10] *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009).

[11] *Auto-Owners Ins Co*, 310 Mich App at 146.

[12] See MCL 257.617; MCL 257.617a; MCL 257.618; MCL 257.619.

[13] Presumably, AAIC is referring to eyewitness opinion testimony that the driver "had to feel that shift of weight," that the driver did not return

true that "[s]peculation and conjecture are insufficient to create an issue of material fact,"[14] a fact-finder could infer from evidence other than eyewitness speculation that the driver was aware that the building materials he was hauling had fallen into the road. Although the eyewitnesses differed as to whether the building materials included lumber or consisted solely of drywall, they agreed that there was such a large amount of materials deposited in the road that the pile measured approximately two feet high. They also agreed that the accident occurred quickly after the materials landed in the roadway: one witness described the lapse of time as approximately three to five seconds; another witness estimated that it was "[m]aybe half a minute, if that"; and a third witness observed that the pickup truck had "barely cleared the intersection" before the ambulance arrived. Given the quantity of dropped materials and the immediacy of the ambulance's collision, reasonable minds could differ as to whether the driver knew about the loss of the building materials from the sudden absence of weight from the vehicle and, in turn, came to realize that the materials had caused an accident. The trial court did not err by reaching the same conclusion.

Next, AAIC argues that the plain language of the insurance policy only provides coverage in these circumstances if the pickup truck caused an object to hit the insured ambulance. Therefore, according to AAIC, it was entitled to summary disposition because the unrefuted evidence demonstrated that the ambulance struck the stationary pile of building materials—the building materials did not strike the ambulance.

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because "he knew he was going to be in trouble," and that "if you lost that much weight, you could tell . . . ."

[14] *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 464; 708 NW2d 448 (2005).

As it relates to this issue, the trial court found that it was required by this Court's holding in *Dancey* to deny AAIC's motion for summary disposition. In that case, this Court was called upon to interpret identical policy language to determine whether the plaintiff was entitled to uninsured motorist benefits after she struck a ladder in the roadway when there was no direct evidence that the ladder had fallen from a vehicle.[15] The Court examined a line of cases involving accidents in which a vehicle came into contact with some object cast off from another vehicle.[16] It found the circumstances before it distinguishable from similar cases because there was no "objective and convincing evidence of another unidentified vehicle that could have been the source of the object that made contact with the insured vehicle."[17] Nonetheless, it affirmed the trial court's denial of summary disposition because the accident had occurred on a raised overpass that was only accessible to vehicular traffic.[18] The Court reasoned that even without evidence of an identified vehicle from which the ladder may have fallen, the unique location of the accident created a question of fact "with regard to whether a substantial physical nexus exists between the ladder and an unidentified hit-and-run vehicle."[19]

Importantly, the issue before the Court in *Dancey*, and the reason for the Court's conclusion, was whether the plaintiff could establish a substantial physical nexus between the ladder and a hit-and-run vehicle. By contrast, as it did in the trial court, AAIC asks this

[15] *Dancey*, 288 Mich App at 11-12.

[16] *Id*. at 13-18.

[17] *Id*. at 17.

[18] *Id*. at 19-22.

[19] *Id*. at 21.

Court to assume for purposes of its appeal that a substantial nexus existed between the pickup truck, the building materials, and the ambulance's impact with the materials. Therefore, we agree with AAIC's contention that the trial court erred by concluding that it was bound to follow the outcome in *Dancey*. Although *Dancey* involved the same policy language and substantially similar facts, it did not turn on the same issue—i.e., how to give effect to the language requiring that the hit-and-run vehicle "cause an object to hit" the insured, an insured vehicle, or a vehicle occupied by an insured. Therefore, *Dancey* was not dispositive of the issue raised by AAIC.

It is evident from the plain language of the policy that coverage is not limited to instances involving direct, physical contact with the hit-and-run vehicle. Instead, the policy states that "[t]he vehicle must hit, *or cause an object to hit*, an 'insured', a covered 'auto' or a vehicle an 'insured' is 'occupying[.]' "[20] For that reason, coverage would be afforded in this case despite the absence of physical contact between the ambulance and the pickup truck as long as the pickup truck "cause[d] an object to hit" the ambulance. According to AAIC, this condition was not satisfied because the unrefuted testimony demonstrated that the pickup truck did not cause the building materials to hit the ambulance; rather, the ambulance hit the stationary building materials. We agree.

The construction of the relevant policy language reflects a clear distinction between the direct object and the indirect object. Coverage is available under the policy only if the subject of the sentence (the "vehicle," meaning the hit-and-run vehicle) caused the direct object ("an object") to hit the indirect object ("an

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[20] Emphasis added.

'insured', a covered 'auto' or a vehicle an 'insured' is 'occupying' "). The order of the words in this sentence is grammatically distinct from the language that would be used to describe circumstances in which the hit-and-run vehicle caused the insured to hit an object. Interpreting the language at issue in a manner that would include those circumstances would require a "forced or constrained construction," which should be avoided.[21]

Drouillard relies on a dictionary definition of the verb "to hit" to refute this reading of the policy language. Specifically, Drouillard calls attention to a particular definition of the word "hit": "to come in contact with."[22] However, it is worth noting that the quoted definition is followed by an illustration of the term and definition: "to come in contact with <the ball ~ the window>[.]"[23] In that illustration, the swung dash replaces the word being illustrated.[24] Therefore, the definition proffered by Drouillard is best illustrated by the following usage: "the ball hit the window." Even this definition suggests a distinction between the object doing the hitting—the ball—and the object being hit—the window. In that example, it is certainly true that the ball and window came in contact with each other, but, absent extraordinary circumstances, it is improbable that a window hit a stationary ball.

Accordingly, we must conclude that the plain language of the contract provides uninsured motorist coverage to Drouillard only if the unidentified pickup truck caused an object to hit the insured ambulance, and not vice versa. Reviewing the pertinent section as

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[21] *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 222; 600 NW2d 427 (1999) (quotation marks and citation omitted).

[22] *Merriam-Webster's Collegiate Dictionary* (11th ed).

[23] *Id*.

[24] *Id*. at p 19a.

a whole, the language cannot reasonably be understood in any other way. Importantly, Drouillard and Schoenberg both admitted that the building materials were stationary at the time of the accident, and Schoenberg agreed that, as the driver of the ambulance, she struck the materials in the roadway. Therefore, this is not a situation in which a hit-and-run vehicle caused an object to hit the insured ambulance, and Drouillard is not entitled to uninsured motorist benefits under the terms of the policy.

Reversed and remanded for entry of an order granting summary disposition in favor of AAIC. We do not retain jurisdiction.

TUKEL, J., concurred with TALBOT, C.J.

TUKEL, J. (*concurring*). I agree that summary disposition must be granted to defendant, and I join the majority opinion. There are two principal legal points at issue: (1) did the pickup truck hit, or cause an object to hit, the ambulance as required by the policy language for there to be coverage and (2) was the pickup truck a "hit-and-run vehicle" as required by the policy language for there to be coverage. The Chief Judge and I answer the first question in the negative, which is sufficient to mandate summary disposition in favor of defendant. The dissent answers the first question in the affirmative by relying on previous decisions of this Court that have ignored the second question and that have merely assumed that the vehicles at issue in those cases were hit-and-run vehicles. I write separately to identify the assumptions that have been and are being built into our jurisprudence—assumptions I believe merit review by our Supreme Court. Although this case likely does not present the issues clearly

enough to warrant that review, I believe those assumptions would merit review in a future case.

I. POLICY LANGUAGE

The policy at issue here required that the pickup truck carrying the drywall "*hit, or cause an object to hit*, an 'insured', a covered 'auto' or a vehicle an 'insured' is 'occupying[.]' " (Emphasis added.) Rather than focusing on the critical "hit, or cause an object to hit" language, as does the majority, the dissent focuses on this Court's opinion in *Dancey v Travelers Prop Cas Co of America*, 288 Mich App 1; 792 NW2d 372 (2010):

> The majority indicates that the *Dancey* Court focused on the possibility of a "substantial physical nexus" between the ladder and another vehicle and not on the "cause an object to hit" phrasing from the policy. Implicit in the *Dancey* Court's holding, however, was that the situation in *Dancey* satisfied the pertinent language of the policy. Therefore, *Dancey* provides supportive caselaw for plaintiff's position in the present case. [*Post* at 230.]

I respectfully disagree. "A point of law merely assumed in an opinion, not discussed, is not authoritative." *United States v Oleson*, 44 F3d 381, 387 (CA 6, 1995) (Nelson, J., concurring), overruled on other grounds by *United States v Reed*, 77 F3d 139 (CA 6, 1996); see also *Webster v Fall*, 266 US 507, 511; 45 S Ct 148; 69 L Ed 411 (1925); *Othi v Holder*, 734 F3d 259, 265 n 3 (CA 4, 2013); *Nelson v Monroe Regional Med Ctr*, 925 F2d 1555, 1576 (CA 7, 1991).[1] Consequently, the dissent's reliance on *Dancey*'s "[i]mplicit" holding of a point not raised or ruled on, but merely assumed, is misplaced. As the majority opinion properly holds,

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[1] The opinions of lower federal courts are not binding on this Court, but those opinions may be considered for their persuasive value. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

Dancey did not decide whether the facts of the present case satisfy the requirement in the policy that "[t]he vehicle must hit, or cause an object to hit" the insured, and *Dancey* therefore does not support plaintiff's position regarding that requirement. The majority correctly construes those words, which plainly do not cover the situation here—in which the ambulance hit stationary objects that had been dropped by the pickup truck, rather than the pickup truck causing objects to hit the ambulance.

II. WHAT CONSTITUTES A "HIT-AND-RUN VEHICLE"?

The analysis in *Dancey* has another flaw—it fails to fully consider what is necessary for a vehicle to constitute a "hit-and-run vehicle," the threshold for coverage in the first instance. Defendant argues that there is no evidence that the driver of the pickup truck knew of an accident and then left the scene, the statutory definition of some hit-and-run offenses. Both the majority and the dissent agree that defendant's reliance on statutory definitions is misplaced; because the term itself is undefined in the policy, statutory definitions have no applicability, and the term must be given its ordinary meaning. See *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 83; 730 NW2d 682 (2007). The majority and dissent also agree that if the term "hit-and-run vehicle" encompasses a requirement that the driver had to have known of the accident, there was sufficient evidence of knowledge here to deny summary disposition on that point. That is so in this case because one fair reading of the record is that the drywall fell off the truck just seconds before the ambulance hit it, as the majority opinion recognizes. Under those circumstances, it is a fair inference that the driver would have felt the shift in weight of the truck,

and would have looked up at the rearview mirror and seen the accident or its immediate aftermath. The driver likely would have heard the crash as well. Therefore, there was sufficient evidence in this case to conclude that the truck was a hit-and-run vehicle and that coverage was at least possible, which is sufficient to preclude summary disposition on that issue.

A. HIT AND RUN v RUN AND HIT

Dancey and *Berry v State Farm Mut Auto Ins Co*, 219 Mich App 340; 556 NW2d 207 (1996), the cases relied on by the dissent and by plaintiff, however, contain a flaw in the form of an assumption that is related to the knowledge issue. The requirement of a "hit-and-run vehicle" requires something basic—that a vehicle hits another vehicle and then runs. Regardless of whether the phrase "hit-and-run" imposes some requirement of knowledge on the part of the driver, its very phrasing imposes a temporal requirement—the "hit" must precede the "run." *Dancey* discussed only what constitutes the "hit" portion of the analysis; after finding that satisfied, it did not discuss the "run" component at all. Therefore, under *Dancey*, a vehicle that in some sense starts a chain of events that later causes an accident (thus, according to *Dancey*, satisfying the "hit, or cause an object to hit" language of the policy) is assumed to constitute a "hit-and-run vehicle." But that cannot be correct, as the facts of *Dancey* demonstrate.

In *Dancey*, a ladder fell or dropped off a truck some time before the plaintiff's vehicle struck the ladder on the highway. At least one vehicle in front of the plaintiff's, which had blocked her view, managed to avoid the ladder. *Dancey*, 288 Mich App at 18. Witnesses at the scene talked about a truck that may have

dropped the ladder, but the plaintiff did not know whether anyone had seen a truck. *Id*.

Accordingly, even assuming that the "hit" portion of the hit-and-run requirement was met in *Dancey*, there was no evidence that the driver fled or "ran" from the accident, even if the driver knew that the ladder had fallen off. Unlike in the present case, there was no immediate accident in *Dancey* that followed the ladder coming to a stop on the roadway, and when the ladder fell it was not necessarily the case that an accident would ensue. One vehicle seemed to have avoided the ladder, and the plaintiff almost did as well. But in any event, all that the evidence showed was that after losing the ladder, the truck continued driving *before* an accident took place. Even if it could be proved that the driver of whatever vehicle lost the ladder knew that it had fallen off, at most it could be said that the driver had created a high likelihood of an accident by creating a very dangerous situation. Continuing one's driving under such circumstances, i.e., not stopping, is not flight or leaving the scene of an accident (as no accident has yet occurred) and thus does not fit the ordinary sense of running as used in the term "hit-and-run vehicle." By thereby putting the cart before the horse, *Dancey* converted the term "hit-and-run" into a new concept, "run-and-hit," because the later accident had the legal effect of turning the driving that *preceded* the accident into the running. *Dancey* labeled a truck that created a dangerous condition short of an accident and continued driving a "hit-and-run vehicle" after it was known with hindsight that an accident occurred. *Dancey* simply ignored or overlooked the fact that there must first be a "hit" and then a "run" in order for a vehicle to become a "hit-and-run vehicle." By ignoring the hit-and-run requirement, *Dancey* violated the rule that "[t]he language of insurance contracts should

be read as a whole and must be construed to give effect to every word, clause, and phrase," *Mich Battery Equip, Inc v Emcasco Ins Co*, 317 Mich App 282, 284; 892 NW2d 456 (2016) (quotation marks and citation omitted), by essentially reading the "run" requirement of "hit-and-run" out of the policy.

Berry, a case also cited by the dissent, demonstrates this point even more clearly. In *Berry*, a truck was hauling a load of scrap metal. At some point it stopped, and the driver got out and inspected the load. Between 5 and 15 minutes later, at a spot about a half-mile from where the driver had stopped to inspect the truck, a fallen piece of metal caused an accident. *Berry*, 219 Mich App at 350. By that time, the truck had long since driven away. The *Berry* Court examined the facts and determined that "a substantial physical nexus between the hit-and-run vehicle and the object struck by plaintiff was established." *Id*. The *Berry* Court did not discuss whether or how the truck had "run" from what it determined was the "hit." Even setting aside whether there was a basis for determining "a substantial physical nexus" between the truck and the plaintiff's vehicle, labeling the truck "the hit-and-run vehicle" simply because it continued driving and was gone from the scene of the subsequent accident ignores the temporal requirement of a hit followed by a run. It is not hard to imagine a scenario, such as in *Berry*, in which a sharp piece of metal could lie on a rural road for days undiscovered and then cause an accident. Under those circumstances, labeling someone a "hit-and-run" driver for having driven days before, even if the driver had known about a part falling off, simply strains the term "hit-and-run" beyond a reasonable reading. See *Radenbaugh v Farm Bureau Gen Ins Co of Mich*, 240 Mich App 134, 138; 610 NW2d 272 (2000)

(stating that courts should avoid strained constructions of insurance policies).[2]

B. APPLICATION TO CURRENT CASE

In the present case, the policy language, properly construed, solves the problem. Its requirement that a vehicle "hit, or cause an object to hit" an insured vehicle (as opposed to the insured vehicle hitting a stationary object, as in this case) necessarily requires that an accident occur before whatever driving by the unidentified vehicle is labeled as running. However, if this Court continues to adopt the *Dancey* and *Berry* assumptions of what constitutes "hit and run," then our Supreme Court will have to address the issue in an appropriate case.

METER, J. (*dissenting*). I respectfully dissent because I believe the trial court correctly denied defendant's motion for summary disposition. I would affirm.

As noted by the majority, plaintiff's insurance policy defined "uninsured motor vehicle" as follows:

> 3. "Uninsured motor vehicle" means a land motor vehicle or "trailer":
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> * * *
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> d. That is a hit-and-run vehicle and neither the driver nor owner can be identified. The vehicle must hit, or cause an object to hit, an "insured", a covered "auto" or a vehicle

[2] The temporal requirement of the term "hit and run" suggests that when this Court does consider whether the driver of a vehicle must have been aware of an accident for the accident to be labeled a hit-and-run, the answer will be yes. As this analysis has shown, absent a preceding accident there can be no hit and run. For the same reasons, absent knowledge of the accident, driving is simply driving, and it only becomes "running" if the driver is running from something, i.e., an accident.

> an "insured" is "occupying". If there is no direct physical contact with the hit-and-run vehicle, the facts of the "accident" must be corroborated by competent evidence, other than the testimony of any person having a claim under this or any similar insurance as the result of such "accident".

In *Dancey v Travelers Prop Cas Co of America*, 288 Mich App 1, 2-3, 11-12; 792 NW2d 372 (2010), this Court considered a situation analogous to that in the instant case: the insured's vehicle hit a ladder in a roadway, and the policy language at issue was identical to that at issue here. The Court stated:

> Defendant claims that in order for the hit-and-run vehicle to "cause an object to hit" plaintiff's vehicle, there must be a physical nexus between the hit-and-run vehicle and the object. Defendant argues that because no one could affirmatively state that the ladder fell off another vehicle, only speculation would permit a jury to conclude that there was any nexus between the ladder and the hit-and-run vehicle, and speculation is insufficient to establish a genuine issue of fact. Plaintiff argues that there was no other logical explanation for how the ladder came to be in the roadway, given that the area was not under construction, was not open to pedestrian traffic, and was not beneath an overpass from which a ladder could have fallen. [*Id*. at 12.]

This Court ultimately affirmed the denial of summary disposition to the insurer, concluding that sufficient evidence had been presented to establish a substantial physical nexus between the ladder and another vehicle. *Id*. at 21-22. The majority indicates that the *Dancey* Court focused on the possibility of a "substantial physical nexus" between the ladder and another vehicle and not on the "cause an object to hit" phrasing from the policy. Implicit in the *Dancey* Court's holding, however, was that the situation in *Dancey* satisfied the pertinent language of the policy. Therefore, *Dancey* provides supportive caselaw for plaintiff's position in the present case.

In *Berry v State Farm Mut Auto Ins Co*, 219 Mich App 340, 342-343; 556 NW2d 207 (1996), the insured's vehicle struck an object in a roadway and she sought uninsured motorist benefits. The insurance policy in question defined an "uninsured motor vehicle," in part, as a hit-and-run vehicle that "strikes . . . the vehicle the insured is occupying." *Id*. at 342. This Court stated:

> [D]efendant takes issue with the [trial] court's legal conclusion that plaintiff was covered under the uninsured motorist provision of the insurance policy. Defendant acknowledges, and we agree, that the policy's requirement that a hit-and-run vehicle must strike the insured's vehicle constitutes a requirement of physical contact between the hit-and-run vehicle and the insured's vehicle. Defendant's arguments all concern whether physical contact between a hit-and-run vehicle and plaintiff's vehicle occurred in this case.
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> * * *
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> [T]his Court has construed the physical contact requirement broadly to include indirect physical contact, such as where a rock is thrown or an object is cast off by the hit-and-run vehicle, as long as a substantial physical nexus between the disappearing vehicle and the object cast off or struck is established by the proofs. In this case, defendant argues that an insufficient nexus existed between a hit-and-run vehicle and the metal piece lying in the road. [*Id*. at 346-347 (citations omitted).]

The *Berry* Court ruled that "the legal requirement of a substantial physical nexus between the hit-and-run vehicle and the object struck by plaintiff was established." *Id*. at 350. The Court indicated that adequate evidence of contact between the insured and another vehicle had been presented because "the metal piece lying in the road that [the insured's] vehicle struck was deposited by the hit-and-run vehicle itself, i.e., the truck hauling a trailer of scrap metal." *Id*. at 352.

The policy in *Berry* defined the term "uninsured motor vehicle" as a "motor vehicle . . . which strikes . . . the vehicle the insured is occupying," and the Court found adequate evidence of coverage. *Id*. at 342, 352. The policy in the present case defines the same term as a "vehicle [that] . . . cause[s] an object to hit . . . a vehicle an 'insured' is 'occupying'." Accordingly, the policy language in the present case is broader than that at issue in *Berry*.

Both *Dancey* and *Berry* suggest the existence of coverage in the present case.[1] In addition, the plain language of the insurance policy supports the existence of coverage. Evidence demonstrated that the building materials in the road "hit" the ambulance when the ambulance proceeded over them. *Random House Webster's College Dictionary* (1997) defines the word "hit," in part, as "to come against with an impact[.]" The building materials in this case "c[a]me against" the ambulance "with an impact[.]" Accordingly, the white pickup truck "cause[d] an object to hit" the ambulance.

In light of the policy language and existing caselaw, I would affirm the denial of summary disposition to defendant.[2]

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[1] Contrary to the suggestion made in the concurring opinion, I do not find that *Dancey* and *Berry* are strictly controlling in the present case. I find them *suggestive* of coverage, and reading them in conjunction with the plain language of the policy leads me to conclude that the trial court did not err by denying summary disposition to defendant.

[2] I agree with the majority that defendant was not entitled to summary disposition on the basis of the argument relating to the common definition of a "hit-and-run vehicle" because, contrary to defendant's argument, the trial court correctly concluded that there were genuine issues of fact regarding knowledge on the part of the driver. Whether this knowledge must ultimately be proved in order for plaintiff to recover is not a question currently before us because we are reviewing, simply, whether the trial court correctly denied defendant's motion for summary disposition.

In re BALLARD

Docket Nos. 339312, 339313, and 339314. Submitted February 14, 2018, at Grand Rapids. Decided February 27, 2018, at 9:05 a.m.

Petitioner-father filed a motion in the Van Buren Circuit Court, Family Division, seeking to terminate his three children's juvenile guardianships with respondents, the children's maternal grandparents, and seeking interim parenting time. Petitioner's children had been removed from his and the mother's care by the Department of Health and Human Services and placed with respondents. The court appointed respondents as the children's juvenile guardians; however, the court did not terminate petitioner's parental rights. For several years thereafter, petitioner maintained a relationship with respondents and his children, engaging in regular parenting time with them absent any visitation court order. A dispute then arose between petitioner and respondents, parenting time was halted by respondents, and petitioner sought to terminate the guardianships and receive interim parenting time. The parties agreed to temporarily place in abeyance the issue concerning termination of the guardianships, focusing instead on the question of parenting time. The court, Jeffrey J. Dufon, J., held that it lacked the authority to order parenting time for petitioner because respondents had complete and unfettered discretion regarding the matter. Petitioner appealed.

The Court of Appeals *held*:

MCL 712A.19a(9)(c) provides, in relevant part, that if the trial court does not order termination of parental rights to a child, then the court shall order one or more alternative placement plans, one of which being the appointment of a juvenile guardian for the child. MCL 712A.19a(14) provides that the court shall consider any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, relative with whom the child is placed, or guardian ad litem in addition to any other evidence, including the appropriateness of parenting time, offered at the hearing. Accordingly, MCL 712A.19a(14) authorizes a trial court to contemplate an order of parenting time in the context of appointing a guardian

under MCL 712A.19a(9)(c). Because MCL 712A.19a(14) plainly envisions a trial court having an authoritative role with respect to parenting time during the course of a guardianship, MCL 712A.19a(14) provides a court with authority to order parenting time for a parent after a juvenile guardianship has been established even if the court did not order parenting time when the guardianship commenced or at the time of the permanency-planning hearing. The language in MCL 712A.19a(14) plainly reflects legislative intent to permit the issuance of parenting-time orders in regard to an ongoing guardianship. Accordingly, in this case, the trial court did have the authority to order parenting time for petitioner, and the case had to be remanded for the trial court to entertain petitioner's motion for parenting time.

Reversed and remanded.

PARENT AND CHILD — JUVENILE GUARDIANSHIPS — TRIAL COURT'S AUTHORITY TO ORDER PARENTING TIME.

A trial court has authority to order parenting time for a parent after a juvenile guardianship has been established even if the court did not order parenting time when the guardianship commenced or at the time of the permanency-planning hearing (MCL 712A.19a).

Child Welfare Appellate Clinic (by *Vivek S. Sankaran* and Amanda Blau (under MCR 8.120(D)(3))) and *Colleen M. Markou* for petitioner-father.

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

MURPHY, P.J. This case presents a pure legal issue, making it unnecessary to delve into the facts in any great detail. Petitioner fathered three children, and they were removed from his and the mother's care by the Department of Health and Human Services because of an inability to care for the children's needs and a poor home environment. The children were placed with respondents, the children's maternal grandparents. Subsequently, the trial court appointed respondents as the children's juvenile guardians; however, petitioner's parental rights were not terminated.

For several years thereafter, petitioner maintained a relationship with respondents and his children, engaging in regular parenting time with them absent any visitation court order. A dispute then arose between petitioner and respondents, parenting time was halted by respondents, and petitioner filed a petition to terminate the guardianships, along with a subsequent motion seeking interim parenting time. The parties later agreed to temporarily place in abeyance the issue concerning termination of the guardianships, focusing instead on the question of parenting time. The trial court determined that under the statutory scheme, it lacked the authority to order parenting time for petitioner because respondents had complete and unfettered discretion regarding the matter. Petitioner now appeals.[1] The question posed to us is whether the trial court has the authority to order parenting time under these circumstances. We hold that the trial court has such authority; therefore, we reverse and remand for further proceedings.

We review de novo issues of statutory construction. *Kemp v Farm Bureau Gen Ins Co of Mich*, 500 Mich 245, 252; 901 NW2d 534 (2017). The *Kemp* Court further observed:

> When interpreting statutes, our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language. In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme. When a statute's language is unambiguous, the Legislature must have intended the

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[1] Petitioner filed a claim of appeal as of right. Assuming that the appeal should have been filed as an application for leave to appeal, we will treat the appeal as an application for leave, grant leave, and address the substantive issue. *Rains v Rains*, 301 Mich App 313, 320 n 2; 836 NW2d 709 (2013).

> meaning clearly expressed, and the statute must be enforced as written. [*Id*. (citations and quotation marks omitted).]

MCL 712A.19a, which pertains to permanency-planning hearings, governs juvenile guardianships created after child protective proceedings have been initiated and in place for a certain period of time but termination of parental rights has not occurred.[2] "If the court determines at a permanency planning hearing that a child should not be returned to his or her parent, the court may order the agency to initiate proceedings to terminate parental rights." MCL 712A.19a(8). With various exceptions, "if the child has been in foster care under the responsibility of the state for 15 of the most recent 22 months, the court shall order the agency to initiate proceedings to terminate parental rights." *Id*. MCL 712A.19a further provides, in relevant part:

> (9) If the agency demonstrates under subsection (8) that initiating the termination of parental rights to the child is clearly not in the child's best interests, or the court does not order the agency to initiate termination of parental rights to the child under subsection (8), then the court shall order 1 or more of the following alternative placement plans:
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> * * *
>
> (c) Subject to subsection (11), if the court determines that it is in the child's best interests, appoint a guardian for the child, which guardianship may continue until the child is emancipated.

MCL 712A.19a(11) mandates criminal background checks, home studies, central registry clearances, and investigations relative to proposed guardians. "The

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[2] Compare MCL 712A.19c, which applies to juvenile guardianships created only when there has been termination of parental rights.

court's jurisdiction over a guardianship created under this section shall continue until released by court order. The court shall review [the] guardianship . . . annually and may conduct additional reviews as the court considers necessary." MCL 712A.19a(13). Additionally, MCL 712A.19a(14) provides:

> In making the determinations under this section, the court shall consider any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, relative with whom the child is placed, or guardian ad litem in addition to any other evidence, *including the appropriateness of parenting time*, offered at the hearing. [Emphasis added.]

This provision authorizes a trial court to contemplate an order of parenting time in the context of appointing a guardian under MCL 712A.19a(9)(c). Accordingly, a situation can arise in which the court creates a juvenile guardianship and additionally orders parenting time for a parent whose parental rights have not been terminated. Thus, during the course of a juvenile guardianship, a child's parent may indeed be exercising parenting time if previously ordered. And the court would certainly have the authority to increase, decrease, or terminate that parenting time during the guardianship if the circumstances warranted court intervention; the original parenting-time order could not be indefinitely fixed. Because MCL 712A.19a(14) plainly envisions a trial court having an authoritative role with respect to parenting time during the course of a guardianship, we construe MCL 712A.19a(14) as providing a court with authority to order parenting time for a parent after a juvenile guardianship has been established even if the court did not order parenting time when the guardianship commenced or at the time of the permanency-planning hearing. The language in MCL 712A.19a(14) plainly

reflects legislative intent to permit the issuance of parenting-time orders in regard to an ongoing guardianship. We therefore conclude that the trial court did have the authority to order parenting time for petitioner, and the case is remanded for the trial court to entertain petitioner's motion for parenting time.

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

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

PEOPLE v HOWARD

Docket No. 336150. Submitted February 13, 2018, at Lansing. Decided February 27, 2018, at 9:10 a.m.

Justin D. Howard was convicted in the Calhoun Circuit Court, John A. Hallacy, J., of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and assault with a dangerous weapon, MCL 750.82. The court sentenced him as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 30 to 60 years for armed robbery, 10 to 30 years for first-degree home invasion, and three to six years for assault with a dangerous weapon. Defendant appealed, and the Court of Appeals affirmed his convictions in an unpublished per curiam opinion, issued November 17, 2015 (Docket No. 322868). Defendant sought leave to appeal in the Supreme Court, and the Supreme Court denied defendant's application. Defendant moved for reconsideration, arguing, in part, that he was entitled to a *Crosby*[1] remand and resentencing pursuant to *People v Lockridge*, 498 Mich 358 (2015). The Supreme Court vacated its previous order and, in lieu of granting leave to appeal, remanded defendant's case to the trial court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *Lockridge*. 500 Mich 852 (2016). The original sentencing judge was unavailable to conduct the *Crosby* remand because he had retired from the bench and subsequently passed away. The successor judge who replaced him on the bench had been the prosecutor in the instant case; therefore, she entered an order of disqualification. The case was assigned to a different judge, and the newly assigned judge did not appoint an attorney to represent defendant for the *Crosby* remand or seek any input from defendant or defense counsel. In his order on remand, which he entered within days of being assigned the case, the judge noted that he had reviewed the presentence report, transcripts, and court file from defendant's case, as well as the *Lockridge* opinion, and determined that he would not impose a materially different sentence. Defendant,

[1] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

acting *in propria persona*, moved for reconsideration, arguing that he was denied his constitutional right to counsel and due process pursuant to Const 1963, art 1, § 20, and that the trial court erred by not obtaining the views of defense counsel before making his determination. The court denied defendant's motion for reconsideration. Defendant appealed.

The Court of Appeals *held*:

1. On a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by law, if it decides to resentence the defendant. In this case, the trial court erred by not appointing and obtaining the views of defense counsel before determining whether resentencing was warranted.

2. The issue of what is required when the original sentencing judge is unavailable to conduct a *Crosby* remand was an issue of first impression in Michigan. Federal courts of appeal are divided regarding the procedural requirements when the sentencing judge is unavailable to conduct a *Crosby* remand or similar procedure. The United States Court of Appeals for the Seventh Circuit, in *United States v Bonner*, 440 F3d 414 (CA 7, 2006), held that when the original sentencing judge is unavailable to preside over a remand, the appeals court must vacate the defendant's sentence and remand for a complete resentencing hearing. However, the United States Court of Appeals for the Second Circuit, in *United States v Garcia*, 413 F3d 201 (CA 2, 2005), stressed that while district court judges are not fungible, they have direct sentencing experience and could determine from the record whether the original sentence was affected by unconstitutional sentencing restraints. The Second Circuit also requires something more of newly assigned judges that is optional for the original sentencing judge under *Crosby*: when making his or her threshold determination regarding whether resentencing is warranted, a newly assigned judge must order the defendant to appear in court and afford the defendant an opportunity to be heard. The Second Circuit gave two reasons for this requirement: first, the Second Circuit deemed the defendant's appearance and opportunity to be heard necessary to the district court's achieving the level of familiarity with the case necessary for a reliable sentencing comparison; and second, the Second Circuit consid-

ered production of the defendant to be important to the perceived integrity of the resentencing decision. Thus, the Second Circuit upheld the propriety of a *Crosby* remand in the event of a newly assigned judge but imposed additional requirements to ensure that the remand procedure was sufficiently fair and reliable under the circumstances. The *Garcia* rationale was persuasive. When a newly assigned judge handles a *Crosby* remand without ever encountering the defendant, both the personal nature of sentencing and perceptions of the fairness, integrity, and public reputation of the judicial proceeding are called into question. Therefore, when the original sentencing judge is unavailable, in addition to following the other *Crosby* remand requirements, the assigned judge must allow the defendant an opportunity to appear before the court and be heard before the judge can decide whether he or she would resentence the defendant. In this case, because that opportunity was not given to defendant, and because defendant was deprived of counsel and the input of counsel at the time of the *Crosby* remand, the trial court's order was vacated and the case was remanded.

Trial court order vacated; case remanded for further proceedings.

SENTENCING — *CROSBY* REMAND PROCEDURE — UNAVAILABILITY OF THE ORIGINAL SENTENCING JUDGE.

On a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing; if notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by law, if it decides to resentence the defendant; when the original sentencing judge is unavailable to conduct a *Crosby* remand, in addition to following the other *Crosby* remand requirements, the newly assigned judge must allow the defendant an opportunity to appear before the court and be heard before the judge can decide whether it would resentence the defendant (*People v Crosby*, 397 F3d 103 (CA 2, 2005)).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David E. Gilbert*, Prosecuting Attorney, and *Jennifer Kay Clark*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Douglas W. Baker* and *Jason R. Eggert*) for defendant.

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

PER CURIAM. Defendant, Justin Duane Howard, appeals as of right the circuit court's order stemming from a *Crosby*[1] remand, which was ordered because defendant's within-the-guidelines sentence was imposed before the Michigan Supreme Court's ruling in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).[2] Because the sentencing judge was no longer available at the time of the remand, a newly assigned judge reviewed defendant's case and ruled that he would not have imposed a materially different sentence. Therefore, he declined to resentence defendant. Defendant contends that the trial court failed to follow the proper procedure in a *Crosby* remand and that because the sentencing judge was no longer available, defendant either should have received a full resentenc-

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[1] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

[2] *Lockridge* held that Michigan's sentencing guidelines violate a defendant's Sixth Amendment fundamental right to a jury trial and are deficient to the extent that they require judicial fact-finding beyond facts admitted by the defendant or found by a jury to score offense variables that mandatorily increase the floor of the guidelines minimum sentence range. *Lockridge*, 498 Mich at 364, 373-374. The Supreme Court remedied the violation by making the guidelines advisory only. *Id*. at 364, 391. It remanded to the trial court cases "in which a defendant's minimum sentence was established by application of the sentencing guidelines in a manner that violated the Sixth Amendment" for a determination of "whether that court would have imposed a materially different sentence but for the constitutional error." *Id*. at 397. "If the trial court determines that the answer to that question is yes, the court shall order resentencing." *Id*. The Supreme Court adopted a remand procedure as set forth in *Crosby*, which is discussed in salient detail in this opinion.

ing or at least an opportunity to appear before the court and be heard before the judge made his decision. We agree in part with defendant, and thus, we vacate the trial court's order and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant's convictions arise out of an October 2012 incident in which defendant and another man broke into Pearlie Parker's home in Battle Creek, Michigan, stole money, and assaulted Parker with a firearm. A jury convicted defendant of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and assault with a dangerous weapon, MCL 750.82. The trial court sentenced him as a habitual offender, second offense, MCL 769.10, to concurrent prison terms of 30 to 60 years for armed robbery, 10 to 30 years for first-degree home invasion, and three to six years for assault with a dangerous weapon.[3]

In his initial appeal, defendant challenged his convictions on grounds that he was denied a speedy trial and that the trial court erred by denying his motion to suppress a witness identification. This Court affirmed his convictions in an unpublished per curiam opinion,[4] and defendant subsequently sought leave to appeal in the Michigan Supreme Court. After our Supreme Court denied defendant's application, defendant moved for reconsideration, arguing, in part, that he was entitled to a *Crosby* remand and resentencing pursuant to *Lockridge*, 498 Mich at 395-398. The Supreme Court vacated its prior order and, in lieu of

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[3] All three minimum sentences were within the guidelines range as scored by the trial court.

[4] *People v Howard*, unpublished per curiam opinion of the Court of Appeals, issued November 17, 2015 (Docket No. 322868).

granting leave, remanded defendant's case to the trial court "to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in [*Lockridge*]." *People v Howard*, 500 Mich 852 (2016). The Supreme Court further instructed, "On remand, the trial court shall follow the procedure described in Part IV of [*Lockridge*]." *Id*.

The original sentencing judge was unavailable to conduct the *Crosby* remand because he had retired from the bench and subsequently passed away. The successor judge who replaced him on the bench had been the prosecutor in the instant case. She entered an order of disqualification, and the case was assigned to a different judge. The newly assigned judge did not appoint an attorney to represent defendant for the *Crosby* remand or seek any input from defendant or defense counsel. In his order on remand, which he entered within days of being assigned the case, the judge noted that he had reviewed the presentence report, transcripts, and court file from defendant's case, as well as the *Lockridge* opinion, and determined that he would not impose a materially different sentence. Defendant, acting *in propria persona*, moved for reconsideration, arguing that he was denied his constitutional right to counsel and due process pursuant to Const 1963, art 1, § 20, and that the trial court erred by not obtaining the views of defense counsel before making his determination. The trial court denied defendant's motion for reconsideration, which led to this appeal as of right.

II. *CROSBY* REMAND REQUIREMENTS

Defendant first argues that the trial court erred by failing to comply with the required procedure for *Crosby* remands. We agree.

The *Lockridge* Court provided the following instructions for a trial court conducting a *Crosby* remand:

> [O]n a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by law, if it decides to resentence the defendant. [*Lockridge*, 498 Mich at 398 (citation omitted).]

Defendant contends that the trial court erred by not appointing and obtaining the views of defense counsel prior to determining whether resentencing was warranted. The prosecution does not dispute that trial courts must follow the steps outlined in *Lockridge* for *Crosby* remands; however, the prosecution would restrict the applicability of these steps to situations in which a trial court determines that resentencing is warranted. In other words, once the trial court determines that it would have imposed a materially different sentence but for the mandatory nature of the sentencing guidelines, then the court should give the defendant an opportunity to decline resentencing and should seek the views of counsel. And if the trial court decides that resentencing is not warranted, then no further steps are necessary.

The prosecution cites no authority for this strained interpretation of the *Lockridge* Court's instructions. In our view, the procedure proposed by the prosecution contrasts with the Supreme Court's statement that "a trial court considering a case on a *Crosby* remand should *first and foremost* include an opportunity for a defendant to avoid resentencing by promptly notifying the [trial] judge that resentencing will not be sought."

Lockridge, 498 Mich at 398 (quotation marks and citation omitted; emphasis added; alteration by the *Lockridge* Court).[5] The prosecution's proposed procedure also ignores the Supreme Court's next statement that "[i]f the defendant does not so notify the court, it 'should obtain the views of counsel, at least in writing . . . ,' in 'reaching its decision . . . whether to resentence.' " *Id.*, quoting *Crosby*, 397 F3d at 120. Furthermore, having a trial court review the record and determine whether resentencing is warranted before providing a defendant the opportunity to avoid resentencing constitutes a waste of judicial resources in those cases in which the defendant does not want to risk a harsher sentence. Therefore, we reject the prosecution's characterization of the order of steps in a *Crosby* remand and agree with defendant that before deciding whether to resentence, the trial court was required to obtain the views of defense counsel.

The record on remand contains no indication that defendant was given an opportunity to inform the court that he would not seek resentencing. The record is also devoid of any indication that the trial court complied with the requirement that it "should obtain the views of counsel." *Lockridge*, 498 Mich at 398. In fact, it appears that defendant did not have an attorney at the time of the *Crosby* remand. In a procedure designed to address whether defendant's sentence was affected by unconstitutional sentencing constraints

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[5] See also *People v Stokes*, 312 Mich App 181, 201-202; 877 NW2d 752 (2015) (noting that the "first step" of the *Crosby* remand procedure is to provide the defendant with an opportunity to avoid resentencing), vacated in part on other grounds 501 Mich 918 (2017); *People v Steanhouse*, 313 Mich App 1, 48; 880 NW2d 297 (2015) (again noting that the "first step" in the remand procedure is to provide the defendant with an opportunity to avoid resentencing), aff'd in part and rev'd in part on other grounds 500 Mich 453 (2017).

and in which soliciting input from defense counsel is specifically required of the trial court, defendant was entitled to representation at the time of the *Crosby* remand. See *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996) ("[S]entencing is a critical stage at which a defendant has a right to counsel."). And because the trial court failed to appoint counsel and obtain the views of that counsel, we conclude that defendant's *Crosby* remand was improperly handled. Therefore, we vacate the trial court's order and remand for further proceedings. Because we are remanding this matter, it is necessary for us to consider defendant's second argument on appeal regarding the impact of a remand to a judge other than the sentencing judge in a *Crosby* remand.

III. IMPACT OF *CROSBY* REMAND BEFORE A DIFFERENT JUDGE

Relying on federal caselaw, defendant contends that because his original sentencing judge is unavailable to conduct the *Crosby* remand, due process requires that he be entitled to a full resentencing. In the alternative, he argues that he should at least be entitled to appear before the judge and have an opportunity to be heard before the court determines whether it would resentence him under the now-advisory sentencing guidelines. Defendant raises an issue of first impression for Michigan.

Federal courts of appeal are divided on the issue of what is required when the sentencing judge is unavailable to conduct a *Crosby* remand or similar procedure. Defendant urges us to adopt the approach set forth by the United States Court of Appeals for the Seventh Circuit. In *United States v Paladino*, 401 F3d 471, 483-484 (CA 7, 2005), the Seventh Circuit adopted a

modified *Crosby* procedure.[6] In those cases in which the Seventh Circuit could not determine from the record whether a defendant's pre-*Booker*[7] sentence constituted prejudicial error, the court would "order a limited remand to permit the *sentencing judge* to determine whether he would (if required to resentence) reimpose his original sentence." *Paladino*, 401 F3d at 484 (emphasis added). Later, in *United States v Bonner*, 440 F3d 414 (CA 7, 2006), the Seventh Circuit faced the issue whether a judge other than the "sentencing judge" could conduct a *Paladino* remand. In concluding that it could not, the Seventh Circuit reasoned that, in order to be confident that the sentencing judge would have given the same sentence subsequent to *Booker* that it gave prior to *Booker*, analysis under *Paladino* had to be conducted by the "original 'sentencing judge.' " *Bonner*, 440 F3d at 416. When the sentencing judge was unavailable, there was "no purpose in restricting a newly assigned judge to comparing the sentence he would impose post-*Booker*, armed with the knowledge that the guidelines are advisory, to the sentence initially imposed by a different judge operating under the as-

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[6] The procedure adopted by the Seventh Circuit differs from *Crosby* in that the Seventh Circuit Court of Appeals retains jurisdiction over a case until the district court determines that resentencing is warranted; at that point, the appeals court vacates the prior sentence and remands the matter to the district court for resentencing. *Paladino*, 401 F3d at 484.

[7] In *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), the United States Supreme Court held that the federal sentencing guidelines violated the Sixth Amendment by allowing a court to impose a sentence above the statutory maximum on facts not submitted to a jury and proved beyond a reasonable doubt or admitted by the defendant. *Lockridge*, 498 Mich at 371, citing *Booker*, 543 US at 226 (opinion by Stevens, J.). To remedy the constitutional violation, the High Court made the guidelines advisory rather than mandatory. *Lockridge*, 498 Mich at 371-372, citing *Booker*, 543 US at 245 (opinion by Breyer, J.).

sumption that the guidelines were mandatory." *Id*. at 417. Therefore, the Seventh Circuit in *Bonner* held that when the original sentencing judge was unavailable to preside over a remand under *Paladino*, the appeals court would "vacate the defendant's sentence and remand for a complete resentencing hearing in order to permit the successor judge to sentence the defendant in conformity with the mandates of *Booker*."[8] *Id*. See also *United States v Sanders*, 421 F3d 1044, 1052 (CA 9, 2005) ("We hold that when the original sentencing judge is not available to conduct a limited remand . . . , the original sentence should be vacated and the case remanded for a full resentencing hearing.").

Unlike a *Paladino* remand, our Supreme Court in *Lockridge* did not describe a *Crosby* remand as going back to the sentencing judge but rather as going back to the "trial court." *Lockridge*, 498 Mich at 398. However, cases on remand in Michigan are always sent back to the judge who entered the judgment or order, whenever possible, and *Lockridge* did not address or appear to contemplate a circumstance in which the original sentencing judge is no longer available.

Assuming we do not agree with defendant's claim of entitlement to a full resentencing—which would arguably give somewhat of a windfall to all defendants whose sentencing judges are no longer available—defendant alternatively urges this Court to adopt the analysis set forth in *United States v Garcia*, 413 F3d

[8] The *Bonner* Court indicated that "[t]he procedure we establish today is applicable whenever the original sentencing judge is unavailable to carry out a remand from this court in accordance with the terms set forth in *Paladino*, regardless of whether the judge is unavailable due to recusal, retirement, absence, death, sickness or other disability." *Id*. We likewise see no reason to distinguish among the reasons why a judge different from the sentencing judge is assigned to the case.

201 (CA 2, 2005). In *Garcia*, the United States Court of Appeals for the Second Circuit expressly addressed the issue of how to handle *Crosby* remands when the original sentencing judge is no longer available. The Second Circuit acknowledged the language in *Crosby* that called for review by the "sentencing judge" but opined that such language "simply recognizes the practical reality that most *Crosby* remands . . . will likely be addressed by the original sentencing judge." *Garcia*, 413 F3d at 226. But the Second Circuit also noted that because of his or her familiarity with the case, the original sentencing judge would be in the best position to conduct an efficient and reliable analysis under *Crosby*. *Id*. at 227. However, the appeals court determined that when the original sentencing judge is no longer available, the district court's ability to provide a reliable response to a *Crosby* remand does not abruptly cease:

> The judgment appealed from, after all, is that of the district court, not simply that of a particular judge. Thus, the comparative sentence inquiry might properly be viewed as between the court's challenged sentence and the sentence *the court* would have imposed with a proper understanding of the law. Where the original sentencing judge is no longer available to speak for the district court on the second point, the responsibility for identifying the sentence that the court would have imposed under a correct view of the law may properly be reassigned to another district judge. . . .
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> . . . [T]he fact that all district judges possess direct sentencing experience, considered together with their ability to develop factual records, necessarily means that such judges can reliably determine, even on reassignment, whether there is a nontrivial difference between a challenged original sentence and one that would have been imposed with a correct understanding of the law. [*Id*. at 227-228.]

Thus, whereas the *Bonner* court stressed the subjectivity of individual judges in sentencing, the *Garcia* court stressed that, while district court judges are not fungible, they have direct sentencing experience and could determine from the record whether the original sentence was affected by unconstitutional sentencing restraints as identified in *Booker*. Further, the *Garcia* court made clear that it did not expect a newly assigned judge to do the impossible, "i.e., determine what sentence the original judge would have imposed on behalf of the court with a correct understanding of the law and a fully developed record." *Id*. at 228. Rather, the newly assigned judge was to determine "what sentence *he* or *she* would have imposed on behalf of the court with the benefit of *Booker* and a full record . . . [and] then determine whether that lawful sentence differs in a more than trivial manner from the one that was actually imposed." *Id*.

Nevertheless, the Second Circuit in *Garcia* did require something more of newly assigned judges that remained optional for the original sentencing judge under *Crosby*. When making his or her threshold determination regarding whether resentencing is warranted, a newly assigned judge must order the defendant to appear in court and afford the defendant an opportunity to be heard. *Id*. at 230. The Second Circuit gave two reasons for this requirement. First, because "human insights important to sentencing cannot be gleaned simply from a review of a cold record," the Second Circuit deemed the defendant's appearance and opportunity to be heard necessary to the district court's achieving the level of familiarity with the case necessary for "a reliable sentencing comparison." *Id*. Second, the Second Circuit considered production of the defendant to be important to the perceived integrity of the resentencing decision, explaining as follows:

> [A]lthough the production of a defendant may not be essential to the perceived integrity of a *Crosby* remand handled by the original sentencing judge, *see United States v. Crosby*, 397 F.3d at 120 (holding that defendant's presence in court is not required on remand to decide *if* resentencing is necessary), when a *Crosby* remand is reassigned to a judge who has never dealt with the defendant, both the parties' and the public's perception of the fairness of the process is enhanced by requiring that judge to have some direct contact with the defendant in a formal court proceeding before answering the remand inquiry . . . . [*Garcia*, 413 F3d at 230.]

The *Garcia* court acknowledged that "a *Crosby* remand may operate less efficiently when the original sentencing judge is no longer available," *id*., but it concluded that it would nevertheless operate "with sufficient reliability that, even in this limited category of cases, we remain committed to case-by-case review of plain error rather than wholesale assumptions that substantial rights were affected in no or all such cases," *id*. at 231. Thus, the Second Circuit upheld the propriety of a *Crosby* remand in the event of a newly assigned judge but imposed additional requirements to ensure that the remand procedure was sufficiently fair and reliable under the circumstances.

We find the Second Circuit's rationale in *Garcia* to be persuasive and its solution reasonable. When a newly assigned judge handles a *Crosby* remand without ever encountering the defendant, both the personal nature of sentencing, *People v Heller*, 316 Mich App 314, 319; 891 NW2d 541 (2016),[9] and perceptions of the

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[9] We ruled in *Heller* that a trial court may not sentence a defendant via videoconference because the intensely personal nature of the sentencing process calls for direct contact. *Heller*, 316 Mich App at 319-321. The trial court's initial determination on a *Crosby* remand is not a sentencing in the same sense as that addressed in *Heller*, and if the trial court should decide to resentence the defendant subsequent to a *Crosby*

fairness, integrity, and public reputation of the judicial proceeding are called into question. We conclude that when the original sentencing judge is unavailable, in addition to following the other *Crosby* remand requirements,[10] the assigned judge must allow the defendant an opportunity to appear before the court and be heard before the judge can decide whether he or she would resentence the defendant. Because that opportunity was not given to defendant in this matter, and because he was deprived of counsel and the input of counsel at the time of the *Crosby* remand, we vacate the trial court's order and remand for further proceedings.

We vacate defendant's sentence and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

CAVANAGH, P.J., and HOEKSTRA and BECKERING, JJ., concurred.

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remand, the court must have the defendant present. *Lockridge*, 498 Mich at 398. However, in those unique and presumably rare situations in which a newly assigned judge conducts a *Crosby* remand for a defendant that has never appeared before the trial court, the analysis more closely resembles the type of situation seen in *Heller* than when the *Crosby* remand is conducted by a sentencing judge familiar with the defendant and the defendant's case.

[10] See *Lockridge*, 498 Mich at 398.

SANDERS v McLAREN-MACOMB

Docket No. 336409. Submitted February 13, 2018, at Detroit. Decided February 27, 2018, at 9:15 a.m. Leave to appeal denied 502 Mich 940.

Nancy Sanders filed a medical malpractice action in the Macomb Circuit Court against Richard S. Veyna, M.D., the Michigan Head and Spine Institute (MHSI), which is an assumed name of University Neurosurgical Associates, PC (collectively, defendants), and others, in connection with the treatment plaintiff received at McLaren-Macomb hospital in July 2013. On June 30, 2015, plaintiff mailed a notice of intent (NOI) to sue to Veyna at two separate addresses and to MHSI at three separate addresses; those defendants asserted that they did not receive notice of plaintiff's claim until after being served with plaintiff's complaint in December 2015 and that they did not receive an NOI from plaintiff until they requested a copy from plaintiff's attorney after being served with the complaint. In their respective answers, defendants asserted as an affirmative defense that plaintiff's claims were barred because she failed to provide a sufficient NOI. Defendants subsequently moved for summary disposition, arguing that dismissal was appropriate because plaintiff had failed to mail the NOIs to defendants' last known professional addresses as required by MCL 600.2912b(2) and that plaintiff was therefore unable to commence her medical malpractice action. The court, James M. Maceroni, J., granted defendants' motion, reasoning that plaintiff had violated MCL 600.2912b(1) by failing to serve an NOI on defendants before filing the complaint even though their addresses were reasonably determinable. Plaintiff moved for reconsideration, and the court granted the motion. On reconsideration, the court concluded that the summary disposition motion had to be denied because defendants had failed to challenge the NOI by motion at the time they filed their first responses to the complaint as required by MCR 2.112(L)(2)(a). The court concluded that defendants did not preserve their challenges to the NOI for purposes of MCR 2.112(L)(2)(a) when they raised the issue as an affirmative defense in their pleadings instead of raising it by motion as required by the rule. The Court of Appeals granted defendants' application for leave to appeal.

The Court of Appeals *held*:

1. MCL 600.2912b(1) provides that a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice not less than 182 days before the action is commenced. MCL 600.2912b(2) requires that the NOI must be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the medical malpractice action; proof of the mailing constitutes prima facie evidence of compliance with the section. A medical malpractice action can only be commenced by providing a timely NOI and then filing a complaint and an affidavit of merit after the applicable notice period has expired but before the period of limitations has expired. Michigan employs a "mailbox rule" for providing the notice, and MCL 600.2912b(2) states that proof of the mailing constitutes prima facie evidence of compliance. Accordingly, providing a timely NOI is a prerequisite condition to the commencement of a medical malpractice action, and the failure to comply with the statutory requirement renders the complaint insufficient to commence the action. In that regard, MCR 2.112(L)(2)(a) states that in a medical malpractice action, unless the court allows a later challenge for good cause, all challenges to the sufficiency of the NOI must be made by motion, filed pursuant to MCR 2.119, at the time the defendant files its first response to the complaint whether by answer or motion; the undefined term "good cause" means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law. MCR 2.112(L)(2)(a) applies to all challenges to an NOI, including a claim that the notice was not received; the court rule is not limited to challenges that are based solely on the content of the NOI.

2. Under MCR 2.112(L)(2)(a), a defendant's challenge to the sufficiency of an NOI is not preserved by raising the challenge as an affirmative defense in his or her answer. A defendant forfeits any challenge to the NOI if the defendant fails to comply with the MCR 2.112(L)(2)(a) requirements; the defendant may not ignore the requirement under the belief that the NOI was not legally sufficient because the NOI is presumed sufficient until determined otherwise by the trial court if the defendant meets the MCL 600.2912b notice requirements for commencing a medical malpractice action.

3. In this case, defendants failed to challenge the sufficiency of the NOIs by motion when they filed their answers—that is, in

their first responses—as required by MCR 2.112(L)(2)(a). Good cause to justify the late challenge did not exist because defendants had the necessary information to challenge the NOIs before filing their answers; specifically, plaintiff had supplied a copy of the notices to defendants after filing her complaint, which listed the addresses to which plaintiff had sent the NOIs. Plaintiff complied with the MCL 600.2912b requirements for commencing a medical malpractice action because her proof of mailing the NOIs to defendants constituted prima facie evidence of plaintiff's compliance with the notice requirement and she filed her complaint and affidavit of merit after waiting the statutorily required period of time. Defendants were therefore obligated to raise their NOI challenges by motion in their first response to the complaint as required by MCR 2.112(L)(2)(a). Defendants could not ignore that requirement by unilaterally determining that plaintiff's compliance with the court rule was inadequate; plaintiff's NOIs were presumptively valid until rebutted in judicial proceedings and the legal sufficiency determined by the trial court. Accordingly, defendants forfeited their challenges to the NOIs by failing to comply with MCR 2.112(L)(2)(a).

Affirmed.

1. NEGLIGENCE — MEDICAL MALPRACTICE ACTIONS — NOTICE OF INTENT — CHALLENGES TO NOTICE OF INTENT.

MCL 600.2912b(1) provides that a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice not less than 182 days before the action is commenced; MCR 2.112(L)(2)(a) provides that unless the court allows a later challenge for good cause, all challenges to the sufficiency of the notice of intent (NOI) must be made by motion, filed pursuant to MCR 2.119, at the time the defendant files its first response to the complaint whether by answer or motion; MCR 2.112(L)(2)(a) applies to all challenges to an NOI, including a claim that the notice was not received; the court rule is not limited to challenges that are based solely on the content of the NOI.

2. NEGLIGENCE — MEDICAL MALPRACTICE — NOTICE OF INTENT — SUFFICIENCY OF NOTICE OF INTENT — CHALLENGES TO SUFFICIENCY MUST BE RAISED BY MOTION IN FIRST RESPONSE.

MCR 2.112(L)(2)(a) provides that in a medical malpractice action, unless the court allows a later challenge for good cause, all challenges to the sufficiency of the notice of intent (NOI) must be made by motion, filed pursuant to MCR 2.119, at the time the

defendant files its first response to the complaint whether by answer or motion; a defendant's challenge to the sufficiency of the NOI is not preserved by raising the challenge as an affirmative defense in his or her answer; a defendant forfeits any challenge to the NOI if the defendant fails to comply with the MCR 2.112(L)(2)(a) requirements because the NOI is presumed sufficient until determined otherwise by the trial court if the defendant meets the MCL 600.2912b notice requirements for commencing a medical malpractice action.

3. NEGLIGENCE — MEDICAL MALPRACTICE — NOTICE OF INTENT — CHALLENGES TO NOTICE OF INTENT — LATER CHALLENGES ALLOWED FOR GOOD CAUSE — DEFINITION OF "GOOD CAUSE."

MCR 2.112(L)(2)(a) provides that in a medical malpractice action, unless the court allows a later challenge for good cause, all challenges to the sufficiency of the notice of intent (NOI) must be made by motion, filed pursuant to MCR 2.119, at the time the defendant files its first response to the complaint whether by answer or motion; the undefined term "good cause" means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law.

Sommers Schwartz, PC (by *Ramona C. Howard*) for Nancy Sanders.

Saurbier Law Firm, PC (by *Marc D. Saurbier* and *Scott A. Saurbier*) for Richard S. Veyna, the Michigan Head and Spine Institute, and University Neurological Associates, PC.

Before: GLEICHER, P.J., and BORRELLO and SWARTZLE, JJ.

BORRELLO, J. In this interlocutory appeal in a medical malpractice action, defendants Richard S. Veyna, M.D., Michigan Head and Spine Institute (MHSI), and University Neurosurgical Associates, PC (UNA)[1] ap-

[1] Because Dr. Veyna, MHSI, and UNA are the only defendants who are parties to this appeal, our use of the word "defendants" refers only to these parties unless otherwise indicated.

peal by leave granted[2] the trial court's order granting plaintiff's motion for reconsideration and denying defendants' motion for summary disposition. The trial court denied defendants' motion for summary disposition on the ground that defendants failed to comply with MCR 2.112(L)(2)(a) in challenging plaintiff's notice of intent (NOI) to file a claim. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Plaintiff's medical malpractice claim stems from the treatment that she received at McLaren-Macomb Hospital[3] in July 2013, related to a fall that had occurred at her home. Plaintiff was admitted to McLaren-Macomb Hospital on approximately July 2, 2013, where she was treated by a neurosurgeon, Dr. Veyna, who was employed by MHSI.[4] Plaintiff alleged that defendants were negligent in treating her condition, principally by failing to timely order and perform an MRI of her brain and cervical spine on July 4, 2013, and July 5, 2013. As a result of the delay in ordering or performing a brain MRI, plaintiff alleges there was a delay in the diagnosis and treatment of her spinal condition, causing prolonged compression of the spine. Plaintiff further alleged that the surgical procedure that was performed on July 13, 2013,[5] did not provide

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[2] *Sanders v McLaren-Macomb*, unpublished order of the Court of Appeals, entered March 3, 2017 (Docket No. 336409).

[3] McLaren-Macomb is an assumed name of the Mount Clemens Regional Medical Center.

[4] Michigan Head and Spine Institute is an assumed name of University Neurosurgical Associates, PC.

[5] Both the trial court and defendants on appeal indicated that the surgery occurred on July 11, 2013. However, the NOI indicates that the surgery occurred on July 13, 2013. Because the only issue on appeal is whether defendants complied with the procedural requirements in

any benefit and that defendants'[6] negligence in failing to appropriately and timely diagnose her cervical spine pathology and relieve the pressure on her spinal cord caused her permanent quadriparesis.

On June 30, 2015, plaintiff, as required pursuant to MCL 600.2912b, mailed her NOI to, among others, defendants Dr. Veyna and MHSI. Plaintiff sent her NOI to Dr. Veyna by United States mail to the following addresses:

Richard S. Veyna, M.D.
c/o Michigan Head and Spine Institute
1030 Harrington Blvd.
Suite 100
Mt. Clemens, MI 48043

Richard S. Veyna, M.D.
c/o McLaren Macomb
1000 Harrington Blvd.
Mt. Clemens, MI 48043

Plaintiff sent her NOI to MHSI by United States mail to the following addresses:

Michigan Head and Spine Institute
1030 Harrington Blvd.
Suite 100
Mt. Clemens, MI 48043

Michigan Head and Spine Institute, PLLC
Resident Agent: Harold D. Portnoy
44555 Woodward Avenue
Suite 506
Pontiac, MI 48341

MCR 2.112(L)(2)(a) for challenging plaintiff's filing of the NOI, the date on which the surgery actually occurred is not pertinent to our analysis.

[6] This allegation in plaintiff's complaint pertained to all defendants, including those who are not parties to this appeal.

MHSI, P.L.L.C.
Resident Agent: Harold D. Portnoy
44555 Woodward Avenue
Suite 506
Pontiac, MI 48341

The two NOIs that were sent to the 44555 Woodward address were returned as undeliverable, but none of the other NOIs was returned.

On December 9, 2015, plaintiff filed her complaint against defendants alleging medical malpractice. Subsequently, on December 16, 2015, defendants' attorney, Scott Saurbier, contacted plaintiff's attorney, Matthew Turner, and requested a copy of the NOI that was sent, indicating that defendants had not received a copy. On December 28, 2015, Turner forwarded a copy of the NOI to Saurbier. Dr. Veyna averred that he never saw or received an NOI involving plaintiff until after being served with the complaint, that he was not an employee of McLaren-Macomb, and that neither MHSI nor McLaren-Macomb had ever indicated that an NOI had been delivered to them on his behalf. Additionally, Karin Green, the office administrator who receives all NOIs delivered to MHSI offices, averred that MHSI never received an NOI pertaining to plaintiff.

MHSI and UNA filed an answer on January 15, 2016, and Dr. Veyna filed an answer on February 9, 2016, in which defendants generally denied the allegations of negligence. Both answers raised as an affirmative defense that "[t]he claims are barred for failing to comply with MCL 600.2912b by not properly filing and providing a sufficient Notice of Intent."

Thereafter, on March 4, 2016, Dr. Veyna and MHSI collectively moved for summary disposition pursuant to MCR 2.116(C)(8), arguing that plaintiff failed to give defendants the notice required by MCL 600.2912b(2)

because plaintiff did not mail the NOIs to defendants' last known professional business addresses. Defendants argued that plaintiff mailed the NOIs to prior or nonexistent addresses, even though their correct addresses were reasonably ascertainable, and as a result, defendants did not receive the notice required under MCL 600.2912b to commence a medical malpractice action. Defendants contended that defendants' last known addresses could be determined by a Google search or, with respect to MHSI, by consulting the Michigan Department of Licensing and Regulatory Affairs (LARA) website.

In opposition to defendants' motion for summary disposition, plaintiff presented two arguments. First, plaintiff argued that defendants' motion was untimely under MCR 2.112(L)(2)(a), which strictly prescribes the time for challenging an NOI, and that defendants' motion must therefore be dismissed. Plaintiff asserted that under MCR 2.112(L)(2)(a), defendants were required to bring their challenge to the NOI by motion when they filed their answers but that defendants failed to do so. Plaintiffs further maintained that there was not "good cause" as required by MCR 2.112(L)(2) that would permit the trial court to allow a later challenge to the NOI because defendants were aware of the addresses to which the NOIs were sent before they filed their answers. Second, plaintiff argued that she complied with the service requirements of MCL 600.2912b(2). Plaintiff asserted that she mailed the NOIs to defendants' last known professional business addresses as reasonably ascertained from the McLaren-Macomb website, Google searches, and the LARA website. Plaintiff also mailed an NOI to McLaren-Macomb, the only place where defendants rendered medical services to plaintiff. Plaintiff further argued that there was nothing to indicate that any one

of the other business addresses for Dr. Veyna was his sole business address for receiving professional correspondence.

Defendants argued in reply that MCR 2.112(L)(2)(a) was inapplicable to their motion because defendants were not challenging the contents of the NOI but instead were only challenging the lack of service of the NOI and plaintiff's failure to comply with the requirements of MCL 600.2912b(1). Defendants further argued that they had preserved their challenge by including it in the affirmative defenses filed with their answers, which put plaintiff on notice. Additionally, defendants argued that there was good cause for purposes of MCR 2.112(L)(2) to allow defendants' challenge because defendants' substantial rights were affected by not receiving the NOI, a medical malpractice action cannot be commenced against a defendant if an NOI is not provided to that defendant, and plaintiff had notice that defendants would assert this defense.

After a hearing on defendants' summary disposition motion, the trial court issued a written opinion and order granting the motion. The trial court noted that the parties had relied on matters beyond the pleadings and, on that basis, treated the motion as one brought under MCR 2.116(C)(10). The trial court concluded that summary disposition in defendants' favor was warranted because plaintiff had violated MCL 600.2912b(1) by completely failing to serve an NOI on defendants before filing the complaint even though their addresses were reasonably determinable.

Plaintiff moved for reconsideration, arguing, as pertinent to this appeal, that defendants' motion was untimely and that the trial court's initial ruling failed to address plaintiff's argument regarding the operation of MCR 2.112(L)(2)(a).

In a written opinion and order, the trial court granted plaintiff's motion for reconsideration and ruled that defendants' summary disposition motion was denied. The trial court concluded that defendants, by filing their answers and then challenging the NOI in their subsequent summary disposition motion, failed to comply with the clear language in MCR 2.112(L)(2)(a) that requires an NOI challenge to be made by a motion filed at the time the first response to the complaint is filed. Additionally, the trial court concluded that the court rule did not permit defendants to preserve a challenge to the NOI by merely raising it in the affirmative defenses in their answers because an answer is a pleading rather than a motion. The trial court further determined that there was no showing of good cause to allow defendants' untimely challenge.

Defendants sought leave to appeal the trial court's order, arguing that MCR 2.112(L)(2)(a), which applies in medical malpractice actions, was inapplicable in this case. Specifically, defendants asserted that because the NOI was not properly served or actually received by defendants, plaintiff failed to comply with MCL 600.2912b and, therefore, a medical malpractice action was not commenced, rendering MCR 2.112(L)(2)(a) inapplicable.

This Court granted leave to appeal limited to the issues raised in the application and the supporting brief. *Sanders v McLaren-Macomb*, unpublished order of the Court of Appeals, entered March 3, 2017 (Docket No. 336409). However, Judge GLEICHER indicated that she would have denied defendants' application because their argument lacked merit, stating that "the issue in this case is whether defendants were obligated to abide by the Court Rules, which clearly set forth when a

challenge to an NOI must be made," and that "[d]efendants' belief that the case had never been properly filed does not excuse their flagrant disregard of . . . MCR 2.112[(L)(2)]." *Sanders*, unpub order (GLEICHER, J., dissenting), citing *Saffian v Simmons*, 477 Mich 8; 727 NW2d 132 (2007).

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Saffian*, 477 Mich at 12. The trial court treated defendants' motion for summary disposition as one brought pursuant to MCR 2.116(C)(10), under which "[s]ummary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Odom v Wayne Co*, 482 Mich 459, 467; 760 NW2d 217 (2008) (quotation marks and citation omitted). In deciding a motion under MCR 2.116(C)(10), a court reviews "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id*. at 466-467 (quotation marks and citation omitted).

This Court reviews for an abuse of discretion a trial court's ruling on a motion for reconsideration. *In re Moukalled Estate*, 269 Mich App 708, 713; 714 NW2d 400 (2006). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian*, 477 Mich at 12. MCR 2.119(F)(3) requires the party moving for reconsideration to "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." The trial court has "considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to

minimize costs to the parties." *In re Moukalled Estate*, 269 Mich App at 714 (quotation marks and citation omitted).

Finally, we review de novo both questions of law and the interpretation of statutes and court rules. *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 309-310; 901 NW2d 577 (2017).

III. ANALYSIS

MCL 600.2912b(1) provides, in relevant part, that "a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced."[7] The manner of providing the NOI to a potential defendant is set forth in MCL 600.2912b(2), which states as follows:

> The notice of intent to file a claim required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim. Proof of the mailing constitutes prima facie evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered.

These statutory provisions provide specific rules for initiating a medical malpractice action. As our Supreme Court has explained, "[a]lthough a civil action is generally commenced by filing a complaint, a medical

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[7] MCL 600.2912b(3), (8), and (9) describe specific situations in which the 182-day notice period may be shortened, but the length of the notice period is not pertinent to the issue raised on appeal.

malpractice action can only be commenced by filing a timely NOI and then filing a complaint and an affidavit of merit after the applicable notice period has expired, but before the period of limitations has expired." *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 94; 869 NW2d 213 (2015). The statutory requirement that a plaintiff file a timely NOI is "a prerequisite condition to the commencement of a medical malpractice lawsuit," and "the failure to comply with the statutory requirement renders the complaint insufficient to commence the action." *Driver v Naini*, 490 Mich 239, 257; 802 NW2d 311 (2011) (quotation marks and citation omitted).

MCR 2.112(L)(2) provides, in pertinent part, that

> [i]n a medical malpractice action, unless the court allows a later challenge for good cause: (a) *all challenges to a notice of intent to sue must be made by motion, filed pursuant to MCR 2.119, at the time the defendant files its first response to the complaint, whether by answer or motion*[.] [Emphasis added.]

This provision was adopted by an amendment of the court rules that became effective on May 1, 2010. 485 Mich cclxxv, cclxxvi (2010).

This Court "interpret[s] court rules using the same principles that govern the interpretation of statutes." *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). "[W]e look to the plain language of the court rule in order to ascertain its meaning and the intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Decker v Trux R Us, Inc*, 307 Mich App 472, 479; 861 NW2d 59 (2014) (quotation marks and citation omitted). "If the rule's language is plain and unambiguous, then judicial

construction is not permitted and the rule must be applied as written." *Id*. (quotation marks and citation omitted).

First, MCR 2.112(L)(2)(a) states that the rule applies specifically to "all challenges to a notice of intent to sue," which, as previously noted, is a prerequisite condition to commencing a lawsuit for medical malpractice. Defendants argue that MCR 2.112(L)(2)(a) is inapplicable in this case because their challenge is based only on a claim that there was a lack of service and is not aimed at the content of the NOI. Thus, defendants argue, MCR 2.112(L)(2)(a) does not apply to their challenge based on a lack of service because the court rule only applies to challenges "*to* a notice of intent to sue." (Emphasis added.) According to defendants, MCR 2.112(L)(2)(a) does not apply to all challenges involving the NOI requirements contained in MCL 600.2912b.

There are essentially two broad categories of NOI requirements—timing concerns and content concerns—both of which are set forth in MCL 600.2912b. See *Driver*, 490 Mich at 257-258 (explaining the difference between the effect of a failure to comply with "the *content* requirements of MCL 600.2912b(4)"[8] and the effect of a failure to comply with "the *notice-waiting-*

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[8] MCL 600.2912b(4) provides:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.

period requirements" on the tolling of the statute of limitations); *Tyra*, 498 Mich at 98 (VIVIANO, J., concurring in part and dissenting in part) ("Generally speaking, there are two ways in which a plaintiff can fail to comply with the notice requirements of § 2912b: timing or content."). The purpose of the requirement in MCL 600.2912b that an individual provide advance notice to a potential defendant before filing a medical malpractice complaint is to encourage settlement and reduce litigation costs. *DeCosta v Gossage*, 486 Mich 116, 122; 782 NW2d 734 (2010) (opinion by WEAVER, J.); see also *Bush v Shabahang*, 484 Mich 156, 174; 772 NW2d 272 (2009) (stating that the "purpose of § 2912b was to provide a mechanism for promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs") (quotation marks and citation omitted).

In other words, the purpose of the NOI is simply to give advance notice of the claim being made by the plaintiff to facilitate potential settlement. Thus, whether a challenge raised by a defendant is based on the timeliness of the NOI, the plaintiff's compliance with the notice waiting period, a claim that no NOI was received, or the contents of the NOI, the challenge

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(d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

(e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

is ultimately directed at the sufficiency of the notice received regarding the plaintiff's intent to sue. Consequently, each of these different types of challenges is just one of the possible grounds on which to challenge the sufficiency of the NOI and is essentially a challenge *to* the NOI. MCR 2.112(L)(2)(a) applies to "all" challenges to an NOI. This Court has recognized in the context of interpreting statutory language that "[t]here cannot be any broader classification than the word *all*, and *all* leaves room for no exceptions." *Peters v Gunnell, Inc*, 253 Mich App 211, 223; 655 NW2d 582 (2002) (quotation marks and citation omitted; alteration in original; emphasis added); see also *People v Monaco*, 474 Mich 48, 55; 710 NW2d 46 (2006) ("There is no broader classification than the word 'all.' In its ordinary and natural meaning, the word 'all' leaves no room for exceptions.") (quotation marks and citations omitted). The phrase "all challenges to a notice of intent to sue" in MCR 2.112(L)(2)(a) is therefore broad enough to encompass any of these grounds for challenging the notice given by a plaintiff, including a claim that the notice was not received. See *Peters*, 253 Mich App at 223. There is no language in the court rule to indicate that its application is limited only to challenges to the NOI that are based on the content of the NOI.

Next, MCR 2.112(L)(2)(a) states that these challenges to the NOI "*must* be made by motion, filed pursuant to MCR 2.119, *at the time the defendant files its first response to the complaint*, whether by answer or motion." (Emphasis added.) "The term 'must' indicates that something is mandatory." *Vyletel-Rivard v Rivard*, 286 Mich App 13, 25; 777 NW2d 722 (2009).

Thus, MCR 2.112(L)(2)(a) plainly requires a defendant to make any challenge to the sufficiency of the

NOI by filing a motion at the same time that the defendant files a first response to the complaint. The language is unambiguous and must be applied as written. *Decker*, 307 Mich App at 479. As Chief Justice KELLY explained in concurring to the adoption of the amendment to MCR 2.112 that is at issue in this case,

> [t]he amendments of MCR 2.112 and 2.118 serve to inject logic and equity into the procedural requirements governing medical malpractice cases. MCR 2.112(L)(2)(a), as amended, requires a defendant to challenge a notice of intent to sue in the defendant's first response to the complaint. This is not a novel concept. Rather, it is entirely consistent with the time limits imposed on defendants asserting other affirmative defenses. See, e.g., MCR 2.116(C)(1) to (3) and (5) to (7); MCR 2.116(D)(1) and (2). . . . These limits promote judicial economy and efficiency and ensure that preliminary issues are disposed of quickly. [485 Mich at cclxxvii (KELLY, C.J., concurring).]

In this case, plaintiff mailed NOIs to defendants and subsequently filed a complaint against defendants alleging malpractice. After the complaint was filed, defendants claimed that they had never received an NOI from plaintiff. Defendants' attorney, Saurbier, requested a copy of the NOI from plaintiff's attorney, Turner, which Turner provided on December 28, 2015. Subsequently, MHSI and UNA filed an answer on January 15, 2016, and Dr. Veyna filed an answer on February 9, 2016. Both answers raised as an affirmative defense that plaintiff's claims were barred due to failing to properly file and provide the NOI. Then, on March 4, 2016, defendants collectively moved for summary disposition, arguing that dismissal was appropriate because they did not receive the notice required under MCL 600.2912b to commence a medical malpractice action. As previously discussed, defendants' claim that they did not receive notice constituted a

challenge to the NOI, and defendants were therefore required to raise this challenge by motion filed at the time of their first response to the complaint. MCR 2.112(L)(2)(a). However, defendants did not raise this challenge by motion until March 4, 2016, well after their answers had been filed. An answer is not a "motion" under MCR 2.119 but is instead a "pleading." MCR 2.110(A)(5). There is nothing in MCR 2.112(L)(2)(a) allowing a challenge to the NOI to be preserved by including it within the affirmative defenses included in an answer. Because MCR 2.112(L)(2)(a) states that challenges to the NOI "must" be made by motion and at a specified time, these requirements are mandatory. *Vyletel-Rivard*, 286 Mich App at 25. By raising their challenge to the NOI in a motion filed after their answers, defendants failed to comply with MCR 2.112(L)(2)(a).

Defendants also argued in the trial court that good cause existed to justify their late challenge. Although MCR 2.112(L)(2)(a) provides that a court may allow a later challenge to the NOI "for good cause," there was no good cause in this case to justify permitting defendants' late challenge. The term "good cause" is not defined in MCR 2.112(L), and this Court therefore refers to the dictionary and to caselaw to ascertain its meaning. *In re FG*, 264 Mich App 413, 419; 691 NW2d 465 (2004). We have previously noted that "good cause" may be defined as " '[a] legally sufficient reason,' " *id*., quoting *Black's Law Dictionary* (7th ed) (alteration in original), or " 'a substantial reason amounting in law to a legal excuse for failing to perform an act required by law,' " *In re FG*, 264 Mich App at 419 (citations omitted).

In this case, the record shows that defendants had the necessary information to comply with the require-

ments of MCR 2.112(L)(2)(a) before defendants filed their answers. Although defendants denied receiving the NOIs before the complaint was filed on December 9, 2015, Turner forwarded a copy of the NOI and the cover letters to Saurbier on December 28, 2015, in response to Saurbier's request. Furthermore, the documents that Turner sent to Saurbier set forth the addresses to which plaintiff sent NOIs to defendants. As previously noted, defendants filed their respective answers on January 15, 2016, and February 9, 2016, but waited until March 4, 2016, to file their motion for summary disposition arguing that plaintiff failed to provide the notice required under MCL 600.2912b. It is apparent from the record that defendants possessed the information necessary to bring such a claim at the time they filed their answers and therefore could have made a timely motion raising this challenge as required by MCR 2.112(L)(2)(a). There was no legally sufficient reason justifying defendants' failure to comply with MCR 2.112(L)(2)(a), and there was consequently no good cause to warrant allowing an untimely challenge to the NOI. *In re FG*, 264 Mich App at 419. Defendants simply neglected to follow the applicable court rule.

Nonetheless, defendants also argue that MCR 2.112(L)(2)(a) is inapplicable in this case because plaintiff could not "commence" a medical malpractice action when she failed to give defendants a timely NOI, and the court rule only applies "[i]n a medical malpractice action."

As previously stated, the statutory requirement that a plaintiff file a timely NOI is "a prerequisite condition to the commencement of a medical malpractice lawsuit," and "the failure to comply with the statutory requirement renders the complaint insufficient to com-

mence the action." *Driver*, 490 Mich at 257 (quotation marks and citation omitted). More specifically, "a medical malpractice action can only be commenced by filing a timely NOI and then filing a complaint and an affidavit of merit after the applicable notice period has expired, but before the period of limitations has expired." *Tyra*, 498 Mich at 94. With respect to the requirement of providing a timely NOI, our Supreme Court has explained that "Michigan employs a 'mailbox rule' for providing this notice of intent." *Haksluoto*, 500 Mich at 310. MCL 600.2912b(2) specifically provides that "[p]roof of the mailing constitutes prima facie evidence of compliance with this section."

In *Saffian*, 477 Mich at 9, the Michigan Supreme Court addressed the question "whether defendant, who chose not to respond to a summons and complaint because he believed it was accompanied by a technically deficient affidavit of merit under MCL 600.2912d(1),[9] could be defaulted." The plaintiff in

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[9] MCL 600.2912d(1) provides:

> Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall 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 under section 2169. The affidavit of merit shall certify that the 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.

Saffian had filed a medical malpractice action, and an affidavit of merit accompanied the complaint. *Id*. at 10. The defendant did not timely answer, and the plaintiff filed a default. *Id*. On appeal, the defendant argued that because the affidavit of merit was technically deficient, no action was ever "commenced," and there was therefore no duty to answer the complaint. *Id*. at 13. Our Supreme Court held that "where an affidavit of merit is filed with a medical malpractice complaint, a defendant must timely answer or otherwise file some responsive pleading to the complaint, or else be subject to a default." *Id*. at 16. The *Saffian* Court reasoned that the defendant was not authorized "to determine unilaterally whether the plaintiff's affidavit of merit satisfies the requirements of MCL 600.2912d." *Id*. at 13. The Court further reasoned that an affidavit is presumed valid when it is filed, that "[i]t is only in subsequent judicial proceedings that the presumption can be rebutted," and that it is for the court to determine whether the pleadings are sufficient. *Id*. No such presumption would exist if no affidavit had been filed. *Id*. Additionally, the *Saffian* Court explained that "this more orderly process of honoring the presumption of the validity of pleadings," and requiring the defendant to first comply with the Court Rule requiring the timely filing of an answer before formally challenging the plaintiff's affidavit of merit, "reduces the chaotic uncertainty that allowing the defendant to decline to answer would introduce." *Id*. at 14.

Saffian guides our decision in this case. Placing that case in its historical perspective helps explain why.

(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.

In *Scarsella v Pollak*, 461 Mich 547, 549, 552-553; 607 NW2d 711 (2000), the Supreme Court held that a medical malpractice complaint filed without the affidavit of merit required by MCL 600.2912d was not "commenced" and therefore did not toll the running of the period of limitations. Two published decisions of this Court rapidly followed *Scarsella*. In both, this Court held that a defect in an affidavit of merit operated in the same manner as no affidavit at all: the underlying lawsuit was not commenced. See *Mouradian v Goldberg*, 256 Mich App 566, 574-575; 664 NW2d 805 (2003), and *Geralds v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003). When *Saffian* reached the Supreme Court in 2007, the law as established by this Court was essentially that a medical malpractice case was not commenced if the affidavit of merit accompanying the complaint was in any way defective. Nevertheless, in *Saffian*, 477 Mich at 13, 14, 16, our Supreme Court unequivocally held that the defendant was compelled to comply with MCR 2.108(A)(6) and timely answer the complaint, despite any alleged defect in the affidavit.

In *Kirkaldy v Rim*, 478 Mich 581, 583, 586; 734 NW2d 201 (2007), our Supreme Court overruled *Geralds* and *Mouradian* and held that a medical malpractice action is considered "commenced" even if the affidavit of merit filed with the complaint is defective in some respect. That our Supreme Court did not need to overrule *Geralds* and *Mouradian* when deciding *Saffian* underscores our Supreme Court's acknowledgment that the court rules control practice and procedure in the circuit courts. *Saffian* implicated a court rule that the defendant believed could be ignored because the underlying legal principle—that a malpractice case was not commenced unless the affidavit of merit met the statutory standards—would shield

this choice. The defendant's "unilateral belief" in the legal rightness of his cause, however, did not save the defendant.

The case before us is analytically no different than *Saffian*. Here, defendants unilaterally determined that plaintiff's alleged failure to mail the notices of intent to the correct addresses excused defendants from complying with the court rule governing challenges to NOIs. Like the defendant in *Saffian*, defendants here made that decision at their peril. Defendants' assumption that a court would ultimately agree that plaintiffs had not "commenced" this case does not excuse defendants' failure to play by the rules established by our Supreme Court, just as it did not excuse the defendant in *Saffian*.

In a brief order entered in *Auslander v Chernick*, 480 Mich 910 (2007),[10] however, our Supreme Court adopted the unpublished Court of Appeals dissenting opinion in that case, which held that because the plaintiffs completely failed to attach the necessary affidavits of merit to the complaint, the defendants "were never required to raise or plead their asserted defenses in the first instance because this medical malpractice action was never properly commenced," *Auslander v Chernick*, unpublished per curiam opinion of the Court of Appeals, issued May 1, 2007 (Docket No. 274079) (JANSEN, J., dissenting), p 1.

In this case, however, plaintiff mailed NOIs to defendants, and the proof of mailing indicating that these NOIs were addressed to defendants is part of the lower court record, which provides prima facie evi-

[10] An order of the Michigan Supreme Court is binding precedent if it includes an understandable rationale supporting its decision. See *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002); *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006).

dence of plaintiff's compliance with the requirement to provide defendants with the required notice. MCL 600.2912b(2); *Haksluoto*, 500 Mich at 310. After waiting a period of time, plaintiff subsequently filed her complaint with an affidavit of merit. Therefore, plaintiff made the necessary filings, and her actions taken as a whole also show prima facie compliance with the complete set of requirements for commencing a medical malpractice action. *Tyra*, 498 Mich at 94. Accordingly, if defendants believed there were deficiencies that existed in plaintiff's compliance with these requirements, defendants were obligated to raise these challenges according to the appropriate procedural rules and could not unilaterally determine that plaintiff's compliance was inadequate. *Saffian*, 477 Mich at 13. Plaintiff's NOIs were presumed to be valid until rebutted in judicial proceedings in which the court could determine their legal sufficiency. See *Saffian*, 477 Mich at 13, 14. Furthermore, defendants were not excused from the procedural requirements set forth in MCR 2.112(L)(2) because, unlike the plaintiffs in *Auslander* who entirely neglected to make a necessary filing, here, plaintiff complied with MCL 600.2912b by mailing notices of intent to the defendants. Accordingly, defendants in this case were entitled to challenge the sufficiency of the notice they received by claiming they never received the NOIs, but they were required to make that challenge according to the requirements of MCR 2.112(L)(2)(a). See *Saffian*, 477 Mich at 13, 14, 16; see also *Tyra*, 498 Mich at 102 (VIVIANO, J., concurring in part and dissenting in part) ("Although an action may be subject to attack because it was not commenced in compliance with a statutory prerequisite, the consequences that might flow from the failure to comply with the prerequisite are not self-executing.").

In conclusion, we hold that MCR 2.112(L)(2)(a) requires all challenges to the NOI to be made by motion at the time that the first response to the complaint is filed, and defendants failed to comply with this requirement. Regardless of how defendants attempt to label their challenge, it is ultimately a challenge to the NOI. Defendants forfeited their challenge to the NOI by failing to comply with the requirements of the court rule. See MCR 2.111(F)(2) (stating, in pertinent part, that a "defense not asserted in the responsive pleading or by motion as provided by these rules is waived, except for the defenses of lack of jurisdiction over the subject matter of the action, and failure to state a claim on which relief can be granted"); *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002) ("[A] 'forfeiture' is the failure to assert a right in a timely fashion."). Accordingly, we affirm the trial court's order granting reconsideration and denying defendants' motion for summary disposition.[11]

Affirmed. Plaintiff, having prevailed, may tax costs. MCR 7.219(A).

GLEICHER, P.J., and SWARTZLE, J., concurred with BORRELLO, J.

[11] Plaintiff also makes additional arguments that she in fact complied with the requirements of MCL 600.2912b and that dismissal without prejudice would be the proper remedy if plaintiff actually failed to comply with the notice requirements. However, in light of our disposition in this case, these arguments are moot, and we decline to address them. "An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). "As a general rule, an appellate court will not decide moot issues." *Id*.

In re MGR

Docket Nos. 338286 and 340203. Submitted January 9, 2018, at Detroit. Decided February 27, 2018, at 9:20 a.m. Reversed and remanded 504 Mich ___.

MGR, the minor child in this case, was born in June 2016. Immediately after his birth, MGR's birth mother placed him with prospective adoptive parents through an adoption agency. Appellants, the prospective adoptive parents, petitioned the Oakland Circuit Court, Family Division, for a direct placement adoption and listed appellee as MGR's putative father. In concurrent proceedings, appellee filed a notice in the Macomb Circuit Court, Family Division, of his intent to claim paternity of MGR, expressing his desire to seek custody of MGR if a paternity test showed that he was MGR's biological father. The paternity proceeding was later moved to the same court as the adoption proceedings. In March 2017, the court began a hearing under MCL 710.39 (§ 39) of the Michigan Adoption Code, MCL 710.21 *et seq*. Appellee did not appear at the hearing, but he participated by telephone. The court, Victoria A. Valentine, J., subsequently sua sponte adjourned the adoption proceedings and indicated that it would not take further action in the adoption case until the paternity case was resolved; appellants appealed that order as of right (Docket No. 338286). A panel of the Court of Appeals granted immediate consideration and ordered the trial court to resume the § 39 hearing. After concluding the § 39 hearing, the trial court determined that appellee was a "do something" father under MCL 710.39(2) and refused to terminate his parental rights to MGR; appellants also appealed that order as of right (Docket No. 340203).

The Court of Appeals *held*:

1. The trial court did not clearly err when it refused to terminate appellee's parental rights on the basis that appellee failed to appear in person at the initial § 39 hearing. Appellee's participation in the hearing by telephone and his counsel's appearance at the hearing satisfied the requirements in MCR 2.117(B)(1) concerning a party's appearance at a hearing. MCR 2.117(B)(1) provides that an appearance by a party's attorney is deemed an appearance by the party, and unless a rule indicates

otherwise, any act a party is required to perform may be performed by the party's attorney. The plain language of MCL 710.39(1) does not mandate that a putative father be *present* at the hearing to contest custody. The statute only requires that a putative father *appear* and contest custody. Appellee in this case "appeared" through his counsel at the § 39 hearing. Therefore, he satisfied the requirements of MCL 710.39(1) and MCR 2.117(B)(1), and the trial court's refusal to terminate appellee's parental rights on that basis was not clearly erroneous.

2. Although the trial court may have abused its discretion by adjourning the adoption proceedings, the issue was moot because a remedy could no longer be fashioned for the alleged error. Shortly after the initial § 39 hearing, the trial court sua sponte adjourned the adoption proceedings pending resolution of MGR's paternity. The Court of Appeals ordered resumption of the § 39 hearing. Because the appeal in Docket No. 338286 focused on whether the trial court abused its discretion by adjourning the § 39 hearing but that hearing was concluded following the Court of Appeals order, the Court of Appeals could no longer fashion a remedy for the alleged error and the issue was moot.

3. Appellants also asserted that the trial court erroneously found that appellee provided substantial and regular support or care to MGR's biological mother during her pregnancy such that his parental rights could not be terminated under MCL 710.39(2), but this issue was also moot. After declining to terminate appellee's parental rights to MGR, the same trial court entered an order of filiation, declaring appellee to be MGR's biological father—that is, MGR's *legal* father. Because both MCL 710.39(1) and (2) exclusively address termination of a *putative* father's parental rights during the course of an adoption, no relief was available under those statutory provisions; as a legal parent, appellee's rights could only be terminated under MCL 712A.19b. Although the Legislature has indicated that adoption actions should be disposed of as early as is practicable and that they generally have the highest priority on court dockets, there is no statutory provision mandating that adoption proceedings must always be completed before a determination is made in a parallel paternity proceeding. In fact, MCL 710.25(2) creates an exception to the general rule of priority. MCL 710.25(2) allows for the adjournment of adoption proceedings upon a showing of good cause, and caselaw states that the existence of a timely paternity action can establish good cause to adjourn an adoption proceeding. In this case, nothing suggested that the trial court acted improperly by conducting the adoption proceedings after it had

resolved the issue of appellee's paternal rights. The propriety of applying MCL 710.39(2) to the question whether appellee's parental rights should be terminated was moot because no remedy was available even if the trial court did err by refusing to terminate appellee's parental rights based on its conclusion that appellee was a "do something" father. Even if the trial court should have applied the standard in MCL 710.39(1)—the standard regarding a "do nothing" father—to the question of terminating appellee's parental rights, no relief was possible because the trial court had entered an order of filiation after determining whether to terminate appellee's parental rights. Once the order of filiation entered, appellee became MGR's legal father, and it became impossible for the Court to grant appellants relief under MCL 710.39. Consequently, the issue was moot; a remand to address provisions that pertain to putative fathers when there is no longer a putative father would provide no proper legal remedy at all.

In Docket No. 338286, trial court order and opinion affirmed as to appellee's appearance by telephone and appeal dismissed as moot with regard to adjournment of the adoption proceedings. In Docket No. 340203, the appeal was dismissed as moot.

O'BRIEN, J., concurring in part and dissenting in part, agreed in Docket No. 338286 that appellee "appeared" at the initial § 39 hearing because he participated by telephone and because his attorney was present at the hearing. Appellee's participation and his attorney's presence satisfied MCR 2.117(B)(1), and the trial court did not clearly err by refusing to terminate his parental rights on that basis. Judge O'BRIEN also agreed in Docket No. 338286 that the issue of whether the trial court erred when it adjourned the adoption proceedings pending its resolution of the paternity issue was moot because no remedy could be fashioned to address the alleged wrong. Judge O'BRIEN disagreed in Docket No. 340203 that the issue whether appellee was a "do something" father whose parental rights should not be terminated was moot. Appellants repeatedly attempted to stay the paternity proceedings until the instant appeal was resolved, and their attempts at a stay were denied. The trial court should have granted the stay and allowed review of its § 39 ruling under the proper standard. The trial court committed both factual and legal error with regard to its conclusions concerning appellee's support of the birth mother during the pregnancy and for the mother or child after the child's birth. To be considered a "do something" father, appellee must have actually done something on a regular basis, but appellee's assistance or support was minimal. Merely filing a notice of

intent to claim paternity did not constitute regular support or care under MCL 710.39(2). Appellee did not provide substantial and regular support or care within his ability to do so, as required by MCL 710.39(2). Appellee had the means and ability to contribute to the support of MGR and MGR's birth mother but did not. Appellee was not a "do something" father. Judge O'BRIEN would have reversed the trial court's decision and remanded for a new trial to determine whether appellee's parental rights should be terminated under the "do nothing" part of MCL 710.39.

ADOPTION — TERMINATION OF PARENTAL RIGHTS — LEGAL FATHER.

MCL 710.39 governs the termination of a putative father's parental rights and the classification of a putative father as a "do nothing" or "do something" father; an order of filiation establishes a putative father as a legal father to whom MCL 710.39 no longer applies.

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Jennifer M. Alberts*) for appellants.

The Heisler Law Group (by *Trevor S. Sexton*) for appellee.

Before: TALBOT, C.J., and MURRAY and O'BRIEN, JJ.

MURRAY, J. These consolidated appeals[1] involve concurrent adoption and paternity proceedings. In Docket No. 338286, we affirm the trial court's decision in part, but we dismiss as moot the second issue that appellants, the prospective adoptive parents, raise on appeal. We also dismiss as moot the appeal in Docket No. 340203.

I. FACTS AND PROCEDURAL HISTORY

MGR was born on June 5, 2016, and immediately placed by his mother in the custody of appellants

[1] *In re MGR*, unpublished order of the Court of Appeals, entered October 18, 2017 (Docket Nos. 338286 and 340203).

through Morning Star Adoption Center. Appellants then filed a petition for direct placement adoption, listing appellee as MGR's putative father.[2] Meanwhile, appellee initiated simultaneous proceedings by filing a notice of intent to claim paternity and expressing his desire to seek custody of MGR.[3]

On March 24, 2017, the trial court commenced a hearing under MCL 710.39 (§ 39) of the Adoption Code,[4] during which appellee appeared by telephone. However, on April 17, 2017, the trial court entered an order indicating it would take no further action in the adoption case until a resolution was reached in the paternity action. Appellants appealed that order, and a panel of this Court granted their motion for immediate consideration, *In re MGR*, unpublished order of the Court of Appeals, entered May 19, 2017 (Docket No. 338286), and ordered the trial court to continue the adoption proceedings by scheduling a § 39 hearing, *In re MGR*, unpublished order of the Court of Appeals, entered May 31, 2017 (Docket No. 338286).

The trial court recommenced the § 39 hearing in the adoption proceedings on August 7, 2017, and issued its opinion and order on September 14, 2017. It concluded that although appellee did not appear in person at the March 24, 2017 hearing, he properly appeared via telephone and expressed his intent to pursue custody if

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[2] Neither the Adoption Code, in MCL 710.22, nor the Paternity Act, in MCL 722.711, defines the term "putative father." However, this Court defined "putative father" for purposes of the Paternity Act as "a man reputed, supposed, or alleged to be the biological father of a child." *Girard v Wagenmaker*, 173 Mich App 735, 740; 434 NW2d 227 (1988), rev'd on other grounds 437 Mich 231 (1991). We see no reason why this same definition should not apply to that term under the Adoption Code.

[3] The paternity action was initially filed in Macomb County but was later moved to Oakland County.

[4] MCL 710.21 *et seq*.

a paternity test determined him to be MGR's father. Further, the trial court determined that appellee was a "do something" father and declined to terminate his parental rights under MCL 710.39(2).

II. ANALYSIS

A. DOCKET NO. 338286

In Docket No. 338286, appellants appeal as of right the trial court's April 17, 2017 order adjourning the adoption proceedings pending resolution of appellee's paternity action. They argue that the court committed clear legal error by failing to terminate appellee's parental rights because he did not personally appear and contest custody during the initial § 39 hearing. Appellants also argue that the trial court erred when it adjourned the adoption proceedings because appellee did not request an adjournment and the good cause necessary to warrant an adjournment did not exist. For the reasons stated in Judge O'BRIEN's partial dissent, we (1) affirm the trial court's conclusion that appellee properly appeared at the § 39 hearing, and (2) dismiss as moot appellants' argument that the court erred when it adjourned the adoption proceedings.

B. DOCKET NO. 340203

In Docket No. 340203, appellants appeal as of right the trial court's September 14, 2017 opinion and order declining to terminate appellee's parental rights pursuant to MCL 710.39(2). Specifically, appellants assert that the trial court erroneously found that appellee provided substantial and regular support or care to MGR's mother during her pregnancy such that his parental rights could not be terminated under MCL 710.39(2). This issue is, likewise, moot.

"An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief." *City of Jackson v Thompson-McCully Co*, LLC, 239 Mich App 482, 493; 608 NW2d 531 (2000). Generally, appellate courts do not decide moot issues. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). Through this appeal, appellants are seeking reversal of the trial court's application of MCL 710.39(2), based on the argument that under the facts appellee was a "do nothing" father, thus warranting application of MCL 710.39(1), rather than MCL 710.39(2). If they were to succeed with this argument, the trial court would be required on remand to apply the termination provisions of MCL 710.39(1). But, as explained below, an order of filiation entered after the order on appeal "renders it impossible for the court, if it should decide in favor of [appellants], to grant relief" under that statutory provision. *City of Jackson*, 239 Mich App at 493. The appeal is therefore moot.

After the trial court entered its opinion and order declining to terminate appellee's parental rights under MCL 710.39(2), the same court entered an order of filiation in the separate paternity action, declaring appellee to be MGR's biological and, therefore, legal father. Accordingly, appellee is no longer a putative father, and neither we nor the trial court can grant relief under MCL 710.39(1) and (2), which both exclusively address termination of a *putative father's* rights during the course of an adoption. Because appellee is now considered a legal parent, his rights can only be terminated pursuant to MCL 712A.19b. See *In re MKK*, 286 Mich App 546, 558; 781 NW2d 132 (2009) ("Once a man perfects his legal paternity, he is considered a 'parent,' with all the attendant rights and responsibilities, and termination of his parental rights

can generally only be accomplished in cases of neglect or abuse under MCL 712A.19b."). A remand to address statutory provisions that pertain to putative fathers, when there is no longer a putative father in this case, would provide no proper legal remedy at all.

Appellants argue that certain provisions of the Adoption Code (MCL 710.36, MCL 710.37, and MCL 710.39) address termination of a legal father's parental rights, so that an order of filiation does not render moot the proceedings under the Adoption Code. This argument focuses on the wrong issue. Whether these other sections can affect a legal father's rights under the Adoption Code has no impact on whether, on remand, a remedy to appellants would exist *under MCL 710.39* in light of the order of filiation. The answer to that question solely involves the scope of § 39. And, as we have previously stated, when it comes to terminating the parental rights of a legal father so that an adoption can move forward, the provisions of § 39 simply do not apply. *In re MKK*, 286 Mich App at 558.[5]

For a couple of reasons, we disagree with appellants' argument that the order of filiation cannot control the disposition of this adoption appeal because proceedings under the Adoption Code routinely take precedence over separate paternity actions. See generally MCL 710.21a. For one, that argument is contradicted by this Court's decision in *In re MKK*, 286 Mich App 546. Additionally, although the Legislature has indicated

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[5] Although MCL 710.36(1) authorizes trial courts to conduct hearings to determine the identity of a child's father when the release or consent of the natural father cannot be obtained, appellants appear to ignore the portion of MCL 710.36(1) that permits the court, as part of the hearing, to terminate the rights of a father as provided in §§ 37 and 39 of the Adoption Code. MCL 710.37 and MCL 710.39 apply only to putative fathers, and as provided above, appellee is no longer a putative father. He is MGR's biological and legal father.

that adoption proceedings should generally have the highest priority on court dockets "so as to provide for their earliest *practicable* disposition," MCL 710.25(1) (emphasis added), no statutory provision has been pointed out to us *mandating* that adoption proceedings must *always* be completed before a determination is made in a parallel paternity proceeding. In fact, MCL 710.25(2) creates an exception to the general rule, allowing for the adjournment of adoption proceedings upon a showing of good cause. *In re MKK*, 286 Mich App at 562. The *In re MKK* Court held that good cause to adjourn an adoption proceeding can be established by the existence of a timely paternity action:

> [I]n cases . . . where there is no doubt that respondent is the biological father, he has filed a paternity action without unreasonable delay, and there is no direct evidence that he filed the action simply to thwart the adoption proceedings, there is good cause for the court to stay the adoption proceedings and determine whether the putative father is the legal father, with all the attendant rights and responsibilities of that status. [*Id*.]

Importantly, the Court also acknowledged that

> while a stated purpose of the Adoption Code is to "safeguard and promote the best interests of each adoptee," upholding the rights of the adoptee as paramount to those of any other, see MCL 710.21a(b), the general presumption followed by courts of this state is that the best interests of a child are served by awarding custody to the natural parent or parents, see, e.g., *Hunter v Hunter*, 484 Mich 247, 279; 771 NW2d 694 (2009) (holding that "the established custodial environment presumption in MCL 722.27[1][c] must yield to the parental presumption in MCL 722.25[1]"). Thus, giving a paternity action priority over an adoption proceeding does not necessarily conflict with protecting the best interests of the child. [*In re MKK*, 286 Mich App at 562-563 (bracketed material in original).]

Although appellants disagree with the conclusion set forth in *In re MKK*, it is a binding decision that has not been rejected by this Court or the Michigan Supreme Court.[6]

We also do not share appellants' concern that trial courts will purposefully insulate their adoption decisions by entering a subsequent order of filiation that, under our decision today, would moot the appeal of an earlier adoption decision. Rather, we employ the well-earned presumption that trial courts act properly in accord with their constitutional duties. *People v Purcell*, 174 Mich App 126, 129; 435 NW2d 782 (1989). Nothing in the record before us suggests that the trial court acted improperly by deciding the paternity case once it had resolved the § 39 issue.[7]

Based on the foregoing, in Docket No. 338286, we affirm that portion of the trial court's April 17, 2017 opinion and order concluding that appellee properly appeared via telephone at the § 39 hearing, but we dismiss as moot appellants' argument that the trial court erred when it adjourned the adoption proceedings. We also dismiss as moot the appeal in Docket No. 340203.

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[6] The recent Supreme Court order in *In re LMB*, 501 Mich 965 (2018), a case likewise involving separate adoption and paternity actions, does not affect our decision. There, subsequent to a decision of this Court dismissing as moot the prospective adoptive parents' appeal from the trial court's order declining to terminate the respondent father's parental rights pursuant to MCL 710.39(1), *In re LMB*, unpublished per curiam opinion of the Court of Appeals, issued September 14, 2017 (Docket No. 338169), pp 1-2, a separate panel of this Court peremptorily reversed a different trial court's refusal to stay the putative father's paternity action pending final resolution of the adoption case, *Sarna v Healy*, unpublished order of the Court of Appeals, entered December 18, 2017 (Docket No. 341211). The same procedural circumstances do not exist in this case.

[7] Interestingly, appellants' theory could only occur if the adoption issue was decided first, something appellants contend should occur in every case.

TALBOT, C.J., concurred with MURRAY, J.

O'BRIEN, J. (*concurring in part and dissenting in part*). In Docket No. 338286, appellants, the adoptive parents, appeal as of right the April 17, 2017 order adjourning proceedings under the Adoption Code, MCL 710.21 *et seq*., pending the resolution of the paternity action initiated by appellee, the putative father. On appeal, appellants present two issues. First, appellants argue that the trial court committed clear legal error by failing to terminate the putative father's parental rights when he failed to appear and contest custody during a hearing scheduled pursuant to MCL 710.39(1) (the § 39 hearing). Second, appellants argue that the trial court should not have adjourned the adoption proceedings because the putative father did not request an adjournment and there was no good cause to warrant an adjournment. In Docket No. 340203, appellants appeal as of right the September 14, 2017 opinion and order determining that the putative father's parental rights should not be terminated under MCL 710.39(2). Appellants ask this Court to determine whether the trial court erroneously found that the putative father provided substantial and regular support or care to the birth mother during her pregnancy such that the putative father was subject to MCL 710.39(1), not MCL 710.39(2). In Docket No. 338286, for the reasons stated in this opinion, I agree with the majority that the putative father "appeared" at the § 39 hearing and that the other issue raised is moot. However, in Docket No. 340203, I would reverse the trial court's decision and remand for the trial court to evaluate whether the putative father's parental rights should be terminated under MCL 710.39(1). Therefore, I dissent from that portion of the majority's opinion.

I. DOCKET NO. 338286

In Docket No. 338286, appellants argue that the trial court erroneously declined to terminate the putative father's parental rights at the § 39 hearing when the putative father failed to personally appear. Appellants also argue that the trial court abused its discretion by adjourning the adoption proceedings pending resolution of the paternity action.

A. PUTATIVE FATHER'S PARENTAL RIGHTS

With respect to appellants' argument that the putative father failed to appear at the § 39 hearing as required by MCL 710.39,[1] appellant's argument is unpersuasive. It is undisputed that the putative father did not personally appear for the § 39 hearing. However, his counsel was present. When the putative father's counsel indicated to the trial court that he did not know where the putative father was and that the putative father had been nonresponsive as of late, the trial judge took it upon herself to call the putative

[1] MCL 710.39 states, in pertinent part:

> (1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.
>
> (2) If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with the putative father's ability to provide support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with [MCL 710.51(6)] or [MCL 712A.2].

father in order to protect his "constitutional rights with regard to [t]his contested hearing."[2]

MCR 2.117(B)(1) states that

> [a]n attorney may appear by an act indicating that the attorney represents a party in the action. An appearance by an attorney for a party is deemed an appearance by the party. Unless a particular rule indicates otherwise, any act required to be performed by a party may be performed by the attorney representing the party.

The putative father's counsel identified himself at the § 39 hearing as representing the putative father, which satisfies MCR 2.117(B)(1). When looking solely at the plain language of MCL 710.39(1), nothing in that statute specifically requires a putative father to be *present* to contest custody; it only requires that a putative father *appear* and contest custody. MCL 710.39(1). When a statute's language is unambiguous, as is the case here, this Court is required to " 'give the words their plain meaning and apply the statute as written.' " *In re MJG*, 320 Mich App 310, 321; 906 NW2d 815 (2017), quoting *Rowland v Washtenaw Co*

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[2] Notably, the trial court's belief that the putative father had constitutional rights regarding the hearing was erroneous. The putative father was not the minor child's legal parent because he had not perfected paternity, and " 'the mere existence of a biological link does not necessarily merit constitutional protection.' " *In re MKK*, 286 Mich App 546, 561; 781 NW2d 132 (2009), quoting *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 193; 740 NW2d 678 (2007) (quotation marks and citation omitted). "Further, 'there has yet to be any determination in this state that a putative father of a child born out of wedlock, without a court determination of paternity, has a protected liberty interest with respect to the child he claims as his own.' " *In re MKK*, 286 Mich App at 561, quoting *Nugent*, 276 Mich App at 193. An exception exists "when a putative father has established a custodial or supportive relationship under MCL 710.39(2)," which the putative father had not done here. *In re MKK*, 286 Mich App at 561. Accordingly, the putative father had no constitutional rights for the trial court to protect.

Rd Comm, 477 Mich 197, 202; 731 NW2d 41 (2007). Therefore, although the putative father's failure to physically appear at the § 39 hearing calls into question his sincerity in contesting the adoption proceedings, the appearance of the putative father's counsel at the § 39 hearing qualifies as an appearance by the putative father pursuant to MCR 2.117(B)(1).[3]

B. ADJOURNMENT OF ADOPTION PROCEEDINGS

Appellants also argue that the trial court abused its discretion by sua sponte adjourning the adoption proceedings pending a resolution of the paternity action initiated by the putative father. The Adoption Code provides that "[a]n adjournment or continuance of a proceeding under this chapter shall not be granted without a showing of good cause." MCL 710.25(2). Generally, adoption proceedings should be resolved as quickly as possible and should be given priority on a trial court's docket. *In re MKK*, 286 Mich App at 562, citing MCL 710.25(1).

Here, the trial court may have abused its discretion by adjourning the adoption proceedings, particularly given that this case had been pending for 10 months at

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[3] Also of note, the trial court was easily able to reach the putative father via telephone. On that telephone call, the putative father made it clear that he had notice of the hearing and had intended to be there, but he was not able to make it due to a lack of transportation. Additionally, the putative father was very clear that if a DNA test established that he was the biological father of the minor child, he would be contesting custody.

Appellants argue that, because the putative father qualified the circumstances under which he would contest custody—i.e., only if the minor child was his biological child—the putative father does not satisfy the requirements of MCL 710.39(1). However, appellants' argument fails because the putative father's intent to contest custody was clear. The trial court did not clearly err by declining to terminate the putative father's parental rights.

the time of the adjournment, that the putative father lacked initiative in seeking a DNA test, and that overall, he lacked involvement in the child's life. However, this issue is moot. An issue is moot and generally will not be reviewed if this Court can no longer fashion a remedy for the alleged error. *Silich v Rongers*, 302 Mich App 137, 151-152; 840 NW2d 1 (2013).

After filing their claim of appeal, appellants filed two motions in this Court: a motion for immediate consideration and a motion for peremptory reversal. We granted appellants' motion for immediate consideration,[4] but denied the motion for peremptory reversal.[5] We also ordered the trial court to "grant no further adjournments of the adoption proceedings after June 6, 2017, and [to] schedule a hearing pursuant to MCL 710.39 of the Adoption Code forthwith."[6]

Subsequently, a § 39 hearing began on July 14, 2017, but the parties were unable to conclude the hearing on that date. As a result, the trial court adjourned the hearing until September 29, 2017. Appellants moved to enforce the May 31, 2017 order, and we ordered the trial court to "re-commence and conclude [the § 39 hearing] within 14 days of the date of entry of this order [July 25, 2017]."[7] The § 39 hearing restarted on August 7, 2017, and concluded on August 8, 2017. Appellants' appeal focuses on whether it was an abuse of the trial court's discretion to adjourn a hearing pursuant to MCL 710.39 pending the outcome of the

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[4] *In re MGR*, unpublished order of the Court of Appeals, entered May 19, 2017 (Docket No. 338286).

[5] *In re MGR*, unpublished order of the Court of Appeals, entered May 31, 2017 (Docket No. 338286).

[6] *Id*.

[7] *In re MGR*, unpublished order of the Court of Appeals, entered July 25, 2017 (Docket No. 338286).

putative father's paternity action, but that hearing was commenced and concluded upon this Court's orders; therefore, "this Court can no longer fashion a remedy for the alleged error," and the issue is moot. *Silich*, 302 Mich App at 151-152.

II. DOCKET NO. 340203

In Docket No. 340203, appellants argue that the trial court legally and factually erred by finding that the putative father qualified as a "do something" father and then determining whether his parental rights should be terminated under MCL 710.39(2).

As the majority points out, because the trial court issued its opinion and order finding that the putative father was a "do something" father, the trial court entered an order of filiation with regard to the putative father and the minor child. Relying on *In re LMB*,[8] an unpublished case from a panel of this Court, the trial court apparently believed that it was obligated to enter the order of filiation. However, in *LMB*, unlike in the instant case, the order of filiation was entered by an entirely separate trial court that was apparently unaware of the adoption proceedings. Moreover, the *LMB* opinion was later vacated by the Michigan Supreme Court in light of this Court's subsequent order in an appeal from a separate paternity action. In that subsequent order, a panel of this Court reversed the trial court's order denying the adoptive parents' motion for a stay pending the adoption appeal and granted the stay.[9] In this case, the paternity and adoption cases

[8] *In re LMB*, unpublished per curiam opinion of the Court of Appeals, issued September 14, 2017 (Docket No. 338169), vacated 501 Mich 965 (2018).

[9] *Sarna v Healy*, unpublished order of the Court of Appeals, entered December 18, 2017 (Docket No. 341211).

were before the same trial court and, given the public record of the paternity action, it appears that appellants repeatedly attempted to stay those proceedings until this appeal was resolved. However, for whatever reason, the trial court denied appellants' motions.[10] In so doing, it appears that the trial court entered an order that it knew would effectively prevent appellate review of its decision rather than grant the stay and allow review. Under these circumstances, I would not hold this issue moot. And for the reasons stated herein, I would remand to the trial court to conduct a § 39 hearing under the proper standard of review.

A trial court's determination of whether MCL 710.39(1) or MCL 710.39(2) applies to a putative father is a question of law that this Court reviews de novo. *In re RFF*, 242 Mich App 188, 195; 617 NW2d 745 (2000). A trial court's factual findings are reviewed for clear error. *In re BKD*, 246 Mich App 212, 215; 631 NW2d 353 (2001). A trial court has clearly erred if this Court is left with a definite and firm conviction that a mistake was made. *Id*.

MCL 710.39 separates putative fathers into two distinct classes: "do nothing" fathers and "do something" fathers. MCL 710.39(1) and (2), respectively. If a putative father is found to be a "do something" father, his parental rights to the child may only be terminated under MCL 710.51(6) or MCL 712A.2. MCL 710.39(2). A lesser standard applies when terminating the parental rights of a "do nothing" father; the trial court need

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[10] The trial court's decision to deny appellants' motion to stay is now pending in a separate appeal before this Court. As in *LMB*, this Court's decision in the separate appeal could result in the Supreme Court's vacating the majority's decision in this case. This is the second time this Court has been confronted with this situation in the past six months. Guidance from the Supreme Court could be of great benefit in the future to the trial courts presiding over similar cases.

only inquire into his fitness as a parent and his ability to properly care for the child and then determine "whether the best interests of the child will be served by granting custody to him." MCL 710.39(1). To qualify as a "do something" father, a putative father must demonstrate that he has either (1) established a custodial relationship with the child or (2) provided substantial and regular support or care, within his ability to do so, for the mother during her pregnancy, or for either the mother or child after the child's birth. MCL 710.39(2).

During the § 39 hearing in this case, the putative father testified that the birth mother became pregnant with the minor child in October 2015. In November 2015, the putative father rented an apartment for them to live in. The birth mother moved out of the apartment in February 2016, four months into her pregnancy, after which the putative father only gave her financial assistance on one occasion. Additionally, the putative father only recalled taking the birth mother to Planned Parenthood once for prenatal care.

After leaving the apartment, the birth mother ceased all communications with the putative father. However, the putative father testified that he was able to make contact with members of her family on "multiple occasions." Specifically, the putative father was in contact with the birth mother's sister, two brothers, and mother. In March 2016, the birth mother threatened to seek a personal protection order (PPO) against the putative father if he did not stop attempting to contact her directly, but she never followed through on the threat.

In a written opinion after the § 39 hearing, the trial court found that the putative father was a "do something" father because he had provided "substantial and

regular support or care" within his abilities to the birth mother during her pregnancy, "despite the legal obstacles and hurdles placed upon him by [the birth mother's counsel and by the birth mother]." Specifically, the trial court cited the birth mother's threat to file a PPO against the putative father as evidence of the birth mother's having "impeded" the putative father's ability to provide regular and substantial support during her pregnancy.

The trial court's opinion clearly contains numerous factual and legal errors. The putative father was not a "do something" father as contemplated by MCL 710.39(2), and the trial court's factual finding that the birth mother impeded the putative father's efforts to provide substantial and regular support and care during her pregnancy, as required under MCL 710.39(2), was clearly erroneous.

In 1998, the Legislature amended MCL 710.39 and increased the supportive element of MCL 710.39(2) from "support or care" to "substantial and regular support or care." MCL 710.39(2), as amended by 1998 PA 94. The plain language of MCL 710.39(2), as amended, requires substantial and *regular* support or care, which suggests that the Legislature intended for putative fathers to provide support or care throughout a birth mother's pregnancy.

This Court previously concluded that a putative father's desire or effort to be involved in a birth mother's pregnancy "does not constitute substantial and regular support or care for the purposes of [MCL 710.39(2)]." *In re RFF*, 242 Mich App at 201. This Court also found that merely filing a notice of intent to claim paternity in an adoption action does not constitute support or care under MCL 710.39(2). *Id*. In sum, this Court has made it clear that, in order to be considered a "do something"

father under MCL 710.39(2), a putative father must actually do something on a regular basis.

The record is clear that the birth mother moved out of the couple's apartment during the fourth month of her pregnancy. Although the putative father had been supporting the birth mother while they were living together, the putative father only provided financial assistance on one occasion after the birth mother moved out. In March 2016, the birth mother told the putative father that she was unwilling to allow him to have custody of their child and that she was considering adoption. The two had no further communication until June or July of 2016, after the minor child was born and placed with appellants.

Although the birth mother threatened to file a PPO against the putative father, she never did. Therefore, during the last five months of the birth mother's pregnancy, the putative father could have sent money or necessities to her directly, or through other channels such as the birth mother's family with whom the putative father had remained in contact. There is no evidence to suggest that the putative father was threatened with a PPO if he continued to communicate with the birth mother's family. Further, the putative father certainly had the financial means to provide at least some regular support to the birth mother during her pregnancy given the putative father's testimony that he was employed until shortly after the minor child's birth. The putative father's testimony established that he had the means to provide regular support or care, yet he *chose* not to do so. Given the foregoing, the trial court's finding that the birth mother impeded the putative father's ability to provide substantial and regular support or care during her pregnancy is wholly unsupported by the record and was clearly erroneous.

The putative father also failed to provide substantial care or support to the minor child after the child's birth. The putative father testified that after the minor child was born, he purchased clothing, diapers, and other necessities for the minor child, and he even set up a "GoFundMe page" to help pay for his attorney fees and things that the minor child would need. However, the putative father never sent those necessities to the birth mother, or to the adoptive parents, which he could have done through the adoption agency with whom the putative father had been in contact.

It is also noteworthy that when the putative father was told that he could have supervised visits with the minor child, he declined because he did not want "strangers staring down at [him] while—[he got] to know [his] son[.]" The putative father further testified that he was also offered an opportunity to meet the minor child's adoptive family "somewhere in the public [to] allow [him] a couple of hours with [his] son," but he declined that invitation as well. Based on the foregoing, the trial court clearly erred by concluding that the putative father provided substantial and regular support or care within his abilities to the birth mother or to the minor child after the minor child's birth, as contemplated by MCL 710.39(2).

The trial court also committed legal error when it considered the putative father's actions in bringing legal proceedings as "support" for the purposes of MCL 710.39(2). The trial court found that the putative father was an "active and vigilant participant in both the paternity and adoption actions . . . despite the legal obstacles and hurdles" placed in his way by the birth mother and her counsel, i.e., the birth mother's threat of a PPO. The trial court opined that the putative father's participation in the legal proceedings "demon-

strate[d] [that] he provided substantial and regular care within his ability . . . ." However, as previously noted, merely filing a notice of intent to claim paternity in an adoption action does not constitute regular support or care under MCL 710.39(2). *In re RFF*, 242 Mich App at 201. Consequently, the putative father's participation in the paternity action and the adoption proceedings should not have been considered when determining whether the putative father fell under MCL 710.39(1) or (2). The trial court's reasoning was legally erroneous.

Additionally, the trial court's ruling in this regard was *factually* erroneous. At the March 24, 2017 hearing, the putative father's own counsel informed the trial court that he did not know where the putative father was. The putative father's counsel informed the trial court that in the month preceding that hearing, the putative father had not responded to any letters or phone calls regarding this matter and that the putative father had not "shown a lot of interest in progressing with his case recently." The trial court's factual determination that the putative father had been an "active and vigilant participant" during these proceedings was clearly erroneous.

The trial court also committed legal error by relying on caselaw predating the amendment of MCL 710.39. In issuing its opinion, the trial court referred to *In re Dawson*, 232 Mich App 690, 694; 591 NW2d 433 (1998), which lists several factors used by trial courts prior to the amendment of MCL 710.39 to evaluate whether a putative father came under MCL 710.39(1) or MCL 710.39(2). The trial court acknowledged that much of the caselaw predating the amendment of MCL 710.39 was now "irrelevant," but it went on to opine that the "factors [enumerated in *In re Dawson*] remain instruc-

tive." Specifically, the trial court relied on language from *In re Dawson* in which trial courts were instructed to consider whether "the mother impeded the father's efforts to provide her with support . . . ." *In re Dawson*, 232 Mich App at 694.

Given that MCL 710.39(2) has been amended to include a more stringent support obligation since this Court's decision in *In re Dawson*, those considerations, including whether the birth mother "impeded the father's efforts to provide her with support," are now obsolete. As discussed, to be considered a "do something" father under MCL 710.39(2), a putative father must have actually done something on a regular basis. Here, the putative father did nothing during the last five months of the birth mother's pregnancy. That the trial court considered the factors from *Dawson* constituted legal error.

On the basis of the foregoing, I would conclude that the trial court improperly assessed whether the putative father's parental rights should be terminated under MCL 710.39(2), and I would remand to the trial court to determine whether his rights should be terminated under the proper standard found in MCL 710.39(1).

For these reasons, I concur with the majority in Docket No. 338286, but respectfully dissent from the majority's decision in Docket No. 340203.

BRONSON HEALTHCARE GROUP, INC v MICHIGAN
ASSIGNED CLAIMS PLAN

Docket No. 336088. Submitted March 6, 2018, at Grand Rapids. Decided March 8, 2018, at 9:00 a.m.

Bronson Healthcare Group, Inc., filed an action in the 8th District Court against the Michigan Assigned Claims Plan and the Michigan Automobile Insurance Placement Facility (collectively, defendants) and against John Doe Insurance Company, seeking to recover personal protection insurance (PIP) benefits for services it had provided to an individual injured in an automobile accident. Plaintiff sought to compel defendants to assign the claim for PIP benefits to an insurer, arguing that the injured individual was not covered by a no-fault insurance policy; defendants refused to assign the claim. The district court, Vincent C. Westra, J., granted summary disposition in favor of plaintiff, reasoning that defendants were statutorily obligated to assign plaintiff's claim for PIP benefits. Defendants appealed in the Kalamazoo Circuit Court. The circuit court, Alexander C. Lipsey, J., dismissed the appeal for lack of subject-matter jurisdiction, reasoning that the district court order was not a final order over which the circuit court had jurisdiction under MCR 7.103(A)(1). The Court of Appeals granted defendants' application for leave to appeal.

The Court of Appeals *held*:

1. The Supreme Court's holding in *Covenant Med Ctr, Inc v State Farm Mut Ins Co*, 500 Mich 191 (2017)—that under the no-fault act, MCL 500.3101, *et seq*., healthcare providers do not have an independent statutory cause of action against insurers for the payment of PIP benefits—applies equally to direct actions by healthcare providers against a state assigned claims plan and applies retroactively to cases pending on direct appeal when *Covenant* was decided; however, an insured may assign his or her right to past or presently due benefits to the healthcare provider. *Covenant* controlled the outcome of the case. Defendants were entitled to summary disposition because, as a healthcare provider, plaintiff did not have a cause of action against defendants for the recovery of PIP benefits. However, on remand, plaintiff

could move to amend its complaint to pursue the benefits under an assigned-claim theory given that the injured person had purportedly assigned those claims to plaintiff.

2. Appellate courts have discretion to consider unpreserved questions of law, and the defense of "failure to state a claim" cannot be waived. Accordingly, defendants did not waive appellate review of their *Covenant*-related arguments even though they failed to raise—and the trial court did not decide—the arguments.

Circuit court order vacated, district court order reversed, and the case remanded to the district court for further proceedings.

Miller Johnson (by *Joseph J. Gavin* and *Jason M. Crow*) for Bronson Healthcare Group, Inc.

Hewson & Van Hellemont, PC (by *Nicholas S. Ayoub*) for the Michigan Assigned Claims Plan and the Michigan Automobile Insurance Placement Facility.

Before: O'CONNELL, P.J., and HOEKSTRA and SWARTZLE, JJ.

HOEKSTRA, J. Defendants Michigan Assigned Claims Plan (MACP) and Michigan Automobile Insurance Placement Facility (MAIPF) appeal by leave granted the circuit court order dismissing their claim of appeal for lack of subject-matter jurisdiction.[1] Because plaintiff is not statutorily entitled to maintain an action for personal protection insurance (PIP) benefits, we vacate the decision of the circuit court, we reverse the district court's grant of summary disposition to plaintiff, and we remand to the district court for entry of summary disposition in favor of defendants.

Plaintiff provided medical treatment to an individual injured in an automobile accident in October

[1] Because only MACP and MAIPF are parties to this appeal, our use of the term "defendants" refers to them alone and does not include defendant John Doe Insurance Company.

2014. According to plaintiff, the injured party was not covered by a no-fault insurance policy, and plaintiff sought to have defendants assign the claim to an insurer. Defendants refused to assign the claim. Thereafter, plaintiff filed a complaint in the district court against defendants and John Doe Insurance Company, claiming that defendants had an obligation to assign the claim to an insurer and that John Doe Insurance Company was liable for approximately $5,000 in no-fault benefits. With regard to defendants, the district court granted summary disposition to plaintiff under MCR 2.116(I), concluding that defendants were statutorily obligated to assign plaintiff's claim for benefits. Defendants appealed in the circuit court, but the circuit court dismissed the appeal for lack of jurisdiction, reasoning that the order granting summary disposition to plaintiff was not a final order over which the circuit court had jurisdiction under MCR 7.103(A)(1). Defendants filed an application for leave to appeal in this Court, which we granted on May 8, 2017.[2]

On appeal, defendants ask that we remand for entry of summary disposition in their favor under *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017). In contrast, plaintiff asserts that we should not grant defendants relief under *Covenant* because defendants did not raise their *Covenant* arguments in the lower courts. Alternatively, plaintiff argues that it should be given an opportunity to amend its pleadings to assert a claim for benefits based on an assignment of rights from the injured party to plaintiff.

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[2] *Bronson Healthcare Group, Inc v Mich Assigned Claims Plan*, unpublished order of the Court of Appeals, entered May 8, 2017 (Docket No. 336088).

Relevant to the parties' arguments, on May 25, 2017, the Michigan Supreme Court decided *Covenant*, wherein the Court held that healthcare providers do not have an independent statutory cause of action against insurers to recover PIP benefits. *Id*. at 195-196, 217-218. Since *Covenant* was decided, this Court has determined that the rule announced in *Covenant* applies equally to direct actions by healthcare providers against a state assigned claims plan. *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 172-173; 909 NW2d 38 (2017). We have also held that *Covenant* applies retroactively to cases pending on direct appeal when *Covenant* was decided. *Id*. at 196. See also *VHS Huron Valley Sinai Hosp v Sentinel Ins Co (On Remand)*, 322 Mich App 707, 713-714; 916 NW2d 218 (2018).

In this case, *Covenant* is clearly dispositive with regard to plaintiff's claims against defendants. Quite simply, as a healthcare provider, plaintiff has no independent statutory claim against defendants. *Covenant*, 500 Mich at 195; *W A Foote Mem Hosp*, 321 Mich App at 172-173. Under *Covenant*, defendants are entitled to summary disposition because plaintiff has no cause of action against defendants, and plaintiff has therefore failed to state a claim on which relief may be granted. See MCR 2.116(C)(8).

On appeal, plaintiff does not offer a substantive challenge to defendants' entitlement to summary disposition under *Covenant*. Instead, plaintiff maintains that the *Covenant* question is not properly before us because it was not raised and decided in the lower courts. In analogous circumstances, we have previously rejected preservation arguments relating to *Covenant* and exercised our discretion to review *Covenant* arguments that were not raised before, addressed, and

decided by the trial court. *W A Foote Mem Hosp*, 321 Mich App at 173-174. See also *VHS Huron Valley Sinai Hosp*, 322 Mich App at 716, 719-720. Specifically, we have recognized that a defense of "failure to state a claim on which relief can be granted" cannot be waived, we have emphasized our discretion to consider unpreserved questions of law, and we have acknowledged that, with regard to cases pending when *Covenant* was decided, a defendant should not be faulted for failing to challenge a healthcare provider's statutory right to bring a claim because pre-*Covenant* caselaw would have rendered any such argument futile. *W A Foote Mem Hosp*, 321 Mich App at 173-174. Likewise, in this case, we find it appropriate to consider the questions of law posed by defendants' *Covenant* arguments, and we reject plaintiff's assertions that these arguments are not properly before us.[3]

Alternatively, plaintiff argues that if *Covenant* does apply to this case, plaintiff should be given the oppor-

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[3] We note that defendants' application for leave to appeal and their supporting brief concerned the circuit court's jurisdictional decision and its conclusion that the district court order granting summary disposition to plaintiff was not a final order. Defendants' application for leave to appeal in this Court did not raise defendants' arguments relating to *Covenant*. Indeed, *Covenant* was decided after we granted defendants' application for leave to appeal. Typically, an appeal "is limited to the issues raised in the application and supporting brief." MCR 7.205(E)(4). However, this Court has the discretionary power to "permit amendment or additions to the grounds for appeal," MCR 7.216(A)(3), and to "enter any judgment or order or grant further or different relief as the case may require," MCR 7.216(A)(7). In this case, we find it appropriate to exercise this discretion to consider defendants' dispositive *Covenant* arguments. Given our conclusion that defendants are entitled to relief under *Covenant*, we find it unnecessary to address the circuit court's jurisdictional decision because, even if the district court order in question was a final order, remand to the circuit court for further proceedings when defendants are so clearly entitled to summary disposition would be a waste of judicial resources.

tunity to amend its complaint to pursue benefits on an assigned-claim theory because plaintiff can establish that the injured party treated by plaintiff assigned her claims to plaintiff. In this regard, we note that an agreement to assign a "right to benefits payable in the future is void." MCL 500.3143. However, an injured person may assign "his or her right to past or presently due benefits to a healthcare provider." *Covenant Med Ctr, Inc*, 500 Mich at 217 n 40. In *Covenant*, the Court expressly recognized that a healthcare provider's inability to bring a direct cause of action did not alter the injured party's ability to assign past or presently due benefits. *Id*. Given this fact, we agree that, in the circumstances presented in this case, plaintiff should be given an opportunity to move the district court to amend its complaint. See *W A Foote Mem Hosp*, 321 Mich App at 196.

In sum, applying *Covenant*, we conclude as a matter of law that defendants are entitled to summary disposition. Consequently, we vacate the decision of the circuit court, we reverse the district court's grant of summary disposition to plaintiff, and we remand to the district court for entry of summary disposition in favor of defendants. On remand, plaintiff shall be given the opportunity to file a motion to amend its complaint.

Vacated in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

O'CONNELL, P.J., and SWARTZLE, J., concurred with HOEKSTRA, J.

GLEASON v KINCAID

Docket No. 340239. Submitted February 15, 2018, at Detroit. Decided March 8, 2018, at 9:05 a.m.

John Gleason, the Genesee County Clerk, sought a declaratory judgment in the Genesee Circuit Court regarding whether defendant, William Kincaid, could run for both the office of 9th Ward City Councilperson for the City of Flint and the office of Mayor of the City of Flint in the same election occurring on November 7, 2017. In April 2017, defendant filed his intent to run for reelection to his city council seat. Defendant had until April 28, 2017, to withdraw as a candidate for city council if he did not wish to run, but defendant did not withdraw his candidacy. Defendant won the primary election for the city council seat on August 8, 2017. However, on August 3, 2017, Gleason had certified a recall election for the office of Mayor of the City of Flint, and on August 11, 2017, defendant paid the filing fee and declared himself a candidate for mayor in the recall election. Both the city councilperson seat and the mayoral seat were to appear on the November 7, 2017 ballot. Gleason brought the declaratory-judgment action on August 15, 2017, and both Karen Weaver (the mayor of Flint who was running for reelection in the November 7, 2017 election) and Don Pfeiffer (a candidate for mayor in the November 7, 2017 election) intervened in the action, arguing that the offices of mayor and city councilperson were incompatible and that because defendant had not timely withdrawn his candidacy as to either office, he was disqualified as a candidate for both offices under MCL 168.558. Following a hearing, the court, Geoffrey L. Neithercut, J., entered an opinion and order holding that defendant was allowed to run for either mayor or city council, but not both. The court observed that MCL 168.558(5) penalizes any candidate who attempts to run for two incompatible offices by excluding the candidate from the elections of both offices, and it ruled that the offices of mayor and city council were incompatible within the definition of MCL 15.181(b) because the two offices must necessarily function separately from one another. However, the trial court noted that no statute addressed the unique timing problem in this case: the fact that at the time the recall election was certified, the language of

MCL 168.322a and MCL 168.558(5) irreversibly barred defendant, an otherwise eligible candidate, from running for mayor because defendant had no mechanism under the law to permissibly withdraw from the city council race and enter the mayoral race. The court then stated that this timing oddity denied defendant his constitutional right to choose the public office for which he wished to run. Therefore, the court created an equitable remedy by requiring that defendant withdraw from one of the races. Defendant withdrew his candidacy for the city council seat, and the court issued an order accepting his withdrawal. The election occurred on November 7, 2017, defendant appeared on the ballot as a candidate for mayor, and Weaver prevailed in the mayoral election. Pfeiffer subsequently appealed the trial court order accepting the withdrawal of defendant's city council candidacy.

The Court of Appeals *held*:

1. An issue is moot when a subsequent event makes it impossible for a reviewing court to grant relief. However, an otherwise moot issue may appropriately be addressed by a court when there is a reasonable expectation that the publicly significant alleged wrong will recur yet escape judicial review, in which case the issue, though moot, is nonetheless justiciable. In this case, the issue whether defendant could continue his candidacy for the office of his choosing despite a statutory proscription to the contrary was moot; the election of November 7, 2017, had already occurred, and no remedy could be fashioned that would affect that event. However, this case was justiciable because it involved an issue of public significance that was likely to recur and likely to evade appellate review: the interpretation and application of Michigan's election laws extended beyond these candidates and beyond the November 2017 Flint general election, affecting future candidates and the public; elections occur regularly, and recall elections sometimes conflict with the timing of the election activities of potential candidates pursuing other offices; and the issue was likely to evade judicial review because the strict time constraints of the election process necessitate that, in all likelihood, such challenges often will not be completed before a given election occurs, rendering the discussion, as in this case, moot before appellate review.

2. When an adequate remedy is provided by statute, equitable relief is precluded. MCL 15.182 prohibits a public officer or public employee from holding incompatible public offices. MCL 168.558(5) provides the remedy for violation of MCL 15.182: a candidate simultaneously seeking two or more incompatible offices is required to withdraw from one of the races within the

applicable period, and failure to do so disqualifies the candidate with respect to both offices. MCL 168.322a provides the applicable period for withdrawal: a candidate who has filed a nominating petition or filing fees is not permitted to withdraw unless a written notice of withdrawal is served on the city clerk not later than 4:00 p.m. on the third day after the last day for filing the petition or filing fee. In this case, there was no dispute that the two offices in question were incompatible; therefore, MCL 15.182 precluded defendant from simultaneously holding both offices for which he was seeking election. Additionally, defendant filed his intent to run for reelection to his city council seat and did not withdraw from that race in the time allocated for withdrawing under MCL 168.322a. Despite knowing that he was irrevocably committed to the city council race, defendant then paid the filing fee and declared himself a candidate for mayor in the recall election; he did not withdraw from the mayoral election in the time allocated for withdrawing. Therefore, defendant was only barred from running for mayor because he already had chosen to run for city council. The trial court fashioned an equitable remedy, despite the clear dictates of the applicable statutes, because the court determined that the timing of the recall election deprived defendant of his constitutional right to run for the office of mayor; however, there is no constitutional right to be a candidate for a particular public office, and the timing of this particular recall election did not change that fact. Therefore, the trial court erred by exercising its equitable jurisdiction to create a remedy when a contrary remedy was dictated by statute. The court was obligated to apply the statute as written and exclude defendant from appearing on the ballot as a candidate for either office.

Reversed.

ELECTIONS — RECALL ELECTIONS — CANDIDATES RUNNING FOR INCOMPATIBLE PUBLIC OFFICES.

MCL 15.182 prohibits a public officer or public employee from holding incompatible public offices; MCL 168.558(5) provides the remedy for violation of MCL 15.182: a candidate simultaneously seeking two or more incompatible offices is required to withdraw from one of the races within the applicable period, and failure to do so disqualifies the candidate with respect to both offices; there is no constitutional right to be a candidate for a particular public office, and the timing of a recall election does not change this fact; a court may not fashion an equitable remedy for a candidate who attempts to run for two incompatible public offices and fails to withdraw his or her candidacy within the applicable statutory

period for withdrawal when MCL 168.558(5) requires that such a candidate be excluded from appearing on the ballot as a candidate for either office.

Gentry Nalley, PLLC (by *Kevin S. Gentry*) for Don Pfeiffer.

Valdemar L. Washington, PLLC (by *Valdemar L. Washington* and *Zena R. Fares*) for William S. Kincaid.

Before: RIORDAN, P.J., and BOONSTRA and GADOLA, JJ.

PER CURIAM. Intervening plaintiff-appellant, Don Pfeiffer, appeals as of right the trial court's order accepting the withdrawal of candidacy of defendant, William Scott Kincaid, from the election for 9th Ward City Councilperson for the City of Flint. Pfeiffer challenges the trial court's August 29, 2017 opinion and order permitting defendant to withdraw from the city council race and instead participate as a candidate in the November 7, 2017 recall election for the office of Mayor of the City of Flint. We conclude that this matter is moot, but we also conclude that this issue is one of public significance that is likely to recur and to evade appellate review. Reaching the merits of this appeal, we reverse.

I. FACTS

This case arose from defendant's attempt to simultaneously run for election to both the office of 9th Ward City Councilperson for the City of Flint and the office of Mayor of the City of Flint. The underlying facts are not disputed. Plaintiff John Gleason is the Genesee County Clerk. Intervening plaintiff Karen Weaver is the mayor of the city of Flint, who in late 2017 was facing a recall election. Pfeiffer, too, had declared his candidacy for mayor in the then upcoming November 7, 2017 election.

Defendant was, at that time, a councilperson on the Flint City Council. In April 2017, defendant filed his intent to run for reelection to his city council seat. After filing his intent to run, defendant had until April 28, 2017, to withdraw as a candidate for city council if he did not wish to run. Defendant did not, at that time, withdraw from the city council race. Defendant thereafter won the primary election for the city council seat on August 8, 2017. Meanwhile, on August 3, 2017, plaintiff certified a recall election for Mayor of the City of Flint. On August 11, 2017, defendant paid the filing fee and declared himself a candidate for mayor in the recall election. Both the city councilperson seat and the mayoral seat were to appear on the November 7, 2017 ballot.

On August 15, 2017, plaintiff, represented by the office of the Genessee County Prosecutor, sought a declaratory judgment from the trial court regarding whether defendant could run for both city council and mayor in the same election. The complaint noted that under MCL 168.558(5), a person who is listed as a candidate for two incompatible offices "shall select the 1 office to which his or her candidacy is restricted within 3 days after the last day for the filing of petitions or filing fees" and that "[f]ailure to make the selection disqualifies a candidate with respect to each office for which petitions or fees were so filed and the name of the candidate shall not be printed upon the ballot for those offices." Plaintiff sought guidance from the trial court regarding whether defendant was required to withdraw from one race or was disqualified with respect to both the mayoral and city council elections. Both Weaver and Pfeiffer intervened in the declaratory-judgment action, arguing that the offices of mayor and city councilperson were incompatible and that because defendant had not timely withdrawn his

candidacy as to either office, he was now disqualified as a candidate for both offices under MCL 168.558.

After a hearing, the trial court entered an opinion and order holding that defendant was allowed to run for either mayor or city council, but not both. The trial court observed that MCL 168.558(5) "penalizes any candidate who attempts to run for two incompatible offices by excluding the candidate from the elections of both offices," and it ruled that "the offices of mayor and city council are incompatible within the definition of MCL 15.181(b) because the two offices must necessarily function separately from one another." However, the trial court noted that "no statute addresses the unique timing problem in the present case," because "[t]he mayoral contest did not become available and did not exist until after [defendant] was irrevocably committed to the council race as a result of MCL 168.322a." Thus, at the time the recall election was certified, "the language of MCL 168.322a and MCL 168.558(5) irreversibly barred [defendant], an otherwise eligible candidate, from running for mayor because [defendant] had no mechanism under the law to permissibly withdraw from the city council race and enter the mayoral race." The trial court determined that because "of this timing oddity, [defendant] was denied his constitutional right to choose the public office for which he wished to run." It concluded that it had to "fashion an equitable remedy, pursuant to the Court's equitable jurisdiction under the Michigan Constitution," because defendant could not "be denied his constitutional right to run for public office . . . ." Concluding that defendant could run for either office but not both, the trial court required defendant to withdraw from one of the races.

Defendant thereafter submitted to the trial court the withdrawal of his city council candidacy, and the

trial court issued an order accepting defendant's withdrawal from the city council race. The general election was held on November 7, 2017, in which defendant appeared as a candidate for mayor. Weaver prevailed in the mayoral recall with approximately 53% of the vote, defendant received approximately 32% of the vote, and Pfeiffer received approximately 6% of the vote.[1] Pfeiffer now appeals in this Court.[2]

II. DISCUSSION

A. MOOTNESS

Whether a case is moot is a threshold question that we address before reaching the substantive issues of a case. *In re MCI Telecom Complaint*, 460 Mich 396, 435 n 13; 596 NW2d 164 (1999). An issue is moot when a subsequent event makes it impossible for this Court to grant relief. *In re Detmer*, 321 Mich App 49, 56; 910 NW2d 318 (2017). It is our duty to decide actual cases and controversies, that is, actual controversies arising between adverse litigants. *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010). A case that does not rest upon existing facts or rights and presents nothing

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[1] We take judicial notice of the fact that defendant appeared as a candidate in the mayoral recall election, as did Weaver and Pfeiffer, and that Weaver won the recall election. See *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 649; 873 NW2d 842 (2015), citing MRE 201 (stating that this Court may take judicial notice of a public record). See also Genesee County, *November 2017 General Election Cumulative Report*, p 4, available at <https://www.gc4me.com/departments/county_clerks1/docs/Elections/201711/Cumulative%20Report-11-9-2017%2017-53-35%20PM.pdf> (accessed March 7, 2018) [https://perma.cc/Q52W-H67U].

[2] This Court denied Pfeiffer's application for leave to appeal in which he sought immediate appellate review of the trial court's ruling. *Gleason v Kincaid*, unpublished order of the Court of Appeals, entered September 21, 2017 (Docket No. 340202).

but abstract questions of law is moot. Because reviewing a moot question ordinarily would be a "purposeless proceeding," we generally dismiss a moot case without reaching the underlying merits. *Id*. at 35 (quotation marks and citation omitted). It is well recognized, however, that an exception exists when an issue is moot, but is one "of public significance and [is] likely to recur, yet may evade judicial review." *In re Midland Publishing Co, Inc*, 420 Mich 148, 152 n 2; 362 NW2d 580 (1984). An otherwise moot issue may thus appropriately be addressed by a court when there is a reasonable expectation that the publicly significant alleged wrong will recur yet escape judicial review, in which case the issue, though moot, is nonetheless justiciable. *Detmer*, 321 Mich App at 56.

The issue in this case is whether defendant, a candidate for two incompatible public offices, having failed to remove his name from candidacy for either of the offices within the time established by statute, could nonetheless continue his candidacy for the office of his choosing despite an apparent statutory proscription to the contrary. That issue, for purposes of these litigants and this election, is now moot. The election of November 7, 2017, has occurred, and no remedy this Court could fashion in this case would affect that event. To the extent that this Court could direct that votes cast for defendant be excluded from the election results, it would not have any practical effect because Weaver would still prevail in the election. We must then ask whether the issue nonetheless (1) is of public significance, (2) is likely to recur, and (3) may evade judicial review, such that it should be resolved by this Court despite its being moot. See *id*. at 57.

We conclude that this issue is of public significance. The interpretation and application of Michigan's elec-

tion laws extend beyond these candidates and beyond the November 2017 Flint general election, affecting future candidates and the public. We also conclude that disputes involving this issue are likely to recur. Elections occur regularly and, to the dismay of elected officials, recall elections are an ever-present part of our political landscape. When a recall election occurs, there is no assurance that the timing of the recall election will not conflict with the other election activities of potential candidates. In fact, because the likely candidate in any recall election is some other elected official who is interested in seeking the challenged position, it is inevitable that recall elections will sometimes conflict with the timing of the election activities of potential candidates pursuing other offices. Moreover, the success of defendant[3] in this case, left unaddressed, may actually encourage others to follow his example and run for two incompatible offices, then withdraw from whichever race is most advantageous to the candidate before the election.

Finally, we note that this issue is likely to evade judicial review. Although the parties to this appeal timely sought a declaratory judgment in the trial court and review in this Court, the strict time constraints of the election process necessitate that, in all likelihood, such challenges often will not be completed before a given election occurs, rendering the discussion, as in this case, moot before appellate review. Accordingly, we conclude that although this matter is moot, this case involves an issue of public significance that is likely to recur and likely to evade appellate review. We therefore will reach the merits of this appeal.

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[3] Though defendant was not successful in his bid for election in Flint's mayoral race, he was successful in placing his name on the ballot for that race despite statutory authority to the contrary.

B. THE TRIAL COURT'S EXERCISE OF EQUITY

In this case, Pfeiffer[4] contends that the trial court erred by exercising its equitable jurisdiction to create a remedy when a contrary remedy was dictated by statute. We agree.

1. STANDARD OF REVIEW

When reviewing a grant of equitable relief, we will set aside the trial court's findings of fact only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that we review de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). In addition, we review de novo questions of statutory interpretation. See *Demski v Petlick*, 309 Mich App 404, 426; 873 NW2d 596 (2015).

2. STATUTORY INTERPRETATION

Courts are bound to follow statutes and must apply them as written. The primary goal of statutory inter-

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[4] We reject defendant's contention that Pfeiffer lacks standing to appeal. MCR 7.203(A) requires that a party seeking appellate relief be an "aggrieved party," which is similar to the requirement that a plaintiff have "standing" to initiate a claim in a trial court, but differs from standing in that the injury to the litigant on appeal must arise from either the actions of the trial court or the appellate court. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 292; 715 NW2d 846 (2006). "A candidate for elective office suffers a cognizable injury in fact if, due to the improper interpretation and enforcement of election law, he or she is prevented from being placed on the ballot or must compete against someone improperly placed on the ballot." *Martin v Secretary of State*, 482 Mich 956, 956 (2008). At the time that Pfeiffer appealed in this Court, he was a rival candidate in the then upcoming mayoral election who was facing the prospect of competing in the election against defendant, who the trial court had concluded was to be placed on the ballot. Pfeiffer therefore is an "aggrieved party" under MCR 7.203(A).

pretation is to give effect to the intent of the Legislature. *Stanton v Battle Creek*, 466 Mich 611, 615; 647 NW2d 508 (2002). If the language of a statute is unambiguous, the intent of the Legislature is clear and the statute must be enforced as written. *Kemp v Farm Bureau Gen Ins Co of Mich*, 500 Mich 245, 252; 901 NW2d 534 (2017).

Equity does not apply when a statute controls. *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 55-56; 503 NW2d 639 (1993). "Although courts undoubtedly possess equitable power, such power has traditionally been reserved for 'unusual circumstances' such as fraud or mutual mistake. A court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking . . . ." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590; 702 NW2d 539 (2005) (citations omitted). Thus, when a statute "is applicable to the circumstances and dictates the requirements for relief by one party, equity will not interfere." *Senters*, 443 Mich at 56. In other words, when an adequate remedy is provided by statute, equitable relief is precluded. See *Tkachik v Mandeville*, 487 Mich 38, 45; 790 NW2d 260 (2010).

Our Supreme Court has explained that " 'if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest.' " *Devillers*, 473 Mich at 585, quoting *Robinson v Detroit*, 462 Mich 439, 467; 613 NW2d 307 (2000). Moreover, "if a court is free to cast aside, under the guise of equity, a plain statute . . . simply because the court views the statute as 'unfair,' then our system of government

ceases to function as a representative democracy." *Devillers*, 473 Mich at 591. "Statutes lose their meaning if an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 407; 738 NW2d 664 (2007) (quotation marks and citation omitted).

3. INCOMPATIBLE OFFICES

Section 2 of Michigan's incompatible public offices act, MCL 15.182, generally prohibits a public officer or employee from holding incompatible public offices. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 154; 627 NW2d 247 (2001). MCL 15.182 provides that "a public officer or public employee shall not hold 2 or more incompatible offices at the same time," except as provided by MCL 15.183. MCL 15.181 defines incompatible offices as follows:

> (b) "Incompatible offices" means public offices held by a public official which, when the official is performing the duties of any of the public offices held by the official, results in any of the following with respect to those offices held:
>
> (*i*) The subordination of 1 public office to another.
>
> (*ii*) The supervision of 1 public office by another.
>
> (*iii*) A breach of duty of public office.

On appeal, the parties in this case do not dispute that the two offices in question, Flint city council member and Flint mayor, are incompatible, and we agree that they are, in fact, incompatible. We therefore conclude, as did the trial court, that MCL 15.182 precluded defendant from simultaneously holding both offices for which he was seeking election.

When a candidate simultaneously seeks two or more incompatible offices, a remedy is provided by MCL 168.558(5).[5] That statutory subsection provides that a candidate simultaneously seeking two or more incompatible offices is required to withdraw from one of the races within the applicable period and that failure to do so disqualifies the candidate with respect to both offices. Specifically, MCL 168.558(5) provides:

> If petitions or filing fees are filed by or in behalf of a candidate for more than 1 office, either federal, state, county, city, village, township, metropolitan district, or school district, the terms of which run concurrently or overlap, the candidate so filing, or in behalf of whom petitions or fees were so filed, shall select the 1 office to which his or her candidacy is restricted within 3 days after the last day for the filing of petitions or filing fees unless the petitions or filing fees are filed for 2 offices that are combined or for offices that are not incompatible. Failure to make the selection disqualifies a candidate with respect to each office for which petitions or fees were so filed and the name of the candidate shall not be printed upon the ballot for those offices. A vote cast for that candidate at the ensuing primary or general election shall not be counted and is void.

In addition, the relevant portion of MCL 168.322a states:

> After the filing of a nominating petition or filing fees by or in behalf of a proposed candidate for a city office, the candidate shall not be permitted to withdraw unless a

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[5] Recall elections in Michigan are governed by Chapter 36 of the Michigan Election Law, MCL 168.951 *et seq*. *Dimas v Macomb Co Election Comm*, 248 Mich App 624, 627; 639 NW2d 850 (2001). Section 976, MCL 168.976, which is part of Chapter 36, provides that "[t]he laws relating to nominations and elections shall govern all nominations and elections under this act insofar as is not in conflict herewith." MCL 168.558, applicable to elections generally, is therefore applicable to recall elections.

> written notice of withdrawal is served on the city clerk not later than 4 o'clock, eastern standard time, in the afternoon of the third day after the last day for filing the petition or filing fee . . . .

In this case, defendant filed his intent to run for reelection to his city council seat and did not withdraw from that race in the time allocated for withdrawing. Meanwhile, after learning that plaintiff had certified the mayoral recall election, defendant paid the filing fee and declared himself a candidate for mayor in the recall election. Defendant did not withdraw from the mayoral race in the time allocated for withdrawing.

The trial court observed that MCL 168.558(5) "penalizes any candidate who attempts to run for two incompatible offices by excluding the candidate from the elections of both offices." We agree. The trial court further observed that "[t]he mayoral contest did not become available and did not exist until after [defendant] was irrevocably committed to the council race as a result of MCL 168.322a." Again, we agree. The trial court next correctly determined that the result dictated by MCL 168.558(5) was that defendant was to be excluded as a candidate for both offices. That is, in fact, the penalty that our Legislature has determined is to be imposed on any candidate who chooses to run for incompatible offices and does not timely withdraw from one of the races.

The trial court in this case, however, then applied its equitable powers to exempt defendant from the outcome mandated by MCL 168.558. The trial court determined that the result dictated by MCL 168.558(5) would be unfair to defendant because of the "timing oddity," which "barred [defendant], an otherwise eligible candidate, from running for mayor because [defendant] had no mechanism under the law to permis-

sibly withdraw from the city council race and enter the mayoral race." Defendant, however, was only barred from running for mayor because he already had chosen to run for city council. Knowing that he was irrevocably committed to the city council race, and presumably also knowing the statutory prohibition against running for incompatible offices, defendant nonetheless also chose to run for mayor in contravention of the incompatible public offices act.

The trial court in this case fashioned an equitable remedy, despite the clear dictates of the applicable statutes, because the trial court determined that the odd timing of the recall election worked to deprive defendant of his "constitutional right" to run for the office of Mayor of the City of Flint. However, the right to be a candidate for public office is not a constitutional one. See *Grano v Ortisi*, 86 Mich App 482, 492; 272 NW2d 693 (1978); see also *Green v McKeon*, 468 F2d 883, 884 (CA 6, 1972). By contrast, our Legislature "is empowered to enact laws to promote and regulate political campaigns and candidacies." *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 202; 801 NW2d 35 (2011) (quotation marks and citation omitted). Thus, while there is a constitutional right of free speech and political expression, any right to run for a particular political office is bounded by applicable statutory provisions, such as the Michigan Election Law and the incompatible public offices act. Neither defendant nor any other potential candidate for public office has a "constitutional right" to run for a particular office in derogation of these laws. The timing of this particular recall election does not change this fact. Defendant had already filed to seek reelection to his position on the Flint City Council and had prevailed in the August primary election for that position. The fact that plaintiff thereafter certified the recall election for

the office of mayor worked, in this instance, to deprive defendant of the opportunity to run for that office. This sad but true reality, when viewed from defendant's perspective, did not empower the judiciary to fashion an equitable remedy allowing defendant to choose the office he wished to seek in the face of statutes precluding defendant from such a choice.

As explained by our Supreme Court, a court's equitable power is not "an unrestricted license for the court to engage in wholesale policymaking," *Devillers*, 473 Mich at 590, and courts are not "free to cast aside, under the guise of equity, a plain statute . . . simply because the court views the statute as 'unfair,' " *id*. at 591. Here, as the trial court accurately noted, at the time the recall election was certified, the language of MCL 168.322a and MCL 168.558(5) barred defendant from running for mayor because defendant had already irrevocably committed himself as a candidate for city council. Because the statute controls, equitable relief was precluded. The trial court therefore was obligated to apply the statute as written and exclude defendant from appearing on the ballot as a candidate for either office.

Reversed.

RIORDAN, P.J., and BOONSTRA and GADOLA, JJ., concurred.

RAMAMOORTHI v RAMAMOORTHI

Docket No. 336845. Submitted March 6, 2018, at Detroit. Decided March 8, 2018, at 9:10 a.m.

Plaintiff filed for divorce in April 2016 in the Oakland Circuit Court. Plaintiff and defendant were married in India in June 2000 and moved to Michigan one month later. They had three children. In 2004, plaintiff and defendant purchased a home in Sterling Heights. Defendant became a United States citizen in 2008. In 2014, plaintiff and defendant and their children moved to India. Plaintiff returned to Michigan later in 2014 and became a United States citizen. She then returned to India. During the time the family lived in India, defendant traveled to the United States for work on several occasions. In November 2014, when defendant returned to India from one of his trips to the United States, plaintiff told him she was not happy in India and wanted to move back to the United States, but plaintiff and the children were still living in India in November 2015. At that time, defendant returned to India from a trip to the United States, and the parties got into a fight during which defendant physically beat plaintiff for nearly a week. Defendant took plaintiff's passport and jewelry, locked her in her apartment, and then traveled back to the United States for work. Plaintiff went to the police in India in December 2015 when she was able to leave the apartment. Defendant traveled back to India when he heard that plaintiff had gone to the police, and he forced plaintiff to sign away her rights to all marital property. Plaintiff obtained an emergency passport from the American consulate, and in March 2016, she returned to the United States. Plaintiff filed for divorce in the Oakland Circuit Court in April 2016. The children were still living in India and had not lived in the United States since 2014. They remained in India with defendant during the pendency of this case despite the trial court's orders that the children were to be returned to plaintiff's custody in Michigan. Defendant challenged the court's subject-matter jurisdiction on the ground that plaintiff failed to meet the statutory residency requirements. Defendant further argued that the court was without jurisdiction to rule on the children's custody under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., because

Michigan was not the children's home state. Alternatively, defendant argued that the court should decline jurisdiction under the doctrine of forum non conveniens. The court, Lisa Langton, J., rejected each of defendant's arguments and denied his motion to dismiss. Finally, defendant moved for summary disposition under MCR 2.116(C)(6), claiming that the trial court should dismiss the complaint under the doctrine of comity because defendant had commenced a divorce action in India before plaintiff filed her complaint in the Oakland Circuit Court. The court denied defendant's motion for summary disposition because it was not timely filed, and the court ruled that, in any event, the doctrine of comity was inapplicable because defendant was not attempting to enforce a foreign judgment. In January 2017, the court granted plaintiff a default judgment of divorce, awarding plaintiff sole custody of the parties' three children. Defendant appealed.

The Court of Appeals *held*:

1. According to MCL 552.9(1), subject-matter jurisdiction of a divorce action turns on whether the complainant or the defendant has resided in Michigan for the 180 days immediately preceding the filing of the complaint and whether the complainant or the defendant has resided in the county in which the complaint was filed for the 10 days immediately preceding the time of filing. The term "reside" does not require an intent to remain permanently or indefinitely, but it does require an intent to remain. In this case, there was no dispute that plaintiff was not physically present in Michigan for the relevant periods preceding her filing of the complaint. However, MCL 552.9(1) does not require a party's continuing physical presence in the state for the entirety of the 180-day period. Determining residence or domicile requires a multi-factor analysis, but the preeminent factor is the person's intent. That is, an established domicile is not destroyed by a temporary absence if the person has no intention of changing his or her domicile. In this case, the trial court found credible plaintiff's testimony that she moved to India in 2014 for a "test period" but that she always intended to move back to Michigan, and the trial court believed plaintiff when she testified that she was not able to return to Michigan when she wanted to because defendant controlled the parties' finances. Also of import to the trial court's decision was plaintiff's testimony that gaining her United States citizenship meant effectively giving up her Indian citizenship; that when she returned to India to get the children and bring them back to Michigan, defendant assaulted her and took all her valuables and important documents; that he forcefully removed the children from her custody; and that he rented

out their Michigan home so she could not return to it. Given the evidence of defendant's actions and plaintiff's intent to reside in Michigan, the trial court did not clearly err by ruling that plaintiff did not intend to relinquish her Michigan residency. As a result, the trial court properly concluded that plaintiff satisfied the residency requirements of MCL 552.9(1), which provided the trial court with subject-matter jurisdiction over the divorce proceeding.

2. A Michigan trial court may exercise subject-matter jurisdiction over a divorce proceeding without also exercising jurisdiction over a custody matter related to the divorce. MCR 3.211(B) requires that a divorce judgment include a determination of the property rights of the parties, but MCR 3.211(C) does not require that a divorce judgment include a custody determination. Therefore, a trial court may enter a divorce judgment without also entering a custody order—that is, the divorce and custody proceedings may be bifurcated. In addition, MCL 722.1207 specifically provides for the bifurcation of a divorce proceeding and a custody proceeding under the UCCJEA. The trial court properly exercised jurisdiction over the divorce proceeding and, although the trial court improperly exercised jurisdiction over the custody matter, the error did not deprive the trial court of jurisdiction over the divorce matter.

3. The focus of the UCCJEA and the determination of a child's home state concerns the child's actual presence in a state, MCL 722.1201, not the child's intent to remain in the state. A child's home state determines which court has jurisdiction over the child's custody, and under MCL 722.1102(g), a home state is defined as the state in which a child lived with a parent or person acting as a parent for at least the six consecutive months immediately before the commencement of the child custody proceeding. Because it was undisputed that the children lived with a parent in India for more than six consecutive months immediately before plaintiff filed her complaint for divorce, India—and not Michigan—qualified as the children's home state under the UCCJEA. Consequently, whether the children could properly be considered residents of Michigan due to their intent to return there was irrelevant to determining the children's home state. The trial court erred by concluding that it had jurisdiction over the children's custody under the UCCJEA because the children had not been present in Michigan for at least six months before plaintiff filed this action.

4. The doctrine of forum non conveniens gives trial courts discretion to decline jurisdiction when the convenience of the

parties and the ends of justice would be better served if the action were brought and tried in another forum. A plaintiff's choice of forum is generally granted deference. Trial courts must consider the plaintiff's choice and weigh carefully the relative advantages and disadvantages of that forum, whether the chosen forum is inconvenient, and whether a more appropriate forum exists. Defendant in this case argued that Michigan was an inconvenient forum in which to hear the divorce matter because he and the children were living in India, important witnesses lived in India, and India had jurisdiction over the children's custody under the UCCJEA. The trial court noted that most of the parties' finances were in Michigan, that parties in India could testify in ways other than in person, and that plaintiff would be in danger of physical harm if she returned to India. Notwithstanding that the trial court ruled that Michigan was a completely acceptable forum for the divorce proceedings, the trial court's decision was influenced by its erroneous ruling that it had jurisdiction over the children's custody under the UCCJEA. Whether the trial court would have made the same decision had it not ruled that it possessed jurisdiction over the custody matter could not be determined, and the case had to be remanded for reconsideration of the forum non conveniens argument.

5. Under MCR 2.116(C)(6), a claim can be dismissed when another action has been initiated between the same parties involving the same claim if the motion to dismiss under MCR 2.116(C)(6) is raised in the party's first responsive pleading unless the grounds for dismissal are stated in a motion filed before the party's first responsive pleading as provided for by MCR 2.116(D)(2). The trial court properly denied defendant's motion for dismissal because he did not raise the issue in his first responsive pleading or in a motion filed before his first responsive pleading.

6. The trial court properly denied defendant's motion to dismiss the case under the doctrine of comity. The doctrine of comity concerns the extent to which a trial court should give effect to a foreign judgment; no foreign judgment existed at the time of the trial court's decision.

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

1. DIVORCE — JURISDICTION — DIVISION OF PROPERTY AND CUSTODY OF CHILDREN.

When jurisdiction over child custody proceedings is not proper in a specific trial court, that trial court is not deprived of jurisdiction over the property division in a divorce that is otherwise properly

before the court; divorce proceedings involving property division and those involving child custody may be bifurcated; although a divorce judgment must include a determination of the parties' property rights, a divorce judgment need not also determine custody arrangements (MCR 3.211(B) and (C); MCL 722.1207).

2. DIVORCE — CUSTODY — UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT — HOME STATE.

MCL 722.1102(g) defines a child's home state as the state in which the child lived with a parent for at least the six consecutive months immediately before the start of the child custody proceeding; determination of a child's home state under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., concerns the child's actual presence in the state as provided in MCL 722.1201 and not the child's intent to remain in the state; that a child may be considered a resident of Michigan due to his or her intent to return to Michigan after an absence is irrelevant to determining the child's home state under the UCCJEA.

Scott Bassett and *Steven H. Wilen* for Chinnaiah Ramamoorthi.

Caplan & Associates, PC (by *David M. Caplan*) for Vidyaarthy C. Ramamoorthi.

Before: TALBOT, C.J., and BECKERING and CAMERON, JJ.

CAMERON, J. Defendant appeals as of right the trial court's judgment of divorce. This case involves parties who, after living in Michigan for several years, returned to their native country of India in 2014 with their three children. In 2016, plaintiff returned to Michigan and filed for divorce. We affirm in part, reverse in part, vacate in part, and remand for further proceedings.

The parties were married in India on June 8, 2000, and then moved to Michigan a month later. In 2004, they purchased a home in Sterling Heights. Defendant

became a United States citizen in 2008. While living in the United States, the parties had three children together. In May 2014, defendant took the children to India, while plaintiff temporarily remained in Michigan to complete paperwork necessary to become a United States citizen. Later that month, plaintiff joined the children in India, but defendant returned to the United States to continue his employment. Plaintiff briefly returned to Michigan in August 2014, became a United States citizen, and then returned to India. Once plaintiff returned to India, defendant traveled back to the United States until November 2014. At that time, plaintiff expressed her desire to return to the United States with the children because she was not happy in India. Defendant said that they could return to live in the United States in five to six months. Defendant returned to the United States for work, but by November 2015, plaintiff and the children were still living in India. On November 29, 2015, defendant returned to India, the parties got into a fight, and defendant physically beat plaintiff for nearly a week while family members watched but did not intervene. Defendant took all of plaintiff's jewelry and her passport from their lockbox. Thereafter, plaintiff was locked in her apartment, and defendant's brother administered medication for her injuries. Defendant left the children with his sister while he traveled back to the United States for work. In December 2015, plaintiff was able to leave the apartment and went to the police. The police escorted her to the home of defendant's sister, and plaintiff was able to see her children. When defendant learned that plaintiff went to the police, he immediately traveled back to India, at which time he and members of his family forced plaintiff to sign away her rights to all the marital property. Plaintiff was eventually able to obtain an

emergency passport from the American consulate, and on March 22, 2016, she returned to the United States.

Plaintiff claims that she never intended to remain in India, despite her lengthy stay from 2014 to 2016, and that defendant had promised that she and the children could return to Michigan if they did not like India. According to plaintiff, defendant would not allow her and the children to return to Michigan. She claimed that defendant and his family members physically abused her and prevented her from leaving. Plaintiff also claimed that she was not able to return to the United States on her own because defendant controlled all of the family's assets and finances.

On April 5, 2016, plaintiff filed a complaint for divorce in the Oakland Circuit Court. It is undisputed that the parties' children were still living in India at this time and that they had not lived in the United States since May 2014. The children remained with defendant in India throughout the pendency of this case, despite the trial court's orders that they be returned to plaintiff's custody in Michigan.

Defendant, who remained in India, challenged the trial court's subject-matter jurisdiction on the ground that plaintiff failed to meet the statutory residency requirements, MCL 552.9(1), before bringing this divorce action in Michigan. Defendant also argued that the trial court did not have jurisdiction to make a custody determination under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., because Michigan was not the children's home state under the act. Alternatively, defendant argued that the trial court should decline to exercise jurisdiction over the proceeding under the doctrine of forum non conveniens. The trial court rejected each of defendant's arguments and denied his motion to dismiss.

Defendant later moved for summary disposition under MCR 2.116(C)(6), arguing that the trial court should dismiss the action under the doctrine of comity because defendant had commenced a divorce action in India before plaintiff filed her complaint for divorce in the Oakland Circuit Court. The trial court denied defendant's motion, ruling that it was not timely filed and that, in any event, the doctrine of comity was not applicable because defendant was not attempting to enforce a foreign judgment.

In January 2017, the trial court granted plaintiff a default judgment of divorce. In relevant part, the judgment awarded plaintiff sole custody of the parties' children, who were still living in India.

On appeal, defendant first argues that the trial court erred by denying his motion to dismiss given that the trial court lacked subject-matter jurisdiction over plaintiff's divorce action because plaintiff did not meet the statutory residency requirements under MCL 552.9(1) before filing her complaint for divorce. We disagree.

In *Kar v Nanda*, 291 Mich App 284, 286-287; 805 NW2d 609 (2011), this Court stated:

> The question whether a court has subject-matter jurisdiction is a question of law that we review de novo. Issues of statutory construction are also questions of law that are reviewed de novo. Whether the requirements of MCL 552.9(1) have been satisfied is a question of fact. Questions of domicile and intent are also questions of fact. We review factual findings for clear error. A finding is clearly erroneous if, on all the evidence, the Court is left with the definite and firm conviction that a mistake has been made. [Quotation marks and citations omitted.]

MCL 552.9(1) provides:

> A judgment of divorce shall not be granted by a court in this state in an action for divorce unless the complainant

> or defendant has resided in this state for 180 days immediately preceding the filing of the complaint and, except as otherwise provided in subsection (2), the complainant or defendant has resided in the county in which the complaint is filed for 10 days immediately preceding the filing of the complaint.

"The statutory residency requirements are jurisdictional, and a divorce is void if it does not comply with the residency requirements." *Kar*, 291 Mich App at 287. "Residence" is "a place of abode accompanied with the intention to remain." *Leader v Leader*, 73 Mich App 276, 280; 251 NW2d 288 (1977). While "the ordinary, common meaning of the term 'reside' does not require an intent to remain permanently or indefinitely," it does require "an intent to remain." *Kar*, 291 Mich App at 288.

It is undisputed that plaintiff was not physically present in Michigan for the relevant periods preceding the filing of her complaint. However, MCL 552.9(1) does not require a party's "continuing physical presence" in the state for the entirety of the state residency period. *Berger v Berger*, 277 Mich App 700, 703; 747 NW2d 336 (2008); see also *Leader*, 73 Mich App at 283. "[D]etermining residence or domicile requires a multifactor analysis, but the preeminent factor is the person's intent." *Berger*, 277 Mich App at 704. Germane to the instant case, "an established domicile is not destroyed by a temporary absence if the person has no intention of changing his or her domicile." *Id*.

In *Leader*, the plaintiff and the defendant "had lived in Michigan for a substantial period of time." *Leader*, 73 Mich App at 278. In October 1975, the plaintiff left Michigan and went to Kentucky with the defendant until January 1976. *Id*. The plaintiff testified that she went to Kentucky at the defendant's request to attempt reconciliation but had no intent of staying in

Kentucky, or anywhere else with the defendant, unless the couple reconciled. *Id*. Even though it was clear that the reconciliation would be unsuccessful, the plaintiff stayed in Kentucky because she did not want to leave her children without a mother and because the defendant was threatening her. *Id*. This Court concluded that, based on the plaintiff's intent, her residence remained in Michigan even though she was physically present in Kentucky for most of the jurisdictional period. *Id*. at 278, 280, 283.

We conclude that *Leader* is instructive to deciding the instant case. In this case, plaintiff moved to India for a "test period" at the urging, if not the insistence, of defendant, but she intended to return to Michigan. The trial court credited plaintiff's testimony that she almost immediately wanted to return to Michigan because the "test period" was not working but that she was not able to return because defendant controlled all of the parties' finances. After going to India, plaintiff returned to the United States for her citizenship proceedings; according to plaintiff, this meant that she was effectively giving up her Indian citizenship. When plaintiff returned to India to bring the children back to Michigan, defendant arrived in India, physically assaulted her, and forcibly took all of her gold jewelry and important documents, including her passport, the visa allowing her to be in India, her United States naturalization papers, and her educational documents. Plaintiff also maintained that defendant forcefully removed the children from her custody and refused to return them. According to plaintiff, after she filed a domestic violence claim with the Indian police, defendant forced her to sign away all her rights to the parties' property. He also rented out their Michigan home to prevent her from returning there. When plaintiff did manage to return to

Michigan, defendant tried to usurp her divorce filing, refused to come to Michigan to participate in the instant proceeding, and repeatedly defied the trial court's orders. The trial court found credible plaintiff's testimony regarding defendant's actions and her intent to reside in Michigan. In light of the foregoing and with deference to the trial court's findings of fact, we conclude that the trial court did not clearly err by finding that plaintiff did not intend to relinquish her Michigan residency. Accordingly, the trial court properly concluded that plaintiff satisfied the residency requirements of MCL 552.9(1), thus providing the trial court with subject-matter jurisdiction over the divorce proceeding.

Defendant seems to argue that Michigan was required to relinquish jurisdiction over the divorce proceeding because India was the children's home state under the UCCJEA. As further discussed later in this opinion, we agree with defendant that the trial court lacked jurisdiction under the UCCJEA to decide issues relating to the children's custody. We disagree, however, that the trial court therefore lacked jurisdiction to resolve noncustody matters.

MCR 3.211(C) does not require that a divorce judgment include a custody determination in the same way that MCR 3.211(B) requires, for example, that a divorce judgment include a determination of the property rights of the parties. See *Yeo v Yeo*, 214 Mich App 598, 600-601; 543 NW2d 62 (1995). Defendant has presented no authority that prohibits a trial court from entering a divorce judgment that does not also include a custody determination, or from otherwise bifurcating divorce and custody proceedings. Moreover, MCL 722.1207 specifically provides for bifurcation of a divorce proceeding and a custody proceeding under the

UCCJEA.[1] Therefore, the fact that the trial court lacked jurisdiction to make a custody determination did not prevent the trial court from entering an otherwise valid divorce judgment concerning noncustody matters.

As indicated, however, we agree with defendant that the trial court lacked jurisdiction under the UCCJEA to make a custody determination because India, and not Michigan, was the children's "home state" under the act.

Section 201 of the UCCJEA, MCL 722.1201, provides, in pertinent part:

> (1) Except as otherwise provided in [MCL 722.1204], a court of this state has jurisdiction to make an initial child-custody determination only in the following situations:
>
> (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
>
> (b) A court of another state does not have jurisdiction under subdivision (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under [MCL 722.1207] or [MCL 722.1208], and the court finds both of the following:
>
> (*i*) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.

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[1] MCL 722.1207(4) states, "A court of this state may decline to exercise jurisdiction under this act if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding."

> (*ii*) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.
>
> (c) All courts having jurisdiction under subdivision (a) or (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under [MCL 722.1207] or [MCL 722.1208].
>
> (d) No court of another state would have jurisdiction under subdivision (a), (b), or (c).
>
> (2) Subsection (1) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

MCL 722.1102(g) defines a child's "home state" as

> the state in which a child *lived* with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. A period of temporary absence of a parent or person acting as a parent is included as part of the period. [Emphasis added.]

MCL 722.1204(1) provides an exception for emergency jurisdiction under certain circumstances, but it requires that a child be "present in this state" for it to apply. Because the children were not present in Michigan at the time this action commenced, it is not applicable.

Under MCL 722.1201, the trial court was required to find that it had jurisdiction under the UCCJEA in order to make a custody determination.[2] To exercise jurisdiction, the trial court was required to find that Michigan was a home state, that another home state

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[2] While MCL 722.1201 applies only to initial determinations, MCL 722.1203 establishes similar requirements for custody modifications.

had decided not to exercise jurisdiction, that all other states having jurisdiction had declined on the ground that Michigan was a more appropriate forum, or that no other home state existed. Defendant is correct that India may qualify as a home state under MCL 722.1105, which provides:

> (1) A court of this state shall treat a foreign country as a state of the United States for the purposes of applying [MCL 722.1101 *et seq*. and MCL 722.1201 *et seq*.].
>
> (2) Except as otherwise provided in subsection (3), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this act must be recognized and enforced under [MCL 722.1301 *et seq*.].
>
> (3) A court of this state need not apply this act if the child-custody law of a foreign country violates fundamental principles of human rights.[3]

Thus, to exercise jurisdiction, the trial court was required to find that Michigan was a home state under MCL 722.1201(1) or that despite the children's presence in India, India should not be considered a home state. Because the children had lived in India "for at least 6 consecutive months immediately before the commencement of [the] child-custody proceeding," India, and not Michigan, qualified as the children's home state under MCL 722.1102(g). There was no evidence that India was unwilling to exercise jurisdiction over the children.

Plaintiff argues that because the children, like herself, were essentially forced to remain in India, their Michigan residency continued, and therefore, Michigan may qualify as their home state. Plaintiff argues that the same analysis that supported her continued Michi-

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[3] As discussed by the trial court, no party has argued that the court was not required to apply the UCCJEA as permitted under MCL 722.1105(3).

gan residency also supports a finding that Michigan was the children's home state. Essentially, plaintiff argues that the phrase "lived with" in MCL 722.1102(g) is synonymous with "residency" or "domicile" for purposes of the UCCJEA. We cannot agree with this argument.

We note that prior decisions from this Court appear to have used the terms "reside" and "live with" interchangeably. See, e.g., *Nash v Salter*, 280 Mich App 104, 107, 110-113; 760 NW2d 612 (2008); *White v Harrison-White*, 280 Mich App 383, 392-395; 760 NW2d 691 (2008); *Fisher v Belcher*, 269 Mich App 247, 261-262; 713 NW2d 6 (2005). However, none of these decisions involved an actual question concerning the extent to which these terms are to be reconciled, and none of them purported to establish a rule of law that "live with" in MCL 722.1102(g) is synonymous with residency or domicile.

"[D]ecisions from other states may guide this Court when interpreting uniform acts." *White*, 280 Mich App at 387. In *Markle v Dass*, 300 Ga 702; 797 SE2d 868 (2017), the Georgia Supreme Court rejected the argument that a "home state" under the UCCJEA is synonymous with concepts of residency or domicile. The Georgia court stated:

> It appears that the superior court declared Georgia to be the "home state" of the child based upon its finding that, prior to August 2015, the child's residence—and the custodial mother's residence—was in Georgia, and that the court then determined that the child's presence in New Mexico was a "temporary absence" from that residence. But, that is not an analysis that the statutory definition of "home state" permits. As has been noted,
>
>> "home state" is not synonymous with the "residence or domicile of the parent having legal custody." [Cit.] Rather, the term "lived" in the definition of

> "home state" refers to the state where the child is physically present "without regard to legal residence." [Cits.] "If the General Assembly had intended that jurisdiction be based upon legal residence or domicile, it would undoubtedly have used these technical terms." [Cit.]

Slay v. Calhoun, 332 Ga.App. 335, 341 (2), 772 S.E.2d 425 (2015).

> By its plain language, [Official Code of Georgia Annotated (OCGA)] § 19-9-41 (7) defines "home state" in terms of current presence, and declares a time frame for that presence to have the necessary legal effect, i.e., six months, or the child's life, if the child is less than six months of age. It is that six-month period that OCGA § 19-9-41 (7) refers to when it speaks of a temporary absence as "part of the period." OCGA § 19-9-41 (7) looks to the present, and then backward six months; it does not look to legal residence or domicile at some point in the past, and then look forward. [*Markle*, 300 Ga at 705-706.]

We find this reasoning persuasive, particularly considering the language in MCL 722.1204 requiring a child's presence in the case of an emergency proceeding. That is, we agree that the focus of the UCCJEA concerns a child's actual presence, not his or her intent to remain. In sum, because it is undisputed that the children had "lived with" a parent in India for more than six consecutive months—indeed, almost two years—immediately before plaintiff filed this action, India, and not Michigan, qualifies as the children's home state under the UCCJEA. Therefore, regardless of whether the children properly could be considered residents of Michigan because they intended to return there, the trial court erred when it decided that it had jurisdiction over the parties' custody dispute under the UCCJEA.

Defendant also argues that the trial court should have applied the doctrine of forum non conveniens to dismiss the entire proceeding. In light of our conclusion that the trial court lacked jurisdiction under the UCCJEA to make a custody determination, it is only necessary to address this issue as it relates to noncustody matters. Trial courts have discretion to decline jurisdiction when the convenience of the parties and the ends of justice "would be better served if action were brought and tried in another forum." *Hernandez v Ford Motor Co*, 280 Mich App 545, 551-552; 760 NW2d 751 (2008) (quotation marks and citations omitted). We review for an abuse of discretion a trial court's decision on whether to apply the doctrine of forum non conveniens. *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 215; 813 NW2d 752 (2011).

Although a plaintiff's choice of forum is generally granted deference, *Manfredi v Johnson Controls, Inc*, 194 Mich App 519, 523; 487 NW2d 475 (1992), trial "courts are charged to consider the plaintiff's choice of forum and to weigh carefully the relative advantages and disadvantages of jurisdiction and the ease of and obstacles to a fair trial in this state," *Cray v Gen Motors Corp*, 389 Mich 382, 396; 207 NW2d 393 (1973). "After a party moves for dismissal on the basis of forum non conveniens, the court must consider two things: (1) whether the forum is inconvenient and (2) whether a more appropriate forum exists." *Lease Acceptance Corp v Adams*, 272 Mich App 209, 226; 724 NW2d 724 (2006). In making this determination, trial courts should consider the private interest of the litigants, matters of public interest, and the defendant's promptness in making the request. *Id*. at 226-227; *Cray*, 389 Mich at 395-396.

Defendant argues that the trial court should have declined to exercise jurisdiction over this divorce matter because he and the children resided in India, important witnesses resided in India, plaintiff could return to India, and India had jurisdiction to decide the custody of the children under the UCCJEA. On balance, we are not persuaded that defendant's remaining contentions demonstrate that dismissal was required under the doctrine of forum non conveniens. Notwithstanding connections with India, the trial court observed that most of the parties' finances were located in Michigan and that litigating the case in Michigan would not be unduly inconvenient because witnesses could testify in ways other than in person. Defendant has not provided any support for his position that witnesses would refuse to testify. Moreover, given the evidence of defendant's and his family's past mistreatment of plaintiff, it was reasonable for the trial court to find that plaintiff would be in danger of physical harm if she returned to India. However, the trial court's finding that Michigan was the more convenient forum was also influenced by its erroneous ruling that it had jurisdiction to decide the children's custody under the UCCJEA. Because we cannot determine if the trial court would have declined to exercise jurisdiction over *noncustody* matters if it lacked jurisdiction to make a *custody* determination, we remand for reconsideration of this issue in light of our decision under the UCCJEA.

Defendant also argues that the trial court erred by denying his motion for summary disposition under MCR 2.116(C)(6), given that he had commenced an action for divorce in India before plaintiff filed her complaint in Michigan. MCR 2.116(C)(6) provides that a claim can be dismissed when "[a]nother action has been initiated between the same parties involving the same claim." However, a motion under Subrule (C)(6)

"must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading." MCR 2.116(D)(2). It is undisputed that defendant did not raise this issue in his responsive pleading, or by motion before filing his responsive pleading. Therefore, the trial court properly denied defendant's motion under MCR 2.116(C)(6) on the ground that it was not timely filed.

Defendant also argues that the trial court should have dismissed the divorce proceeding under the doctrine of comity. This doctrine concerns the extent to which a trial court should give effect to a foreign judgment. *Gaudreau v Kelly*, 298 Mich App 148, 152; 826 NW2d 164 (2012). We agree with the trial court that this doctrine was not applicable because no foreign judgment existed at the time the trial court made its decision.

In sum, we affirm the trial court's decision regarding subject-matter jurisdiction over this divorce action, we reverse the trial court's decision regarding jurisdiction over the children under the UCCJEA, we vacate the portion of the trial court's judgment pertaining to child custody, and we remand for reconsideration of the forum non conveniens issue consistent with this opinion. On remand, the trial court shall determine whether India is the more appropriate forum to determine this divorce action.

Affirmed in part, reversed in part, vacated in part, and case remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

TALBOT, C.J., and BECKERING, J., concurred with CAMERON, J.

PEOPLE v WINES

Docket No. 336550. Submitted January 9, 2018, at Grand Rapids. Decided March 8, 2018, at 9:15 a.m. Leave to appeal sought.

Gregory Wines was convicted in 1994 following a jury trial in the Kent Circuit Court, Donald A. Johnston, J., of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and kidnapping, MCL 750.349. Defendant was 17 years old when he, along with 16-year-old Steven Launsburry and a 14-year-old girl named Jennifer, decided to leave town. The three minors had been living in a camper in Jennifer's backyard when Jennifer's mother found out that defendant and Jennifer were engaging in sexual relations, and Jennifer's mother went to the police. Launsburry and defendant decided to hijack a car by flagging down a passing vehicle before picking up Jennifer. Launsburry told defendant that the only way they could get away with the carjacking would be to kill the driver, and defendant asked whether they could just knock the driver out. A vehicle driven by the victim stopped to offer Launsburry and defendant a ride, and after riding in the vehicle for a few minutes, Launsburry took out a gun, pointed it at the victim, and directed the victim to drive to an isolated area. Defendant remained in the vehicle while Launsburry took the victim to an area out of defendant's sight. Defendant heard two gunshots, after which Launsburry returned to the vehicle and told defendant that he had killed the victim. Later that day, after picking up Jennifer, the three drove to a hotel room, and while Launsburry was sleeping, defendant told Jennifer that Launsburry had shot someone. Jennifer told defendant that they needed to call the police, and defendant did so. Defendant told the police about the killing, identified their location, showed the police the money that Launsburry had taken from the victim, and took the police to where Launsburry disposed of the spent shotgun shells. Defendant was arrested and charged on the grounds that he aided and abetted Launsburry. Although defendant was a minor, he was sentenced to life imprisonment without parole for the first-degree murder conviction, to be served concurrently with sentences of life imprisonment for the armed robbery and kidnapping convictions. Approximately 23 years later, defendant was resentenced pursuant to the United States Supreme

Court's decision in *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718 (2016), that *Miller v Alabama*, 567 US 460 (2012) (holding that a mandatory sentence of life imprisonment without the possibility of parole is unconstitutional for a juvenile offender) is to be applied retroactively. The court, Donald A. Johnston, J., resentenced defendant to 40 to 60 years' imprisonment, which was the maximum possible term of years. Defendant appealed.

The Court of Appeals *held*:

1. MCL 769.25a(4)(c) provides, in pertinent part, that if the prosecuting attorney does not file a motion under MCL 769.25a(4)(b) seeking reimposition of a sentence of life imprisonment without parole eligibility for an offender who was under the age of 18 at the time of the crime, then the court shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years. In *Miller*, the United States Supreme Court outlined several factors identifying the differences between adults and minors, including that children have a lack of maturity and an undeveloped sense of responsibility, that children are more vulnerable to negative influences and outside pressures, that children have only limited control over their environment, and that a child's character is not as well formed as an adult's character. The holding in *Miller* did not constitutionally compel a sentencing judge to specifically make findings as to the *Miller* factors except in the context of a decision whether to impose a sentence of life imprisonment without parole under MCL 769.25a.

2. Under *People v Snow*, 386 Mich 586 (1972), the Michigan Supreme Court outlined objectives generally relevant to sentencing: (1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses. The process of properly balancing these objectives in the case of a minor defendant necessitates consideration of the distinctive attributes of youth. Taking the distinctive attributes of youth into account is consistent with both Michigan's long-stated sentencing objectives and the United States Supreme Court's judgment that youth matters. A failure to consider the distinctive attributes of youth, such as those discussed in *Miller*, when sentencing a minor to a term of years pursuant to MCL 769.25a so undermines a sentencing judge's exercise of his or her discretion as to constitute error requiring reversal. Accordingly, when sentencing a minor convicted of first-degree murder, when the sentence of life imprisonment without parole is not at issue, the court should be guided by a

balancing of the *Snow* objectives and in that context is required to take into account the attributes of youth, such as those described in *Miller*. In this case, given that the Legislature determined that the minimum term may range from 25 to 40 years, the trial court had to exercise its discretion by considering and balancing the *Snow* factors. The trial court erred by failing to consider and balance the *Snow* factors, instead concluding that defendant should receive the maximum sentence the court could impose because it was defendant's idea to leave town that set the events in motion and because defendant participated in the carjacking with Launsburry, who defendant knew was armed and who had expressed the intent to kill the victim. The trial court did not discuss whether defendant remained a threat to the safety of society, whether he was capable of reform, or whether sentencing defendant to 40 years, rather than a lesser minimum term, would be likely to have a significantly different deterrent effect. While the court briefly referred to facts relevant to culpability, the court made no reference to the fact that the day after the crime, defendant called the police, assisted them in locating Launsburry, and confessed to his role in the crimes. The trial court also did not refer to any of the content in defendant's psychological reports. Finally, because defendant had been incarcerated for more than 20 years, there was information available to evaluate defendant's rehabilitation and postsentencing conduct, not merely his potential for rehabilitation; while the court noted that it had reviewed these materials, the court made no reference to any information regarding defendant's postsentencing conduct.

3. Defendant was not entitled to resentencing with regard to his sentences of life with the possibility of parole for his convictions of armed robbery and kidnapping. The scope of the trial court's action and of appellate review was controlled by the order of the Michigan Supreme Court, and in that order, the Court vacated the sentence of the trial court on defendant's first-degree murder conviction and remanded the case to the trial court for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a. Because neither the remand order nor the referenced statutes provided for resentencing on his other convictions, the trial court properly concluded that it had no authority to resentence on those grounds.

Trial court's denial of defendant's request for resentencing on his kidnapping and robbery convictions affirmed; defendant's first-degree murder sentence vacated; case remanded for resentencing on the first-degree murder conviction. Jurisdiction retained.

CRIMINAL LAW — JUVENILES — HOMICIDE — RESENTENCING — TERM OF YEARS — CONSIDERATION OF ATTRIBUTES OF YOUTH AND OBJECTIVES RELEVANT TO SENTENCING.

MCL 769.25a(4)(c) provides, in pertinent part, that if the prosecuting attorney does not file a motion under MCL 769.25a(4)(b) seeking reimposition of a sentence of life imprisonment without parole eligibility for an offender who was under the age of 18 at the time of the crime, then the court shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years; in *Miller v Alabama*, 567 US 460 (2012), the United States Supreme Court outlined factors identifying the differences between adults and minors, including that children have a lack of maturity and an undeveloped sense of responsibility, that children are more vulnerable to negative influences and outside pressures, that children have only limited control over their environment, and that a child's character is not as well formed as an adult's character; under *People v Snow*, 386 Mich 586 (1972), the Michigan Supreme Court outlined objectives generally relevant to sentencing: (1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses; when sentencing a minor convicted of first-degree murder, when the sentence of life imprisonment without parole is not at issue, the court should be guided by a balancing of the *Snow* objectives and in that context is required to take into account the attributes of youth, such as those described in *Miller*; failure to consider the distinctive attributes of youth, such as those discussed in *Miller*, when sentencing a minor to a term of years pursuant to MCL 769.25a so undermines a sentencing judge's exercise of his or her discretion as to constitute error requiring reversal.

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

Willey & Chamberlain LLP (by *Britt M. Cobb* and *Charles E. Chamberlain, Jr.*) for defendant.

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

PER CURIAM. In 1994, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and kidnapping, MCL 750.349. Though a minor, he was sentenced to life imprisonment without parole for the first-degree murder conviction, to be served concurrently with sentences of life imprisonment for the armed robbery and kidnapping convictions. Following the United States Supreme Court decision in *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), in which it held that *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), is to be applied retroactively, defendant was scheduled to be resentenced. He was resentenced on December 9, 2016, to a prison term of 40 to 60 years. For the reasons set forth in this opinion, we vacate defendant's sentence for first-degree murder and remand for resentencing on that charge.

I. *MILLER*, *MONTGOMERY*, AND MCL 769.25a

The Supreme Court decided *Miller* in 2012, but its opinion did not state whether that decision was to be applied retroactively. In 2016, the Court decided *Montgomery*, holding that *Miller* was retroactive. In 2014, after the *Miller* decision but before *Montgomery*, the Michigan Legislature passed MCL 769.25a, adopting sentencing provisions to come into effect in the event that *Miller* was held to apply retroactively. This statute provides that prosecutors may seek a reimposition of life-without-parole imprisonment if they file a motion within a defined period of time. It goes on to provide, in pertinent part, that

> [i]f the prosecuting attorney does not file a motion under [MCL 769.25a(4)(b)], the court shall sentence the individual to a term of imprisonment for which the maxi-

> mum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years. [MCL 769.25a(4)(c).]

The statute does not define any special considerations to be applied at resentencing. However, in *Miller*, the United States Supreme Court discussed differences between minors[1] and adults relevant to sentencing:

> *Roper*[2] and *Graham*[3] establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, they are less deserving of the most severe punishments. Those cases relied on three significant gaps between juveniles and adults. First, children have a lack of maturity and an undeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievabl[e] deprav[ity]. [*Miller*, 567 US at 471 (quotation marks and citations omitted).]

In *People v Garay*, 320 Mich App 29, 50; 903 NW2d 883 (2017), we held that in deciding whether a minor should be sentenced to life imprisonment without parole, a sentencing judge must make the decision on the basis of these factors. We held that it was an error

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[1] *Miller* uses the term "juvenile" to apply to all defendants who were under 18 at the time of their offense. We use the term "minor" in this opinion in order to make clear that the relevant age is 18.

[2] *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005).

[3] *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010).

of law for the judge to rely on broader sentencing goals such as rehabilitation, punishment, deterrence, and protection. *Id*. at 46-48. This was consistent with the *Miller* Court's conclusion that typical sentencing considerations such as retribution and deterrence are uniquely altered when the defendant is a minor:

> Because [t]he heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. [*Miller*, 567 US at 472 (quotation marks and citations omitted).]

In the instant case, we face the question whether, and if so how, *Miller* applies to the sentencing of a minor for first-degree murder when the prosecution does not seek a sentence of life without parole. Defendant argues that the *Miller* standards should govern his sentencing even when the prosecution does not seek a life-without-parole sentence and, therefore, that the trial court erred by considering causes that *Miller* holds should not be considered and by failing to consider the factors that *Miller* articulated. Defendant does not indicate whether he contends that *Garay* should be applied to such cases, thereby focusing on the *Miller* factors to the exclusion of other considerations such as punishment and protection. At a minimum, however, defendant argues that the trial court's overriding concern should be the factors defined in *Miller*.

The prosecution responds that the holding in *Miller* was a narrow one, i.e., a term of life without parole may not automatically be imposed on a minor and that for such a sentence to be imposed, the sentencing judge

must undertake the specific inquiry defined in *Miller*. We agree with the prosecution that the constitutional holding in *Miller* applied only in life-without-parole decisions and does not constitutionally compel a sentencing judge to consider only the factors defined in *Miller* when the sentence of life imprisonment without parole is not sought by the prosecution per MCL 769.25a.

We disagree with the prosecution, however, to the extent that it argues that because *Miller*'s constitutional holding is limited, the Supreme Court's opinion has *no* application to these sentencing decisions. The prosecution offers no legal or precedential support from which to conclude that the attributes of youth, such as those described in *Miller*, should be considered only when the sentence of life without parole is sought.[4]

The range of potential minimum terms under MCL 769.25a is very substantial—from 25 years to 40 years. There are no sentencing guidelines to guide a trial court's exercise of discretion within that very substantial range.[5] If a 17-year-old defendant is sentenced to the lesser of these possible terms, that defendant may

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[4] See *State v Null*, 836 NW2d 41, 71 (Iowa, 2013) ("Certainly the notions that juveniles have less-developed judgment, that juveniles are more susceptible to peer pressure, and that juveniles' characters are not fully formed applies to this and any other case involving a juvenile defendant. Thus, the notions in *Roper*, *Graham*, and *Miller* that 'children are different' and that they are categorically less culpable than adult offenders apply as fully in this case as in any other.").

[5] The crime of first-degree murder is not addressed by the guidelines. We reject the argument that the minimum sentence range of 25 to 40 years represents a "guideline." The statute's text contains no language suggesting that it is an addendum to the sentencing guidelines and contains no mechanism to score objective factors. It is a legislatively defined minimum sentencing range, but not one that resembles the methods, purpose, or objectivity of the guidelines.

seek parole consideration when he or she is 42 years old; however, a 40-year minimum sentence prevents parole consideration until that defendant is 57 years old. And because release at a first parole date is by no means assured, and inmate life expectancy is statistically low,[6] the 40-year minimum sentence virtually ensures that the defendant will not be released until he or she is geriatric, while the 25-year minimum sentence would allow a defendant to be released at an age when reentry into broader society is likely.

Further, consideration of these characteristics is in harmony with Michigan's long-established sentencing aims. The objectives generally relevant to sentencing were first articulated by the Michigan Supreme Court in *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), and have been often reiterated by our courts. In *Snow*, the Court explained that in imposing sentence, the court should "balance" the following objectives: (1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses. *Id*. The process of properly balancing these objectives in the case of a minor defendant necessitates consideration of the distinctive attributes of youth. For example, consideration of what the Supreme Court described as youth's "diminished culpability and greater prospects for reform," *Miller*, 567 US at 471, relates directly to *Snow*'s

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[6] " 'The United States Sentencing Commission Preliminary Quarterly Data Report' (through June 30, 2012) indicates that a person held in a general prison population has a life expectancy of about 64 years. This estimate probably overstates the average life expectancy for minors committed to prison for lengthy terms." *People v Sanders*, 2016 IL App (1st) 121732-B, ¶ 26; 56 NE3d 563, 571 (2016). See also Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003*, 103 Am J Pub Health 523, 526 (2013), which concluded that "for each year served in prison, a person could expect to lose approximately 2 years of life."

consideration of reformation and the protection of society. Similarly, the Supreme Court's reference to the "diminish[ed] . . . penological justifications for imposing the harshest sentences on juvenile offenders," *id*. at 472, correlates with *Snow*'s inclusion of punishment and deterrence as relevant factors in a sentencing determination. Taking the distinctive attributes of youth into account is consistent with both Michigan's long-stated sentencing objectives and the United States Supreme Court's judgment that "youth matters." *Id*. at 483. We conclude that a failure to consider the distinctive attributes of youth, such as those discussed in *Miller*, when sentencing a minor to a term of years pursuant to MCL 769.25a so undermines a sentencing judge's exercise of his or her discretion as to constitute reversible error.

In sum, we conclude that there is no *constitutional* mandate requiring the trial court to specifically make findings as to the *Miller* factors except in the context of a decision whether to impose a sentence of life without parole. We further conclude that when sentencing a minor convicted of first-degree murder, when the sentence of life imprisonment without parole is not at issue, the court should be guided by a balancing of the *Snow* objectives and in that context is required to take into account the attributes of youth, such as those described in *Miller*.

II. FACTS AND APPLICATION OF LAW

When defendant was 17 years old, he was without a home and began staying in a camper in the backyard of a 14-year-old girl named Jennifer. Another 16-year-old boy, Steven Launsburry, was staying in the camper. Defendant became romantically involved with Jennifer. The feelings, such as they were, were mutual and

the two engaged in sexual relations. Jennifer's mother discovered them in bed together and went to the police. Defendant was questioned by a detective and admitted to having consensual sex with Jennifer. Launsburry was also questioned, as he had also had sexual relations with Jennifer.

Launsburry and defendant concluded that they had to leave town, and Jennifer agreed to go with them. According to Jennifer, it was Launsburry's idea that they leave town. Later that day, the two boys were at the home of a friend who observed that Launsburry appeared to be "in charge" and "calling the shots." At some point, Launsburry showed off some bullets that he had with him. Later, Launsburry called a different friend, who picked the two boys up. Launsburry asked to borrow a gun for a few minutes to have with him while he made a marijuana purchase. The friend gave Launsburry his gun, dropped the two boys off, and waited for them to return. They never did.

The two boys decided to steal a car parked in the neighborhood but were caught by the owner and ran off. At that point, they made a decision to hijack a car by flagging down a passing vehicle. Launsburry told defendant that the only way they could get away with the carjacking "is to kill [him]." Defendant asked "who?" and Launsburry answered, "Whoever [is] driving." Defendant asked, "Couldn't we just knock the driver out?"

The next day, Launsburry and defendant attempted to flag down cars, and tragically, the victim of this crime, a young woman, stopped to offer them a ride. Launsburry sat in the front seat next to the victim, and defendant sat in the back. After a few minutes, Launsburry took out the gun, pointed it at the victim, and directed her to drive to an isolated area. After getting

to that area, Launsburry told her to stop the car and get out. Launsburry also got out and directed the victim to an area out of defendant's sight. Defendant heard two shots, after which Launsburry returned to the car and told defendant that he had killed the victim. At no time during this course of events did defendant attempt to stop Launsburry or warn the victim.

Later that day, Launsburry and defendant picked up Jennifer, who had agreed to run away with them. They drove as far as Indiana and got a hotel room. While Launsburry was sleeping, defendant told Jennifer that Launsburry shot someone and that he was afraid that he killed her. According to Jennifer, defendant was emotionally distraught because he had failed to do anything to stop Launsburry. Jennifer told defendant that they needed to call the police, and he did so. In his phone call, he told the police about the killing, identified their location, and warned them that when they come, they will "need more people because the gun is under [Launsburry's] pillow." When the police arrived and arrested Launsburry, he denied the crime, at which time defendant told the police that he could prove that it happened. He showed the police the money that Launsburry took from the victim and took the police to where Launsburry disposed of the spent shells.

Following his arrest, defendant was charged with first-degree felony murder, kidnapping, and armed robbery on the grounds that he aided and abetted Launsburry. He was offered a plea bargain in which he would have pleaded guilty to second-degree murder, but he refused to accept it, against the advice of his attorney. He was convicted of all charges and sentenced as described.

Approximately 23 years later, defendant was resentenced. At resentencing, the trial judge imposed the maximum possible term of years, i.e., a term of no less than 40 years and no more than 60 years.

The court's reasoning was based overwhelmingly on the seriousness of the crime and the state's interest in imposing punishment. Undoubtedly, this murder, like virtually all such crimes, was heinous, tragic, and irreversible. However, given that the Legislature has determined that the minimum term may range from 25 to 40 years, the trial court clearly had to exercise its discretion by considering and balancing the *Snow* factors. We find that the trial court did not do so. To the contrary, the court concluded that defendant should receive the maximum sentence the court could impose because it was defendant's idea to leave town that set the events in motion and because defendant participated in a carjacking with Launsburry, who defendant knew was armed and who had expressed the intent to kill the victim. The court concluded, "No matter how one slices the rest of the case, it still comes down to those inexorable facts . . . ."

The trial court did not discuss whether defendant remained a threat to the safety of society, whether he was capable of reform, or whether sentencing defendant to 40 years, rather than a lesser minimum term, would be likely to have a significantly different deterrent effect. The court did briefly refer to facts relevant to culpability. First, it stated that "Stephen Launsburry, his co-defendant, [is the one] who actually pulled the trigger and is the one directly and personally . . . responsible for the death of [the victim]." The court also noted:

> I agree in part with [defense counsel], certainly the defendant, whatever his chronological age, was psycho-

> logically, for lack of a more clinical term, immature. I don't think his thought process was particularly cogent and rational, and in addition to whatever psychological issues he may have had, probably reflects a substandard education and a poorly developed process for logical analysis.

It is difficult to see, however, where or how the trial court incorporated these factors into its decision when imposing the maximum term it had the authority to impose. Further, the court made no reference to the fact that the day after the crime, defendant called the police, assisted them in locating Launsburry, and confessed to his role in the crimes. Even if defendant was an adult, such actions would be relevant to his culpability and rehabilitative potential.[7]

Lastly, we note that because defendant has been incarcerated for over 20 years, there was information available to evaluate defendant's rehabilitation, not merely his potential for rehabilitation. Consideration of defendant's postsentencing conduct and state of mind is also consistent with the rule that at resentencing, a trial court may consider the defendant's conduct since his original sentencing. See *People v Triplett*, 407 Mich 510, 515-516; 287 NW2d 165 (1980).

The sentencing court had before it defendant's 20-year-old presentence investigation report (PSIR) supplemented with a list of defendant's prison misconducts, some samples of undated positive and negative reviews of defendant's work performance, a list of classes he had taken, and a reference to the fact that he had at one time been a member of a prison gang but

[7] The minimum term imposed does not define defendant's release date. The minimum term imposed by the sentencing judge is the first, not the last, barrier a prisoner faces before release from prison, let alone release from supervision. The minimum term merely sets the date at which defendant may, for the first time, be considered for parole by the parole board.

that he renounced his membership in 2004.[8] The court was also provided with a 1986 psychological evaluation of defendant at age 10 and a 1994 psychological evaluation performed upon defendant's entry into the custody of the Department of Corrections (DOC). Although the court noted that it had reviewed these materials, the court did not refer to the content of these materials.[9]

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[8] Defendant entered prison having left school in the 9th grade. During his incarceration, he completed a GED and obtained multiple certifications in various programs. His updated PSIR reveals that from 1994, when he was first incarcerated, through 2003, defendant had several misconducts for angry verbal behavior and several for fighting with other prisoners. From 2004 to 2011, he had no misconducts for anger or fighting. During that seven-year period, he had a total of seven misconducts, the two most serious of which were stealing five "post-it" note pads and stealing a mop head. From the end of 2011 to the time of resentencing in 2016, he had no misconducts whatsoever.

[9] According to the 1986 report, defendant was referred to a clinical psychologist at age 10 "in order to determine the possibility of a psychotic depression, possibility of hallucinations, [and] reason for excessive anxiety." The psychological report recounted that defendant's mother had a history of drug abuse since age 13 and so, at age 6, defendant was sent to live with his maternal grandmother. The child did not know the whereabouts of his father and feared he might be dead. He was sent for evaluation after "a very severe anxiety attack with an apparent hallucination of his father in a coffin." On IQ testing, he showed "deficits [which] would appear to be most likely the result of some organic or neuropsychological deficit." The examiner noted that "the child was evidently subject to some abuse and neglect as a young child and there is a probability that both parents were abusing drugs during his conception and prenatal life." He found that defendant's anxiety interfered with his reasoning and that his way of dealing with problems was to try to avoid conflict. His diagnoses were major depression, attention deficit disorder without hyperactivity, and "developmental disorder characterized by academic retardation."

The DOC psychological evaluation was conducted in 1994. It revealed that defendant returned to his mother's custody at age 14. The examiner noted that defendant likely had a learning difficulty but did not conduct the relevant testing. The personality testing indicated that defendant was the type of "individual who usually expresses his anger in

III. DEFENDANT'S SENTENCES FOR KIDNAPPING AND ARMED ROBBERY

At his original sentencing, defendant received sentences of life with the possibility of parole on his convictions of armed robbery and kidnapping. Defendant argues that the trial court erred by refusing to resentence him on these convictions because they now constitute his longest sentences and were imposed without the preparation or consideration of a sentencing guideline calculation. Defendant's argument that he should be resentenced on those charges does have merit in light of the requirements of MCL 771.14(2)(e)(*ii*) which provides, in relevant part:

> (2) A presentence investigation report prepared under subsection (1) shall include all of the following:
>
> * * *
>
> (e) For a person to be sentenced under the sentencing guidelines set forth in [MCL 777.1 *et seq*.], all of the following:
>
> * * *
>
> (*ii*) Unless otherwise provided in subparagraph (*i*), for each crime having the highest crime class, the sentence grid in part 6 of [MCL 777.61 *et seq*.] that contains the recommended minimum sentence range.

However, the scope of the trial court's action and of our review is controlled by the order of the Michigan

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indirect ways . . . and transfer[s] blame onto others." Such men, the examiner noted, "are generally controlled" but "may exhibit occasional periods of impulsivity or aggressiveness." The testing indicated that defendant experienced "a great deal of anxiety when given an unstructured task." The PSIR noted that "prior to the instant offense, the defendant had no history of violent or assaultive behavior." He had been convicted of shoplifting on one occasion.

Supreme Court. In that order, the Court vacated "the sentence of the Kent Circuit Court on the defendant's first-degree murder conviction" and remanded the case to the trial court "for resentencing on that conviction pursuant to MCL 769.25 and MCL 769.25a." *People v Wines*, 499 Mich 908, 909 (2016). Neither the remand order nor the referenced statutes provide for resentencing on his other convictions, and so the trial court properly concluded that it had no authority to resentence on those grounds.

Accordingly, we hold that defendant is not entitled to resentencing on those charges in this appeal.

IV. CONCLUSION

We vacate defendant's sentence and remand for resentencing consistent with this opinion. We affirm the trial court's denial of defendant's request for resentencing on his kidnapping and armed robbery convictions. We retain jurisdiction.

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

GALEA v FCA US LLC

Docket No. 334576. Submitted December 5, 2017, at Detroit. Decided March 13, 2018, at 9:00 a.m.

Loretta G. Galea brought an action in the Oakland Circuit Court against FCA US LLC, Jim Riehl's Friendly Chrysler Jeep, Inc., and US Bank NA, alleging breach of express and implied warranties and violation of several Michigan statutes after the new Jeep Cherokee she purchased from Jim Riehl's Friendly Chrysler Jeep, Inc., experienced numerous defects and nonconformities requiring extensive service. Plaintiff alleged that these defects were discovered within the time and mileage limits of the manufacturer's express warranty. Defendants moved for summary disposition, asserting that plaintiff's lawsuit was barred by an agreement to submit any warranty disputes to binding arbitration. According to defendants, plaintiff agreed to arbitration in exchange for obtaining a discount through Chrysler's "Employee Friends Program" by signing a pricing and acknowledgment form containing language indicating that she agreed to submit any warranty disputes to mandatory, binding arbitration. Plaintiff asserted that she did not voluntarily participate in the program and that pursuant to the Federal Arbitration Act (FAA), 9 USC 1 *et seq*., the trial court was required to hold a summary trial to decide the factual dispute regarding whether she agreed to arbitration. Plaintiff further argued that the Federal Trade Commission (FTC) had promulgated rules stating that mandatory, binding arbitration was prohibited under the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*., and that the arbitration clause was unenforceable because it was not contained within the four corners of the warranty document. Defendants argued that the Michigan Supreme Court rejected both the single-document rule and the FTC's conclusion that the MMWA barred agreements for binding arbitration of claims covered by the MMWA in *Abela v Gen Motors Corp*, 469 Mich 603 (2004). Following a hearing, the court, Martha D. Anderson, J., granted defendants' motion for summary disposition, concluding that there was no factual dispute regarding the agreement to arbitrate because plaintiff did not dispute signing the arbitration acknowledgment form and that the rules promulgated by the FTC did not

supersede binding Michigan caselaw, which held that binding arbitration agreements are permitted under the MMWA. The court further rejected plaintiff's contention that the arbitration agreement was invalid under the single-document rule, concluding that such a requirement was rejected by the Michigan Supreme Court in *Abela*. Plaintiff appealed.

The Court of Appeals *held*:

1. When assessing whether a dispute must be submitted to arbitration, courts must first determine whether an arbitration agreement has been reached by the parties. A contract to arbitrate does not exist unless it was formed by the mutual assent of the parties, and the determination of whether an arbitration contract exists is for the courts to decide, applying general contract principles. Michigan law presumes that one who signs a written agreement knows the nature of the instrument so executed and understands its contents. In this case, plaintiff's signature appeared on a one-page document that clearly stated in conspicuous language and font that plaintiff was entering an agreement to arbitrate in exchange for a discount. Plaintiff did not deny signing the document and did not assert that her signature was obtained under duress. Accordingly, the trial court did not err by holding that plaintiff knowingly and voluntarily entered the arbitration agreement.

2. Plaintiff could not show that inadequate consideration supported the arbitration agreement. Both a dealer worksheet, which plaintiff signed, and an incentives configuration form that were part of the lower court record indicated that the discount was applied to plaintiff's purchase of the vehicle, and plaintiff offered no evidence to the contrary in the trial court or on appeal.

3. MCL 440.2204(1) provides that a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties that recognizes the existence of such a contract. In this case, plaintiff argued that the arbitration agreement was invalid and could not have been part of the sales contract because she signed the agreement on May 31, 2014, whereas she made the down payment on the vehicle on April 19, 2014. Nothing in MCL 440.2204(1) precludes additional terms in subsequent documents from becoming part of a sales contract; accordingly, plaintiff's argument that the arbitration agreement could not have been part of the sales contract because it was not signed until May 31, 2014, was without merit.

4. 9 USC 4 provides, in pertinent part, that a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any

United States district court for an order directing that arbitration proceed in the manner provided in the agreement and that if the making of the arbitration agreement or the failure, neglect, or refusal to perform the agreement is at issue, the court shall proceed summarily to the trial. In this case, 9 USC 4 was inapplicable because this action was not in federal district court and because plaintiff was not a party aggrieved by an alleged failure to arbitrate; rather, plaintiff sought to avoid arbitration. Accordingly, the trial court did not err by failing to hold a summary hearing under 9 USC 4.

5. 15 USC 2310(a) provides, in pertinent part, that the FTC shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure that is incorporated into the terms of a written warranty. 15 USC 2310(a)(3)(C) provides that if an informal dispute settlement procedure complies with the FTC's rules and is properly included in a written warranty, the consumer may not commence a civil action (other than a class action) unless he or she initially resorts to the informal dispute settlement procedure. In 1999, the FTC interpreted these sections to mean that an informal dispute settlement mechanism could not be binding, and in 2015, the FTC reaffirmed this position, noting that, since the issuance of the 1999 Federal Register Notice, courts have reached different conclusions as to whether the MMWA gives the FTC authority to ban mandatory binding arbitration in warranties. In *Abela*, the Michigan Supreme Court held that binding arbitration agreements are permissible under the MMWA, concluding that the text, the legislative history, and the purpose of the MMWA did not evidence a congressional intent under the FAA to bar agreements for binding arbitration of claims covered by the MMWA. Accordingly, *Abela* constituted binding precedent that had to be followed, and plaintiff's contention that the FTC rule prohibiting compulsory, binding arbitration of MMWA claims had to be followed was rejected.

6. Under the authority delegated by Congress in 15 USC 2302, the FTC promulgated rules regarding the content of written warranties in 16 CFR 701.3(a) (2018), which provides, in relevant part, that any warrantor warranting to a consumer by means of a written warranty a consumer product actually costing the consumer more than $15.00 shall clearly and conspicuously disclose in a single document in simple and readily understood language certain information, including information respecting the availability of any informal dispute settlement mechanism elected by the warrantor. In *Abela*, while the Supreme Court did

not directly address the issue of whether the single-document rule bars enforcement of a binding arbitration provision that was not contained in the warranty document, the Supreme Court stated that it was persuaded by the "analyses and conclusions" of the United States Court of Appeals for the Fifth Circuit in *Walton v Rose Mobile Homes LLC*, 298 F3d 470 (CA 5, 2002), and the Eleventh Circuit in *Davis v Southern Energy Homes, Inc*, 305 F3d 1268 (CA 11, 2002). Those federal appellate cases concluded that binding arbitration is not an informal dispute settlement procedure or mechanism within the meaning of the MMWA; rather, binding arbitration is a formal, final adjudication that acts as a substitute for a judicial forum, not merely a prerequisite to it. Therefore, agreements to submit to binding arbitration fall outside the FTC's rulemaking authority under the MMWA, and the single-document rule does not apply to binding arbitration agreements. In this case, although the parties' binding arbitration agreement was not included as part of a single warranty document, the agreement was enforceable. Accordingly, the FTC regulations did not prohibit enforcement of the arbitration agreement because the agreement was not included as part of the warranty document.

Affirmed.

GLEICHER, P.J., concurring in part and dissenting in part, disagreed with the majority to the extent that it held that the term "informal dispute settlement mechanism" did not encompass binding arbitration in the context of the single-document rule. *Abela*, *Walton*, and *Davis* never mentioned the single-document rule; those cases merely held that a consumer may be compelled to arbitrate, but none considered whether the FTC could properly require that an arbitration agreement be included in the warranty. The only federal appellate case that squarely addressed that issue was *Cunningham v Fleetwood Homes of Georgia, Inc*, 253 F3d 611 (CA 11, 2001), which held that arbitration agreements outside a warranty are not enforceable, and *Cunningham*'s reasoning should have prevailed over the dicta in *Walton* and *Davis* on which *Abela* and the majority relied. Additionally, 16 CFR 701.3(a)(6), (7), and (8) (2018) concern a consumer's right to notice about available legal remedies, not whether some remedies are barred. None of the cases on which the majority relied erased notice of binding arbitration from the single-document rule, and none of the cases contradicted *Cunningham*. Further, Congress entrusted the FTC with the authority to decide what information a warranty must contain, and the FTC promulgated a regulation, 16 CFR 701.3(a)(6), mandating

that the availability of any informal dispute settlement procedure must be disclosed clearly and conspicuously in a single document. The FTC took the position that arbitration is an "informal dispute settlement procedure," and a conclusion to the contrary dilutes a critical protection of the MMWA and contradicts its history and purpose. In this case, Judge GLEICHER would have held that because the warranty document omitted any mention of the legal remedies available (including binding arbitration), the warranty on plaintiff's Jeep violated the single-document rule; therefore, the circuit court's order sending the case to arbitration should have been reversed and the case should have been remanded for a trial.

1. ARBITRATION — WRITTEN WARRANTIES — WORDS AND PHRASES — INFORMAL DISPUTE SETTLEMENT PROCEDURE.

15 USC 2310(a)(3)(C) of the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*., provides that if an informal dispute settlement procedure complies with the Federal Trade Commission's rules and is properly included in a written warranty, the consumer may not commence a civil action (other than a class action) unless he or she initially resorts to the informal dispute settlement procedure; *Abela v Gen Motors Corp*, 469 Mich 603 (2004), held that binding arbitration agreements are permissible under the MMWA; binding arbitration is not an informal dispute settlement procedure or mechanism within the meaning of the MMWA; agreements to submit to binding arbitration fall outside the Federal Trade Commission's rulemaking authority under the MMWA.

2. ARBITRATION — WRITTEN WARRANTIES — THE SINGLE-DOCUMENT RULE DOES NOT APPLY TO BINDING ARBITRATION AGREEMENTS.

Under the authority delegated by Congress in 15 USC 2302, the Federal Trade Commission promulgated rules regarding the content of written warranties in 16 CFR 701.3(a) (2018), which provides, in relevant part, that any warrantor warranting to a consumer by means of a written warranty a consumer product actually costing the consumer more than $15.00 shall clearly and conspicuously disclose in a single document in simple and readily understood language certain information, including information respecting the availability of any informal dispute settlement mechanism elected by the warrantor; the single-document rule does not bar enforcement of a binding arbitration provision that was not contained in the warranty document.

The Liblang Law Firm, PC (by *Dani K. Liblang* and *Susan M. Martin*) for Loretta G. Galea.

Wienner & Gould, PC (by *Daniel K. Beitz*) for FCA US LLC and Jim Riehl's Friendly Chrysler Jeep, Inc.

Peacock Law, PC (by *Peter W. Peacock*), *Kerr, Russell and Weber, PLC* (by *Edward C. Cutlip, Jr.*), *Robert C. Davis*, and *William N. Listman* for US Bank NA.

Before: GLEICHER, P.J., and GADOLA and O'BRIEN, JJ.

GADOLA, J. In this vehicle warranty dispute, plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7) on the basis that the parties had entered a valid and enforceable arbitration agreement. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In 2014, plaintiff purchased a new Jeep Cherokee from Jim Riehl's Friendly Chrysler Jeep, Inc. The vehicle was manufactured by defendant FCA US LLC. In her complaint, plaintiff alleged that within the time and mileage limits of the manufacturer's express warranty, the vehicle experienced numerous defects and nonconformities that required extensive service, substantially impaired the value of the vehicle to plaintiff, and irreparably shook her confidence in the vehicle. In January 2016, plaintiff filed a complaint alleging breach of express and implied warranties, revocation of acceptance under Michigan's Uniform Commercial Code (UCC), MCL 440.2101 *et seq*., and violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*. Plaintiff also alleged that the vehicle dealer violated Michigan's Motor Vehicle Service and Repair Act,

MCL 257.1301 *et seq*., and that the vehicle manufacturer violated Michigan's new motor vehicle warranties act, MCL 257.1401 *et seq*. Finally, plaintiff asserted holder liability against the finance company, US Bank NA.

Defendants Jim Riehl's Friendly Chrysler Jeep, Inc., and FCA US LLC moved for summary disposition under MCR 2.116(C)(7), with which US Bank NA later joined, asserting that plaintiff's lawsuit was barred by an agreement to submit any warranty disputes to binding arbitration. According to defendants, plaintiff agreed to arbitration in exchange for obtaining a discount through Chrysler's "Employee Friends Program." Defendants attached to their motion a "Pricing and Acknowledgment" form bearing plaintiff's signature. The form contained the following language:

> The Chrysler Employee Friends Program allows eligible purchasers to obtain a new vehicle at a substantial discount. **I understand that, in consideration for this discount, I will not be able to bring a lawsuit for any warranty disputes relating to this vehicle. Instead, I agree to submit any and all disputes through the Chrysler Vehicle Resolution Process, which includes mandatory arbitration that is binding on both Chrysler and me.**

The form also stated in all-caps lettering near the top of the page: "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES." Defendants argued that the signed agreement to arbitrate was presumptively valid, that the burden of proving nonarbitrability was on plaintiff as the party seeking to avoid arbitration, and that the arbitration agreement was enforceable under both state and federal law, including the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*.

Plaintiff asserted that she did not voluntarily participate in the discount program, that the vehicle dealer fraudulently obtained a control number under the name of someone she did not know to secure the discount, and that she never saw the discount program documents during the purchase transaction. Plaintiff further argued that under the Federal Arbitration Act (FAA), 9 USC 1 *et seq.*, the trial court was required to hold a summary trial to decide the factual disputes regarding whether plaintiff voluntarily agreed to arbitration. Finally, plaintiff argued that the Federal Trade Commission (the FTC) had promulgated rules stating that mandatory, binding arbitration was prohibited under the MMWA and that the arbitration clause was unenforceable because it was not contained within the four corners of the warranty document.

In reply, defendants argued that in *Abela v Gen Motors Corp*, 469 Mich 603; 677 NW2d 325 (2004), the Michigan Supreme Court rejected both the single-document rule and the FTC's conclusion that the MMWA barred agreements for binding arbitration of claims covered by the MMWA. Defendants also argued that the arbitration clause was valid and enforceable because plaintiff admitted that she received a copy of the sales document that contained the arbitration clause, she obtained a discount in exchange for the agreement to arbitrate, and she signed all the relevant documents to complete the transaction.

Following a hearing, the trial court issued an order granting defendants' motion for summary disposition. The trial court concluded that there was no factual dispute regarding the agreement to arbitrate, noting that plaintiff did not dispute signing the arbitration acknowledgment form. The court also concluded that the rules promulgated by the FTC did not supersede

binding Michigan caselaw, which held that binding arbitration agreements are permitted under the MMWA. Finally, the court rejected plaintiff's contention that the arbitration agreement was invalid under the single-document rule, concluding that such a requirement was rejected by the Michigan Supreme Court in *Abela*.

II. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(7). *Hicks v EPI Printers, Inc*, 267 Mich App 79, 84; 702 NW2d 883 (2005). A motion under MCR 2.116(C)(7) is appropriately granted when a claim is barred by an agreement to arbitrate. *Maiden v Rozwood*, 461 Mich 109, 118 n 3; 597 NW2d 817 (1999). "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Id*. at 119. However, "a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id*. Whether an arbitration agreement exists and is enforceable is a legal question that we review de novo. *Hicks*, 267 Mich App at 84.

III. VOLUNTARY AGREEMENT TO ARBITRATE

Plaintiff first argues that the trial court erred by granting summary disposition in favor of defendants because she did not knowingly participate in the employee friends discount program and did not receive a substantial discount on her vehicle. Plaintiff also argues that the trial court erred by failing to hold a summary hearing under 9 USC 4 of the FAA because

there were material questions of fact regarding whether she voluntarily agreed to arbitration. We disagree.

"An arbitration agreement is a contract by which the parties forgo their rights to proceed in civil court in lieu of submitting their dispute to a panel of arbitrators." *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 577; 552 NW2d 181 (1996). When assessing whether a dispute must be submitted to arbitration, courts must first "determine whether an arbitration agreement has been reached by the parties." *Horn v Cooke*, 118 Mich App 740, 744; 325 NW2d 558 (1982). A contract to arbitrate does not exist unless it was formed by the mutual assent of the parties. *Id*. "A party cannot be required to arbitrate an issue he has not agreed to submit to arbitration." *Id*. "The determination of whether an arbitration contract exists is for the courts to decide, applying general contract principles." *Id*. at 744-745.

"Michigan law presumes that one who signs a written agreement knows the nature of the instrument so executed and understands its contents." *Watts v Polaczyk*, 242 Mich App 600, 604; 619 NW2d 714 (2000). "Moreover, mere failure to read an agreement is not a defense in an action to enforce the terms of a written agreement." *Id*. Plaintiff's signature appears on a one-page document that clearly states in conspicuous language and font that plaintiff is entering an agreement to arbitrate in exchange for a friends and family discount. Plaintiff does not deny signing this document, nor does she assert that her signature was obtained under duress. Accordingly, plaintiff has not set forth any arguments to persuade us that she did not knowingly and voluntarily enter the arbitration agreement.

We also find unpersuasive plaintiff's argument that inadequate consideration supported the arbitration agreement because she paid more than the manufacturer's suggested retail price for the vehicle. Both a dealer worksheet, which plaintiff signed, and an incentives configuration form that are part of the lower court record indicate that the discount was applied to plaintiff's purchase of the vehicle. Plaintiff offered no evidence to the contrary in the trial court or on appeal. Plaintiff therefore has not shown failure of the consideration given in exchange for the agreement to arbitrate.

Plaintiff also contends, citing MCL 440.2204(1) of Michigan's UCC, that the arbitration agreement is invalid because she signed the arbitration agreement on May 31, 2014, while she made the down payment on the vehicle on April 19, 2014. MCL 440.2204(1) states the following: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Nothing in this section precludes additional terms in subsequent documents from becoming part of a sales contract. Plaintiff's argument that the arbitration agreement could not have been part of the sales contract because it was not signed until May 31, 2014, is therefore without merit.

Finally, plaintiff argues that she was entitled to a summary hearing under 9 USC 4. This statute provides a mechanism for a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 USC 4. Plaintiff highlights the following language: "If the

making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 USC 4. Defendants correctly point out that Michigan does not have an equivalent rule. Further, 9 USC 4 is inapplicable because this action is not in federal district court and plaintiff is not a party aggrieved by an alleged failure to arbitrate. Rather, plaintiff is seeking to avoid arbitration. Plaintiff offers no authority that this section of the United States Code applies in Michigan courts, and in fact, she cites contrary authority from the United States Supreme Court instructing courts to apply state-law contract principles to questions concerning whether an agreement to arbitrate exists. See *First Options of Chicago, Inc v Kaplan*, 514 US 938, 944; 115 S Ct 1920; 131 L Ed 2d 985 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . , courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."). Plaintiff has not shown that the trial court erred by refusing to hold a summary hearing under 9 USC 4.

IV. BINDING ARBITRATION OF MMWA CLAIMS

Plaintiff next argues that the trial court erred by refusing to apply the 2015 FTC rule barring binding arbitration of MMWA claims. The MMWA, 15 USC 2301 *et seq.*, is a federal statute dealing with consumer product warranties. This case involves 15 USC 2310, which concerns "informal dispute settlement procedures." The statute states the following:

> (1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

> (2) The [FTC] shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities. [15 USC 2310(a).]

The statute goes on to state that if an informal dispute settlement procedure complies with the FTC's rules and is properly included in a written warranty, "the consumer may not commence a civil action (other than a class action) under [15 USC 2310(d)] unless he initially resorts to such procedure[.]" 15 USC 2310(a)(3)(C). The statute also states, "In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence." *Id*.

In 1999, the FTC interpreted these sections to mean that an informal dispute settlement mechanism (IDSM) could not be binding. Federal Trade Commission, *Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act*, 64 Fed Reg 19700, 19708, § C.2 (April 22, 1999). The FTC reasoned that the statute implied that a valid IDSM could not foreclose litigation because of Congress's use of the phrase "unless he initially resorts to such procedure." *Id*. (quotation marks, citation, and emphasis omitted). The FTC also noted that the statute addressed the admissibility of IDSM decisions in subsequent litigation, further implying that an IDSM could not foreclose future litigation. *Id*. In 2015, the FTC reaffirmed this position, noting that "[s]ince the issuance of the 1999 [Federal Register Notice (FRN)], courts have reached different conclusions as to whether the MMWA gives the [FTC] authority to ban mandatory binding arbitra-

tion in warranties." Federal Trade Commission, *Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act*, 80 Fed Reg 42710, 42719, § B.4(d) (July 20, 2015).

In 2004, the Michigan Supreme Court squarely addressed the issue of whether binding arbitration agreements are permissible under the MMWA in *Abela*, 469 Mich 603. In *Abela*, the plaintiff purchased a 1999 Chevrolet truck from a General Motors dealership under the defendant's employee purchase plan, which offered him a discount because of his wife's employment with General Motors. *Id*. at 605. As part of the purchase contract, the plaintiff was required to sign an agreement requiring him to submit any warranty disputes to binding arbitration. *Id*. The truck subsequently developed a number of problems, which led to costly repairs. *Id*. The plaintiff and his wife filed suit against General Motors, raising claims under the MMWA and Michigan consumer-protection law. *Id*. General Motors moved for summary disposition, and the trial court denied the motion, holding that agreements to submit to binding arbitration were prohibited under the MMWA. *Id*. On appeal, this Court reversed, citing two federal circuit court opinions as binding precedent for the proposition that the MMWA allows compulsory, binding arbitration of written warranty claims. *Id*. at 605-606. The Michigan Supreme Court agreed with the Court of Appeals' ultimate conclusion but disagreed that the circuit court cases cited by this Court were binding on Michigan courts. *Id*. at 606. The Supreme Court stated: "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Id*. (citation omitted). The Supreme Court then stated the following:

> Although the federal courts of appeals decisions are not binding, we nevertheless affirm the decision of the Court of Appeals. We have examined the decisions in *Walton v Rose Mobile Homes LLC*, 298 F3d 470 (CA 5, 2002), and *Davis v Southern Energy Homes, Inc*, 305 F3d 1268 (CA 11, 2002), and find their analyses and conclusions persuasive. Both decisions carefully examined the MMWA and the FAA, and both concluded that the text, the legislative history, and the purpose of the MMWA did not evidence a congressional intent under the FAA to bar agreements for binding arbitration of claims covered by the MMWA. Persuaded by these analyses of the federal courts of appeals, we conclude that plaintiffs' agreement with defendant to address the warranty claim through defendant's dispute resolution process, including mandatory arbitration, is enforceable. [*Abela*, 469 Mich at 607.]

We are bound by the Michigan Supreme Court's decision in *Abela*. The 2015 action of the FTC merely affirms its previous position regarding compulsory, binding arbitration, which the *Abela* Court rejected. Congress has not amended the MMWA in any manner that would affect the binding character of *Abela*. Accordingly, we reject plaintiff's contention that we are bound to follow the FTC rule prohibiting compulsory, binding arbitration of MMWA claims.

V. SINGLE-DOCUMENT RULE

Finally, plaintiff argues that FTC regulations prohibit enforcement of the arbitration agreement because the agreement was not included as part of the warranty document. Under the authority delegated by Congress in 15 USC 2302, the FTC promulgated rules regarding the content of written warranties. 16 CFR 701.3 (2018). These rules state, in relevant part, the following:

> (a) Any warrantor warranting to a consumer by means of a written warranty a consumer product actually costing

> the consumer more than $15.00 shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items of information:
>
> * * *
>
> (6) Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with part 703 of this subchapter[.] [16 CFR 701.3 (2018).]

Although the parties agree that the arbitration clause was not part of the warranty document, defendants argue that the Michigan Supreme Court rejected the single-document rule in *Abela*. Plaintiff conversely argues that although *Abela* involved an arbitration agreement that was outside of the warranty document, the single-document rule was not discussed by the Supreme Court and implicit conclusions are not binding precedent. See *People v Heflin*, 434 Mich 482, 498 n 13; 456 NW2d 10 (1990) (opinion by RILEY, C.J.) ("[J]ust as obiter dictum does not constitute binding precedent, . . . 'implicit conclusions' do [not as well]."). Although we agree that implicit conclusions are not binding precedent and that the Michigan Supreme Court in *Abela* did not directly address the issue of whether the single-document rule bars enforcement of a binding arbitration provision that was not contained in the warranty document, the Supreme Court's analysis in *Abela* compels us to conclude that the single-document rule does not apply to an agreement to undergo binding arbitration.

In *Abela*, 469 Mich at 607, our Supreme Court stated that it was persuaded by the "analyses and conclusions" of the United States Court of Appeals for the Fifth Circuit in *Walton*, 298 F3d 470, and the United

States Court of Appeals for the Eleventh Circuit in *Davis*, 305 F3d 1268, to conclude that the MMWA does not prohibit binding arbitration of MMWA claims. In *Walton*, the Fifth Circuit explained the following regarding the meaning of the phrase "informal dispute settlement procedures" as used in the MMWA:

> The text of the MMWA does not specifically address binding arbitration, nor does it specifically allow the FTC to decide whether to permit or to ban binding arbitration. Although the MMWA allows warrantors to require that consumers use "informal dispute settlement procedures" before filing a suit in court, and allows the FTC to establish rules governing these procedures, it does not define "informal dispute settlement procedure." However, the MMWA does make clear that these are to be used *before* filing a claim in court. Yet binding arbitration generally is understood to be a *substitute* for filing a lawsuit, not a prerequisite. . . .
>
> * * *
>
> [B]inding arbitration is not normally considered to be an "informal dispute settlement procedure," and it therefore seems to fall outside the bounds of the MMWA and of the FTC's power to prescribe regulations. We thus conclude that the text of the MMWA does not evince a congressional intent to prevent the use of binding arbitration. [*Walton*, 298 F3d at 475-476.]

Then, in *Davis*, the Eleventh Circuit stated the following regarding the scope of the same phrase:

> When considering a preliminary draft of the MMWA, the Senate reflected that "it is Congress' intent that warrantors of consumer products cooperate with government and private agencies to establish informal dispute settlement mechanisms that take care of consumer grievances without the aid of litigation *or formal arbitration*." S.Rep. No. 91-876, at 22-23 (1970) (emphasis added). As the Fifth Circuit concluded, "there is still no evidence

> that Congress intended binding arbitration to be considered an informal dispute settlement procedure. Therefore the fact that any informal dispute settlement procedure must be non-binding, does not imply that Congress meant to preclude binding arbitration, which is of a different nature." *Walton*, 298 F.3d at 476. [*Davis*, 305 F3d at 1276.]

We agree with the analyses set forth in *Walton* and *Davis*, which our Supreme Court accepted as persuasive in *Abela*, and conclude that binding arbitration is not an informal dispute settlement procedure or mechanism within the meaning of the MMWA. Rather, binding arbitration is a formal, final adjudication that acts as a substitute for a judicial forum, not merely a prerequisite to it.[1] Agreements to submit to binding arbitration therefore fall outside the FTC's rulemaking authority under the MMWA, and the single-document rule does not apply to binding arbitration agreements. See 15 USC 2310(a)(2) ("The [FTC] shall prescribe rules setting forth minimum requirements for any *informal dispute settlement procedure* which is incorporated into the terms of a written warranty . . . .") (emphasis added); see also 16 CFR 701.3(6) (2018) (stating that "[i]nformation respecting the availability of any *informal dispute settlement mechanism*" must be included in a single warranty document) (emphasis added). Accordingly, the parties' binding arbitration

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[1] Excluding binding arbitration from the concept of an informal dispute settlement procedure further makes sense of the provisions in the MMWA stating that a consumer "may not commence a civil action . . . unless he initially resorts to such procedure" and that "[i]n any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence." 15 USC 2310(a)(3)(C). Both these provisions contemplate that an informal dispute settlement procedure is a prerequisite, not a substitute, for the judicial decision-making process.

agreement is enforceable despite the fact that the agreement was not included as part of a single warranty document.

Affirmed.

O'BRIEN, J., concurred with GADOLA, J.

GLEICHER, P.J. (*concurring in part and dissenting in part*). Plaintiff, Loretta Galea, contends that her brand new Jeep Cherokee turned out to be a lemon. She sued the dealer who sold it and the bank that financed the deal, asserting a variety of warranty claims. Defendants countered with a signed arbitration agreement. Galea argues that the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*., prohibits binding arbitration of warranty disputes. This argument collides with *Abela v Gen Motors Corp*, 469 Mich 603; 677 NW2d 325 (2004), in which the Supreme Court held directly to the contrary. But Galea also maintains that by failing to mention arbitration, her warranty violated the single-document rule embodied in 16 CFR 701.3 (2018), a Federal Trade Commission (FTC) regulation implementing the MMWA. This omission, Galea insists, takes arbitration off the table.

The majority interprets the Supreme Court's analysis in *Abela* to mean that a binding arbitration provision need not be included in a vehicle warranty. But *Abela* never mentions the single-document rule, and neither do the two federal cases guiding the *Abela* majority's memorandum opinion. The only federal appellate case squarely addressing the issue holds that arbitration agreements outside a warranty are not enforceable. *Cunningham v Fleetwood Homes of Georgia, Inc*, 253 F3d 611 (CA 11, 2001). I believe *Cunningham*'s reasoning should prevail over the equivocal dicta on which the majority relies, and respectfully dissent.

I

Congress passed the MMWA in 1975 as a remedy for inadequate and misleading warranties on consumer goods. *Davis v Southern Energy Homes, Inc*, 305 F3d 1268, 1272 (CA 11, 2002). Senator Frank Moss, one of the act's sponsors, explained on the Senate floor that " '[b]y making warranties of consumer products clear and understandable through creating a uniform terminology of warranty coverage, consumers will for the first time have a clear and concise understanding of the terms of warranties of products they are considering purchasing.' " Steverson & Munter, *Then and Now: Reviving the Promise of the Magnuson-Moss Warranty Act*, 63 U Kan L Rev 227, 229 n 6 (2015), quoting 120 Cong Rec, part 30 (December 18, 1974), p 40711.

The act encourages warrantors to let consumers know exactly what to do when a product fails. The second section of the MMWA (only definitions occupy the first) highlights the act's *disclosure* function:

> In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the [FTC], fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. [15 USC 2302(a).]

This paragraph delegates to the FTC the authority to make rules advancing Congress's information-sharing goal. The principle guiding the rulemaking, as expressed in the balance of the text of 15 USC 2302(a), is that a warrantor must advise a consumer of the practical components of a warranty in language that the consumer can easily find and understand. "The comprehensive disclosure requirements of [the

MMWA] are an integral, if not the central, feature of the [a]ct, perhaps eclipsing even the civil action and informal dispute resolution mechanisms in their importance to consumers." *Cunningham*, 253 F3d at 621.

The act commanded the FTC to consider 10 "items" as fodder for informational regulations. 15 USC 2302(a). The "items" include very basic matters such as "[t]he clear identification of the names and addresses of the warrantors," § 2302(a)(1), "[t]he identity of the party or parties to whom the warranty is extended," § 2302(a)(2), and "[t]he products or parts covered," § 2302(a)(3). Also included in the list are: "[i]nformation respecting the availability of any informal dispute settlement procedure offered by the warrantor," § 2302(a)(8), and "[a] brief, general description of the legal remedies available to the consumer," § 2302(a)(9).

The FTC implemented its charge by promulgating 16 CFR 701.3(a) (2018), which obliges warrantors to "clearly and conspicuously disclose in a single document" all information relevant to enforcement of a warranty:

> Any warrantor warranting to a consumer by means of a written warranty a consumer product actually costing the consumer more than $15.00 shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items of information[.]

The mandatory disclosures that must appear in a single document are nine in number. The most pertinent here are:

> (6) Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with part 703 of this subchapter;

> (7) Any limitations on the duration of implied warranties, disclosed on the face of the warranty as provided in . . . 15 USC 2308 . . . [;]
>
> (8) Any exclusions of or limitations on relief such as incidental or consequential damages . . . [;]
>
> (9) A statement in the following language:
>
> This warranty gives you specific legal rights, and you may also have other rights which vary from State to State. [16 CFR 701.3(a) (2018).]

Read together, these provisions communicate that warrantors must thoroughly advise consumers of the contours of their legal rights and remedies.

The majority and I part company regarding whether the term "informal dispute settlement mechanism" encompasses binding arbitration in the context of the single-document rule. The FTC has expressed that a binding arbitration agreement qualifies as an "informal dispute settlement mechanism" and is not permitted by the MMWA. See 16 CFR 703.5(j); *Davis*, 305 F3d at 1277 (compiling federal register citations). The FTC's rejection of arbitration as an acceptable mechanism was the subject of the two federal appellate opinions on which *Abela* relies. But Subsections (6), (7) and (8) of 16 CFR 701.3(a) (2018) concern a consumer's right to *notice* about available legal remedies, not whether some remedies are barred. Galea contends that a mandatory arbitration of a warranty dispute falls within these notice requirements, and I agree.

II

Galea's complaint alleges that the warranty on her vehicle did not include an arbitration provision. Defendants have not rebutted this allegation. The arbitration agreement they seek to enforce is instead contained in a "Friends Program Pricing and

Acknowledgement Form" bearing Galea's signature and advising that in consideration for the discount she received on her vehicle, she agreed to arbitrate any warranty disputes:

> The Chrysler Employee Friends Program allows eligible purchasers to obtain a new vehicle at a substantial discount. **I understand that, in consideration for this discount, I will not be able to bring a lawsuit for any warranty disputes relating to this vehicle. Instead, I agree to submit any and all disputes through the Chrysler Vehicle Resolution Process, which includes mandatory arbitration that is binding on both Chrysler and me.** Before initiating this binding arbitration, I will attempt to resolve the dispute (1) at the dealership, (2) through the Customer Assistance Center. . . . I represent to Chrysler that before purchasing or leasing a vehicle under this Program, I received and read the Program Rules and Provisions ("Rules"), specifically including a document entitled "Vehicle Resolution Process – Binding Arbitration."

The referenced "Official Program Rules" document is eight pages long and covers a number of subjects including the "program overview," the characteristics of the employees and others eligible for discounted pricing, and "dealer reimbursement." Pages six through seven address arbitration and other dispute resolution processes:

> **Dispute Resolution Process – Binding Arbitration:**
>
> Friends program participants must follow the Vehicle Resolution Process summarized below for warranty disputes regarding a vehicle purchased or leased under the Program.
>
> Experience has shown that most problems can be resolved by taking the following steps:
>
> 1. Attempt to resolve problems with dealership management.

> 2. If additional help is needed, contact Chrysler's Customer Assistance Center at 1-800-992-1997.
>
> 3. If still unable to resolve the problems satisfactorily, the last stage is binding arbitration. Contact NCDS (National Center for Dispute Settlement) at 1-866-937-2461 for further information.
>
> 1. ARBITRATION
>
> Arbitration is a process by which two or more parties resolve a dispute through the use of a third party neutral. As a condition of participation in the program, employees, retirees and eligible family members agree that binding arbitration is solely and exclusively the final step for resolving any warranty dispute concerning vehicles purchased or leased under the Program. **They may not bring a separate lawsuit**. . . .
>
> . . . NCDS reviews only vehicle disputes involving Chrysler's Limited Warranty on a Chrysler vehicle. If the complaint is eligible, the customer has the option to select either an oral presentation with a single dispute settler or a "documents only" review by a panel of three decision-makers.

The warranty for Galea's vehicle occupies a separate booklet and consumes approximately 30 pages. Toward the end is a five-page section titled "How to Deal with Warranty Problems." Arbitration is not mentioned. The first "remedy" suggested is to "talk to your dealer's service manager or sales manager," and if unsuccessful, "[d]iscuss your problem with the owner or general manager of the dealership." If that does not work, the warranty offers that the consumer should "contact the Chrysler Customer Assistance Center. You'll find the address in section 7.2."

By omitting any mention of the legal remedies available (including binding arbitration), the warranty on Galea's Jeep violates the single-document rule.

III

The majority reads *Abela* to mean that "[a]greements to submit to binding arbitration . . . fall outside the FTC's rulemaking authority under the MMWA" and, therefore, "the single-document rule does not apply to binding arbitration agreements." My disagreement hinges on the interpretation of Subsection (6) of the FTC's implementing regulation, which declares that a warranty must include "[i]nformation respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with part 703 of this subchapter[.]" 16 CFR 701.3(a)(6) (2018). The majority holds that in *Abela* the Supreme Court rejected the single-document rule, even though the subject was not raised or even mentioned in the opinion.

Abela's rationale rests on two decisions rendered by two federal appellate courts, the United States Courts of Appeal for the Fifth and Eleventh Circuits. The majority asserts that those two cases hold that arbitration is not an "informal dispute settlement procedure" and extrapolates from there to a conclusion that the single-document rule does not require mention of arbitration in a warranty. Here is the paragraph from *Abela* that guides the majority's analysis:

> Although the federal courts of appeals decisions are not binding, we nevertheless affirm the decision of the Court of Appeals. We have examined the decisions in *Walton v Rose Mobile Homes LLC*, 298 F3d 470 (CA 5, 2002), and *Davis v Southern Energy Homes, Inc*, 305 F3d 1268 (CA 11, 2002), and find their analyses and conclusions persuasive. Both decisions carefully examined the MMWA and the [Federal Arbitration Act (FAA), 9 USC 1 *et seq*.], and *both concluded that the text, the legislative history, and the purpose of the MMWA did not evidence a congressional intent under the FAA to bar agreements for binding arbitration of claims covered by the MMWA*. Persuaded by

> these analyses of the federal courts of appeals, we conclude that plaintiffs' agreement with defendant to address the warranty claim through defendant's dispute resolution process, including mandatory arbitration, is enforceable. [*Abela*, 469 Mich at 607 (emphasis added).]

This paragraph, and the emphasized portion in particular, does not support (or even speak to) the proposition advanced by the majority. *Abela* holds that Congress did not intend the MMWA to bar binding arbitration. *Walton* and *Davis* express the same holding. The majority seizes on obiter dictum in *Walton* and *Davis* positing that the FTC improperly nixed binding arbitration as an available remedy by mistakenly interpreting arbitration as an "informal dispute settlement procedure." That dicta, the majority concludes, means that "[a]greements to submit to binding arbitration . . . fall outside the FTC's rulemaking authority under the MMWA, and the single-document rule does not apply to binding arbitration agreements." Under the majority's conclusion, a warranty need not inform the consumer that his or her legal rights are limited to binding arbitration.

I submit that the majority over-reads all three cases and incorrectly treats dicta as precedent. None of the three cases erases notice of binding arbitration from the single-document rule, and none contradicts *Cunningham*. Further, an analysis of the single-document rule rests on an entirely different legal framework. That framework supports that a warrantor must notify a consumer in the warranty that any breach-of-warranty claim must be submitted to binding arbitration.

A

I begin with *Cunningham* because it is a decision of the same court that decided *Davis*, one of the two cases relied on by the majority.

The *Cunningham* plaintiffs purchased a motor home. They sued for breach of warranty and also raised other claims. The defense moved to compel arbitration. The parties presented two issues to the federal court of appeals: whether the MMWA prohibits binding arbitration, and whether the warranty violated the single-document rule by omitting any reference to binding arbitration. The court concluded that the informal dispute resolution procedures mentioned in the act were "prerequisites" to a lawsuit rather than substitutes barring other procedures, such as arbitration. *Cunningham*, 253 F3d at 618-619. This conclusion rested on the court's analysis of the legislative history of the MMWA and abundant United States Supreme Court jurisprudence standing for the proposition that "the presence of one type of non-judicial mechanism in the text does not necessarily preclude the possibility of alternative mechanisms." *Id*. at 620. The court spent little time on this subject, however, because it found another aspect of the case dispositive—the single-document rule. The court explained:

> [W]hile we are inclined to think that the presence of the non-binding § 2310 mechanism in the statutory text does not in and of itself mandate the conclusion that [the MMWA] renders binding arbitration agreements unenforceable, other key provisions of [the MMWA], together with § 2310, cast considerable doubt on the propriety of the particular arrangement at issue here. These provisions include the requirements that significant conditions, limitations, and terms of the warranty be included in simple language in the warranty itself, and that the warranty must consist of a single, understandable document made available prior to sale to the consumer. [*Id*.]

In other words, the Eleventh Circuit in *Cunningham* found that although the "informal dispute settlement procedure" language of the statute could not be con-

strued as a *bar* to arbitration, it nevertheless compelled that a mandatory arbitration be included in a single warranty document.

This is so because context matters. When considered as an impediment to arbitration, the phrase does not do enough work to supplant the presumption in favor of arbitration described throughout United States Supreme Court caselaw. When considered as part of a regulation governing the content of a warranty, the phrase embraces arbitration because the FTC says it does. In the *notice* context, the FTC makes the rules.

The *Cunningham* Court had no difficulty concluding that in contrast with the "procedural provisions" of arbitration found in federal law, "§ 2302 of [the MMWA] and the rules promulgated by the [FTC] . . . do in fact impose substantive obligations on manufacturers that choose to issue warranties, requiring clear disclosure of warranty terms in a single document." *Id*. at 623. The court drew this conclusion from the legislative history and purpose of the act, emphasizing that the MMWA was remedial legislation intended to counteract complex, misleading warranty language: "Congress sought to remedy the situation by requiring that material terms be presented in clear language in a single document." *Id*. at 621. At Congress's behest, the FTC "crafted the disclosure requirements so that they might 'inform the consumer of the full extent of his or her obligations under the warranty, and to eliminate confusion as to the necessary steps which he or she must take in order to get warranty performance.' " *Id*. (citation omitted). The FTC understood that a warranty omitting relevant terms was just as unhelpful as a warranty written in a complicated or misleading way. "The single document rule reinforces these concerns by requiring warrantors to present all

information relevant to the warranty in one place, where it might be easily located and assimilated by the consumer." *Id*. The court concluded, "Compelling arbitration on the basis of an arbitration agreement that is not referenced in the warranty presents an inherent conflict with the [a]ct's purpose of providing clear and concise warranties to consumers." *Id*. at 622.

B

I turn next to *Davis*, also decided by the Eleventh Circuit. Judge R. Lanier Anderson signed both *Cunningham* and *Davis*, a fact that should not be lost in the caselaw shuffle. Had the results in these two cases been incompatible, one would expect that Judge Anderson would have called that fact to a reader's attention. But he did not, and they are not incompatible because *Davis*'s holding is sharply limited: "We hold that the [MMWA] *permits* binding arbitration and that a written warranty claim arising under the [MMWA] may be subject to a valid pre-dispute binding arbitration agreement." *Davis*, 305 F3d at 1270 (emphasis added). *Cunningham* is cited several times in *Davis*, never disapprovingly. Although the majority locates in *Davis* a snippet of text citing another case (*Walton*) for the proposition that arbitration was not considered by Congress as an "informal dispute settlement procedure," the case does not stand for that proposition. Rather, the *Davis* court painstakingly analyzed the question of arbitrability under the MMWA based on two lines of federal caselaw: *Shearson/American Express, Inc v McMahon*, 482 US 220; 107 S Ct 2332; 96 L Ed 2d 185 (1987), and *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984).

These cases present the tests used by the federal courts to ascertain whether Congress intended to preclude arbitration of a statutory claim (*McMahon*) and whether an agency regulation merits a federal court's deference (*Chevron*). The *Davis* court determined that Congress did not clearly express in the MMWA the intent to preclude binding arbitration. *Davis*, 305 F3d at 1272. It further found that the FTC's belief to the contrary was unreasonable and not worthy of deference. *Id*. at 1280. This analysis does not undermine *Cunningham*'s conclusion that to be enforceable, a binding arbitration provision must be included in a warranty. The FTC's opinion that arbitration is barred received no deference, but its view that a warranty must describe the legal remedies available to a consumer did. *Davis* and *Cunningham* peacefully coexist in the Eleventh Circuit because they address different legal issues in a readily reconcilable way.

C

Now to *Walton*, a two-to-one decision of the Fifth Circuit. Like *Davis*, *Walton* does not discuss the single-document rule. Also like *Davis*, the analysis presented in *Walton* rests on *McMahon* and *Chevron*. In dictum, the Court observed, "We also note that binding arbitration is not normally considered to be an 'informal dispute settlement procedure,' and it therefore seems to fall outside the bounds of the MMWA and of the FTC's power to prescribe regulations." *Walton*, 298 F3d at 476.[1] This rather tentative conclusion about the common understanding of an "informal dispute settle-

[1] Ironically, our Supreme Court disagrees and most assuredly views arbitration as an "informal" dispute resolution procedure: "By narrowing the grounds upon which an arbitration decision may be invaded, the court rules preserve the efficiency and reliability of arbitration as an

ment procedure" appears at the end of an extended discussion of the first of the *McMahon* factors, whether in drafting the MMWA Congress spoke to the issue of arbitration. I respectfully submit that the majority errs by elevating this dictum to a rule of law that the FTC lacked the authority to consider arbitration as a remedy that must be included in a single warranty document.[2]

IV

When it comes to the information that must be included in a warranty, the real question presented is: who makes the rules? The answer is incontrovertible: Congress entrusted the FTC with the authority to decide what information a warranty must contain. 15 USC 2302(a). The FTC promulgated a regulation mandating that the availability of any "informal dispute settlement procedure" must be disclosed "clearly and conspicuously . . . in a single document . . . ." 16 CFR 701.3(a)(6) (2018). The FTC has taken the position that arbitration is an "informal dispute settlement procedure" for that purpose. *Abela*, *Walton*, and *Davis* hold that a consumer may be compelled to arbitrate. But none of those cases considered whether the FTC could properly require that an arbitration agreement be included in the warranty. In the federal appellate courts, only *Cunningham* has reached that issue, and its verdict supports Galea.

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expedited, efficient, and informal means of private dispute resolution." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991).

[2] The holding in *Walton* does not speak to whether arbitration is or is not an "informal dispute settlement procedure": "We therefore hold that the text, legislative history, and purpose of the MMWA do not evince a congressional intent to bar arbitration of MMWA written warranty claims." *Walton*, 298 F3d at 478.

The single-document rule furthers an important congressional objective: notifying consumers about their warranty rights. Including all relevant information in a single location allows a consumer to easily locate his or her remedies. When a warranty dispute erupts, there is no more important piece of information to a consumer than: what do I do now? If a consumer is limited to binding arbitration, it follows that this information must be included in the warranty. That is what both Congress and the FTC intended. Holding otherwise dilutes a critical protection of the MMWA and contradicts its history and purpose. Based on defendant Riehl's violation of the single-document rule, I would reverse the circuit court's order sending the case to arbitration and would remand for a trial.

LOCKWOOD v ELLINGTON TWP

Docket No. 338745. Submitted March 7, 2018, at Detroit. Decided March 13, 2018, at 9:05 a.m.

Duane Lockwood, George Mika, Eugene Davison, and others filed an action in the Tuscola Circuit Court against Ellington Township, Eric Zbytowski, and Ed Talaski, seeking under the Open Meetings Act (OMA), MCL 15.265 *et seq*., to compel the Ellington Township Board to remove Zbytowski and Talaski from membership on the Ellington Township Planning Commission and to appoint Mika and Davison to those positions. The board held a meeting on November 1, 2016, that had previously been scheduled for November 8, 2016—election day; the board did not post a notice of the rescheduled meeting on the township hall as required by OMA. At the November 1, 2016 meeting, the board appointed Mika and Davison to the planning commission, and they took an oath of office on November 15, 2016. One week later, the new township board held a special meeting, concluding that the November 1, 2016 meeting was held in violation of OMA. The new board added the action items from the November 1, 2016 meeting to the December board agenda. At the December 15, 2016 board meeting, the board did not ratify the appointments of Mika and Davison and instead resolved to accept applications to fill the two planning commission seats; the board ultimately appointed Zbytowski and Talaski to the commission in January 2017. Plaintiffs moved for summary disposition, which the court, Amy G. Gierhart, J., granted, reasoning that it did not have jurisdiction to address whether the board's appointments should be invalidated for violating OMA because a prior action challenging the minutes of the November 1, 2016 meeting had not been filed in the circuit within 60 days of the minutes being made available to the public. The court concluded that because MCL 125.3815(9) allows public bodies to only remove planning commission members for misfeasance, malfeasance, or nonfeasance in office, the incoming board did not have authority to remove Mika and Davison and to appoint Zbytowski and Talaski in their place. The court ordered that Mika and Davison were entitled to serve on the planning commission and ordered that Zbytowski and Talaski be removed from their positions. Defendants appealed.

The Court of Appeals *held*:

1. Under MCL 15.270(2), a plaintiff may seek to have a decision of a public body invalidated if the public body did not comply with OMA when making the decision or if the violation impaired the rights of the public under OMA. A trial court's determination of whether the public's rights were impaired is based on the public's opportunity to participate in the public body's decision-making process. MCL 15.265(3) requires public bodies to post within three days any change in the schedule of regular meetings of the public body after a meeting at which the change is made, stating the new dates, times, and places of its regular meetings. Under MCL 15.270(3), the circuit court does not have jurisdiction to invalidate a public body's decision for an OMA violation unless an action is commenced within 60 days after the approved minutes are made available to the public by the public body. In this case, the trial court correctly concluded that it did not have jurisdiction to consider the alleged November 1, 2016 OMA violations because no party had filed an action in the circuit court to invalidate the decisions made at that meeting.

2. Under MCL 15.270(5), in any case in which an action has been initiated to invalidate a decision of a public body on the ground that the action did not conform with OMA, the public body may reenact the disputed decision in conformity with the act. In other words, a deficiency in the procedure may not render a decision made during a session invalid if the public body reenacts and corrects the procedural omission. While MCL 15.270(5) permits a public body to correct a deficiency in procedure by reenacting the decisions made during a meeting, OMA does not require public bodies to do so, and the public body may correct a procedural violation on its own motion. Conversely, if a public body does not reenact an action taken at a meeting in violation of OMA, that action is not valid and has no force or effect. In this case, the trial court erred when it concluded that the only way to invalidate an action taken at a meeting held in violation of OMA was by bringing an action in circuit court. Instead, the board had authority to correct decisions made in violation of OMA by reenacting those decisions. The board procedurally violated OMA when it failed to provide notice of the November 1, 2016 meeting, and the board's appointments of Mika and Davison to the planning commission on that date were therefore invalid. Because the board did not subsequently reenact those appointments, they had no force or effect. The board's appointments of Zbytowski and Talaski to the planning commission were valid and remained in effect. Accordingly, the trial court erred by

granting summary disposition in favor of plaintiffs and by placing Mika and Davison on the planning commission and removing Zbytowski and Talaski from their positions.

Summary disposition order reversed; judgment vacated.

STATUTES — OPEN MEETINGS ACT — DEFICIENCIES IN PROCEDURE — REENACTMENT OF DECISIONS — EFFECT OF FAILURE TO REENACT DECISION.

Under MCL 15.270(5), in any case in which an action has been initiated to invalidate a decision of a public body on the ground that the action did not conform with the Open Meetings Act (OMA), MCL 15.265 *et seq.*, the public body may reenact the disputed decision in conformity with the act; a deficiency in the procedure may not render a decision made during a session invalid if the public body reenacts and corrects the procedural omission; MCL 15.270(5) does not require public bodies to correct a deficiency in procedure by reenacting the decisions made during a meeting, but a public body may do so and on its own motion; if a public body does not reenact an action taken at a meeting in violation of OMA, that action is not valid and has no force or effect.

George A. Holmes for plaintiffs.

Foster, Swift, Collins & Smith, PC (by *Michael D. Homier* and *Laura J. Genovich*) for defendants.

Before: M. J. KELLY, P.J., and JANSEN and METER, JJ.

JANSEN, J. Defendants, the Township of Ellington, Eric Zbytowski, and Ed Talaski, appeal as of right the May 22, 2017 judgment ousting Zbytowski and Talaski from the Ellington Township Planning Commission and reinstating the appointments of plaintiffs Eugene Davison and George Mika to the planning commission. The basis of defendants' appeal, however, is actually a challenge to the trial court's order granting summary disposition, pursuant to MCR 2.116(C)(10), in favor of plaintiffs, Duane Lockwood, David Vollmar, Ronald Cybulski, Mika, and Davison. We reverse the trial court's order granting summary disposition in favor of

plaintiffs and vacate the trial court's judgment reinstating Mika and Davison to the planning commission.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

This case arises out of a November 1, 2016 meeting of the Ellington Township Board. The November 1, 2016 meeting had been rescheduled from November 8, 2016, which was election day. It is uncontested that no notice of the November 1, 2016 meeting was posted at the Ellington Township Hall, as was required under MCL 15.265 of the Open Meetings Act (OMA). During the November 1, 2016 meeting, the board appointed and verified the appointments of Mika and Davison to the planning commission. Mika and Davison were appointed to serve three-year terms, beginning on January 1, 2017. Mika and Davison each took an oath of office on November 15, 2016.

Subsequently, a new board took office, and at a special board meeting on November 22, 2016, the new board concluded that the November 1, 2016 meeting was held in violation of OMA and that the events of that meeting would therefore be added to the December meeting agenda; this included the appointments of Mika and Davison. At the December 15, 2016 board meeting, the board did not ratify the appointments of Mika and Davison to the planning commission. Instead, the board resolved to accept applications for the vacancies that the removals created. On January 17, 2017, the board approved the appointments of Zbytowski and Talaski to the planning commission.

On March 20, 2017, plaintiffs Lockwood, Cybulski, and Vollmar filed a complaint for quo warranto relief.[1]

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[1] On March 17, 2017, plaintiffs filed an ex parte application for leave to institute a quo warranto action, noting that on February 21, 2017,

Plaintiffs stated that they were lessors of land, leased by Next Era Energy Resources, LLC, for the purpose of development of a wind energy conversion system in Almer, Fairgrove, and Ellington Townships known as Tuscola Wind III, LLC (the Tuscola Wind Project). Plaintiffs explained that the Tuscola Wind Project would utilize their properties and that they would generate income from the leases.

Plaintiffs alleged that the board erroneously invalidated the actions of the November 1, 2016 meeting because OMA does not permit a public body to invalidate prior actions and, further, that the board had not engaged in any evaluation or discussion regarding whether the November 1, 2016 meeting impaired the rights of the public because no notice was given. Plaintiffs also asserted that the invalidation of the appointments of Mika and Davison to the planning commission was unlawful

> as contrary to MCL 125.3815(a); Section 6 of the Township of Ellington Planning Commission Ordinance and Section 5c of its Bylaws which require finding of misfeasance, malfeasance, or nonfeasance in office, written charges, notice, and an opportunity to be heard.

Plaintiffs asserted that because Mika and Davison were unlawfully removed from the planning commission, Zbytowski and Talaski were "usurping, intruding into, or unlawfully holding office on the Ellington Township Planning Commission."[2] Plaintiffs re-

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they had requested that the Attorney General bring this action and that he had refused to do so. On March 17, 2017, the trial court granted plaintiffs' application.

[2] Plaintiffs also alleged that four of the five members of the new board, as well as Zbytowski and Talaski, were part of a political action group called "Ellington-Almer Township Concerned Citizens," which openly opposed and actively attempted to stop the Tuscola Wind Project. Plaintiffs alleged that at the November 22, 2016 special board meeting,

quested that the trial court order the ouster of Zbytowski and Talaski from the planning commission, order that Mika and Davison were entitled to serve complete three-year terms on the planning commission, and enjoin Zbytowski and Talaski from holding office or participating as members of the planning commission until a determination was made regarding the rightful holders of office on the planning commission.

Before defendants could file an answer, plaintiffs filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff argued that OMA does not vest a public body with the power of invalidation. Rather, OMA "provides that an action may be commenced in the circuit court to challenge the validity of a decision of a public body made in violation of OMA[.] MCL 15.270(1)." The board's "power to take action, curative or otherwise, is limited to those situations in which a circuit court action has been filed seeking invalidation of action." Accordingly, the new board did not have the authority to "invalidate" the political appointments of Mika and Davison, particularly in light of the fact that there were never any charges or findings of misfeasance, malfeasance, or nonfeasance brought or made with respect to Mika and Davison.

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in addition to erroneously placing the events of the November 1, 2016 meeting on the December agenda, the board "enacted a Wind Energy Conversion Facilities Moratorium Ordinance, freezing Township consideration of the Tuscola Wind III project . . . ." Further, on January 17, 2017, the new board had approved a motion to strengthen the regulations for "noise, setback, shadow flicker, decommissioning, and conflict resolution for Wind Energy Conversion Systems," and the new board asked that "the Planning Commission make a recommendation to the [board] regarding such proposed amendments." Plaintiffs went on to allege that they were "apprehensive that [the board] in concert with . . . Zbytowski and . . . Talaski will legislate, by restriction, wind turbines out of Ellington Township . . . ."

Further, plaintiffs argued that a decision of a public body can only be invalidated if the public body has not complied with the requirements of MCL 15.263(1) through (3). Plaintiffs contended that was not the case here, given that the November 1, 2016 meeting was open to the public, that it was held in a place that was available to the public, and that the failure to give notice did not impair the rights of the public. Therefore, even if the board had the power to take action, "the action it took failed to meet the statutory or case law requirements."

Defendants filed their brief in opposition to plaintiffs' motion for summary disposition on April 17, 2017, and requested summary disposition in their favor pursuant to MCR 2.116(I)(2). Defendants argued that before the four of five members of the board left office, they "purported to reappoint two members to the Planning Commission" at a meeting that did not comply with the notice requirement of OMA. However, after the new board took office, they corrected the defect by holding a new, properly noticed meeting and appointed two different individuals to the planning commission. Defendants argued that nothing in OMA prevents public bodies from curing their own defects and that plaintiffs' "contrary interpretation of . . . OMA would prevent public bodies from correcting their own mistakes and would instead require the public body to be sued, at taxpayers' expense." Although a circuit court's jurisdiction is limited by OMA—it only has jurisdiction over actions filed within 60 days of the minutes being approved—there is nothing in OMA that limits a public body's ability to reenact, or not reenact, an illegal decision.

Further, defendants argued, the appointments of Mika and Davison were unlawful, as the " 'lame duck' " outgoing board could not make appointments that

were legally binding on the new board. Defendants noted that the appointment of government officers is a governmental function, and therefore a "municipal board cannot impair the rights of its successors, including the right to appoint planning commission members." In fact, defendants stated, this Court has held that the appointment of public officers is a governmental function and thus a "municipal council cannot engage a public officer by contract for a term extending beyond that of its own members, so as to impair the right of their successors to remove such officer and to appoint another in his place." (Quotation marks and citation omitted.)

Following a hearing on plaintiffs' motion, the trial court entered an opinion and order granting summary disposition in favor of plaintiffs on May 3, 2017. The trial court determined that it did not have jurisdiction to address "whether the planning commission's appointments should be invalidated for a violation of" OMA because no cause of action was filed in the circuit court within 60 days of the minutes from the November 1, 2016 meeting being made available to the public. However, the trial court went on to determine that because public bodies may only remove planning commission members in the event of misfeasance, malfeasance, or nonfeasance in office, MCL 125.3815(9), the incoming board did not have the authority to remove Mika and Davison and to appoint Zbytowski and Talaski in their place. The trial court opined:

> If there was concern about appointments made during a meeting that violated . . . OMA, the concerned party or parties should have filed a lawsuit within the 60-day statutory limit for invalidation of the decision. See MCL 15.270(1) . . . [.] It should be noted that because the newly elected Township Board wishes to invalidate the prior Township Board's action and take a different action, the

> remedy of reenactment by action by the Township Board which is a contemplated remedy for OMA violations was not feasible. The newly elected Township Board wished to take a different action and intended to invalidate the prior Board's action, this could only have been accomplished by a Circuit Court action as provided by . . . OMA. Because that did not occur and because the Board did not remove plaintiffs Davison and Mika for "misfeasance, malfeasance, or nonfeasance," MCL 125.3815(9), the Board had no legal authority to remove Mika and Davison and appoint Zbytowski and Talaski.

The trial court relied on *Trainor v Bd of Auditors*, 89 Mich 162, 170; 50 NW 809 (1891), to support its holding that officers, as opposed to employees, cannot be subject to removal from office at " 'the will or caprice of the appointing power.' "

Defendants unsuccessfully moved for reconsideration of the trial court's order. On May 22, 2017, the trial court entered a final judgment in this matter, ordering that Mika and Davison were entitled to serve on the planning commission for three years. This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's decision regarding a motion for summary disposition de novo. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5-6; 890 NW2d 344 (2016). A motion for summary disposition brought under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint," *Shinn v Mich Assigned Claims Facility*, 314 Mich App 765, 768; 887 NW2d 635 (2016), and should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law," *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). The court must consider all of the admissible evidence in a light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). However, the party opposing summary disposition under MCR 2.116(C)(10) "may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Oliver v Smith*, 269 Mich App 560, 564; 715 NW2d 314 (2006) (quotation marks and citation omitted). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 423; 864 NW2d 609 (2014) (quotation marks and citation omitted).

If, after careful review of the evidence, it appears to the trial court that there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law, then summary disposition is properly granted under MCR 2.116(I)(2). *Holland v Consumers Energy Co*, 308 Mich App 675, 681-682; 866 NW2d 871 (2015), aff'd *Coldwater v Consumers Energy Co*, 500 Mich 158 (2017).

III. JURISDICTIONAL ISSUES

Defendants first argue that the trial court erroneously held that the 60-day period for filing a civil action under OMA had expired and that therefore it did not have jurisdiction over any alleged violation of the act. We disagree.

There are three different types of relief available under OMA. *Leemreis v Sherman Twp*, 273 Mich App 691, 699-700, 704; 731 NW2d 787 (2007). A plaintiff may: (1) seek to compel compliance with OMA or enjoin further noncompliance (MCL 15.271(1); *Leemreis*, 273 Mich App at 699); (2) seek actual and exemplary damages against a public official for intentional violations of OMA (MCL 15.273(1); *Leemreis*, 273 Mich App at 700); or (3) seek to have the decision of a public body invalidated on the grounds that it was not made in conformity with OMA (MCL 15.270; *Leemreis*, 273 Mich App at 699).

This case involves allegations of an OMA violation, specifically, that the board held its November 1, 2016 meeting without providing the requisite notice. MCL 15.270(2) provides:

> A decision made by a public body may be invalidated if the public body has not complied with the requirements of [MCL 15.263(1) through (3)] in making the decision or if failure to give notice in accordance with [MCL 15.265] has interfered with substantial compliance with [MCL 15.263(1) through (3)] and the court finds that the noncompliance or failure has impaired the rights of the public under this act.

Therefore, "[a] court has discretion to invalidate a decision made in violation of . . . OMA if it finds that violation impaired the rights of the public under . . . OMA." *Morrison v East Lansing*, 255 Mich App 505, 520; 660 NW2d 395 (2003), abrogated in part on other grounds by *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125 (2014). A trial court's determination of whether the public's rights were impaired is based on the public's opportunity to participate in the public body's decision-making process. *Id*. at 521.

With respect to the November 1, 2016 meeting, which was changed from November 8, 2016, the board was required to post "within 3 days after the meeting at which the change is made, a public notice stating the new dates, times, and places of its regular meetings" in order to be in compliance with OMA. MCL 15.265(3). It is uncontested that no notice of the November 1, 2016 meeting was provided and that the meeting was violative of OMA.

OMA also lays out the procedure to be utilized by the attorney general, the county prosecuting attorney, or any other person when seeking invalidation of a decision made by a public body. Specifically, MCL 15.270(3) provides:

> The circuit court shall not have jurisdiction to invalidate a decision of a public body for a violation of this act unless an action is commenced pursuant to this section within the following specified period of time:
>
> (a) Within 60 days after the approved minutes are made available to the public by the public body except as otherwise provided in subdivision (b).
>
> (b) If the decision involves the approval of contracts, the receipt or acceptance of bids, the making of assessments, the procedures pertaining to the issuance of bonds or other evidences of indebtedness, or the submission of a borrowing proposal to the electors, within 30 days after the approved minutes are made available to the public pursuant to that decision.

We find no error with the trial court's determination that it did not have jurisdiction over any alleged OMA violation relating to the November 1, 2016 meeting. It appears from our review of the record that the minutes from the November 1, 2016 meeting were neither approved nor made available to the public. While we agree with defendants that because the minutes were

never approved and released, the 60-day period of limitations had not begun to run, we nevertheless conclude that the trial court did not have jurisdiction because no party had filed an action in the circuit court to invalidate any decision made at the November 1, 2016 meeting. MCL 15.270(3). The trial court did not err by concluding that it did not have jurisdiction to determine whether the appointments of Mika and Davison should have been invalidated because the November 1, 2016 board meeting did not comply with the notice requirements of OMA.

IV. OMA VIOLATIONS

Defendants next argue that the trial court erroneously held that the board could not cure any alleged OMA violation on its own without first being sued. We agree.

It is uncontested that OMA provides that public bodies may *ratify* decisions made at meetings that were not in conformity with OMA. Specifically, MCL 15.270(5) states:

> In any case where an action has been initiated to invalidate a decision of a public body on the ground that it was not taken in conformity with the requirements of this act, the public body may, without being deemed to make any admission contrary to its interest, reenact the disputed decision in conformity with this act. A decision reenacted in this manner shall be effective from the date of reenactment and shall not be declared invalid by reason of a deficiency in the procedure used for its initial enactment.

Therefore, "a deficiency in the procedure may not render a decision made during a session invalid if the public body duly reenacts and corrects the procedural omission." *Herald Co, Inc v Tax Tribunal*, 258 Mich

App 78, 90; 669 NW2d 862 (2003), abrogated in part on other grounds by *Speicher*, 497 Mich 125.

The failure to provide notice of the November 1, 2016 meeting was a procedural violation. In granting summary disposition in favor of plaintiff, the trial court concluded that the only way the new board could have invalidated the actions taken by the old board at the November 1, 2016 meeting was if an action had been filed in the circuit court. We disagree.

Although the board was *permitted* by OMA to correct the deficiency in the procedure by reenacting the decisions made during the November 1, 2016 meeting, there is nothing in OMA to suggest that it was *required* to reenact the decisions made during that meeting. MCL 15.270(5). Therefore, if an action taken at a meeting held in violation of OMA is not reenacted, it is not valid, and it has no force or effect. Further, there is nothing in OMA that suggests a board must be sued before correcting any procedural violations on its own. To conclude otherwise ignores the ratification provision included in OMA by the Legislature, and further, it would result in a waste of city resources and taxpayer dollars. Accordingly, we conclude that the trial court erred by concluding that the only way to invalidate an action taken at a meeting that was held in violation of OMA was by bringing an action in the circuit court.

In sum, we conclude that because the appointments made at the November 1, 2016 board meeting were violative of OMA and never reenacted, they had no force or effect. Comparatively, the subsequent appointments of Zbytowski and Talaski to the planning commission were valid and should remain in effect because they were made at a meeting properly noticed and held in compliance with OMA. On that basis, we reverse the

order granting summary disposition in favor of plaintiffs and vacate the judgment placing Mika and Davison on the planning commission. Given the foregoing, we find it unnecessary to address defendants' arguments relating to the "lame duck" outgoing board.

Summary disposition order reversed and judgment vacated.

M. J. KELLY, P.J., and METER, J., concurred with JANSEN, J.

In re KERR

Docket No. 335000. Submitted January 3, 2018, at Grand Rapids. Decided March 13, 2018, at 9:10 a.m.

The Bay County Prosecutor filed two juvenile-delinquency petitions against respondent in the juvenile division of the Bay Circuit Court. Both petitions alleged that respondent had committed criminal sexual conduct with a minor, with one petition citing both MCL 750.520d and MCL 750.520e and the other citing only MCL 750.520d. Petitioner filed a notice of intent to introduce, in both cases, other-acts evidence under MCL 768.27a, which provides that in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. The notice expressed petitioner's intent to use the acts alleged in the first petition in the trial on the second petition and the acts alleged in the second petition in the trial on the first petition. Respondent objected, arguing, in part, that MCL 768.27a allows for the admission into evidence of other acts in criminal cases, and juvenile-delinquency proceedings are not criminal cases. Respondent contended that petitioner did not indicate what purpose beyond mere propensity would be served by the introduction of the other-acts evidence and stated that evidence may not be offered to demonstrate propensity under MRE 404(b). Petitioner acknowledged that it was seeking to admit the other-acts evidence to show propensity but argued that this was appropriate under MCL 768.27a because the statute supersedes MRE 404(b). The trial court, Dawn A. Klida, J., ruled in respondent's favor, stating that if the Legislature had intended to include juvenile proceedings within the purview of MCL 768.27a, it would have explicitly said as much in the statute. The court also cited MRE 403 and ruled that the probative value of the evidence would be outweighed by the danger of unfair prejudice. Petitioner appealed.

The Court of Appeals *held*:

1. The trial court erred by concluding that MCL 768.27a does not apply to juvenile-delinquency trials. MCL 768.27a provides

that in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant, including the defendant's character and propensity to commit the charged crime. The Michigan Supreme Court has held that MCL 768.27a irreconcilably conflicts with MRE 404(b), which bars the admission of other-acts evidence for the purpose of showing propensity, and that MCL 768.27a prevails over MRE 404(b). MCL 768.27a does not expressly refer to juvenile-delinquency trials, but MCR 3.942(C) states that the Michigan Rules of Evidence apply in juvenile-delinquency trials. MRE 101 provides that a statutory rule of evidence not in conflict with these rules or other rules adopted by the Supreme Court is effective until superseded by rule or decision of the Supreme Court, and MCL 768.27a is a statutory rule of evidence. Although MCL 768.27a conflicts with MRE 404(b), the Supreme Court has determined that for cases encompassed by the language of MCL 768.27a, MCL 768.27a supersedes MRE 404(b). Therefore, as a statutory rule of evidence, MCL 768.27a is effective under the Michigan Rules of Evidence and applicable in juvenile-delinquency trials.

2. The trial court erred in its application of MRE 403 when determining whether to exclude the other-acts evidence. When applying MRE 403 to evidence admissible under MCL 768.27a, a trial court must weigh the propensity inference in favor of the probative value of the evidence rather than in favor of its prejudicial effect, and other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference. Because it appeared from the trial court's ruling that it had improperly weighed the propensity inference in favor of the prejudicial effect of the evidence, the order excluding the other-acts evidence was vacated and the trial court was directed to make its MRE 403 determination in accordance with the foregoing principles.

Order vacated and case remanded for further proceedings.

1. JUVENILES — JUVENILE-DELINQUENCY PROCEEDINGS — TRIALS — EVIDENCE — STATUTORY RULES OF EVIDENCE — OTHER ACTS COMMITTED AGAINST MINORS.

MCL 768.27a provides that in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for

its bearing on any matter to which it is relevant, including the defendant's character and propensity to commit the charged crime; this statutory rule of evidence is applicable in juvenile-delinquency trials.

2. CRIMINAL LAW — EVIDENCE — STATUTORY RULES OF EVIDENCE — OTHER ACTS COMMITTED AGAINST MINORS — ADMISSIBILITY.

Evidence that is admissible under MCL 768.27a may be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; when applying MRE 403 to evidence admissible under MCL 768.27a, a trial court must weigh the propensity inference in favor of the probative value of the evidence rather than in favor of its prejudicial effect; other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Nancy E. Borushko*, Prosecuting Attorney, and *Sylvia L. Linton*, Assistant Prosecuting Attorney, for petitioner.

Jeffrey M. Day for respondent.

Before: METER, P.J., and BORRELLO and BOONSTRA, JJ.

METER, P.J. In this juvenile-delinquency case against respondent, petitioner appeals by leave granted an order excluding other-acts evidence. We hold that the trial court erred by concluding that MCL 768.27a does not apply to juvenile-delinquency trials. We vacate the trial court's order excluding the other-acts evidence and remand this matter to the trial court for a determination of the admissibility of the other-acts evidence under the proper legal framework.

Petitioner filed two juvenile-delinquency petitions against respondent. Each petition concerns a separate alleged victim. The first petition alleges that respon-

dent committed third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(b) (force or coercion used to accomplish sexual penetration), and fourth-degree criminal sexual conduct, MCL 750.520e(1)(b) (force or coercion used to accomplish sexual contact). This petition relates to an October 27, 2014, incident in which respondent allegedly touched his minor cousin's vagina through her pants and then, after removing her pants and underwear, penetrated her vagina with his fingers and performed cunnilingus. The second petition alleges that respondent committed CSC-III, MCL 750.520d (multiple variables), by penetrating a 14-year-old girl's vagina with his fingers, mouth, and penis during the period from October 30, 2015, to November 1, 2015.

Petitioner filed a notice of intent to introduce, in both cases, other-acts evidence under MCL 768.27a. MCL 768.27a(1) states, in relevant part, that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." The notice expressed petitioner's intent to use the acts alleged in each petition in the trial on the other petition, i.e., the acts alleged in the first petition in the trial on the second petition, and the acts alleged in the second petition in the trial on the first petition.

Respondent objected, arguing, in part, that MCL 768.27a allows for the admission into evidence of other acts in criminal cases, and juvenile-delinquency proceedings are not criminal cases. Respondent contended that petitioner did not indicate what purpose beyond mere propensity would be served by the introduction of the other-acts evidence and stated that evidence may

not be offered to demonstrate propensity under MRE 404(b). Petitioner acknowledged that it was seeking to admit the other-acts evidence to show propensity but argued that this was appropriate under MCL 768.27a because the statute supersedes MRE 404(b).

The trial court ruled in respondent's favor, stating that if the Legislature had intended to include juvenile proceedings within the purview of MCL 768.27a, it would have explicitly said as much in the statute. The court also cited MRE 403, concluding that the probative value of the evidence would be outweighed by the danger of unfair prejudice. Petitioner now appeals the trial court's ruling.[1]

We review for an abuse of discretion a trial court's decision to exclude evidence. *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012). "A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes." *Id*. We review de novo the interpretation of statutes and court rules. *People v Lee*, 489 Mich 289, 295; 803 NW2d 165 (2011). We enforce unambiguous language of a statute or court rule as it is written. *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017).

MCL 768.27a allows the fact-finder to consider evidence of other acts committed by a defendant to show the defendant's character and propensity to commit the charged crime. *Watkins*, 491 Mich at 470, 486. Again, the statute provides, in pertinent part, that "[i]n a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense

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[1] The trial court's order cites both petitions, but in its oral ruling the court stated that it was ruling only with respect to the first petition. Our opinion today applies, in any event, to both cases.

against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." MCL 768.27a(1).[2]

In *Watkins*, the Michigan Supreme Court concluded that MCL 768.27a irreconcilably conflicts with MRE 404(b), which bars the admission of other-acts evidence for the purpose of showing propensity, and that MCL 768.27a prevails over MRE 404(b). *Watkins*, 491 Mich at 455. Evidence admissible under MCL 768.27a remains subject to MRE 403 and may be excluded under MRE 403 if " 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' " *Id*. at 481, quoting MRE 403. When applying MRE 403 to evidence admissible under MCL 768.27a, a trial court must weigh the propensity inference in favor of the probative value of the evidence, rather than in favor of its prejudicial effect. *Watkins*, 491 Mich at 487. "[O]ther-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference." *Id*. However, courts may exclude such evidence under MRE 403 for other reasons, including:

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*Id*. at 487-488.]

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[2] Respondent did not and does not dispute that the petitions involve "listed offense[s]" under MCL 768.27a(1).

"This list of considerations is meant to be illustrative rather than exhaustive." *Id*. at 488.

The central question presented in this case is whether MCL 768.27a applies in juvenile-delinquency trials. MCL 768.27a does not expressly refer to juvenile-delinquency trials. Subchapter 3.900 of the Michigan Court Rules governs proceedings involving juveniles. MCR 3.901(A)(3) states that "[t]he Michigan Rules of Evidence, except with regard to privileges, do not apply to proceedings under this subchapter, except where a rule in this subchapter so provides." See also MRE 1101(b)(7) (providing that the Michigan Rules of Evidence do not apply to juvenile proceedings "wherever MCR subchapter 3.900 states that the Michigan Rules of Evidence do not apply"). MCR 3.942 governs juvenile trials. MCR 3.942(C) states, "The Michigan Rules of Evidence and the standard of proof beyond a reasonable doubt apply at trial." Therefore, the Michigan Rules of Evidence apply in juvenile-delinquency trials. MRE 101 provides that "[a] statutory rule of evidence not in conflict with these rules or other rules adopted by the Supreme Court is effective until superseded by rule or decision of the Supreme Court." MCL 768.27a is a statutory rule of evidence. *Watkins*, 491 Mich at 473. Although MCL 768.27a conflicts with MRE 404(b), the Supreme Court has determined that for cases encompassed by the language of MCL 768.27a, MCL 768.27a supersedes MRE 404(b). *Watkins*, 491 Mich at 476-477. Therefore, as a statutory rule of evidence, MCL 768.27a is effective under the Michigan Rules of Evidence because the statutory rule has not been superseded by rule or decision of the Supreme Court but has, on the contrary, been held by the Supreme Court to supersede MRE 404(b). Because the Michigan Rules of Evidence apply in juvenile-delinquency trials, the statute at issue—a statutory

rule of evidence that supersedes MRE 404(b)—is applicable in juvenile-delinquency trials.

Reinforcing this conclusion is that, although "juvenile proceedings are not considered to be criminal prosecutions," *In re McDaniel*, 186 Mich App 696, 698; 465 NW2d 51 (1991), juvenile-delinquency proceedings are nonetheless closely analogous to the criminal process, *In re Carey*, 241 Mich App 222, 227; 615 NW2d 742 (2000). "[W]hen addressing a question implicating the juvenile code, this Court routinely looks to the adult criminal code and cases that interpret it so long as they are not in conflict or duplicative of a juvenile code provision." *In re Killich*, 319 Mich App 331, 337; 900 NW2d 692 (2017); see also *In re McDaniel*, 186 Mich App at 699 (holding that a criminal statutory provision abolishing the distinction between a principal and an accessory applies in juvenile proceedings). In *In re Alton*, 203 Mich App 405, 407; 513 NW2d 162 (1994), this Court stated that substantive criminal law applies in juvenile-delinquency proceedings when the critical issue is whether the juvenile violated the law. The Michigan Supreme Court has held that "MCL 768.27a is a valid enactment of substantive law"[3] that "is based on policy considerations over and beyond the orderly dispatch of judicial business." *Watkins*, 491 Mich at 475. In particular, MCL 768.27a "reflects a substantive legislative determination that juries should be privy to a defendant's behavioral history in cases charging the defendant with sexual misconduct against a minor." *Id*. at 476. The Supreme Court explained that MCL 768.27a was enacted "to address a

[3] The *Watkins* Court discussed the distinction between "procedural rules of evidence" and "substantive rules of evidence," concluding that MCL 768.27a is a substantive rule of evidence. *Watkins*, 491 Mich at 474-475.

substantive concern about the protection of children and the prosecution of persons who perpetuate certain enumerated crimes against children and are more likely than others to reoffend." *Id*. MCL 768.27a embodies substantive policy considerations regarding criminal law, *id*. at 475-476, and there is no provision in the juvenile code or juvenile court rules that conflicts with or parallels MCL 768.27a. The applicable statutory language, court rules, and caselaw demonstrate that the trial court erred by concluding that MCL 768.27a did not apply to the proceedings in question.

As noted, the trial court also based its decision to exclude the other-acts evidence on an application of MRE 403. As discussed, the Supreme Court in *Watkins* ruled that evidence admissible under MCL 768.27a remains subject to MRE 403, but in undertaking an analysis under MRE 403, a trial court must weigh the propensity inference in favor of the probative value of the evidence rather than in favor of its prejudicial effect. *Watkins*, 491 Mich at 486-487. From a reading of the trial court's ruling, it appears that the trial court improperly weighed the propensity inference in favor of the prejudicial effect of the evidence. Accordingly, we vacate the trial court's order excluding the other-acts evidence and direct the trial court to make its MRE 403 determination in accordance with the principles set forth in *Watkins*, 491 Mich at 486-490.

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

BORRELLO and BOONSTRA, JJ., concurred with METER, P.J.

WOOD v CITY OF DETROIT

Docket No. 335760. Submitted March 7, 2018, at Detroit. Decided March 15, 2018, at 9:00 a.m.

Bruce T. Wood brought a negligence action in the Wayne Circuit Court against the city of Detroit and James D. Pennington, seeking no-fault insurance benefits for injuries he sustained after being struck by a tire that came off a van owned by the city and driven by Pennington. Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10), asserting that there was no genuine issue regarding any material fact and that plaintiff's claim was barred by governmental immunity under MCL 691.1407(1). Defendants argued that the motor vehicle exception to governmental immunity set forth by MCL 691.1405 was inapplicable because if there was negligence, it constituted negligent maintenance, not negligent operation of a motor vehicle. They also asserted that there was no evidence of gross negligence on Pennington's part, which was required to hold him liable under MCL 691.1407(2). In response, plaintiff submitted an affidavit from a traffic-crash reconstructionist suggesting that the wheel in question had not been secured by lug nuts. The trial court, Kathleen Macdonald, J., denied defendants' motion, ruling that the issues involved questions of fact regarding both negligence and gross negligence. Defendants appealed.

The Court of Appeals *held*:

1. The trial court did not err by ruling that there was a genuine issue of material fact with regard to whether defendant Pennington was negligent in his operation of the van. As a general rule, under MCL 691.1407(1), a governmental agency is immune from tort liability when it is engaged in the exercise or discharge of a governmental function. MCL 691.1405 provides an exception to governmental immunity when bodily injury and property damage result from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is the owner. Pennington's testimony established that he was driving at 20 to 25 miles per hour when the driver's side rear tire came off his van. A traffic-crash reconstructionist averred that the tire came loose

while being driven because of the absence of lug nuts and that the chafing marks on the inside of the tire correlated with the tire wobbling before becoming separated from the vehicle, which would not have been possible if lug nuts had been affixed to the bolts of the hub and which would have served to warn the driver of the unsecured wheel and the danger of continuing to drive the van. In addition, plaintiff's medical records indicate that, before the accident, he noticed a van with a loose tire. Taken together, this evidence allowed for a reasonable inference that, before the tire fell off the van, the tire was wobbling noticeably. Although Pennington's deposition testimony suggested that he had not noticed any problems with the tire before it came off, resolution of this factual dispute was best suited for a jury rather than a trial court on a summary disposition motion.

2. The trial court erred by ruling that evidence regarding the lack of lug nuts on the wheel in question was sufficient to raise an issue of fact regarding whether Pennington had been grossly negligent. MCL 691.1407(2) provides immunity from tort liability for government employees under certain circumstances if their conduct does not amount to gross negligence that is the proximate cause of the injury or damage. "Gross negligence" is defined by MCL 691.1407(8)(a) as conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. In this case, plaintiff provided no evidence that Pennington was negligent, let alone grossly negligent, for failing to ensure that there were lug nuts on the van. Testimony indicated that maintenance workers, not Pennington, were responsible for ensuring that the van was in proper working order. Further, although it was reasonable to infer that Pennington was aware that the tire on his vehicle was wobbling before the tire came off, there was no evidence that he was aware that the wobbling was caused by the absence of lug nuts, nor was there any evidence that the only possible cause for a wobbling tire is that the wheel is about to fall off.

Affirmed in part and reversed in part.

Mark Granzotto, PC (by *Mark Granzotto*) and *Andreopoulos & Hill, PLLC* (by *L. Louie Andreopoulos* and *David T. Hill*) for plaintiff.

City of Detroit Law Department (by *Linda D. Fegins*) for defendants.

Before: M. J. KELLY, P.J., and JANSEN and METER, JJ.

M. J. KELLY, P.J. Defendants, the city of Detroit and James Pennington, appeal as of right the trial court's order denying their motion for summary disposition. For the reasons stated herein, we affirm in part and reverse in part.

I. BASIC FACTS

On July 3, 2015, plaintiff, Bruce Wood, was crossing the street at the intersection of Rosa Parks Boulevard and West Grand Boulevard in Detroit when he heard something. He testified that he turned toward the sound and saw a tire about a foot away from him. He added that he tried to stop it, but the next thing he recalled was waking up in the hospital. It is undisputed that, as a result of being struck by the tire, Wood sustained significant bodily injuries. It is further undisputed that the tire came off a van owned by the city of Detroit that was being operated by Pennington. Pennington testified that he had been driving about 20 to 25 miles per hour down Rosa Parks Boulevard when the left rear tire came off. He stated that he felt a "jolt" when he lost the tire, then coasted to a stop, parked his vehicle, and went to investigate where the tire went. The authorities were contacted after he saw Wood lying on the ground.

Wood filed an action in the Wayne Circuit Court for first- and third-party no-fault benefits. Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10), asserting that there was no genuine issue regarding any material fact and that Wood's claim was barred by governmental immunity under MCL 691.1407(1). Defendants argued that the motor vehicle exception to governmental immunity set forth by MCL 691.1405 was inapplicable because if

there was negligence, it constituted negligent maintenance, not negligent operation of a motor vehicle. They also asserted that there was no evidence of gross negligence on Pennington's part as required to hold him liable under MCL 691.1407(2). The trial court denied the motion, stating:

> [T]hey're all issues of fact including the gross negligence. If [Wood] can prove no one put lug nuts on this vehicle, that's gross negligence, as far as I'm concerned or at least raises an issue of fact as to whether it's gross negligence or not. In addition to that, I don't see how you can say that a tire is not part of operating a motor vehicle; it is.

II. GOVERNMENTAL IMMUNITY

A. STANDARD OF REVIEW

Defendants argue that the trial court erred by denying their motion for summary disposition because they were entitled to governmental immunity and the exceptions to governmental immunity set forth in MCL 691.1405 and MCL 691.1407(2) were inapplicable as a matter of law. Challenges to a trial court's decision on a motion for summary disposition are reviewed de novo. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). "Similarly, the applicability of governmental immunity is a question of law that this Court reviews de novo." *McLean v McElhaney*, 289 Mich App 592, 596; 798 NW2d 29 (2010). The proper interpretation and application of a statute are also reviewed de novo. *Id*. at 596.

B. ANALYSIS

1. MOTOR VEHICLE EXCEPTION

"As a general rule, a governmental agency is immune from tort liability when it is 'engaged in the

exercise or discharge of a governmental function.' " *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003), quoting MCL 691.1407(1).[1] In order to assert a viable claim against a governmental agency, a plaintiff must plead facts establishing that an exception to governmental immunity applies to his or her claim. *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002). Here, Wood asserts that his claim against the City should be allowed to proceed because there is a genuine issue of material fact with regard to whether the motor vehicle exception to governmental immunity, MCL 691.1405, applies.

Under MCL 691.1405, "[g]overnmental agencies shall be liable for bodily injury and property damage resulting from the *negligent operation* by any officer, agent, or employee of the governmental agency, *of a motor vehicle* of which the governmental agency is the owner . . . ." (Emphasis added.) In *Chandler v Muskegon Co*, 467 Mich 315, 316; 652 NW2d 224 (2002), our Supreme Court addressed whether the term "operation" included a motor vehicle that was parked so that maintenance could be performed. The Court concluded that "the language 'operation of a motor vehicle' means that the motor vehicle is being operated *as* a motor vehicle." *Id*. at 320. The Court explained that " 'operation of a motor vehicle' encompasses activities that are directly associated with the driving of a motor vehicle." *Id*. at 321. Applying that definition, the Court held:

> In this case, the injury to plaintiff did not arise from the negligent operation of the bus as a motor vehicle. The plaintiff was not injured incident to the vehicle's operation as a motor vehicle. Rather, the vehicle was parked in

[1] It is undisputed that the city of Detroit was engaged in the exercise of a governmental function at the time of the accident.

> a maintenance facility for the purpose of maintenance and was not at the time being operated *as* a motor vehicle. [*Id*. at 322.]

Here, Pennington's testimony established that he was operating the van *as* a motor vehicle at the time that the accident occurred. Specifically, he was driving at 20 to 25 miles per hour when the driver's side rear tire came off his vehicle. The question on appeal is whether his operation was negligent.

In response to defendants' motion for summary disposition, Wood submitted an affidavit from Timothy Robbins, a traffic-crash reconstructionist, who asserted that there was no evidence that the rear left wheel had been secured by lug nuts and that the tire came loose while being driven because of the absence of lug nuts. Robbins further averred that the chafing marks on the inside of the tire "correlate with the wheel wobbling prior to becoming separated from the vehicle," which "would not [have been] possible if lug nuts had been affixed to the bolts of the hub." Finally, he asserted that "[t]he extent of chaffing [sic] and scarring to the tire from the unsecured wheel demonstrates the Defendant operator would likely have experienced significant wobbling thus warning him of the unsecured wheel and the danger of continuing to drive the vehicle." In addition, Wood's medical records indicate that, before the accident, he noticed a van with a loose tire. Taken together, this evidence allows for a reasonable inference that, before the wheel fell off the van, the tire would have been wobbling noticeably. Defendants direct this Court to Pennington's deposition testimony to suggest that Pennington did not notice any problems with the van's tire before it came off.[2] However, given that his testi-

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[2] Pennington did not, in fact, testify that he was unaware the tire was loose. Rather, he testified that as he was driving the vehicle "the rear left

mony is contradicted by expert testimony about how the tire would have been affected by the absence of lug nuts, it is clear that resolution of this factual dispute is best suited for a jury, not a trial court on a summary disposition motion.[3] Accordingly, we conclude that the trial court did not err by determining that there was a genuine issue of material fact with

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tire came off of the vehicle" and as it came off he "felt the jolt of it." He testified that he did not recognize the "jolt" as the tire coming off until he saw the tire going past him. The remainder of his testimony regarding the events surrounding the incident related solely to his actions *after* the tire came off, not *before* it came off.

[3] In addition, MCL 257.683(1) provides in relevant part:

> A person shall not drive or move or the owner shall not cause or knowingly permit to be driven or moved on a highway a vehicle or combination of vehicles that is in such an unsafe condition as to endanger a person . . . .

Robbins's affidavit indicated that Pennington was operating the van even though it contained no lug nuts on the rear left wheel, which caused the tire to wobble and fall off. From that evidence, a jury could reasonably infer that an unsecured tire is an unsafe condition that can endanger another person, including a pedestrian lawfully crossing the street. Thus, it appears that there is a question of fact with regard to whether Pennington violated MCL 257.683(1) given that he drove the van with a wheel that was not properly secured by lug nuts.

The existence of a duty of care arising from a statute "depends on (1) whether the purpose of the statute was to prevent the type of injury and harm actually suffered and (2) whether the plaintiff was within the class of persons which the statute was designed to protect." *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 16; 596 NW2d 620 (1999) (quotation marks, citation, and brackets omitted). But even if a duty of care arises from a statute, the violation of that statute is only prima facie evidence of negligence. *Id*. Here, it is apparent that MCL 257.683(1) was designed to prevent people, including pedestrians lawfully crossing the street at an intersection, from harm caused by unsafe conditions on a vehicle. It is further apparent that the type of injury and harm to be prevented is injury and harm caused by unsafe conditions on the vehicle being driven. Thus, it appears that the possible violation of the statute constitutes prima facie evidence of negligence.

regard to whether Pennington was negligent in his operation of the van.[4]

2. GROSS NEGLIGENCE

MCL 691.1407(2) provides immunity for government employees:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Here, the only dispute is whether Pennington's conduct constituted gross negligence.

"Gross negligence" is defined by statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). "Evidence of ordinary negligence is not

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[4] Given our resolution, we need not address defendants' argument that they are immune from liability arising from any negligent maintenance performed on the vehicle before the accident.

enough to establish a material question of fact regarding whether a government employee was grossly negligent." *Chelsea Investment Group LLC v Chelsea*, 288 Mich App 239, 265; 792 NW2d 781 (2010). Moreover, "[s]imply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). This is true of "the most exacting standard of conduct, the negligence standard," and even truer of the "much less demanding standard of care," gross negligence. *Id*. The latter suggests "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Id*. Although questions regarding whether a governmental employee's conduct constituted gross negligence are generally questions of fact for the jury, if reasonable minds could not differ, summary disposition may be granted. *Briggs v Oakland Co*, 276 Mich App 369, 374; 742 NW2d 136 (2007).

In this case, the trial court concluded that if Wood could establish that no one put lug nuts on the van, it was proof of gross negligence. Although we agree that the complete failure to put lug nuts on the vehicle could, under certain circumstances, constitute gross negligence, in this case, there is no evidence that Pennington was negligent, let alone grossly negligent, for failing to ensure that there were lug nuts on the van. First, the testimony reflects that it was his responsibility to drive buses for the city of Detroit. Although he was obligated to inspect any bus, including its tires and lug nuts, before driving it, he testified that when it came to relief vans (like the one he was driving at the time of the accident), the responsibility for ensuring the vehicle was in proper working order

fell to maintenance workers.[5] There is no evidence whatsoever that, before driving the vehicle, Pennington was actually aware that there were no lug nuts on the driver's side rear wheel, and his failure to inspect it before driving, although arguably negligent, simply does not rise to the level of gross negligence. Further, although it is reasonable to infer that Pennington was aware that the tire on his vehicle was wobbling before the tire came off, there is no evidence that he was aware that the wobbling was caused by the absence of lug nuts, nor is there any evidence that the only possible cause for a wobbling tire is that the wheel is about to fall off. Accordingly, on this record, Wood provided no evidence that Pennington's conduct rose to the level of gross negligence.[6]

Affirmed in part and reversed in part. No taxable costs, neither party having prevailed in full. MCR 7.219(A).

JANSEN and METER, JJ., concurred with M. J. KELLY, P.J.

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[5] The maintenance records for the vehicle were not produced in the lower court proceedings, nor were any individuals who performed maintenance on the vehicle named as parties in the complaint. Therefore, to the extent that there was gross negligence in connection with the maintenance of the vehicle, it does not appear that the parties named were responsible for it.

[6] Even if Wood can establish that Pennington violated MCL 257.683, see note 3 of this opinion, a presumption of negligence arising from the statutory violation does not rise to the level of gross negligence in the absence of evidence that Pennington's conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury would result. Stated differently, although a presumption of negligence may arise from a violation of MCL 257.683, it is a presumption of ordinary negligence, not gross negligence.

REYNOLDS v ROBERT HASBANY, MD PLLC

Docket No. 336933. Submitted March 6, 2018, at Detroit. Decided March 20, 2018, at 9:00 a.m.

Deborah Reynolds brought an action in the Oakland Circuit Court against Robert Hasbany, MD PLLC, and Robert Hasbany, MD, alleging that defendants violated the Elliott-Larsen Civil Rights Act (the ELCRA), MCL 37.2101 *et seq*., by discriminating against her based on her weight and by retaliating against her for engaging in protected activity related to her weight. Plaintiff asserted that throughout her employment with defendants, Hasbany regularly harassed female employees about their weight. Plaintiff also alleged that when she arrived at work on August 12, 2016, she was told that Hasbany wanted her to weigh herself and meet him in his office. When plaintiff refused, she was allegedly advised that she would be sent home and could not return without a doctor's note. Plaintiff went to Hasbany's office and directly told him that she would not weigh herself, and when Hasbany insisted that she either weigh herself or get a doctor's note, plaintiff responded, "Then I take it you're firing me." Plaintiff filed her complaint, and about a month later, defendants' lawyer sent an "unconditional return to work" letter to plaintiff's lawyer that offered plaintiff her same position with the same hours and rate of pay. Plaintiff's lawyer responded that plaintiff rejected the offer. Defendants moved for summary disposition, arguing that even if plaintiff prevailed on her ELCRA claim, her maximum recovery amount would be $5,280 because she refused the unconditional offer to return to work, which, under MCL 600.8301(1), placed her claim within the exclusive jurisdiction of the district court, not the circuit court. Plaintiff responded, asserting that under MCL 37.2801(2), the circuit court had exclusive jurisdiction over civil-rights claims regardless of the amount in controversy. Following oral argument, the court, Denise Langford Morris, J., granted summary disposition in favor of defendants, holding that plaintiff failed to establish damages to a legal certainty more than $25,000. Plaintiff appealed.

The Court of Appeals *held*:

When there are two statutory provisions, one of which is special and particular, and certainly includes the matter in question, and the other general which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act, because the Legislature is not to be presumed to have intended a conflict. In this case, a statutory jurisdictional conflict appears to exist between MCL 600.8301(1) of the Revised Judicature Act, MCL 600.101 *et seq*., and MCL 37.2801(2) of the ELCRA. MCL 600.8301(1) provides that the district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000. However, MCL 37.2801(2) of the ELCRA grants the circuit court jurisdiction over civil-rights claims brought under the ELCRA. Although nonbinding, the decision in *Baxter v Gates Rubber Co*, 171 Mich App 588 (1988), holding that MCL 37.2801 was a specific grant of jurisdiction, was persuasive. Accordingly, MCL 37.2801 of the ELCRA took precedence over the general jurisdictional grant set forth in MCL 600.8301. Because the ELCRA provided for exclusive circuit court jurisdiction regardless of the amount in controversy, the trial court erred by granting summary disposition in favor of defendants.

Reversed and remanded.

COURTS — JURISDICTION — CLAIMS BROUGHT UNDER THE ELLIOTT-LARSEN CIVIL RIGHTS ACT.

MCL 600.8301(1) of the Revised Judicature Act, MCL 600.101 *et seq*., provides that the district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000; MCL 37.2801(2) of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., grants the circuit court jurisdiction over civil-rights claims brought under the ELCRA; the specific grant of jurisdiction set forth in MCL 37.2801 takes precedence over the general jurisdictional grant set forth in MCL 600.8301; the ELCRA provides for exclusive circuit court jurisdiction regardless of the amount in controversy.

Fagan McManus, PC (by *Jennifer L. McManus*) for plaintiff.

Neil Strefling for defendants.

Before: M. J. KELLY, P.J., and JANSEN and METER, JJ.

PER CURIAM. Plaintiff, Deborah Reynolds, appeals by right the trial court's order granting summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) in favor of defendants, Robert Hasbany, MD PLLC, and Robert Hasbany, MD. Because the circuit court has exclusive jurisdiction over claims brought pursuant to the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., we reverse.

I. BASIC FACTS

Reynolds filed a complaint alleging that defendants had violated ELCRA by discriminating against her based on her weight and by retaliating against her for engaging in protected activity related to her weight. Reynolds alleged that she worked for defendants from 2010 through 2012, during which time she lost 60 pounds. When she returned to work for defendants in 2015, she had gained most of that weight back. Reynolds alleged that Hasbany commented on the gain and told her that she had to lose the weight again. Reynolds asserted that, throughout her employment with defendants, Hasbany "regularly harassed his female employees about their weight." By way of example, Reynolds asserted that Hasbany told female employees, including Reynolds, "you gotta lose this weight," "I'm sick and tired of these fat/big/overweight people," "overweight people don't produce as much in the workplace," and "you guys need to take the weight off." She alleged that Hasbany regularly required his female employees to weigh themselves in his office and then report the results to him.

Reynolds alleged that, on August 12, 2016, she arrived at work and was told by defendants' office manager that Hasbany wanted her to weigh herself and meet him in his office. Reynolds expressed frustra-

tion at the demand and stated that she told the office manager, "No, I am not doing this today." Reynolds was allegedly advised that if she did not, she would be sent home, and if she went home, she could not return to work without a "doctor's note." According to Reynolds, she went to Hasbany's office and directly told him that she was not going to weigh herself, to which Hasbany responded, "[Y]ou either weigh in, or you get a doctor's note." Reynolds objected, noting that she could not get a doctor's note because she lacked insurance; she was also unsure about what she was supposed to get a doctor's note for because she was not sick. When Hasbany insisted that she either weigh in or get a doctor's note, Reynolds responded, "[T]hen I take it you're firing me." Reynolds then left Hasbany's office, telling her coworkers that she guessed she was fired because she did not want to weigh herself.

On October 25, 2016, about a month after Reynolds filed her complaint, defendants' lawyer sent the following "unconditional return to work letter" to Reynolds's lawyer:

> Please consider this e-mail a formal, unconditional offer to your client to return to work. She would be returning to her same position, same rate of pay, and same work hours. To accept this offer, you must notify me of your acceptance in writing (e-mail will do) by Tuesday, Nov. 1, 2016 by 5:00 p.m., and your client must return to work at 8:30 a.m. on Monday, November 7, 2016.

Reynolds's lawyer sent the following reply on October 31, 2016:

> I have conveyed your offer to my client, and she is understandably rejecting it. Given the circumstances of her prior employment with Dr. Hasbany, and the fact that a return to work would require that she work closely with Dr. Hasbany and potentially again endure his discrimina-

> tory, harassing and abusive conduct, it is not reasonable that she return [to] her former employment.

Thereafter, on November 2, 2016, defendants moved for summary disposition under MCR 2.116(C)(4), arguing that, even if Reynolds prevailed on her ELCRA claim, her maximum recovery would be $5,280,[1] which, under MCL 600.8301(1), places her claim within the exclusive jurisdiction of the district court, not the circuit court. In response, Reynolds asserted that the circuit court has exclusive jurisdiction over civil-rights claims regardless of the amount in controversy. After oral argument, the circuit court held:

> From the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit of the Circuit Court. [Reynolds] has failed to establish damages to a legal certainty more than $25,000.

II. JURISDICTION

A. STANDARD OF REVIEW

Reynolds argues that the circuit court erred by finding that it lacked jurisdiction over her ELCRA claim. We review de novo a trial court's decision to grant summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App

[1] To support the argument that Reynolds could only receive a maximum recovery of $5,280, defendants argued that in a civil-rights action, a plaintiff is required to mitigate damages and that an unconditional offer to return to work cuts off damages on the right to "front pay." Defendants contend that the October 25 return-to-work letter constituted an unconditional offer to return to work, which meant that as a matter of law, Reynolds's damages were limited by her refusal of the offer. In response, Reynolds asserted that the letter was not an unconditional offer and that, even if it was, there remained a question of fact with regard to whether her rejection of the offer was reasonable. We do not address this argument on appeal. See note 6, *infra*.

362, 369; 775 NW2d 618 (2009). Summary disposition is properly granted under MCR 2.116(C)(4) when "[t]he court lacks jurisdiction of the subject matter." Whether a court has subject-matter jurisdiction presents a question of law that this Court reviews de novo. *Bank v Mich Ed Ass'n-NEA*, 315 Mich App 496, 499; 892 NW2d 1 (2016). We review de novo issues of statutory interpretation relating to jurisdiction. *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 6; 818 NW2d 337 (2011).

B. ANALYSIS

"A court's subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint. If it is apparent from the allegations that the matter alleged is within the class of cases with regard to which the court has the power to act, then subject-matter jurisdiction exists." *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 586; 644 NW2d 54 (2002) (quotation marks and citation omitted). Here, Reynolds claims that defendants violated ELCRA, and she alleges that the amount in controversy exceeds $75,000.

Defendants argue that Reynolds's claim must be dismissed under MCL 600.8301(1), which provides that "[t]he district court has exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00." Assuming arguendo that the amount in controversy does not exceed $25,000, this provision plainly vests jurisdiction over Reynolds's claim in the district court. However, § 801 of ELCRA specifically grants the circuit court jurisdiction over civil-rights claims brought under ELCRA:

> (2) An action commenced pursuant to [MCL 37.2801(1)] may be brought in the circuit court for the county where

> the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business. [MCL 37.2801(2).][2]

Because § 801 of ELCRA and § 8301(1) of the Revised Judicature Act[3] each appear to provide jurisdiction to a different court, we must resolve the apparent jurisdictional conflict.

When a statutory jurisdictional conflict exists, we apply the following rule:

> " 'Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act, as the Legislature is not to be presumed to have intended a conflict.' " [*Driver v Hanley*, 207 Mich App 13, 17; 523 NW2d 815 (1994), quoting *Baxter v Gates Rubber Co*, 171 Mich App 588, 590; 431 NW2d 81 (1988), in turn quoting

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[2] Defendants argue that the use of the word "may" in MCL 37.2801(2) means that a circuit court may, under certain circumstances, have jurisdiction over ELCRA claims, but, under other circumstances, another court, such as a district court, may have jurisdiction. We disagree. The statute provides that an action under ELCRA may be brought in the circuit court in one of three counties: (1) where the alleged violation occurred, (2) where the person who committed the alleged violation resides, or (3) where the person who committed the alleged violation has his or her principal place of business. MCL 37.2801(2). Nothing in the statute provides that a claim under ELCRA may sometimes be brought in district court. See *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011) (stating that nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself). Thus, given that the word "may" plainly refers to the choice of *counties*, not courts, and given that the statute includes no provision providing for district-court jurisdiction, we find defendants' interpretation of the statutory language unpersuasive and contrary to the plain meaning of the statute.

[3] MCL 600.101 *et seq*.

> *Wayne Co Prosecutor v Wayne Circuit Judge*, 154 Mich App 216, 221; 397 NW2d 274 (1986).]

It is well established that MCL 600.8301(1) "is general in its application." *Driver*, 207 Mich App at 17. Further, in *Baxter*, this Court concluded that § 801 of ELCRA was a specific grant of jurisdiction. *Baxter*, 171 Mich App at 591-592. The *Baxter* Court explained:

> [Section] 801 of the Civil Rights Act vests the circuit court with jurisdiction of a specific subject matter, a private action for discrimination prohibited by the Civil Rights Act. This Court has previously held that § 801 is more than a venue provision, conferring substantive jurisdiction to the exclusion of other forums. The prohibitions against discrimination and the promotion of civil rights rise to the level of a clearly established public policy of this state. We discern a legislative judgment that the policies underlying the civil rights legislation are of such importance that resort to circuit court is mandated in every case, even when potential damages are less than $10,000.[4] A plaintiff seeking vindication of these policies through a private cause of action should have access to all of the procedural advantages and protections available only in the circuit court. Because § 801 is a specific grant of jurisdiction, reflecting substantive policy concerns, we hold that it takes precedence over the more general jurisdictional provision of MCL 600.8301(1). [*Id*. (citations omitted).]

Although *Baxter* is not binding because it was decided before November 1, 1990, see MCR 7.215(J)(1), we nevertheless find the reasoning persuasive, see *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2013).[5] Thus, we reaffirm that MCL 37.2801 of

[4] The jurisdictional limit was raised from $10,000 to $25,000 in 1996; the change took effect in 1998. See 1996 PA 388.

[5] In doing so, we necessarily reject defendants' suggestion that the 1996 amendment of MCL 600.8301(1), which raised the jurisdictional limit from $10,000 to $25,000, reflected a legislative intent to essentially

ELCRA takes precedence over the general jurisdictional grant set forth in MCL 600.8301, and we reaffirm that ELCRA provides for exclusive circuit court jurisdiction, regardless of the amount in controversy.[6]

Reversed and remanded for further proceedings. We do not retain jurisdiction. Reynolds may tax costs as the prevailing party. See MCR 7.219(A).

M. J. KELLY, P.J., and JANSEN and METER, JJ., concurred.

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reject the reasoning applied in *Baxter*. Although we agree with defendants that the 1996 amendment reflected a legislative intent to decrease the amount of civil cases heard in circuit court, that does not change the nature of MCL 600.8301(1) as a general jurisdictional statute, nor does it change the nature of MCL 37.2801(2) as a specific jurisdictional statute.

Defendants also rely on documentary evidence showing that the Oakland Circuit Court generates over 10,000 new cases per year. However, the number of cases filed in circuit court, no matter how voluminous, does not negate the circuit court's exclusive jurisdiction over civil-rights cases brought under § 801 of ELCRA.

[6] Given our resolution of this issue, we need not address the alternative arguments in support of finding jurisdiction raised in Reynolds's brief on appeal. However, we note that Reynolds's complaint asserted that she suffered "substantial economic and noneconomic damages." Damages for emotional distress are a form of noneconomic damages, see *Hannay v Dep't of Transp*, 497 Mich 45, 76; 860 NW2d 67 (2014), which are recoverable under ELCRA, see *Hyde v Univ of Mich Bd of Regents*, 226 Mich App 511, 522-524; 575 NW2d 36 (1997).

PEOPLE v COOK

Docket No. 336467. Submitted March 8, 2018, at Detroit. Decided March 22, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich 913.

Dana L. Cook was bound over to the St. Clair Circuit Court on one count of operating while intoxicated, third offense, MCL 257.625(1) and (9)(c); and one count of misdemeanor possession of marijuana, MCL 333.7403(2)(d). Defense counsel stated that he intended to file a motion under § 8 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., which allows a person to assert that they had a medical purpose for using marijuana as a defense to any prosecution involving marijuana if certain elements are established. The prosecution argued that MCL 333.26427(b)(4), which is excepted from the defenses set out in § 8, does not permit anyone to operate a motor vehicle while under the influence of marijuana and that the § 8 defense was therefore only applicable to the misdemeanor possession charge. The court, Cynthia A. Lane, J., determined that it would not hold a § 8 hearing with regard to the charge of operating while intoxicated but would hold such a hearing with regard to the misdemeanor possession charge. The prosecutor then filed an amended information, replacing the charge of operating while intoxicated with a charge of operating a vehicle with the presence of a controlled substance in her body, third offense, under MCL 257.625(8) and (9)(c), and left the second charge of possession of marijuana unchanged. Defendant moved for an evidentiary hearing to present a § 8 defense to both charges. The court denied defendant's motion, ruling that the § 8 defense was still unavailable to defendant and that the matter would proceed to trial that day. After a discussion with defense counsel, defendant pleaded guilty to operating a vehicle with the presence of a controlled substance in her body, and the possession charge was dismissed. The court accepted the plea and entered a judgment of conviction. Defendant applied for leave to appeal in the Court of Appeals, which denied the application. Defendant then applied for leave to appeal in the Supreme Court, which, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration, as on leave granted, of whether defendant's plea was

conditional and reserved her right to appeal; whether, if defendant's guilty plea was not conditional, she waived appeal of the trial court's decision denying her an evidentiary hearing under § 8; and, if defendant preserved her right to appeal, whether the trial court erred by denying her a § 8 evidentiary hearing. 501 Mich 857 (2017).

The Court of Appeals *held*:

Defendant waived her ability to challenge on appeal the denial of a § 8 defense by tendering what the parties agree was an unconditional guilty plea. Under *People v New*, 427 Mich 482 (1986), a criminal defendant may appeal from an unconditional guilty plea only if the claim on appeal implicates the very authority of the state to bring the defendant to trial, that is, where the right of the government to prosecute the defendant is challenged. If the claim sought to be appealed involves only the capacity of the state to prove the defendant's factual guilt, it is waived by a guilty plea. Section 8(a) of the MMMA provides any patient or primary caregiver, regardless of registration with the state, with the ability to assert an affirmative defense to a marijuana-related offense. If a defendant establishes the elements set forth in § 8 and no question of fact exists regarding these elements, then the defendant is entitled to dismissal of the criminal charges. If questions of fact exist, then dismissal of the charges is not appropriate and the defense must be submitted to the jury. This defense is different from the protections set forth in § 4 of the MMMA, MCL 333.26424, which provides absolute immunity from prosecution to those individuals who can establish the required elements of that provision. Because defendants raising a § 8 defense must ultimately be able to prove their factual entitlement to that defense at trial, the § 8 defense, unlike § 4 immunity, does not implicate the right of a prosecutor to bring a defendant to trial in the first instance. A guilty plea waives all the rights and challenges associated with that trial. Therefore, by tendering an unconditional guilty plea, defendant waived the § 8 defense and cannot raise the denial of the defense on appeal. Accordingly, it was unnecessary to determine whether the trial court erred by denying defendant an evidentiary hearing under § 8.

Affirmed.

CRIMINAL LAW — APPEAL — GUILTY PLEAS — MICHIGAN MEDICAL MARIHUANA ACT — SECTION 8 DEFENSE — WAIVER.

A defendant who tenders an unconditional guilty plea waives the right to appeal on the ground that he or she was denied the ability to assert the affirmative defense to a marijuana-related offense

provided under § 8 of the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*. (MCL 333.26428).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Hilary B. Georgia*, Senior Assistant Prosecuting Attorney, for the people.

Shyler Engel, PLLC (by *Shyler C. Engel*) for defendant.

Before: MURRAY, P.J., and CAVANAGH and FORT HOOD, JJ.

MURRAY, P.J.

I. INTRODUCTION

This matter is before the Court on remand from our Supreme Court, which directed this Court to consider, as on leave granted, "the following issues: (1) whether the defendant's plea was conditional and reserved her right to appeal, (2) whether the defendant waived appeal of the trial court's decision denying her an evidentiary hearing under Section 8 of the Michigan Medical Marihuana Act [(MMMA)], MCL 333.26421 *et seq*., if her guilty plea was not conditional, and (3) if the defendant has preserved her right to appeal, whether the trial court erred in denying defendant a Section 8 evidentiary hearing." *People v Cook*, 501 Mich 857, 858 (2017). We affirm defendant's conviction and conclude that (1) defendant's plea was not conditional, a fact that defendant admits, (2) defendant waived the right to appeal the trial court's denial of an evidentiary hearing under § 8 of the statute, MCL 333.26428, and (3) we are precluded from resolving the third issue on remand because, as noted under (2), the issue was waived.

II. FACTS AND PROCEEDINGS

After the St. Clair Circuit Court denied her motion seeking an evidentiary hearing pursuant to § 8, the affirmative defense provision of the MMMA, defendant pleaded guilty to operating a motor vehicle with the presence of marijuana[1] in her body, MCL 257.625(8).

The prosecutor initially charged defendant with one count of operating while intoxicated, third offense, which is a felony in violation of MCL 257.625(1) and (9)(c), and one count of misdemeanor possession of marijuana, MCL 333.7403(2)(d). Defendant, represented by counsel, appeared for a plea proceeding on September 19, 2016. However, a plea agreement was not reached, and the trial court was informed that a laboratory report was now available revealing that defendant's blood contained 14 nanograms per milliliter of tetrahydrocannabinol (THC). Defendant's counsel explained that he intended to file a motion under § 8, which provides, in relevant part:

> (a) Except as provided in section 7(b), a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:
>
> (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 mari-

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[1] "Although the MMMA refers to 'marihuana,' this Court uses the more common spelling, i.e., 'marijuana,' in its opinions. *People v Carruthers*, 301 Mich App 590, 593 n 1; 837 NW2d 16 (2013). Therefore, except when directly quoting a statute, we will use the more common spelling in this opinion." *People v Bylsma*, 315 Mich App 363, 365 n 1; 889 NW2d 729 (2016).

> huana 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 medical 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.
>
> (b) 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 subsection (a). [MCL 333.26428.]

According to the prosecution, § 7(b)(4) of the MMMA, MCL 333.26427(b)(4), which is excepted from the defenses set out in § 8, does not permit anyone to operate a motor vehicle while "under the influence of marihuana." As a result, the prosecutor argued that the § 8 defense was only applicable to Count II of the information, the misdemeanor possession charge.

Although defense counsel agreed with this position, he nonetheless explained that without the § 8 defense, the prosecutor could prove the felony charge by simply showing that defendant had any amount of marijuana in her body while she was driving. The trial court determined that it would not hold a § 8 hearing with regard to the charge of operating while intoxicated, but

would hold such a hearing with regard to the misdemeanor possession charge.

The day after this hearing, the prosecutor filed an amended information, replacing the charge of operating while intoxicated with a charge of operating a vehicle with the presence of a controlled substance in her body, third offense, in violation of MCL 257.625(8) and (9)(c), and left the second charge of possession of marijuana unchanged.

Defendant subsequently filed a motion requesting an evidentiary hearing so that she could prove her § 8 defense to both charges. Defendant argued that the § 8 defense applied to any criminal charge involving marijuana and that the defense was applicable regardless of whether she had a valid patient card at the time of the offense. Defendant agreed that the defense was subject to MCL 333.26427(b)(4) and that under MCL 333.26427(b)(4), the MMMA does not permit anyone to "[o]perate, navigate, or be in actual physical control of any motor vehicle . . . while under the influence of marihuana." Thus, according to defendant, the purpose of raising the defense was to heighten what the prosecutor would have to prove. Defendant explained that if she successfully proved her § 8 defense, it would be insufficient for the prosecutor to prove that she had any amount of marijuana in her body while driving, as is contemplated by MCL 257.625(8). Rather, the prosecutor could only obtain a conviction by showing that defendant was under the influence of marijuana while driving.

The prosecutor argued that *People v Koon*, 494 Mich 1; 832 NW2d 724 (2013), was inapplicable because the defendant in *Koon* was a registered patient under the MMMA, while defendant here had not acted in conformity with the MMMA and, there-

fore, could not raise a § 8 defense. The prosecutor further argued that the trial court could conclude from the preliminary examination transcript that defendant was under the influence of marijuana while driving and, therefore, was not entitled to a § 8 defense or hearing on the issue.

The trial court denied defendant's motion. Thereafter, the parties and the trial court reconvened for an on-the-record hearing in chambers. After lengthy discussions about stays, jury instructions, and other matters, the trial court explained that the § 8 defense was still unavailable to defendant and that it was denying "the right to present [this] affirmative defense." And because the trial court was denying defendant the ability to present this defense, the court stated that it would not stay the proceedings and the matter would proceed to trial that day.

After counsel discussed the matter with defendant, the parties reconvened about an hour later. The prosecutor explained:

> My understanding is Ms. Cook is going to plead guilty to operating with the presence of a controlled substance third offense which is Count 1, which has a maximum penalty of up to five years. We would dismiss Count 2, the possession of marijuana. I did mention that Ms. Cook has obviously with, with a plea it would be an application for leave to appeal. I don't have an objection if the Court puts the sentencing out for a period [of] time for that application [for] leave.

Defense counsel agreed that this was "a correct recitation" and stated that his "understanding is that today's plea will follow Defendant's application for leave to appeal and that a sentence will not be or at least a sentence will not be imposed until appellate proceedings have finished."

Defendant was sworn in by the trial court and testified that she understood the charge against her and the possible penalty. She was informed of the rights she was waiving by entering a plea and then provided the factual basis for the plea, admitting that she drove a vehicle on June 17, 2016, after using marijuana and that she had several prior convictions for drunk driving. The trial court accepted the plea and, on December 20, 2016, entered a judgment of conviction.

We now turn to the issues put forth to us by the Supreme Court.

III. ANALYSIS

The dispositive issue to resolve is whether defendant waived her ability to challenge, on appeal, the denial of a § 8 defense by tendering an unconditional[2] guilty plea. Precisely what rights are waived by an unconditional guilty plea is a question of law that we review de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). We hold that by tendering an unconditional guilty plea, defendant waived her claimed § 8 defense.

More than three decades ago, in *People v New*, 427 Mich 482, 488-493; 398 NW2d 358 (1986), our Supreme Court discussed at length what, precisely, is waived by an unconditional guilty plea:

> This Court has held, as a general rule, that a plea of guilty "waives all nonjurisdictional defects in the proceedings." *People v Alvin Johnson*, 396 Mich 424, 440; 240 NW2d 729 (1976), cert den sub nom *Michigan v Johnson*,

[2] As noted at the outset of this opinion, the parties agree that defendant did not enter a conditional plea. The record and the law support that proposition.

429 US 951; 97 S Ct 370; 50 L Ed 2d 319 (1976), citing *People v Ginther*, 390 Mich 436, 440; 212 NW2d 922 (1973). In *Alvin Johnson*, we addressed the effect of a plea of guilty on the constitutional defense of double jeopardy. Therein, we limited the broad scope of the plea-waiver rule, holding that a guilty plea does not waive defendant's right to appeal from an adverse decision on his double jeopardy defense. [*Johnson*,] 396 Mich [at] 444-445. We set forth the following test to be used to distinguish between those rights or defenses which are waived by a plea of guilty and those rights or defenses which may be asserted despite a plea of guilty:

> Certainly it is true that those rights which might provide a complete defense to a criminal prosecution, those which undercut the state's interest in punishing the defendant, or the state's authority or ability to proceed with the trial may never be waived by guilty plea. These rights are similar to the jurisdictional defenses in that their effect is that there should have been no trial at all. The test, although grounded in the constitution, is therefore a practical one. Thus, the defense of double jeopardy, those grounded in the due process clause, *those relating to insufficient evidence to bind over at preliminary examination and failure to suppress illegally-obtained evidence without which the people could not proceed are other examples*. Wherever it is found that the result of the right asserted would be to prevent the trial from taking place, we follow the lead of the United States Supreme Court and hold a guilty plea does not waive that right. [[*Id*. at] 444. Emphasis added.]

The above-emphasized statement in *Alvin Johnson* was not only a misreading of the previously cited federal authority, it also was not necessary to the decision of that case, as defendant did not present any such claims. Hence, the statement that the defense of the failure to suppress illegally obtained evidence and the defense of insufficient

evidence to bind over at the preliminary examination are examples of claims which survive a guilty plea is obiter dictum.

We next addressed the effect of a guilty plea on an appeal in the case of *People v White*, 411 Mich 366; 308 NW2d 128 (1981). In *White*, this Court unanimously held, in separate opinions, that the defense of entrapment was not waived by a plea of guilty. [*Id*. at] 386-387, 399. The majority opinion stated that the defense of entrapment "does not involve an assessment of guilt or innocence, but rather expresses a policy that there should be no prosecution at all." [*Id*. at] 387. Entrapment was determined to be "like a jurisdictional defect." *Id*.

Similarly, the well-reasoned separate opinion noted that if successful, the entrapment defense provides " 'a complete defense to a criminal prosecution' and undercuts 'the state's interest in punishing the defendant' and 'authority or ability to proceed with the trial.' " [*Id*. at] 393 (MOODY, J., concurring in part and dissenting in part), quoting *Alvin Johnson*, 396 Mich [at] 444.

Recently, this Court discussed the related issue of the validity of a conditional plea of guilty in the case of *People v Reid*, 420 Mich 326; 362 NW2d 655 (1984). The defendants in *Reid* pled guilty, but reserved their right to appeal a denial of their motions to suppress evidence obtained pursuant to a search warrant. We held that a defendant may appeal from a denial of a Fourth Amendment or a Const 1963, art 1, § 11 search and seizure claim where "the defendant could not be prosecuted if his claim that a constitutional right against unreasonable search and seizure was violated is sustained and the defendant, the prosecutor, and the judge have agreed to the conditional plea." [*Reid*,] 420 Mich [at] 331-332.

Reid did not modify the essential holding of *Alvin Johnson*, but rather provided a procedure (conditional guilty plea) in which a defendant may admit to a criminal act but challenge the state's ability to present its case against him because of an alleged illegal search and seizure. See *Reid*, 420 Mich [at] 334-335.

Today, we hold that a defendant, after pleading guilty, may raise on appeal only those defenses and rights which would preclude the state from obtaining a valid conviction against the defendant. Such rights and defenses "reach beyond the factual determination of defendant's guilt and implicate the very *authority* of the state to bring a defendant to trial . . . ." *White*, 411 Mich [at] 398 (MOODY, J., concurring in part and dissenting in part). In such cases, the state has no legitimate interest in securing a conviction. On the other hand, where the defense or right asserted by defendant relates solely to the capacity of the state to prove defendant's factual guilt, it is subsumed by defendant's guilty plea.

The rationale for this holding was aptly summarized by Justice MOODY:

> A literal interpretation of the language of *Menna* [*v New York*, 423 US 61; 96 S Ct 241; 46 L Ed 2d 195 (1975)] and *Blackledge* [*v Perry*, 417 US 21; 94 S Ct 2098; 40 L Ed 2d 628 (1974)] might allow a defendant to preserve a wide variety of defenses in spite of his guilty plea. However, the spirit of those cases, and respect for the state's interest in the finality of conviction and judicial economy as reflected in the guilty-plea procedure, undercuts the wisdom of such a construction. Further, the underlying rationale of the guilty plea in many cases is the notion of bargain and exchange. When a defendant pleads guilty he gives up a series of important rights, including the right to a jury trial, the right to confront accusers and present witnesses, and the right to remain silent. In exchange, he may be convicted of a lesser crime or receive a shorter sentence. Courts should be hesitant to allow a defendant to upset a bargain by which he knowingly and intelligently admitted his guilt.
>
> In light of these functions of the guilty plea in the criminal justice system, the distinction implicit in *Menna* and *Blackledge* and that underlying the "complete defense" language of *Alvin Johnson* would

> insulate only a narrow class of rights against a waiver by plea. Only those rights and defenses which reach beyond the factual determination of defendant's guilt and implicate the very *authority* of the state to bring a defendant to trial are preserved. Examples include: the prohibition against double jeopardy, *Menna*; the right to challenge the constitutionality of the statute under which one is charged, *Journigan v Duffy*, 552 F2d 283 (CA 9, 1977); the challenge that a charge is brought under an inapplicable statute, *People v Beckner*, 92 Mich App 166; 285 NW2d 52 (1979). These defenses are "similar to the jurisdictional defenses," *Alvin Johnson*, [396 Mich at] 444, in that they involve the right of the government to prosecute the defendant in the first place. Such rights may never be waived.
>
> In contrast, those rights which are subsumed in a guilty plea relate to a different aspect of governmental conduct in the criminal process. When a defendant pleads guilty, he waives his right to a trial. Therefore, he necessarily gives up all the rights and challenges associated with that trial. Thus, important safeguards relating to the *capacity* of the state to prove defendant's factual guilt, and those regulating the prosecution's conduct at trial are among those defendant waives when he pleads guilty. These rights, which essentially relate to the gathering and presentation of evidence, are lost even if a successful challenge would provide a "complete defense" by in effect rendering the state unable to continue with the prosecution. [[*White*,] 411 Mich [at] 397-399.]

To summarize, the *New* Court held that "a criminal defendant may appeal from an unconditional guilty plea or a plea of nolo contendere only where the claim on appeal implicates the very authority of the state to bring the defendant to trial, that is, where the right of the government to prosecute the defendant is challenged," but "[w]here the claim sought to be appealed involves only the capacity of the state to prove defen-

dant's factual guilt, it is waived by a plea of guilty or nolo contendere." *New*, 427 Mich at 495-496. "Another phrasing of this principle . . . is that 'jurisdictional' defenses are not waived by a plea of guilty." *People v Lannom*, 441 Mich 490, 493; 490 NW2d 396 (1992).[3]

We now turn to whether § 8 implicates the very authority of the state to bring charges, or is instead a provision regarding the ability of the state to prove a defendant's factual guilt. In *People v Hartwick*, 498 Mich 192, 226-228; 870 NW2d 37 (2015), the Supreme Court explained the nature of the § 8 defense:

> Section 8(a) of the MMMA provides any patient or primary caregiver—regardless of registration with the state—with the ability to assert an affirmative defense to a marijuana-related offense. The affirmative defense "shall be presumed valid where the evidence shows":
>
> > (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

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[3] *New*'s construct is still controlling. See, e.g., *People v Horton*, 500 Mich 1034 (2017) (remanding a case to this Court to determine whether a "speedy-trial claim is 'nonjurisdictional' as defined by *People v New*, 427 Mich 482 (1986)"); *People v Aceval*, 282 Mich App 379, 385 n 3, 389 n 4; 764 NW2d 285 (2009) (citing *New* to determine whether certain claims were waived by the entry of a guilty plea); *People v Johnson*, 207 Mich App 263, 264-265; 523 NW2d 655 (1994) (citing *New* for the proposition that "[a] plea of guilty waives all defenses and rights that relate solely to the capacity of the state to prove the defendant's factual guilt" but "defenses and rights raised on appeal that would preclude the state from obtaining a valid conviction against the defendant, i.e., that implicate the very authority of the state to bring a defendant to trial, are not waived by a guilty plea").

> 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 medical 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)(1) to (3).]

> In [*People v*] *Kolanek*, [491 Mich 382, 416; 817 NW2d 528 (2012),] we determined that if a defendant establishes these elements and no question of fact exists regarding these elements, then the defendant is entitled to dismissal of the criminal charges. We also clarified that if questions of fact exist, then "dismissal of the charges is not appropriate and the defense must be submitted to the jury." [*Id*.] Additionally, if a defendant has not presented prima facie evidence of each element of § 8 by "present[ing] evidence from which a reasonable jury could conclude that the defendant satisfied the elements of the § 8 affirmative defense, . . . then the circuit court must deny the motion to dismiss the charges," and "the defendant is not permitted to present the § 8 defense to the jury." [*Id*.]

Although defendant did not (and cannot) raise it because she did not possess a valid registry card at the time of the act giving rise to her conviction, to provide additional context, the MMMA also provides immunity

in certain cases under § 4 of the act, MCL 333.26424. Pursuant to MCL 333.26424(a):

> A qualifying patient who has been issued and possesses a registry identification card is not 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 a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents, 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. The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the qualifying patient.

Section 4 provides qualifying patients who hold registry cards "broad immunity from criminal prosecution, civil penalties, and disciplinary actions . . . ." *Kolanek*, 491 Mich at 394-395. In contrast, § 8 "provides an affirmative defense to charges involving marijuana for its medical use . . . ." *Id*. at 396. "Sections 4 and 8 provide separate and distinct protections and require different showings . . . ." *Id*. at 401. Unlike immunity under § 4, the affirmative defense provided by § 8 "is available to unregistered patients." *Id*. at 402. "The stricter requirements of § 4 are intended to encourage patients to register with the state and comply with the act in order to avoid arrest and the initiation of charges and obtain protection for other rights and privileges. If

registered patients choose not to abide by the stricter requirements of § 4, they will not be able to claim this broad immunity, but will be forced to assert the affirmative defense under § 8, just like unregistered patients." *Id*. at 403.

While § 4 immunity is not at issue, the comparison of § 4 and § 8 of the MMMA helps draw a line between what is waived and what is not waived by an unconditional guilty plea. An unconditional guilty plea does not waive claims that "implicate[] the very authority of the state to bring the defendant to trial, that is, where the right of the government to prosecute the defendant is challenged." *New*, 427 Mich at 495. That is precisely what is accomplished by § 4 of the MMMA, as it provides absolute immunity from prosecution to those individuals who can establish the required elements of the statute. In other words, if a defendant is entitled to immunity under § 4 of the MMMA, the state simply cannot bring charges against the defendant "for the medical use of marihuana in accordance with" the MMMA. MCL 333.26424(a) and (b). Because § 4 immunity "implicate[s] the very authority of the state to bring the defendant to trial," it is not the type of defense that is waived by an unconditional guilty plea. *New*, 427 Mich at 495.

But the affirmative defense provided by § 8 of the MMMA is a different creature, one that is "separate and distinct" from immunity under § 4. *Kolanek*, 491 Mich at 401. It is an affirmative defense to charges that the prosecution *has* the right to bring against a defendant. And as the Supreme Court explained in *Hartwick*, 498 Mich at 227, and *Kolanek*, 491 Mich at 416, if a factual dispute is presented to the trial court at an evidentiary hearing regarding a § 8 defense, the dispute must be resolved by the jury at the defendant's

trial. Accordingly, while a prosecutor has no right to prosecute an individual entitled to immunity under § 4 of the MMMA in the first instance, defendants raising a § 8 defense must ultimately be able to prove their factual entitlement to that defense *at trial*. Thus, a § 8 defense does not implicate the right of a prosecutor to bring a defendant to trial in the first instance, as the defense specifically contemplates the matter potentially proceeding to a trial, where the defense will be weighed by the jury. A guilty plea waives "all the rights and challenges associated with that trial." *New*, 427 Mich at 492 (quotation marks and citation omitted). Thus, by tendering an unconditional guilty plea, defendant waived the § 8 defense and cannot raise the denial of the defense on appeal.[4]

Affirmed.

CAVANAGH and FORT HOOD, JJ., concurred with MURRAY, P.J.

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[4] As noted at the outset of this opinion, because we have concluded that defendant waived the right to appeal the denial of a § 8 defense, we need not address the third issue set forth in the Supreme Court's remand order, which was conditioned on the outcome of the waiver issue.

PEOPLE v PENNINGTON

Docket No. 323231. Submitted February 9, 2018, at Detroit. Decided March 22, 2018, at 9:05 a.m. Leave to appeal denied 503 Mich 875.

Floyd R. Pennington was convicted after a bench trial in the Wayne Circuit Court of second-degree murder, MCL 750.317; being a felon in possession of a firearm (felon-in-possession), MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Pennington was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent terms of imprisonment of 46 years and 8 months to 56 years for second-degree murder and 1 to 5 years for felon-in-possession, to be served consecutively to a 5-year term of imprisonment for felony-firearm. In December 2013, Pennington shot and killed James Buckman, Jr., after he had a verbal altercation with Buckman. The shooting occurred while Pennington sat in the driver's seat of his truck and Buckman stood in a driveway near the truck. After the shooting, Pennington gave a statement in which he claimed that he fired at Buckman because Buckman was coming at him with a gun. Although Buckman carried a firearm, surveillance video indicated that he never withdrew or brandished it during the altercation. At trial, Pennington claimed that he acted in self-defense and that at most, he was guilty of voluntary manslaughter. The court, Qiana D. Lillard, J., rejected Pennington's claim of self-defense and concluded that he was guilty as charged. Pennington appealed.

The Court of Appeals *held*:

1. Testimony from a defendant's preliminary examination is generally not admissible at trial. An exception to the rule is contained in MRE 613, which permits the use of preliminary examination testimony for impeachment purposes. At trial, the prosecution read into the record a short excerpt of a witness's preliminary examination testimony for impeachment purposes. The trial court referred to a transcript of the preliminary examination and followed along as counsel read the selected testimony into the record. The trial court did not err by reading from the preliminary examination transcript. The trial court only re-

viewed the portion of the transcript properly read into the record, and the record indicated that the trial court understood that the testimony being read was admissible only for impeachment purposes. In addition, because the trial court did not consider any testimony that was not admitted at trial, there was no Confrontation Clause violation, US Const, Am VI.

2. To establish a claim of ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient, meaning that it fell below an objective standard of reasonableness. The defendant must also show that but for his or her counsel's performance, there was a reasonable probability that the outcome of the trial would have been different. Pennington argued that his counsel was ineffective for failing to engage in plea negotiations. However, at the hearing held pursuant to *People v Ginther*, 390 Mich 436 (1973), defense counsel testified that he approached the prosecution four or five times about a plea and that the prosecution was unwilling to offer a reduced plea. Defense counsel also claimed that he visited Pennington five to six times at the county jail and that they discussed a plea on each occasion, but that Pennington continued to insist that he was going to trial to pursue a self-defense theory. Pennington denied that defense counsel discussed with him the possibility of a plea. However, the trial court found Pennington's testimony not credible because Pennington had testified that defense counsel only visited him twice in the county jail, while jail records were consistent with defense counsel's testimony. In light of this evidence and the trial court's credibility determination, Pennington failed to satisfy his burden of establishing that defense counsel's performance fell below an objective standard of reasonableness. And even if Pennington had established that defense counsel unreasonably failed to initiate plea negotiations, Pennington did not establish prejudice. In the context of pleas, a defendant must show that the outcome of the plea process would have been different with competent advice. In this case, there was no evidence that the prosecution would have offered Pennington a plea even if defense counsel had initiated a discussion about a possible plea. Moreover, there was evidence that, absent extraordinary circumstances, the standard plea offer in Wayne County involving a defendant charged with open murder was second-degree murder, which was exactly the result Pennington received at the end of his bench trial. Consequently, Pennington failed to establish that he was prejudiced by his counsel's allegedly deficient performance. Pennington also argued that his counsel was ineffective for failing to adequately inform him of the strength of his case, the nature of the charges, and the consequences of a guilty plea. However, at the *Ginther* hearing, defense counsel

testified that, among other things, he did speak with Pennington about the legal issues in the case, the burden of proof, and the difficulty of arguing self-defense given that the victim never produced a weapon. Defense counsel admitted that he never showed the surveillance video to Pennington, but he said that Pennington never asked to see it and that he had explained the video's content to Pennington. Pennington testified that he asked to see the surveillance video but it was never shown to him, that its contents were never explained to him, and that if he had seen it before his trial he would have insisted that his counsel pursue plea negotiations; however, the trial court concluded that Pennington's testimony was not credible. Accordingly, Pennington failed to establish ineffective assistance of counsel with regard to the frequency and content of his communication with defense counsel, and Pennington failed to show any prejudice from his counsel's allegedly deficient performance in light of Pennington's continued assertion at the *Ginther* hearing, after having seen the surveillance video, that he had acted in self-defense.

3. Manslaughter is a necessarily included lesser offense of murder; to show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time between the provocation and the killing during which a reasonable person could control his passions. Contrary to Pennington's argument that the trial court failed to consider manslaughter, the trial court did consider manslaughter, rejected it, and instead convicted Pennington of second-degree murder. Whether a situation presented reasonable provocation is a question for the fact-finder. In this case, although Buckman became enraged, he maintained his distance from Pennington and, although Buckman may have made a slight gesture toward his concealed weapon, he never unholstered or brandished the firearm. Video evidence and eyewitness testimony showed that Buckman was standing with his arms at his side and his hands empty at the time he was shot. The trial court did not err when it concluded that the confrontation did not rise to the level at which a reasonable person would lose control. The provocation present in this case was not cause for Pennington to act out of passion rather than reason.

4. The practice of sentencing defendants to terms of imprisonment at the top of the sentencing guidelines range when they opt to go to trial rather than enter a plea is fundamentally inconsistent with the principle of individualized sentences. A trial court cannot base its sentence, even in part, on a defendant's refusal to admit guilt, and a trial court may not punish a criminal

defendant charged with a felony for asserting his or her constitutional right to a trial. However, a trial court may encourage a defendant to plead guilty in a case by offering substantial benefits in return for a plea. Although the precise line between punishing a defendant for opting for a trial and rewarding a defendant for tendering a guilty plea may be difficult to articulate, in this case the trial court's admitted practice was to sentence criminal defendants who exercised their right to a trial to a sentence at the top of the recommended statutory sentencing guidelines range. This practice violated Pennington's constitutional right to due process as well as violated Michigan's law governing sentencing.

Convictions affirmed, sentences vacated, and case remanded for resentencing before a different judge.

CRIMINAL LAW — FELONY SENTENCING — TRIAL — LENGTH OF SENTENCE.

A trial court's practice of imposing sentences at the top of the recommended guidelines range on defendants who exercise their right to go to trial rather than take a plea is fundamentally inconsistent with the principle of individualized sentences; the practice violates a defendant's constitutional right to due process as well as violates Michigan's sentencing law; a defendant may be substantially rewarded for pleading guilty, but a defendant may not be punished for asserting his or her constitutional right to a trial.

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

Larene & Kriger, PLC (by *Allison L. Kriger*) for defendant.

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

PER CURIAM. Following a bench trial, defendant appeals his convictions of second-degree murder, MCL 750.317;[1] being a felon in possession of a firearm

[1] Defendant was originally charged with open murder, MCL 750.316.

(felon-in-possession), MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 46 years and 8 months to 56 years for the second-degree murder conviction and 1 to 5 years for the felon-in-possession conviction, to be served consecutively to a 5-year term of imprisonment for the felony-firearm conviction. For the reasons set forth in this opinion, we affirm defendant's convictions but remand for resentencing before a different judge.

I. FACTS

Defendant's convictions arose from the December 24, 2013 shooting death of the victim, James Buckman, Jr., in the driveway of Great Lakes Power & Equipment (Great Lakes). It is undisputed that defendant shot the victim during a verbal altercation and caused Buckman's death. A witness, Mark Mosed, testified that at the time the victim was shot, he saw defendant pointing a gun out the window of defendant's truck. Mosed removed the gun from defendant's hand, but then gave the gun back to defendant and told him to leave. Another witness, Robert Okun, observed the escalating verbal altercation between defendant and the victim. Okun thought that he heard defendant threaten the victim by saying, "I will kill you, if you touch my dog." Okun denied hearing the victim threaten defendant, but testified that he heard the victim call "someone" a "white trash hillbilly." Although Okun did not see defendant's reaction to the slur, he testified that he heard two gunshots thereafter.

After defendant's arrest, he gave a statement to the police claiming that he shot the victim because the victim was coming at him with a gun. A surveillance

camera located on Great Lakes' property captured much of the encounter, and defendant's statement was inconsistent with the events depicted in the video, which revealed that at the time the victim was shot, he was standing with his arms at his side and had nothing in his hands. At trial, defendant asserted that the evidence established that he acted in self-defense. Alternatively, defendant argued that at most, he was guilty of voluntary manslaughter. The trial court rejected defendant's self-defense theory and found him guilty of second-degree murder and the firearm charges.

II. ANALYSIS

A. PRELIMINARY EXAMINATION TRANSCRIPT

On appeal, defendant first argues that, during trial, the court improperly reviewed testimony from his preliminary examination transcript. We disagree.[2]

During trial, the prosecutor attempted to impeach Mosed with inconsistent testimony Mosed gave at defendant's preliminary examination with regard to the distance between defendant and the victim before the shooting. The following exchange occurred on the record at trial:

The Court: I'm sorry. Hold on. One moment.

Mr. Anderson [prosecutor]: Yes, Judge.

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[2] Because defendant did not object at trial to the trial court's review of the preliminary examination transcript, this issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). An unpreserved claim of error is reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To satisfy the plain-error standard, a defendant must show (1) that an error occurred, (2) that the error was plain (i.e., it was clear or obvious), and (3) that the error affected his or her substantial rights (i.e., that affected the outcome). *Id*.

The Court: They have this thing now where they don't put preliminary exam transcripts in the file. So I don't have preliminary exam transcripts readily available. I'll get it [—] hold on. I just have to log into the computer. So just give me one moment.

* * *

The Court: You may continue.

[*Mr. Anderson*]: Do you recall testifying at a preliminary examination that was held on April 9th, 2014?

[*Witness*]: Yes, sir.

[*Mr. Anderson*]: In front of the Honorable Judge Joseph Baltimore in this building?

[*Witness*]: Yes, sir.

[*Mr. Anderson*]: Okay. And do you recall being asked the question—

The Court: Line, page, please.

Mr. Slameka [defense counsel]: Page and line, please, Judge.

Mr. Anderson: I'm sorry. I'm on Page 23.

Mr. Slameka: Thank you.

Mr. Anderson: That would be Lines 14 through 16. Excuse me.

The Court: I'm sorry? Hold on.

[*Mr. Anderson*]: I'm sorry. To set this question up, we probably have to go back to Line 3. Do you recall being asked this question . . . .

Relying on *People v Ramsey*, 385 Mich 221, 225; 187 NW2d 887 (1971), defendant erroneously argues that the trial court's brief use of the preliminary examination transcript constitutes error requiring reversal of his convictions.

In *Ramsey*, the trial court, sitting as the trier of fact, reviewed the transcript of the preliminary examination

testimony of the complainant. *Id*. at 223. The Supreme Court held that this was error requiring reversal because it violated the Confrontation Clause for the trial court to consider testimony not admitted at trial. *Id*. at 224-225. The Court noted that MCL 768.26 bars the admission of preliminary examination testimony unless the witness cannot be produced at trial or has become mentally incapacitated since the preliminary examination.[3] *Id*. at 223-224. In this case, however, the trial court was merely using the preliminary examination transcript to follow along as the prosecution used that testimony to impeach the witness. Prior statements, including ones made at a preliminary examination, are admissible for purposes of impeachment. MRE 613. Because the trial court only reviewed the portion of the transcript properly read into the record, it did not consider any testimony that was not admitted at trial. Moreover, the record indicates that the judge understood that the portion of the preliminary examination read to the witness was admissible only for impeachment and that she was using the transcript only to assist her with following the prosecutor's recitation of the testimony when impeaching the witness. Unlike the situation in *Ramsey*, the trial court did not consider testimony not admitted at trial and so there was no Confrontation Clause violation in this case.[4]

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[3] MCL 768.26 provides:

> Testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify.

[4] We reached the same conclusion in *People v Walter*, 41 Mich App 109, 110-111; 199 NW2d 651 (1972). Although that case is not precedentially

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his convictions must be reversed because he was denied the effective assistance of counsel. We disagree.[5]

"To prevail on a claim of ineffective assistance of counsel, a defendant bears a heavy burden to establish that (1) counsel's performance was deficient, meaning that it fell below an objective standard of reasonableness, and (2) but for counsel's error, there is a reasonable probability that the outcome of the defendant's trial would have been different." *People v Solloway*, 316 Mich App 174, 188; 891 NW2d 255 (2016).

Defendant first argues that defense counsel was ineffective for failing to engage in plea negotiations. The subject of a plea agreement was briefly addressed at defendant's arraignment and final conference. When the court inquired whether plea negotiations were possible, the prosecutor advised the court that no plea offers had been made to defendant, but that the prosecutor was available to discuss plea offers after the arraignment. Defense counsel stated that he could not do so that day because he was in trial in another courtroom, but that he would speak with the prosecution about it on another day. At the *Ginther*[6] hearing, defense counsel testified that he approached the pros-

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binding because it was published before November 1, 1990, we find its reasoning persuasive. MCR 7.215(J)(1).

[5] "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id*. We review the trial court's factual findings for clear error and review questions of law de novo. *People v Lane*, 308 Mich App 38, 67-68; 862 NW2d 446 (2014).

[6] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

ecutor "probably four or five times about a plea" and that the prosecution was unwilling to offer a plea to reduced charges. The prosecutor testified that he could not recall if he ever spoke to defense counsel about a plea bargain or if he ever told defense counsel that no plea offers would be made.

Defense counsel further testified at the *Ginther* hearing that after defendant's arrest, he interviewed defendant five to six times while he was at the county jail. According to defense counsel, during every visit, the subject of a plea was discussed, but defense counsel understood by defendant's continued insistence that he was going to trial to pursue a self-defense theory that defendant was not interested in a plea. Although defendant denied that his counsel discussed the possibility of a plea, the trial court found that defendant's testimony was not credible because he testified that his attorney came to see him only twice, while the jail records were consistent with defense counsel's testimony that he had met with defendant on five or six occasions.

Given this evidence and the trial court's credibility determination, defendant has failed to meet his burden of establishing that defense counsel's performance fell below an objective standard of reasonableness.

Further, even assuming that defense counsel unreasonably failed to initiate plea negotiations with the prosecutor's office, defendant has not established prejudice. "As at trial, a defendant is entitled to the effective assistance of counsel in the plea-bargaining process." *People v Douglas*, 496 Mich 557, 591-592; 852 NW2d 587 (2014). In the context of pleas, "a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler v Cooper*, 566 US 156, 163; 132 S Ct 1376; 182 L Ed 2d 398

(2012). There is no evidence that if defense counsel had approached the prosecutor about a possible plea, a plea offer would have been forthcoming. At the *Ginther* hearing, defendant presented the affidavit of a criminal defense attorney with 32 years of experience who testified that, absent extraordinary circumstances, when a defendant is charged with open murder or murder in the first degree, the standard plea offer in Wayne County is a guilty plea to murder in the second degree. This, however, is exactly the result defendant faced at the conclusion of the bench trial. Thus, defendant has failed to establish that he was prejudiced by his counsel's allegedly deficient performance.

Defendant also argues that his counsel was ineffective for failing to adequately inform him about the strength of his case, the nature of the charges against him, and the consequences of a guilty plea to the charges. He contends that as a result of these failings, he was unable to make an informed choice about whether to proceed to trial.

Conflicting testimony was presented at the *Ginther* hearing regarding the exchange of information between defendant and his counsel. Defense counsel claimed that he spoke with defendant about the legal issues in the case, the burden of proof, and the difficulty of arguing self-defense given that the victim never produced a weapon. Defense counsel further testified that he did explain that the trier of fact could reach a verdict of second-degree murder. Defense counsel admitted that he never showed defendant the surveillance video, but he asserted that he explained the video's content to defendant and that defendant had never asked to see it. When asked if it would have been important for defendant to see the video, defense counsel replied, "He was there when it happened."

Defense counsel also stated that defendant told him "exactly what the video showed." Defense counsel agreed that defendant's statement to the police contradicted what the surveillance video showed and that the false exculpatory statement was damaging. When asked if he explained to defendant the penalties for the various charges, defense counsel testified that it was not necessary to do so because defendant told him what the penalties were. Defense counsel did inform defendant that the penalties were "pretty egregious."

By contrast, defendant testified that defense counsel explained that the charge was open murder but defendant denied that his counsel explained what the prosecutor was required to prove for a conviction. Defendant further asserted that his counsel never explained his chances of success or the sentences he faced if convicted of the charged offenses or any lesser offenses. Defendant acknowledged that it was commonly known that a first-degree-murder conviction could result in life in prison. According to defendant, although he asked, defense counsel never showed him the surveillance video or described its contents. Defendant testified that he did not actually see the video until after his convictions, and he claimed that if he had seen it before the trial, he would have insisted that defense counsel pursue plea negotiations. Defendant claimed that because his counsel failed to spend sufficient time with him, there was never an opportunity to request that counsel pursue plea negotiations. As noted earlier, however, the trial court concluded that defendant's testimony was not credible.

Accordingly, we conclude that defendant has failed to establish ineffective assistance of counsel. Defendant's assertion that he lacked sufficient information to make meaningful decisions related to seeking a plea

had little bearing on the outcome in light of his consistent position that he felt threatened and had acted in self-defense. At the *Ginther* hearing, by which time defendant had seen the surveillance video, defendant continued to assert that he acted in self-defense. This testimony again bolstered defense counsel's testimony that defendant was unwilling to consider a plea. Further, defendant's testimony undermined the credibility of his assertions that had he been adequately advised by his attorney, he would have insisted that his counsel pursue plea negotiations. In light of defendant's continued assertions that he was innocent because he allegedly acted in self-defense, it is unlikely that more information would have prompted defendant to insist that his counsel initiate plea negotiations.

Accordingly, we are not left with a definite and firm conviction that the trial court erred when it found that defendant failed to show prejudice stemming from his counsel's allegedly deficient performance.

C. LESSER INCLUDED OFFENSE

Next, defendant argues that the trial court erred by failing to consider the lesser included offense of manslaughter and convicting him instead of second-degree murder. We disagree.[7]

"Manslaughter is a necessarily included lesser offense of murder." *People v Gillis*, 474 Mich 105, 137; 712 NW2d 419 (2006). "[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a

[7] A trial court's factual findings in a bench trial are reviewed for clear error; its conclusions of law are reviewed de novo. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007).

reasonable person could control his passions." *People v Reese*, 491 Mich 127, 143; 815 NW2d 85 (2012) (quotation marks and citation omitted).

The court did consider this charge, but properly rejected it because the evidence did not show adequate provocation. "The determination of what is reasonable provocation is a question of fact for the factfinder." *People v Pouncey*, 437 Mich 382, 390; 471 NW2d 346 (1991). In this case, the confrontation was about insulting comments made by the victim against defendant and defendant's father and about the alleged endangerment of defendant's dogs. Although the victim became enraged, he maintained his distance from defendant. Further, while early on in the confrontation the victim might have made a slight gesture toward his concealed weapon, he never brandished it. Indeed, the victim never removed his gun from its holster. The video evidence and eyewitness testimony confirmed that at the time he was shot, the victim was standing with his arms at his side, his hands empty, and the gun he carried still holstered at his side. Under these circumstances, the trial court did not err when it concluded that the confrontation did not rise to the level at which a reasonable person would lose control. "The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason." *Pouncey*, 437 Mich at 389. Adequate provocation is that "which would cause the reasonable person to lose control." *Id*. Therefore, the trial court did not err when it failed to find defendant guilty of manslaughter.

D. SENTENCING

Defendant requests that his sentence be vacated and that his case be remanded to a different judge. He

asserts that the trial court sentenced him pursuant to a blanket policy of imposing sentences at the top of the guidelines range on defendants who exercise their right to a trial rather than plead guilty. Defendant did go to trial and did receive the highest sentence that could be imposed within the range recommended by the guidelines.

In *People v Smith*, unpublished per curiam opinion of the Court of Appeals, issued November 22, 2016 (Docket No. 328477), we addressed this issue with regard to the same trial judge. In that case, we admonished Judge Lillard for her practice of sentencing defendants who proceed to trial at the top of the guidelines range. *Id*. at 6. In *Smith*, this Court held that the trial court erred when it employed this practice because the practice failed to provide the defendant with an individualized sentence. *Id*. This Court noted:

> In this case, the trial court sentenced defendant pursuant to its "practice" of sentencing defendants "to the top of your guidelines" following a jury trial. According to the court, the purpose of its practice is "not to punish people for exercising their right to go to trial," but to "reward[] people who accept—who accept responsibility for their behavior and plead guilty in advance of trial." The distinction drawn by the trial court is unconvincing. The court's statement that its practice rewards defendants who plead guilty strongly implied that those defendants are not as a matter of routine sentenced to the high end of their minimum sentence range. Thus, had defendant pleaded guilty, he would have received a lesser sentence. The court may not have intended to punish defendant for exerting his Fifth Amendment rights, but the impact is the same regardless. [*Id*.]

We agree that a policy of sentencing all defendants who go to trial to the top of the sentencing guidelines range is fundamentally inconsistent with the principle of individualized sentences.

The judge's policy also runs afoul of the principle that "[a] court cannot base its sentence even in part on a defendant's refusal to admit guilt." *People v Hatchett*, 477 Mich 1061 (2007); *People v Yennior*, 399 Mich 892 (1977). The right to trial by jury in a criminal felony prosecution is among the most fundamental rights provided by our judicial system. *People v Allen*, 466 Mich 86, 90; 643 NW2d 227 (2002). Moreover, "[i]t is a violation of due process to punish a person for asserting a protected statutory or constitutional right." *People v Ryan*, 451 Mich 30, 35; 545 NW2d 612 (1996).

Our opinion in *Smith* was issued on November 22, 2016. The sentencing in this case occurred on July 30, 2014, well before that date. Nearly two years later, on July 20, 2016, during a posttrial hearing in the instant case, the trial judge confirmed that this was her sentencing practice. The relevant colloquy reads:

> *Defense counsel*: As your Honor knows, it's the practice of this Court to sentence to the top of the guidelines after a defendant goes to trial and—
>
> *The Court*: Sometimes higher.[8]

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[8] In a posttrial hearing on February 17, 2017, several months after we released *Smith*, Judge Lillard made the following statement: "And so to the extent that there is a perception in this building or maybe I have said something that has lead [sic] anyone to believe that after a jury trial if someone is found guilty they will automatically be sentenced at the top of their guidelines that's not true."

The judge went on to say that "if someone is willing to accept responsibility for what they've done and they plead guilty that there should be some sort of reward . . . ." "And to the extent that I am able to do that by sentencing people at the bottom of their guidelines when there is no sentencing agreement and they have plead [sic] guilty, I do routinely do that." While these remarks are reassuring, the judge's prior remarks and actions cannot be undone after the fact. And an improper sentencing policy can only be cured by a change in practice, not a change of words.

Courts, including the United States Supreme Court, have sometimes struggled to articulate the precise line between rewarding a defendant for pleading guilty, which is routine in plea bargains, and punishing a defendant for asserting his constitutional right to trial.[9] See *United States v Jackson*, 390 US 570, 582-583; 88 S Ct 1209; 20 L Ed 2d 138 (1968) (statute was unconstitutional where trial by jury provided for a greater possible sentence than did a bench trial); *Corbitt v New Jersey*, 439 US 212, 219; 99 S Ct 492; 58 L Ed 2d 466 (1978) ("[A] State may encourage a guilty plea by offering substantial benefits in return for the plea.").

In this case, however, we need not resolve any tension between these principles. Here, the judge's sentencing policy was to impose the maximum recommended guidelines sentence when a defendant was convicted after going to trial. This does not demonstrate a process by which a court determines what an individualized sentence should be and then reduces it as an inducement or reward for a plea.[10] Rather, it is the automatic imposition of the maximum guidelines sentence—a policy that ignores the requirement of individualized sentencing and promises not a degree of mercy as reward for a plea, but instead a harsh sentence as punishment for seeking a trial. Thus, while an admission of guilt may be considered indica-

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[9] For a discussion of these issues, see 5 LaFave et al, Criminal Procedure (4th ed), § 21.2(a) through (c).

[10] In *People v Godbold*, 230 Mich App 508, 516; 585 NW2d 13 (1998), we held that judges may "reduce otherwise valid sentences for defendants who opt for bench trials" rather than jury trials. In that case, we quoted, at length, the trial judge's description of his sentencing approach, i.e., that he determined what he believed was the proper individualized sentence based on the offender and the offense and then, if the defendant had opted for a bench trial, provided a sentence concession. *Id*. at 514-516. This case is not comparable to *Godbold*.

tive of remorse and may be grounds to reduce the punishment that would otherwise be imposed, there is no doubt that sentencing defendants to the top of the guidelines because they went to trial, or increasing their sentence in any way for doing so, is a violation of both due process and our law governing sentencing.

We affirm defendant's convictions, vacate defendant's sentences, and remand for resentencing before a different judge. We do not retain jurisdiction.

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

PEOPLE v HAYES

PEOPLE v BLACK

PEOPLE v TIPTON

Docket Nos. 339543, 339544, and 339547. Submitted March 13, 2018, at Detroit. Decided March 27, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich 1016.

Over 25 years ago, Jessie Hayes, Donyelle M. Black, and Jemal Tipton were separately tried and convicted in the Oakland Circuit Court, Jessica R. Cooper, J., of first-degree murder, MCL 750.316, along with other offenses. Defendants, each of whom was under the age of 18 at the time of the offenses, were sentenced to life imprisonment without the possibility of parole, as mandated by Michigan law at the time. Following the United States Supreme Court's decision in *Miller v Alabama*, 567 US 460 (2012), in which the Court held that a mandatory sentence of life in prison absent the possibility of parole for a defendant who was under the age of 18 at the time of the sentencing offense violates the Eighth Amendment's prohibition against cruel and unusual punishment, the Michigan Legislature enacted MCL 769.25, which provided a procedural framework for sentencing juvenile offenders in pending and future cases. Anticipating the possibility of *Miller*'s retroactive application for closed cases, the Legislature also enacted MCL 769.25a, which was triggered when the United States Supreme Court held in *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718 (2016), that the *Miller* rule applied retroactively. In compliance with MCL 769.25a(4)(b), which provides that the prosecuting attorney must file motions for resentencing within 180 days of the *Montgomery* decision in all cases in which the prosecuting attorney will request that the court impose a sentence of imprisonment for life without the possibility of parole, the Oakland County prosecutor's office timely filed motions for resentencing for each of the three defendants, requesting that the court impose life-without-parole sentences. More than nine months after the resentencing motions were filed, more than a year after defendants each obtained court-appointed counsel, and well beyond the 180-day window in MCL 769.25a(4)(b), defendants filed motions to disqualify the prosecutor for Oakland

County, Jessica R. Cooper, and her entire office, asserting a violation of MRPC 1.12 because Cooper had been the circuit court judge who presided over defendants' trials and imposed their life-without-parole sentences. While defendants' motions were pending, the prosecutor submitted a request to the Michigan Attorney General, seeking appointment of a special prosecutor to handle the three cases in accordance with MCL 49.160. The Attorney General approved the request and decided not to withdraw the prosecutor's motions for mandatory life sentences. A hearing was conducted on defendants' disqualification motions, and in a written opinion and order, the court, Cheryl A. Matthews, J., determined that the prosecutor effectively conceded disqualification by making the request to the Attorney General under MCL 49.160, therefore making it unnecessary to specifically rule on the issue of disqualification. The court concluded that the prosecutor's motions should not be struck and that the Attorney General had the authority to investigate and reevaluate the prosecutor's motions, including the power to withdraw the motions. Defendants appealed.

The Court of Appeals *held*:

MCL 49.160(2) provides that if the attorney general determines that a prosecuting attorney is disqualified or otherwise unable to serve, the attorney general may elect to proceed in the matter or may appoint a prosecuting attorney or assistant prosecuting attorney who consents to the appointment to act as a special prosecuting attorney to perform the duties of the prosecuting attorney in any matter in which the prosecuting attorney is disqualified or until the prosecuting attorney is able to serve. To "proceed" means to go forward, to continue, to go on, to move along, or to advance. Accordingly, under MCL 49.160(2), when the Attorney General, upon request, intervened in the three cases and took over the prosecutions in regard to sentencing, the Attorney General did so for purposes of going forward or continuing the existing cases, wherein the motions for mandatory life sentences had already been timely filed. The procedural history of the case up to that point in time was not wiped out by the transfer of prosecutorial power from the prosecutor to the Attorney General. While defendants were concerned with the appropriateness of the prosecutor and her office playing any role in making a sentencing decision under MCL 769.25a(4)(b), the subsequent recusal of the prosecutor and her office and the involvement of the Attorney General effectively rendered defendants' concern inconsequential and irrelevant because MCL 49.160(3) provides that the Attorney General, upon accepting the cases, becomes vested with all of the powers of the prosecuting attorney, including the

power to investigate and initiate charges. The Attorney General thus had the full authority to withdraw the previously filed motions seeking life imprisonment without the possibility of parole; however, on contemplation of each of the cases and the surrounding circumstances, the Attorney General decided to proceed on the same course as the prosecutor. Defendants therefore received the unbiased review that they demanded. Had recusal and the acceptance of the cases by the Attorney General occurred during the 180-day period set forth in MCL 769.25a(4)(b), with the Attorney General making the initial determination to seek mandatory life imprisonment consistent with its current position, defendants would have been in the same position—awaiting resentencing hearings. Under the procedural circumstances, defendants did not suffer any harm.

Affirmed.

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

Law Office of John A. Shea (by *John A. Shea*) for Jessie Hayes.

Hewson & Van Hellemont, PC (by *James F. Hewson*) for Donyelle M. Black.

Gurewitz & Raben, PLC (by *Margaret Raben*) for Jemal Tipton.

Before: K. F. KELLY, P.J., and MURPHY and RIORDAN, JJ.

MURPHY, J. Defendants appeal by leave granted the opinion and order by the trial court rejecting their efforts to avoid resentencing hearings on whether they should again be sentenced to life in prison without parole for murders committed as juveniles, as opposed to being resentenced to a term of years. We affirm.

Over 25 years ago, and as based on the verdicts, the three defendants, as juveniles, committed first-degree murder, MCL 750.316, along with other offenses, and were sentenced to life imprisonment without the possibility of parole, as mandated by Michigan law at the time. The crimes were committed in Oakland County, and defendants were tried in the Oakland Circuit Court. The current Oakland County Prosecutor, Jessica R. Cooper (the prosecutor), was the circuit court judge who presided over defendants' trials, two of which were jury trials and one a bench trial, and she later imposed their life-without-parole sentences.

In *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the United States Supreme Court held that mandatory punishment of life in prison absent the possibility of parole for a defendant who was under the age of 18 at the time of the sentencing offense violates the Eighth Amendment's prohibition against cruel and unusual punishments. The *Miller* Court did not indicate whether its decision was to be retroactively applied to closed cases involving juvenile offenders. In light of *Miller*, the Michigan Legislature enacted MCL 769.25, which provides a procedural framework for sentencing juvenile offenders who have committed offenses punishable by life imprisonment without the possibility of parole; this provision applied to pending and future cases. Anticipating the possibility of *Miller*'s retroactive application for closed cases, the Legislature also enacted MCL 769.25a, which would be triggered if our Supreme Court or the United States Supreme Court were to hold that *Miller* applied retroactively. And subsequently, in *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), the United States Supreme Court held that the rule announced in *Miller*, which was a new substantive

constitutional rule, was retroactive on state collateral review. Accordingly, MCL 769.25a took effect.

MCL 769.25a(4) sets forth the governing procedure that is relevant in the instant cases, providing as follows:

> (a) Within 30 days after the date the supreme court's decision [making *Miller* retroactive] becomes final, the prosecuting attorney shall provide a list of names to the chief circuit judge of that county of all defendants who are subject to the jurisdiction of that court and who must be resentenced under that decision.
>
> (b) *Within 180 days after the date the supreme court's decision becomes final, the prosecuting attorney shall file motions for resentencing in all cases in which the prosecuting attorney will be requesting the court to impose a sentence of imprisonment for life without the possibility of parole*. A hearing on the motion shall be conducted as provided in section 25 of this chapter.
>
> (c) If the prosecuting attorney does not file a motion under subdivision (b), the court shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years. [Emphasis added.]

In compliance with MCL 769.25a(4)(a) and its deadline, the prosecutor's office provided a list to the chief judge of the names of 49 individuals who were subject to the jurisdiction of the court and who had to be resentenced under *Montgomery*. In compliance with MCL 769.25a(4)(b) and its deadline, the prosecutor's office filed motions for resentencing with respect to 44 of the 49 identified individuals, including the three defendants here, requesting the court to impose a sentence of imprisonment for life without the possibility of parole. More than nine months after the resentencing motions were filed, more than a year after

defendants each obtained court-appointed counsel, and well beyond the 180-day window in MCL 769.25a(4)(b), defendants filed motions to disqualify the prosecutor and her entire office, asserting a violation of Michigan Rule of Professional Conduct (MRPC) 1.12.[1] Defendants challenged the failure of the prosecutor to initiate self-imposed recusal in the determination or efforts to have defendants again sentenced to mandatory life imprisonment, premised on a conflict of interest, public policy, and constitutional concerns given that the prosecutor served as the trial and sentencing judge on the three cases. Defendants also pointed to stances unfavorable to juvenile lifers expressed by the prosecutor. Defendants maintained that the prosecutor, as well as her office, were precluded from being involved in the cases and that the prosecutor's motions requesting sentences of life without parole must be struck, which would effectively result in defendants being resentenced to a term of years pursuant to MCL 769.25a(4)(c).

While defendants' motions were pending, the prosecutor submitted a request to the Michigan Attorney General, seeking appointment of a special prosecutor to handle the three cases in accordance with MCL 49.160,[2] which request was accepted and approved.

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[1] MRPC 1.12(a) provides:

> Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person, unless all parties to the proceeding consent after consultation.

[2] MCL 49.160 provides, in part:

> (1) If the prosecuting attorney of a county determines himself or herself to be disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, he or she

The Attorney General, exercising independent judgment, decided not to withdraw the prosecutor's motions for mandatory life sentences and has proceeded as the prosecutorial entity pursuing such sentences. A hearing was conducted on defendants' disqualification motions. In a written opinion and order, the trial court determined that the prosecutor effectively conceded disqualification by making the request to the Attorney General under MCL 49.160; therefore, the court found it unnecessary to specifically rule on the issue of disqualification. The trial court still spent considerable time examining and discussing the disqualification issue for purposes of resolving whether the prosecutor's motions for mandatory life imprisonment should be struck or, stated otherwise, whether the disqualification should operate retroactively, eviscerating the timely motions for mandatory life imprisonment and making it impossible for the Attorney General, at this late date, to file motions in compliance with MCL 769.25a(4)(b). For a variety of reasons, the trial court concluded that the prosecutor's motions should not be struck and that the Attorney General had the authority to investigate and reevaluate the prosecutor's motions, including the power to withdraw the motions. Defendants now appeal the court's ruling.

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shall file with the attorney general a petition stating the conflict or the reason he or she is unable to serve and requesting the appointment of a special prosecuting attorney to perform the duties of the prosecuting attorney in any matter in which the prosecuting attorney is disqualified or until the prosecuting attorney is able to serve.

(2) If the attorney general determines that a prosecuting attorney is disqualified or otherwise unable to serve, the attorney general may elect to proceed in the matter or may appoint a prosecuting attorney or assistant prosecuting attorney who consents to the appointment to act as a special prosecuting attorney to perform the duties of the prosecuting attorney in any matter in which the prosecuting attorney is disqualified or until the prosecuting attorney is able to serve.

We conclude that MCL 49.160 dictates the outcome of these cases. We review de novo issues of statutory construction. *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001). MCL 49.160 was the procedural mechanism employed in these cases by which the prosecutor recused or disqualified herself and her office from further participation in the cases. The ultimate question is whether the disqualification or recusal requires the striking of the prosecutor's earlier and timely motions to seek sentences of life imprisonment without the possibility of parole relative to the three defendants.

MCL 49.160(2) provides, in pertinent part, that "the attorney general may elect *to proceed* in the matter . . . ." (Emphasis added.) To "proceed" means to go forward, to continue, to go on, to move along, or to advance. *Merriam-Webster's Collegiate Dictionary* (11th ed); see also *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005) ("We may consult dictionary definitions of terms that are not defined in a statute."). Accordingly, under MCL 49.160(2), when the Attorney General, upon request, intervened in the three cases and took over the prosecutions in regard to sentencing, the Attorney General did so for purposes of going forward or continuing the existing cases, wherein the motions for mandatory life sentences had already been timely filed. The procedural history of the case up to that point in time was not wiped out by the transfer of prosecutorial power from the prosecutor to the Attorney General.

Defendants' main concern was the appropriateness of the prosecutor and her office playing any role in making a sentencing decision under MCL 769.25a(4)(b), considering the prosecutor's history as the presiding judge at defendants' trials and sentencing hearings and the statements made by the prosecutor outside of a court

setting. However, the subsequent recusal of the prosecutor and her office and the involvement of the Attorney General effectively rendered defendants' concern inconsequential and irrelevant. We reach this conclusion given that the Attorney General, upon accepting the cases, became "vested with all of the powers of the prosecuting attorney . . . , including the power to investigate and initiate charges." MCL 49.160(3). And the Attorney General thus had the full authority to withdraw the previously filed motions seeking life imprisonment without the possibility of parole; however, on contemplation of each of the cases and the surrounding circumstances, the Attorney General decided to proceed on the same course as the prosecutor. Defendants, therefore, have received the unbiased review that they demand, and a judge, or perhaps a jury, will later decide defendants' sentences. Had recusal and the acceptance of the cases by the Attorney General occurred during the 180-day period set forth in MCL 769.25a(4)(b), with the Attorney General making the initial determination to seek mandatory life imprisonment consistent with its current position, defendants would be, as they are now, awaiting resentencing hearings. Under the procedural circumstances, defendants have simply not suffered any harm. See *In re Osborne*, 459 Mich 360, 368-369; 589 NW2d 763 (1999) (describing a situation in which a prosecutor at a termination hearing previously represented a parent subject to the termination proceeding absent objection or notice of the problem by the trial court and holding that "we are not prepared to sweep away the 1996 and 1997 proceedings in the absence of demonstrated harm").

Affirmed.

K. F. KELLY, P.J., and RIORDAN, J., concurred with MURPHY, J.

DOES 11-18 v DEPARTMENT OF CORRECTIONS

Docket Nos. 332536, 335440, and 335527. Submitted November 14, 2017, at Lansing. Decided March 27, 2018, at 9:05 a.m. Leave to appeal denied 504 Mich ___.

John Does 11-18 and others (Docket No. 332536), and John Does 1-10 and others (Docket Nos. 335440 and 335527)—individuals who had been incarcerated in adult prisons as juveniles—brought separate actions in the Washtenaw Circuit Court against the Department of Corrections, the Governor, and others, claiming that the individuals had been subjected to sexual violence and harassment by adult male prisoners and female prison guards in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. Plaintiffs asserted that defendants knew or should have known of the risk to plaintiffs but failed to prevent the abuse and harassment, or aided and abetted it. Defendants moved for summary disposition in each case, arguing in separate motions that defendants were immune from tort liability under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*.; that plaintiffs could not recover for alleged ELCRA violations because MCL 37.2301, as amended by 1999 PA 202, expressly exempted ELCRA-violation claims by individuals serving a sentence of imprisonment in a state or county correctional facility; and that prisoners were not entitled to protections under the ELCRA because prisons were not public facilities as defined in the ELCRA. In separate orders, the court, Carol A. Kuhnke, J., denied, in part, defendants' motions for summary disposition. The court concluded that the GTLA did not grant immunity to defendants for ELCRA violations, that the ELCRA provision excluding individuals serving a sentence of imprisonment from bringing actions under the ELCRA did not apply to trainees under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*., because those individuals were not serving a sentence of imprisonment, and that the ELCRA provision excluding individuals serving a sentence of imprisonment from bringing actions under the ELCRA violated the Equal Protection Clause of the 1963 Michigan Constitution. Defendants appealed by right in Docket No. 335440. Defendants appealed by leave granted in Docket Nos. 332536 and 335527.

The Court of Appeals *held*:

1. Article 1, § 2, of the 1963 Michigan Constitution provides that no person shall be denied the equal protection of the laws and that the Legislature shall implement the provision by appropriate legislation. The equal-protection provision extends to any and all persons, and the Legislature, which is constitutionally mandated to implement protection to all citizens, does not have authority to exclude anyone from those protections, including individuals serving a term of imprisonment. MCL 37.2302(a) of the ELCRA provides that a person shall not deny an individual the full and equal enjoyment of the goods, services, facilities, advantages, or accommodations of a public service because of religion, race, color, national origin, sex, or marital status. Under MCL 37.2301(b), as amended by 1999 PA 202, the term "public service" includes a public facility owned, operated, or managed by or on behalf of the state but expressly does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment. In this case, the Court adopted the analysis of Judge BECKERING in *Neal v Dep't of Corrections (On Rehearing)*, 232 Mich App 730 (1998) (BECKERING, J., concurring in part and dissenting in part), and concluded that the Legislature acted outside the constitutional authority granted by the Equal Protection Clause—that is, the mandate to implement legislation that protects all persons—when it amended the ELCRA to effectively bar prisoners from bringing ELCRA suits. Accordingly, the trial court correctly concluded that 1999 PA 202 violated Const 1963, art 1, § 2. Given the determination that 1999 PA 202 was unconstitutional, it was not necessary to consider whether the MCL 37.2301(b) provision barring prisoners from bringing actions under the ELCRA applied to individuals assigned to youthful-trainee status under HYTA.

2. Governmental immunity does not apply to ELCRA claims; in other words, governmental immunity is not a defense to a claim brought under the act. Accordingly, the trial court correctly denied defendants' motion for summary disposition on the basis of governmental immunity.

Affirmed.

O'CONNELL, P.J., dissenting, disagreed with the majority's conclusion that plaintiffs brought a legally valid claim under Article 3 of the ELCRA. Under the GTLA, state defendants acting in their official capacity with regard to policy decisions are immune from tort liability; they are also not vicariously liable for the criminal acts of third parties or the criminal acts of unnamed correctional officers who acted outside the scope of their author-

ity. The language of Article 3 of the ELCRA did not waive defendants' immunity; if the Legislature had intended to waive the historical grant of immunity to state officials acting in their official capacity, it would have expressly stated so in the later-enacted GTLA. Therefore, defendants were immune from liability under the ELCRA for the actions taken in their official capacities, and plaintiffs failed to plead in avoidance of that immunity. Judge O'CONNELL also disagreed with the majority's conclusion that 1999 PA 202 was unconstitutional. That amendment clarified the definition of "public service" in MCL 37.2301(b); it did not deprive any persons of rights guaranteed by Michigan's 1963 Constitution. The amendment did not violate the Equal Protection Clause because a rational basis existed for excluding prisons from the definition of "public service"; specifically, that the amendment reflected a legitimate governmental interest in deterring meritless lawsuits and reducing costs associated with those lawsuits. Moreover, there was no equal-protection violation because the Legislature treated the unique class of individuals known as prisoners similarly within that class. 1999 PA 202 did not violate the implementation language of the Equal Protection Clause because the parts of prisons that do not deal with the public do not provide a public service as defined in the ELCRA. Rather, the Legislature defined the scope of the term "public service" within its own enactment consistently with the constitutional mandate to implement the Equal Protection Clause with appropriate language. The majority usurped the constitutionally granted prerogative of the Legislature to define the scope of the amendment when it concluded that it was unconstitutional. The majority should have decided the case on statutory grounds because neither the allegations of a sexually hostile prison environment nor the assertions that the state's customs and policies discriminated against youthful offenders—that is, age discrimination—set forth a valid public-service claim under the ELCRA. Plaintiffs have other remedies available to them, but they are not entitled to money damages under the ELCRA because their allegations do not fit within the scriptures of the act. Judge O'CONNELL would have reversed the trial court's denial of defendants' motions for summary disposition and remanded the case for further proceedings.

1. PRISONS AND PRISONERS — CIVIL ACTIONS — ELLIOTT-LARSEN CIVIL RIGHTS ACT — WORDS AND PHRASES — "PUBLIC SERVICE."

MCL 37.2302(a) of the Elliott-Larsen Civil Rights Act provides that a person shall not deny an individual the full and equal enjoyment of the goods, services, facilities, advantages, or accommodations of a public service because of religion, race, color, national

origin, sex, or marital status; MCL 37.2301(b), as amended by 1999 PA 202—which provides that the term "public service" includes a public facility owned or operated, or managed by or on behalf of the state but does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment—is unconstitutional because the Equal Protection Clause of Michigan's 1963 Constitution mandates that the Legislature implement the clause by appropriate legislation to protect all persons, including individuals serving a term of imprisonment (MCL 37.2101 *et seq*.; Const 1963, art 1, § 2).

2. CONSTITUTIONAL LAW — EQUAL PROTECTION CLAUSE — AUTHORITY TO IMPLEMENT CLAUSE WITH APPROPRIATE LEGISLATION — APPLICATION TO ANY AND ALL PERSONS.

Article 1, § 2, of the 1963 Michigan Constitution provides that no person shall be denied the equal protection of the laws and that the Legislature shall implement the provision by appropriate legislation; the equal-protection provision extends to any and all persons, and the Legislature, which is constitutionally mandated to implement protection to all citizens, does not have authority to exclude anyone from those protections, including individuals serving a sentence of imprisonment.

3. GOVERNMENTAL IMMUNITY — WAIVER OF GOVERNMENTAL IMMUNITY — ELLIOTT-LARSEN CIVIL RIGHTS ACT.

The governmental immunity provided by the governmental tort liability act does not apply to claims brought under the Elliott-Larsen Civil Rights Act (MCL 691.1401 *et seq*.; MCL 37.2101 *et seq*.).

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Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, *B. Eric Restuccia*, Deputy Solicitor General, and *Mark Donnelly* and *Heather Meingast*, Assistant Attorneys General, for defendants.

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

K. F. KELLY, J. Defendants appeal by right (Docket No. 335440) and by leave granted (Docket Nos. 332536 and 335527) from three separate rulings of the trial court. First, defendants claim that the trial court erred when it declared unconstitutional an exclusion prohibiting individuals who are serving a sentence of imprisonment from bringing actions under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. Next, defendants argue that the trial court erred when it ruled that the exclusion does not apply to trainees under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*., because those individuals are not serving a sentence of imprisonment. Finally, defendants maintain that the trial court erred when it concluded that governmental immunity does not apply to these civil-rights actions.

As explained more fully in this opinion, we hold that the 1999 amendment to the ELCRA, specifically MCL 37.2301(b), as amended by 1999 PA 202, does not pass constitutional muster. Because we conclude that the exclusion is unconstitutional, we need not consider whether the prohibition applies to individuals assigned to youthful-trainee status under HYTA. We further hold that governmental immunity does not apply to ELCRA claims. Therefore, finding no error warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case was originally brought on behalf of seven unidentified male prisoners who sought relief under the ELCRA. They alleged that while they were under the age of 18, they were housed with adult prisoners who

took advantage of their youth to commit sexual and physical abuse and harassment. Plaintiffs further asserted that defendants knew or should have known of the risk to plaintiffs but failed to prevent the abuse and harassment, or aided and abetted it.

This case has been heavily litigated in the circuit court and in this Court. Since the case was originally filed on December 9, 2013, there have been multiple applications for leave to appeal in this Court as well as some proceedings in the Court of Claims, and applications for leave to appeal in our Supreme Court. Throughout the course of this litigation, various plaintiffs, claims, and defendants have been added and others have been dismissed. It is a procedural quagmire. Still, the issues on appeal are relatively straightforward and are purely legal. We are first tasked with determining whether the ELCRA, which excludes individuals who are serving a sentence of imprisonment from bringing suit, is constitutional. We conclude that it is not. We must then consider whether defendants can assert governmental immunity.

II. ELCRA

The Michigan Constitution provides:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation. [Const 1963, art 1, § 2.]

To that end, MCL 37.2302(a) of the ELCRA provides:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or

> accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

In its current form, the ELCRA defines the term "public service" as

> a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, except that *public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment*. [MCL 37.2301(b) (emphasis added).]

The highlighted language was added in 1999 after this Court's decision in *Neal v Dep't of Corrections (On Rehearing)*, 232 Mich App 730, 734-737; 592 NW2d 370 (1998), which concluded that prisons were not excluded from the definition of "public service." The enacting section of the amendment that added this language provides:

> This amendatory act is curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision Neal v Department of Corrections, 232 Mich App 730 (1998). This legislation further expresses the original intent of the legislature that an individual serving a sentence of imprisonment in a state or county correctional facility is not within the purview of this act. [1999 PA 202, enacting § 1.]

At the heart of this appeal is whether the ELCRA, in its postamendment form, is constitutional. "We review de novo constitutional questions such as whether a party was denied due process and equal protection under the law." *Lima Twp v Bateson*, 302 Mich App 483, 503; 838 NW2d 898 (2013). An issue

involving statutory construction is likewise reviewed de novo. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

> The role of this Court in interpreting statutory language is to ascertain the legislative intent that may reasonably be inferred from the words in a statute. The focus of our analysis must be the statute's express language, which offers the most reliable evidence of the Legislature's intent. When the statutory language is clear and unambiguous, judicial construction is not permitted and the statute is enforced as written. A court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. [*Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 199; 895 NW2d 490 (2017) (quotation marks, citations, and alteration omitted).]

As previously stated, this case has a long and protracted history. In 2014, the trial court denied defendants' motion for summary disposition, citing the same equal-protection concerns that it later articulated in the order on appeal here. That ruling, along with a ruling regarding the prison litigation reform act (PLRA), MCL 600.5501 *et seq.*, was the subject of leave applications filed in this Court in Docket Nos. 321013 and 321756. This Court denied leave in both applications, but our Supreme Court remanded for consideration as on leave granted. *Doe v Dep't of Corrections*, 497 Mich 881 (2014). That remand resulted in *Doe v Dep't of Corrections*, 312 Mich App 97; 878 NW2d 293 (2015), in which this Court held that the trial court erred by not granting summary disposition for failure to comply with the disclosure requirement of the PLRA and that plaintiffs could not amend their complaint to cure the defect. *Id.* at 112-114, 138. This Court also concluded that the challenged ELCRA provisions did not violate defendants' right to equal protection. *Id.* at 136-139. However, on March 30, 2016, our Supreme

Court vacated the equal-protection ruling in this Court's *Doe* decision because "[i]n light of the Court of Appeals ruling that plaintiffs' complaint should be dismissed under the Prisoner Litigation Reform Act, MCL 600.5501 *et seq.*, it was unnecessary to resolve the remaining issues." *Doe v Dep't of Corrections*, 499 Mich 886 (2016).

In *Doe*, 312 Mich App 97, both Judge RIORDAN (opinion of the Court) and Judge BECKERING (concurring in part and dissenting in part) provided extensive and lengthy analysis on the constitutionality (or lack thereof) of the ELCRA amendment. Writing for the majority, Judge RIORDAN concluded that prisoners were not similarly situated to nonprisoners and that the Legislature's action in excluding prisoners from the ELCRA was rationally related to its interest in deterring frivolous lawsuits and preserving scarce public resources. *Id.* at 127-138. Judge BECKERING had a different approach to the case. She emphasized the following terms in Michigan's Equal Protection Clause:

> *No person* shall be denied the equal protection of the laws; nor shall *any person* be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature *shall implement* this section by appropriate legislation. [*Id.* at 145 (BECKERING, J., concurring in part and dissenting in part), quoting Const 1963, art 1, § 2.]

Judge BECKERING noted that the use of the singular within the clause demonstrated that it was "unquestionably the intent of the ratifiers that civil rights protections be extended to *any* and *all* persons." *Id.* Under the second sentence, the Legislature was constitutionally mandated to implement protection to *any* and *all* persons and lacked authority to exclude any-

one. *Id*. at 146-147. In response to that mandate, the Legislature enacted the ELCRA, which also contains the singular: "a person shall not . . . 'deny *an individual* . . . .' " *Id*. at 147 (citation omitted; formatting altered). Judge BECKERING noted that following *Neal*, 232 Mich App 730, the Legislature amended the statute and, in so doing, violated its constitutional mandate. *Doe*, 312 Mich App at 148-149 (BECKERING, J., concurring in part and dissenting in part). Judge BECKERING explained:

> The parties and the majority frame the issue at hand as one calling for a determination of whether the 1999 amendment to the ELCRA violates equal protection by denying prisoners, as a class, protections under the ELCRA. In my opinion, this focus is directed at the wrong section of Const 1963, art 1, § 2. I believe that the analysis misses a more significant and dispositive issue. That is, whether the Legislature has authority, given the constitutional directive in Const 1963, art 1, § 2 pertaining to *all citizens*, to carve out a particular class of individuals and exclude them from the protections of the ELCRA.
>
> I would hold that the Legislature acted outside of its constitutional authority by removing prisoners from the scope of the ELCRA and thereby denying protection to all. Where the analysis in this case should start, and end, in my opinion, is with the idea that Const 1963, art 1, § 2 contains more than just the guarantee of equal protection of the laws; it contains a directive to the Legislature to implement legislation that protects the rights of *all* citizens.
>
> * * *
>
> . . . [T]he Legislature is not permitted, pursuant to the implementation language contained in Const 1963, art 1, § 2, to define the persons to whom civil rights are guaranteed. The Constitution already answers that question, unequivocally guaranteeing that legislation to protect

> civil rights must be extended to all, without reservation or limitation. Any implementation language contained in Const 1963, art 1, § 2 should not be construed as giving the Legislature "the authority to circumvent the protections that the section guarantees." See *Midland Cogeneration* [*Venture Ltd Partnership v Naftaly*, 489 Mich 83, 95; 803 NW2d 674 (2011)]. If it did, just as the Court cautioned in *Midland Cogeneration*, the protection of "any person" would "lose [its] strength" and the Legislature would render such protection meaningless. See *id*. Consequently, I would hold that the 1999 amendment, by eradicating a constitutional guarantee, violates Const 1963, art 1, § 2. [*Doe*, 312 Mich App at 149-150, 153-154 (BECKERING, J., concurring in part and dissenting in part) (second alteration in original).]

Judge BECKERING did not believe that the Legislature was endowed with the discretion to define the meaning of the constitutional mandate by narrowing the scope of protected individuals. *Id*. at 154. Because the amendment infringed on a constitutional directive, it could not stand. *Id*. at 151-152. Judge BECKERING surmised that "there is no need to evaluate the exclusion of prisoners from the scope of the ELCRA on equal protection grounds. The analysis of the constitutionality of the 1999 amendment should begin with the directive given to the Legislature in Const 1963, art 1, § 2 and end with the conclusion that the 1999 amendment is constitutionally infirm because it is contrary to the directive contained in article 1, § 2." *Id*. at 156.

We conclude that the amendment is unconstitutional for the reasons stated by Judge BECKERING in her dissenting opinion and, therefore, we specifically adopt this analysis as our own. The Legislature's amendment of the ELCRA to effectively bar correctional-facility prisoners from bringing ELCRA suits is in direct violation of Const 1963, art 1, § 2 of the Michigan Constitution, which makes clear that the mandatory legislation

must protect *all* persons. The amendment violates the constitutional mandate that the Legislature craft laws for the protection of its individual citizens.

III. GOVERNMENTAL IMMUNITY DOES NOT APPLY TO ELCRA CLAIMS

Defendants argue that the trial court erred when it failed to grant their motion for summary disposition. "A trial court may grant a motion for summary disposition under MCR 2.116(C)(7) on the ground that a claim is barred because of immunity granted by law." *McLean v McElhaney*, 289 Mich App 592, 597; 798 NW2d 29 (2010). Such a decision is reviewed de novo on appeal. *Id*. at 596.

Contrary to defendants' assertions, the law is clear that governmental immunity does not apply to ELCRA claims. *In re Bradley Estate*, 494 Mich 367, 393 n 60; 835 NW2d 545 (2013) ("Compare MCL 600.1721 and MCL 600.1701 with other statutes expressly waiving governmental immunity, including the Elliot[t]-Larsen Civil Rights Act . . . ."); *Mack v Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002) ("[T]here are other areas outside the [governmental tort liability act (GTLA), MCL 691.1401 *et seq*.,] where the Legislature has allowed specific actions against the government to stand, such as the Civil Rights Act."); *Diamond v Witherspoon*, 265 Mich App 673, 691; 696 NW2d 770 (2005) ("The Legislature has allowed specific actions against the government to stand, such as one under the CRA."); *Manning v Hazel Park*, 202 Mich App 685; 509 NW2d 874 (1993) ("Governmental immunity is not a defense to a claim brought under the Civil Rights Act."). Defendants cite *Jones v Bitner*, 300 Mich App 65; 832 NW2d 426 (2013), in support of their position that immunity supersedes and replaces preexisting

statutory waivers of immunity. However, the *Jones* case involved an interplay between the GTLA and the Child Protection Law, MCL 722.621 *et seq*., and does not support defendants' argument. *Jones* simply cannot and does not overrule the established binding precedent that governmental immunity does not apply to ELCRA claims.

Affirmed.

MURPHY, J., concurred with K. F. KELLY, J.

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

Plaintiffs' artfully drafted complaint seeks to hold these state defendants *vicariously* liable for the criminal actions of third parties while plaintiffs were incarcerated in the state prison system. Plaintiffs' complaint seeks to avoid governmental immunity, seeks to declare 1999 PA 202 unconstitutional, and seeks to wrest money damages from these state defendants.

Plaintiffs' primary complaint is that *if* these state officials had instituted better policies with regard to youthful prisoners, these plaintiffs *may not* have been victims of crimes by unnamed third parties while incarcerated in the prison system. The basket that plaintiffs place all of their eggs into is Article 3 of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. But Article 3, MCL 37.2301 *et seq*., does not place any affirmative duties on these state defendants. No Michigan ELCRA case involving Article 3 has ever recognized a cause of action based on an allegation of a *failure to discriminate*. Allowing plaintiffs to use the ELCRA in this innovative manner places an impossible burden on public-service providers and is antagonistic to current state law. In addition, plaintiffs have numerous other remedies for the relief they are seeking.

For the reasons stated in this opinion, I would reverse the summary disposition orders of the trial court and remand for further proceedings consistent with this opinion.

I. FACTS AND NATURE OF CASE

As a result of being convicted of serious criminal offenses, plaintiffs are incarcerated in the state prison system. Plaintiffs' theory of the case is that defendants' former *policy* of housing youthful offenders with non-youthful offenders resulted in plaintiffs' abuse, harassment, or other unlawful treatment by other prisoners or correctional staff. Plaintiffs claim that the state's policies, customs, and practices discriminate against youthful offenders by failing to separate youthful offenders from adult offenders. Plaintiffs seek to hold state officials, such as the Governor, wardens, former wardens, directors, former deputy and chief directors, and all state officials associated with the prison system, accountable for failing to institute *better* policies that *may* have better protected youthful offenders while serving sentences in the state prison system. Plaintiffs assert that their civil rights were violated; as a result, plaintiffs speculate, or are at least hopeful, that they may be entitled to monetary damages from these state defendants.

Plaintiffs have alleged violations of Article 3 of the ELCRA, which prohibits discrimination in places of public accommodation or in the delivery of public services, MCL 37.2302(a). Plaintiffs allege four separate violations of Article 3: (1) creating a sexually hostile prison environment, (2) failing to prevent and remedy a sexually hostile prison environment, (3) aiding and abetting violations of the ELCRA, and (4) age discrimination.

In three separate orders, the trial court denied the state defendants' request to dismiss this lawsuit. This case presents three significant issues: (1) whether governmental immunity applies to a claim brought under Article 3 of the ELCRA, (2) whether 1999 PA 202 is constitutional, and (3) whether plaintiffs have stated a cognizable cause of action under Article 3.

II. THE MAJORITY'S ERRONEOUS AND HISTORICALLY INACCURATE CONCLUSION THAT GOVERNMENTAL IMMUNITY IS NOT APPLICABLE TO THIS CASE

Plaintiffs and the majority theorize that Article 3 of the ELCRA operates as a waiver of governmental immunity under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. I respectfully disagree. Nothing in the language of Article 3 provides for a waiver of governmental immunity for *state officials acting in their official capacity*. Hence, *state officials acting in their official capacity* retain governmental immunity.

The GTLA grants absolute immunity from tort liability to "the elective or highest appointive executive official of all levels of government . . . if he or she is acting within the scope of his or her . . . executive authority." MCL 691.1407(5); *Beaudrie v Henderson*, 465 Mich 124, 139 n 11; 631 NW2d 308 (2001). Other state officials have immunity from tort liability when all of the following conditions are met:

> (a) The officer [or] employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's [or] employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. [MCL 691.1407(2).]

To survive a motion for summary disposition based on governmental immunity, a plaintiff must plead in avoidance of governmental immunity and "allege facts warranting the application of an exception to governmental immunity." *Plunkett v Dep't of Transp*, 286 Mich App 168, 180; 779 NW2d 263 (2009). Plaintiffs' complaint hypothesizes that defendants' *policies or lack of policies* caused the maltreatment of these plaintiffs. Remarkably, plaintiffs do not claim that the named defendants perpetrated any of the alleged abuse or harassment. Rather, the alleged criminal acts were committed by other prisoners or other nonparties. Even taking all of plaintiffs' allegations as true, see *McLean v Dearborn*, 302 Mich App 68, 72-73; 836 NW2d 916 (2013), plaintiffs failed to plead any facts in their complaint that Article 3 of the ELCRA waives immunity for *state officials acting in their official capacity* when making policy decisions for the state of Michigan. No such waiver exists in the ELCRA or the GTLA. The GTLA provides immunity for the state defendants *acting in their official capacity* with regard to policy decisions.[1] That should be the end of this issue.

Moreover, these state actors cannot be held vicariously liable for the criminal acts of third parties, or in a few instances, criminal acts of unnamed correctional officers who were clearly acting outside the scope of their authority. In *Hamed v Wayne Co*, 490 Mich 1, 5; 803 NW2d 237 (2011), the Supreme Court addressed "whether Wayne County and its sheriff's department may be held vicariously liable for a civil rights claim under MCL 37.2103(i) based on a criminal act of a

[1] Plaintiffs have sued the state defendants in both their individual capacity and in their official capacity, but plaintiffs' complaint does not make any allegations against the individual defendants acting in their individual capacity.

deputy sheriff committed during working hours but plainly beyond the scope of his employment." The Supreme Court rejected liability for these state actors, explaining that "permitting liability against defendants under these circumstances would impose too great a burden on public-service providers and on society in general, which is clearly contrary to the Legislature's intent." *Id*. at 30.

In furtherance of preventing the burdensome consequences of holding state actors vicariously liable for the acts of their employees, the Supreme Court warned against artfully pleading a civil-rights claim to bypass the GTLA:

> Artful pleading would also allow a plaintiff to avoid governmental immunity under the [GTLA]. A school district, for example, could not be vicariously liable in tort for a teacher's sexual molestation of a student because the GTLA would bar the claim. However, if the plaintiff styled its claim as [an ELCRA] action, the school district could be vicariously liable under a theory of quid pro quo sexual harassment affecting public services. Plaintiff's preferred approach, under which public-service providers would be strictly liable for *precisely the same conduct* as that for which they would typically be immune, is inherently inconsistent with the Legislature's intent. If the Legislature had intended such a result, it should have clearly abrogated the common-law rule for purposes of [the ELCRA]. [*Id*. at 29 n 74.]

Hamed clearly holds that plaintiffs cannot avoid the GTLA by simply alleging a violation of the ELCRA. Plaintiffs, to their *innovative* credit, have artfully pleaded a cause of action exactly as the *Hamed* Court cautioned should not be done.

I would also note that the GTLA, which grants immunity to *state officials acting in their official capacity*, MCL 691.1407, as amended by 1986 PA 175, is the

later statutory enactment. See *Jones v Bitner*, 300 Mich App 65, 76; 832 NW2d 426 (2013). "It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws." *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). If the Legislature intended to waive the historical grant of immunity to state officials acting in their official capacity, it is incumbent on the Legislature to expressly state that such a waiver exists. No such waiver is found in the ELCRA or the GTLA. This Court cannot by dicta infer such a waiver. We are required to follow the GTLA, as the later and the more specific act.

If the aforementioned law is not sufficient, I would additionally note that the majority opinion cites three employment cases[2] involving Article 2 of the ELCRA, MCL 37.2201 *et seq*., for the alleged proposition that governmental immunity is not a defense to a civil-rights action. Surprisingly, I concur with this singular, isolated, and irrelevant statement of the law—the GTLA is not an affirmative defense to any cause of action. See *Mack v Detroit*, 467 Mich 186, 200-203; 649 NW2d 47 (2002). Accordingly, plaintiffs must plead in avoidance of the GTLA.

I find disturbing the majority's short and incomplete analysis of the law in regards to governmental immu-

[2] Article 2 of the ELCRA pertains only to employee-employer relationships. Article 2 does not apply to this case because plaintiffs are not employees of defendants.

nity. The majority opinion makes no attempt to determine whether plaintiffs have pleaded their case in avoidance of governmental immunity, to consider which statute is the latest in time, or to cite any Article 3 cases that have held that governmental immunity is a defense to a civil-rights action under Article 3. Plaintiffs have not pleaded in avoidance of governmental immunity. Therefore, the state actors acting in their official capacity retain governmental immunity as set forth in the GTLA.

III. THE MAJORITY'S MISGUIDED CONCLUSION THAT 1999 PA 202 IS UNCONSTITUTIONAL

The majority opinion, without any discernable *statutory* analysis and without any accepted *constitutional* analysis, declares that the Legislature acted outside the scope of its constitutional authority when it enacted 1999 PA 202 (the amendment). I humbly suggest that it is the majority opinion that has acted outside the scope of its authority, not the Legislature.

A. HISTORY OF THIS LITIGATION

In the words of George Santayana, "Those who cannot remember the past are condemned to repeat it." Santayana, *The Life of Reason* (New York: Charles Scribner's Sons, 1905), p 284.

This case and its predecessors, including *Neal v Dep't of Corrections*, 230 Mich App 202; 583 NW2d 249 (1998) (*Neal I*), and *Neal v Dep't of Corrections (On Rehearing)*, 232 Mich App 730; 592 NW2d 370 (1998) (*Neal II*), have a 20-year history. In 1998, this Court decided *Neal I*, 230 Mich App at 209-215, in which a majority held that prisons were not a place of public accommodation or a place of public service as defined by the ELCRA, MCL 37.2301(b). On rehearing, one judge

reversed her position, and the majority concluded that prisons are places of public service on the basis of the statutory definition of "public service," MCL 37.2301(b). *Neal II*, 232 Mich App at 735-736.[3] In response to a statement in *Neal II*, 232 Mich App at 740, that the Legislature did not explicitly exclude prisoners from the ELCRA, the Legislature passed the 1999 amendment to do just that. 1999 PA 202, enacting § 1. If that were not sufficient precedent to uphold the amendment, I note that a 2000 conflict panel of this Court gave the same advice to the Legislature in *Doe v Dep't of Corrections*, 240 Mich App 199, 201; 611 NW2d 1 (2000), stating that the Legislature should draft the statute to reflect its intent that the statute not apply to prisoners and prisons.

When viewed in its correct context, it is obvious that 1999 PA 202 clarified the definition of "public service" found in MCL 37.2301(b). The amendment was not meant to deprive any person of any rights guaranteed under our Constitution; it simply amended the definition of the term "public service."

In sum, the Legislature did exactly as two panels of this Court advised it to do. Today, the majority opinion rebukes the Legislature for heeding this Court's advice and declares 1999 PA 202 unconstitutional. Such an action by a panel of this Court is unprecedented in the

[3] I note that in *Neal II*, the majority opinion took a wrong turn at its discussion of the decision in *Pennsylvania Dep't of Corrections v Yeskey*, 524 US 206; 118 S Ct 1952; 141 L Ed 2d 215 (1998). See *Neal II*, 232 Mich App at 735-736. *Yeskey*, 524 US at 209-210, held that the definition of a "public entity" in the Americans with Disabilities Act of 1990, 42 USC 12131(1)(B), included state prisons and prisoners because the act contained no ambiguous exceptions that "cast the coverage of prisons into doubt." The ELCRA, on the other hand, does have such an exception, including the 1999 amendment as set forth in MCL 37.2301(b), which specifically excludes state or county correctional facilities and individuals serving sentences of imprisonment in those facilities.

history of this Court, especially when prisons do not provide a public service as that term is defined in Article 3 of the ELCRA.

B. STANDARD OF REVIEW

The majority opinion has set forth a constitutional barrier to the 1999 amendment and, unsurprisingly, determined that the legislation cannot surmount that barrier. The majority opinion fails to set forth a standard of review for its analysis of the 1999 amendment. Appellate courts cannot strike down a legislative enactment on the basis of a nonexistent standard of review.

A constitutional challenge to the validity of a statute can be brought in one of two ways, by either a facial challenge or an as-applied challenge. "The party challenging the constitutionality of the statute has the burden of proving the law's invalidity." *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 414-415; 878 NW2d 891 (2015) (quotation marks and citation omitted). The challenging party must overcome a heavy burden because "[s]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014) (quotation marks and citation omitted).

Plaintiffs do not address which type of challenge they bring to the 1999 amendment. At best, plaintiffs' allegation could be considered an as-applied challenge, meaning that the claimant has alleged " 'a present infringement or denial of a specific right or of a particular injury in process of actual execution' of government action." *Bonner v City of Brighton*, 495

Mich 209, 223 n 27; 848 NW2d 380 (2014), quoting *Village of Euclid, Ohio v Amber Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926). "The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Ada v Guam Society of Obstetricians & Gynecologists*, 506 US 1011, 1012 (1992) (Scalia, J., dissenting).

C. TRADITIONAL CONSTITUTIONAL ANALYSIS

"The Equal Protection Clauses of the United States and Michigan Constitutions provide that no person shall be denied the equal protection of the law." *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 551; 656 NW2d 215 (2002), citing US Const, Am XIV; Const 1963, art 1, § 2. "To comply with the Equal Protection Clause . . . , defendant is required to exercise equal treatment of similarly situated" individuals. *Lear Corp v Dep't of Treasury*, 299 Mich App 533, 538; 831 NW2d 255 (2013) (quotation marks and citation omitted). If the state has a "rational basis" for treating similarly situated individuals differently, the state action will survive a constitutional equal-protection challenge. See *id*. at 538-539. The rational-basis test applies only when the equal-protection challenge does not allege a claim based on a suspect classification, a fundamental right, or an intermediate classification, such as gender. *Phillips v Mirac, Inc*, 470 Mich 415, 432; 685 NW2d 174 (2004).

The majority declares that 1999 PA 202 must be struck down because Const 1963, art 1, § 2 contains a mandate. The constitutional provision upon which the majority relies to strike down the amendment states that the "legislature shall implement this section by *appropriate* legislation." Const 1963, art 1, § 2 (empha-

sis added). The majority opinion states that "the Legislature was constitutionally mandated to implement protection to *any* and *all* persons and lacked authority to exclude anyone," *ante* at 487-488, meaning that if any legislation treats any person differently than any other person, that legislation must be struck down as unconstitutional. Putting aside the question of what, if any, law would pass such a contrived test, I would simply state that the law provides that a party challenging the facial constitutionality of an act "must establish that *no set of circumstances exists under which the [a]ct would be valid*. The fact that the [act] *might* operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . ." *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987) (emphasis added).

The primary error of the majority opinion is its adoption of plaintiffs' assertion that prisoners and nonprisoners are similarly situated in all aspects of this case. "Resident inmates are obviously members of the public in a general sense," but "[t]he rights of . . . inmates are severely restricted while they are incarcerated." *Martin v Dep't of Corrections*, 424 Mich 553, 565; 384 NW2d 392 (1986) (CAVANAGH, J., dissenting). Prisoners and nonprisoners have never been similarly situated, are not currently similarly situated, and hopefully will never be similarly situated. That a rational basis exists for treating prisoners differently from free citizens is obvious.

I conclude that the 1999 amendment has a rational basis for its existence. In this regard, I concur with Judge RIORDAN's analysis in *Doe v Dep't of Corrections*, 312 Mich App 97, 134; 878 NW2d 293 (2015), vacated in part 499 Mich 886 (2016), that "the deterrence of

meritless lawsuits and the preservation of scarce resources through the reduction of costs associated with resolving those lawsuits" reflects a legitimate governmental interest. See *id*. at 134-136. Prisoners file a disproportionate number of lawsuits, and the cost to the state has skyrocketed. In one instance, a prisoner has filed 5,813 lawsuits and counting.[4] The Legislature recognized that including prisons in the definition of "public service," MCL 37.2301(b), is problematic. Prisoners could sue for the loss of their right to vote or for the loss of their Second Amendment right to carry a gun in prison. Therefore, a rational basis exists for excluding prisons from the definition of "public service" in Article 3 of the ELCRA.[5]

Even assuming prisoners are in some respects similarly situated to nonprisoners, the Legislature can make special provisions for prisoners based on their circumstances. In this case, plaintiffs make no allegations that certain prisoners were treated differently than other prisoners. As long as the Legislature does not discriminate within the unique class of individuals known as prisoners, no equal-protection violation occurs.

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[4] Haas, *Inmate has filed 5,813 lawsuits—and counting* <https://www.usatoday.com/story/news/nation/2014/08/14/inmate-has-filed-5813-lawsuits--and-counting/14092317/> (accessed March 26, 2018) [https://perma.cc/ZA43-DNGD].

[5] The unintended ramifications of the majority opinion are significant. The majority opinion allows prisoners, who are already the largest group of litigators in the state, to sue all state officials, including prosecutors, judges, the Governor, and all state officials acting in their official capacity, for ordinary decisions that these officials make each day. If a prisoner is not satisfied with a bond determination, a sentencing decision, or a prisoner classification, a prisoner can now sue for an Article 3 civil-rights violation, and the GTLA is inapplicable. Any and all decisions made by prosecutors, state officials, and judges will now be subject to prisoner lawsuits claiming a violation of their civil rights, including all judicial sentencing decisions and all prosecutorial charging decisions. The floodgates are now open.

Equal protection is not premised on an underlying independent right to a service or privilege; it prohibits invidious discrimination among potential recipients of benefits or rights after the decision has been made to establish the right. See *Arnett v Kennedy*, 416 US 134, 163; 94 S Ct 1633; 40 L Ed 2d 15 (1974). Even if we were to assume that the definition of "public service" in Article 3 of the ELCRA applies to prisons and prisoners, plaintiffs' complaint does not allege any invidious discrimination among potential recipients of any prison services. More importantly, it does not discriminate based upon a prisoner's status as a prisoner, but treats all prisoners the same and has a rational basis for its realistic goal.

D. LEGISLATIVE PREROGATIVE

Our Constitution provides that "[n]o person exercising powers of one branch [of government] shall exercise powers properly belonging to another branch . . . ." Const 1963, art 3, § 2. As I stated in my dissent in *Council of Organizations & Others for Ed About Parochiaid v Governor*, 216 Mich App 126, 135; 548 NW2d 909 (1996) (O'CONNELL, J., dissenting), "the judiciary has no legislative powers, and, thus, it cannot act as a 'super legislature' to sit in review of the policy choices made by coordinate branches of government acting within their respective spheres of authority." It is the Legislature that makes the laws. The Court's job is to interpret the law. In my opinion, the majority has encroached on the sphere of authority reserved to our Legislature, thereby violating the doctrine of separation of powers.

The scope or *purview* of a legislative act is reserved to the Legislature. This case is similar to *Will v Mich Dep't of State Police*, 491 US 58, 71; 109 S Ct 2304; 105

L Ed 2d 45 (1989), in which the United States Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under [42 USC] 1983." In rejecting the plaintiff's claim that the state and state officers were persons for the purpose of a 42 USC 1983 civil-rights action, the Supreme Court explained that the language of § 1983 did not signal clear congressional intent to subject the states to liability. *Id*. at 64-65.

In the present case, the Legislature is simply defining the scope of its own legislative enactment. I simply repeat what the Legislature has stated in the enabling act to the 1999 amendment: that prisons are not within the purview of "public service" as defined by Article 3 of the ELCRA. See 1999 PA 202, enacting § 1. The 1999 amendment's purpose was to define the scope of the term "public service," MCL 37.2301(b), consistently with the Legislature's task to define what "appropriate legislation" is, Const 1963, art 1, § 2. Article 3 of the ELCRA only applies to establishments that are "open to the public[.]" See MCL 37.2303. Furthermore, MCL 37.2302 includes the phrase "[e]xcept where permitted by law," thereby providing discretion to the Legislature to decide the scope of Article 3. When read in context, there is nothing unconstitutional in the language of 1999 PA 202.

The Legislature's intent was to state that those parts of prisons that do not deal with the public do not fall within the purview of Article 3 of the ELCRA's definition of "public service." The reason is simple—that part of prisons that houses prisoners does not provide a public service as defined in the act. Prisoners do not perform a public service; they do not deal with the public. Additionally, that part of prisons that houses prisoners was not intended to interact with the

public. In fact, it is just the opposite; prisoners by their own behaviors are a tremendous burden on society. Hence, prisoners do not fall within the purview of Article 3 of the ELCRA.

Plaintiffs claim that they are being denied the right of access to the courts. Plaintiffs cite *Furman v Georgia*, 408 US 238, 290; 92 S Ct 2726; 33 L Ed 2d 346 (1972) (BRENNAN, J., concurring), for the proposition that prisoners retain a fundamental "right of access to the courts." There is no doubt that access to the courts is a fundamental right, but the 1999 amendment's purpose was to define the scope of the term "public service," not to deny anyone access to the courts. This lawsuit is Exhibit One that plaintiffs have not been denied access to the courts.

Because the Legislature drafted the ELCRA, it can and should clearly define the scope of its own statutory enactment. Despite this, the majority not only usurps the prerogative that our Constitution grants the Legislature in this context of defining the scope of the amendment but then proceeds to strike down the Legislature's definition of the scope of "public service" in Article 3.

IV. PLAINTIFFS' FAILURE TO SET FORTH A COGNIZABLE CAUSE OF ACTION UNDER THE ELCRA

This case does not require this Court to declare an act of the Legislature unconstitutional. Courts must avoid constitutional issues if a case can be resolved on the basis of statutory interpretation. See *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 455; 688 NW2d 523 (2004). I believe this case can be resolved on statutory grounds. There is no need to interfere with the responsibilities of another branch of government.

A. WHAT THIS CASE IS NOT ABOUT

Before addressing the substance of plaintiffs' allegations, this Court has the responsibility of deciding whether plaintiffs' cause of action is cognizable under Article 3 of the ELCRA. Plaintiffs' sophisticated complaint is similar to a Gordian knot that must be unwound to fully understand the gravity of the allegations. Before engaging in an analysis of plaintiffs' allegations, for *clarification* purposes, it may be easier to state what principles are not involved in the present case.

First: Plaintiffs' complaint does not allege a constitutional tort. Our Supreme Court has defined a constitutional tort as an allegation "that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution . . . ." *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will*, 491 US 58. Plaintiffs do not allege a cause of action under Michigan's Equal Protection Clause, Const 1963, art 1, § 2. It should also be noted that had plaintiffs filed an action under Const 1963, art 1, § 2, plaintiffs would not be entitled to money damages. See *Sharp v Lansing*, 464 Mich 792, 800 n 9; 629 NW2d 873 (2001). Our Supreme Court has declined to infer a damages remedy from the Equal Protection Clause because the authority to allow money damages for an equal-protection violation belongs to the Legislature. *Lewis v Michigan*, 464 Mich 781, 786-789; 629 NW2d 868 (2001).

Second: Plaintiffs' complaint does not allege a cause of action under the United States Constitution's Equal Protection Clause, US Const, Am XIV. Nor do plaintiffs allege a constitutional claim under the Eighth Amendment of the United States Constitution. See *Carlton v Dep't of Corrections*, 215 Mich App 490, 502-504; 546 NW2d 671 (1996). Furthermore, the state and state

officials acting in their official capacity cannot be sued for monetary damages under 42 USC 1983. See *Will*, 491 US at 71. Also, states are immune "from suit in state and federal courts." *Ernst v Rising*, 427 F3d 351, 358 (CA 6, 2005).[6]

Third: Plaintiffs do not allege that the state defendants committed any traditional torts. To impose tort liability on a state official, the official must be "the proximate cause" of the injury, "meaning the one most immediate, efficient, and direct cause preceding an injury." *Robinson v Detroit*, 462 Mich 439, 458-459; 613 NW2d 307 (2000). Plaintiffs do not allege in their complaint that the named defendants, in their official capacity or in their individual capacity, committed any traditional torts.

Fourth: Plaintiffs do not allege that this case is an employment action under Article 2 of the ELCRA. Plaintiffs' complaint does a nice job of attempting to conflate an Article 2 employment cause of action with an Article 3 public service cause of action, but, suffice it to say, no Michigan cases have recognized such a conflated cause of action. The fact that prisons are a hostile environment, or as plaintiffs state, a sexually hostile

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[6] The Sixth Circuit neatly summarized the source and scope of sovereign immunity:

> From birth, the States and the Federal Government have possessed certain immunities from suit in state and federal courts. For the Federal Government, that immunity flows not from any one provision in the Constitution but is derived by implication from the nature of sovereignty itself. For the States, that immunity flows from the nature of sovereignty itself as well as the Tenth and Eleventh Amendments to the United States Constitution. The States' immunity from suits in federal court applies to claims against a State by citizens of the same State as well as to claims against a State by citizens of another State. The immunity also applies to actions against state officials sued in their official capacity for money damages. [*Ernst*, 427 F3d at 358 (quotation marks and citations omitted).]

prison environment, has never been recognized in a published case as an Article 3 cause of action.

Fifth: Plaintiffs do not allege that the ELCRA is coextensive with Michigan's equal-protection clause. The ELCRA is best described, in part, as a codification of the equal-protection clause but "broadened to include categories not covered under the constitution, such as age, sex, and marital status." *Neal II*, 232 Mich App at 739.[7] For this reason, the trial court's and plaintiffs' citation of *Mason v Granholm*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 23, 2007 (Case No. 05-73943), is misguided. *Mason*'s conclusion that the 1999 amendment was not curative is also wrong. The amendment's enacting section explicitly provides, in plain English, that the 1999 amendment "is curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision [*Neal II*]." 1999 PA 202, enacting § 1. The enacting section stated that the Legislature's "original intent . . . that an individual serving a sentence of imprisonment in a state or county correctional facility is not within the purview of this act." *Id*. Ironically, if they were coextensive, plaintiffs would not be entitled to monetary damages.

But, if plaintiffs can *artfully* allege a valid public-service claim under Article 3 of the ELCRA, they would be entitled to monetary damages. See *Hamed*, 490 Mich at 29 n 74. At issue in this case is whether such a cause of action exists under Michigan law and

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[7] Although *Neal II* stated that the ELCRA was coextensive with Michigan's Equal Protection Clause, *Neal II* quickly corrected itself to describe the ELCRA as a codification of the Equal Protection and Antidiscrimination Clauses that were broadened to include classifications not included in the Constitution. See *Neal II*, 232 Mich App at 739.

whether plaintiffs' complaint has set forth such a cause of action.[8]

B. SEXUALLY HOSTILE PRISON ENVIRONMENT

In their complaint, plaintiffs allege that defendants' "acts and omissions constitute sexual harassment and violate Plaintiffs' rights under the ELCRA. . . ." The ELCRA's definition of sexual harassment underscores a fatal flaw in plaintiffs' case. The ELCRA defines sexual harassment as follows:

> Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> (*i*) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
>
> (*ii*) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions

[8] In this regard, plaintiffs' attorneys are a creative lot. They are attempting to create causes of action that have never previously existed or been recognized by existing law. In my opinion, courts should act as gatekeepers and scrutinize these complaints to determine if the alleged (manufactured) constitutional torts (civil-rights torts) have any basis in law or fact or if they are subsumed by statutory claims. See *Mays v Governor*, 323 Mich App 1; 916 NW2d 227 (2018), and *Boler v Earley*, 865 F3d 391 (CA 6, 2017).

In the present case, alleging that prisons are a "sexually hostile prison environment" as a basis for a cause of action against state officials is nonsensical. Prisons house murderers, rapists, pedophiles, and individuals who have established that they cannot conform to society's minimum standards of behavior or accountability. Plaintiffs suggest that we reward *all* prisoners for their involuntary participation in "a sexually hostile prison environment." *No amount of governmental oversight can change prisons into a nonhostile environment*.

> affecting the individual's employment, public accommodations or public services, education, or housing.
>
> (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment. [MCL 37.2103(i).]

Nothing in plaintiffs' complaint alleges, either explicitly or implicitly, that a term or condition of plaintiffs' obtaining public services was contingent on them submitting to conduct or communication of a sexual nature. In addition, plaintiffs' complaint fails to allege that these state defendants committed any "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature," MCL 37.2103(i), in the provision of public services.

Moreover, the vast majority of *hostile-environment* civil-rights-act cases involve employment cases under Article 2 of the ELCRA. Plaintiffs have not cited a published *hostile-environment* case that involves a prison setting as it relates to the term "public services" as found in Article 3 of the ELCRA. No such case exists. I conclude that no reason exists to extend *hostile-environment* cases beyond employment cases. For that reason alone, plaintiffs' complaint fails to state a *hostile-environment* cause of action under Article 3 of the ELCRA.

If plaintiffs are correct, then every single prisoner in the state of Michigan can sue the state for being placed in a sexually hostile prison environment. I, for one, will not be the first judge to extend the hostile-environment line of cases to state prisons. That is a public policy question best left to the Legislature or to the Supreme Court.

C. AGE DISCRIMINATION

Plaintiffs allege that the state's customs and policies discriminated against youthful offenders, but, when read in context, plaintiffs' actual complaint is that the state defendants should have treated youthful offenders differently from nonyouthful offenders. The difficulty with such a cause of action is that Article 3 of the ELCRA does not impose any affirmative duties on these state defendants to draft new policies. The only duty imposed by Article 3 is that the state shall not discriminate when delivering public services. Plaintiffs' complaint is devoid of any allegations that the state or its officials affirmatively discriminated against these youthful offenders when delivering a public service. In short, plaintiffs want this Court to recognize an Article 3 cause of action for failing to treat prisoners differently.

Defendants cannot be liable under Article 3 of the ELCRA just because there may be a better way to achieve a goal or a better way to run a prison. No Michigan caselaw and no statutory language supports the concept that failure to institute different policies, customs, or practices can provide a basis for imposing liability on a governmental agency. See *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 184; 615 NW2d 702 (2000) (holding that the "highway exception" to governmental immunity does not impose a duty on the state or county road commissions "to install additional traffic signs or signals that might conceivably have made the intersection safer"). While, as in this case, a decision to adopt new policies, customs, or practices may be prudent and advisable, those decisions are best left to the executive or legislative branch. Article 3 of the ELCRA does not provide a cause of action for such a claim. The state defendants did not deny these plaintiffs

a public service on the basis of plaintiffs' age or other suspect classification or as a term or condition of getting a specific public service.

D. OTHER REMEDIES

It is important to note that plaintiffs would not be left without a remedy if this Court determined that their claims did not fall within the scope of Article 3 of the ELCRA. Youthful offenders and other prisoners have remedies under statutory enactments and other provisions of the Michigan Constitution, including the Equal Protection Clause, Const 1963, art 1, § 2. The Equal Protection Clause does not carry a damages remedy, however, because the authority to allow money damages for an equal-protection violation belongs to the Legislature.

To be candid, the hidden issue in this case is monetary damages. Plaintiffs have filed a claim in federal court, in part, alleging violations of 42 USC 1983. Plaintiffs' attorney admits that "monetary damages" are not available in federal court because "federal rules bar the collection of damages from the state or state agencies."[9] Hence, plaintiffs filed a duplicate action in state court, alleging a violation of Article 3 of the ELCRA. Plaintiffs' only avenue to collect monetary damages against the state or state agencies is to awkwardly attempt to fit their claim into an ELCRA action, but plaintiffs' cause of action does not fit into the strictures of an Article 3 civil-rights violation.

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[9] French, *Are Teen Prison Rapes a Violation of Civil Rights? A Michigan Court is About to Decide.*, Bridge Magazine, November 16, 2017, available at <http://www.bridgemi.com/children-families/are-teen-prison-rapes-violation-civil-rights-michigan-court-about-decide> (accessed March 26, 2018) [https://perma.cc/C48X-3XVT].

Plaintiffs allege egregious acts perpetrated against them by third parties that, if true, are significant and deserve remediation under the law. However, the remedy is not for this Court, based upon a visceral response, to reengineer the law to discard governmental immunity for state actors or to conclude that prisoners and nonprisoners are similarly situated for purposes of an equal-protection argument.

V. CONCLUSION

In essence, plaintiffs seek money damages against the state for failing to institute better safeguards in prison. But plaintiffs have not pleaded in avoidance of governmental immunity. Furthermore, this case can be decided on statutory grounds. There is no need to declare 1999 PA 202 unconstitutional. Even if I were to decide this case on constitutional grounds, plaintiffs make no claim that they were treated differently than a similarly situated class of prisoners. Prisoners and nonprisoners are not members of the same class for purposes of this lawsuit. Plaintiffs' actual claim is that the state should have discriminated in favor of youthful offenders. That claim is a policy decision for the executive branch or the legislative branch to resolve. Because of the separation-of-powers doctrine, courts should not be involved in the day-to-day operation of the duties or responsibilities of other branches of government.[10]

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[10] When the ELCRA was drafted by the Legislature in 1977, its central purpose was to define the term "civil rights" as it is applicable to the public. As such, the ELCRA sets the parameters and guidelines for eligible civil-rights claims that were not originally included in the Michigan Constitution.

In 1977, and again in 1999, the Legislature decided that prisons and prisoners are not within the scope of an Article 3 cause of action. It must

The truth of the matter is that prisons are a dangerous place. No matter what rules, customs, practices, or policies are instituted in state prisons, the state cannot prevent all misdeeds by perpetrators of criminal behavior. The majority's desire to cure all wrongs by eviscerating the doctrine of governmental immunity, while well-intentioned, is fraught with the law of unintended consequences. Depriving governmental officials of governmental immunity when making policy decisions, when making sentencing decisions, and when running the government would certainly cause most of us to rethink the traditional notion of public service.

For the reasons stated in this opinion, I would reverse the decision of the trial court and remand this case for further proceedings consistent with this opinion.

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be emphasized that prisoners are not entitled to the same freedoms as nonprisoners. I doubt if any prisoner would refer to his or her jail cell as a "public accommodation" in the same manner that a nonincarcerated individual refers to a stay at a Holiday Inn, or that any prisoner would claim that a prison is performing a *public service* by incarcerating him or her. I simply note that it is the Legislature that has the responsibility to define the scope of the ELCRA.

Plaintiffs can still bring a cause of action under Articles 1, 2, 4, 5, and 6 of the ELCRA. Plaintiffs are not being denied their civil right, as they claim, to bring a cause of action under the ELCRA. The issue in this case is very narrow. Simply stated, prisons and prisoners do not provide a *public service* as that term is defined by the Legislature in Article 3 of the ELCRA.

HARDENBERGH v DEPARTMENT OF TREASURY

Docket No. 337039. Submitted March 6, 2018, at Lansing. Decided March 27, 2018, at 9:10 a.m.

Lewis R. Hardenbergh, John T. Hardenbergh, Thomas R. Hardenbergh, and Dorothy R. Williamson (petitioners) appealed in the Michigan Tax Tribunal the decision of respondent, the Department of Treasury, to deny their request for a waiver of interest pursuant to MCL 211.7cc(8) of the General Property Tax Act (GPTA), MCL 211.1a *et seq*. Lewis owned land in Manistee, Michigan, and contiguous to his property was another parcel (the subject property) that had been owned by Lewis's mother but was transferred to petitioners after her death in 2006. Petitioners applied for a principal residence exemption (PRE) given that Lewis's property was contiguous to the subject property, although none of the petitioners intended to reside, or did reside, on the subject property. When Lewis requested PRE status for the subject property, the county assessor sought the guidance of the county equalization director, who informed the assessor that while the buildings on the land would not qualify for the PRE, the land itself would qualify for the PRE. Because the value of the buildings amounted to 15% of the total taxable value of the property, petitioners claimed, and they were granted, PRE status for 85% of the property. In November 2013, the Manistee County Treasurer determined that the subject property was not eligible for the PRE and denied the PRE for 2010 through 2013. The county issued petitioners a corrected tax bill that included interest. In February 2014, petitioners requested that respondent waive the interest, noting that they had followed the guidance that the assessor had received from the county director and that the assessor had followed the statutory requirements by submitting an affidavit that explained why the property had been allowed the 85% PRE. Respondent denied the interest waiver request. Petitioners appealed the denial to the Tribunal, alleging that the explanation submitted by the assessor outlined facts and circumstances that constituted an "other error" by the assessor pursuant to MCL 211.7cc(8). After a hearing, the Tribunal entered a Final Opinion and Order denying petitioners' interest

waiver request, reasoning that the phrase "other error" meant classification errors. Petitioners appealed.

The Court of Appeals *held*:

Under MCL 211.7cc(2), the GPTA allows a PRE in the instance that the property is owned and occupied as a principal residence; the owner of the property claims the exemption by filing an affidavit attesting that the owner of the property owns it and occupies it as the owner's principal residence. Under MCL 211.7cc(11), when a county denies a claimed PRE, the county treasurer issues a corrected tax bill including interest. However, under MCL 211.7cc(8), the Department of Treasury may waive the interest accrued in a corrected tax bill issued as a result of a rescinded PRE if the assessor of the local tax collecting unit files with the Department of Treasury a sworn affidavit stating that the tax set forth in the corrected tax bill is a result of the assessor's classification error or other error or the assessor's failure to rescind the exemption after the owner requested in writing that the exemption be rescinded. The GPTA does not define "other error." Turning to dictionary definitions, the phrase "other error" is a catch-all phrase that includes mistakes different than those specifically mentioned in the statute. Under the doctrine of *ejusdem generis*, courts will interpret a catch-all phrase to include only those things of the same type as the preceding specific list. In MCL 211.7cc(8), the preceding type of error listed is a "classification error," and the other type of error listed is a failure to submit an owner's paperwork rescinding the PRE. In both instances, the assessor has a duty to perform or take action under other statutory provisions. Considering that the types of actions listed include those for which a statutory duty exists requiring the assessor to take some action, the phrase "other error" is limited to include all other errors that an assessor may undertake through a statutory grant of authority. To interpret the phrase "other error" as broadly encompassing all errors would make the listed errors of MCL 211.7cc(8) mere surplusage and allow waiver of interest in those instances in which an assessor acted ultra vires. Accordingly, petitioners' broad interpretation is contrary to the legislative intent of the statute. An assessor's misinformation regarding a property owner's eligibility for the PRE is not the type of error that qualifies as an "other error" under MCL 211.7cc(8). The assessor does not have a statutory duty to advise taxpayers regarding their eligibility for a tax exemption or otherwise claim the exemption for a taxpayer; rather, MCL 211.7cc(2) expressly states that it is the taxpayer's duty to claim the exemption. Finally, the use of the word "may" in

MCL 211.7cc(8) indicates that the action is permissive, not mandatory. Accordingly, even if petitioners had established that the tax set forth in the corrected tax bill was a result of the assessor's "other error," respondent was still not required to waive the interest. The Tribunal did not commit an error of law by concluding that the error in this case did not qualify as an "other error" under MCL 211.7cc(8), and petitioners did not demonstrate entitlement to the relief requested.

Affirmed.

TAXATION — GENERAL PROPERTY TAX ACT — RESCINDED PRINCIPAL RESIDENCE EXEMPTIONS — WORDS AND PHRASES — "OTHER ERROR."

MCL 211.7cc(8) of the General Property Tax Act, MCL 211.1a *et seq.*, provides that the Department of Treasury may waive the interest accrued in a corrected tax bill issued as a result of a rescinded principal residence exemption if the assessor of the local tax collecting unit files with the Department of Treasury a sworn affidavit stating that the tax set forth in the corrected tax bill is a result of the assessor's classification error or other error or the assessor's failure to rescind the exemption after the owner requested in writing that the exemption be rescinded; because the types of actions listed in MCL 211.7cc(8) include those for which a statutory duty exists requiring the assessor to take some action, the phrase "other error" is limited to include all other errors that an assessor may undertake through a statutory grant of authority.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Matthew B. Hodges*, Assistant Attorney General, for respondent.

Mika Meyers PLC (by *James F. Scales*) for petitioners.

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

PER CURIAM. Petitioners appeal as of right the final judgment of the Michigan Tax Tribunal (the Tribunal) upholding the Department of Treasury's denial of petitioners' request for a waiver of interest under MCL 211.7cc(8). We affirm.

The principal facts are not in dispute. Since at least 2005, Lewis R. Hardenbergh has resided on land he owns in Manistee, Michigan. Contiguous to his property is another parcel (the subject property), measuring approximately four acres and including a cottage occupied by a caretaker of the property, a house, a log cabin, two garages, and three sheds. The subject property was owned by Lewis's mother, Flora, but upon her death in 2006, it transferred to her children, petitioners.

Upon acquiring the property in 2006, petitioners applied for a principal residence exemption (PRE) given that Lewis's property was contiguous to the subject property, although none of the petitioners intended to reside, or did reside, on the subject property. When Lewis requested PRE status for the subject property, David Meister, the county assessor, sought the guidance of the Manistee County Equalization Director. The director informed Meister that "the value attributable to the buildings on the Subject Property would not qualify for the PRE, but the land itself would qualify for the PRE." Because the value of the buildings amounted to 15% of the total taxable value of the property, petitioners claimed, and they were granted, PRE status for 85% of the property.

In November 2013, the Manistee County Treasurer determined that the subject property was not eligible for the PRE and, hence, denied the PRE for 2010 through 2013. The county issued petitioners a corrected tax bill for $80,384.94, including $20,231.06 in interest.

In February 2014, petitioners requested that respondent waive the interest, pursuant to MCL 211.7cc(8), which permits respondent to waive interest in the instance that the county assessor submits an

affidavit attesting to an error enumerated in the statute. In their request, petitioners noted that they had followed "the guidance [the assessor] received from the County Equalization Director in claiming an 85% PRE exemption [sic]." Pursuant to statutory requirements, Meister also submitted an affidavit requesting that respondent waive the interest and noting the reason why the subject property had been allowed the 85% PRE. Respondent denied the interest waiver request, stating, "Based on the information we received, it has been determined that insufficient documentation was submitted to show that an assessor's error occurred as required by MCL 211.7cc(8)."

Petitioners appealed respondent's denial of the interest waiver to the Tribunal.[1] In their petition, petitioners pleaded that "the explanation submitted by the Assessor outlined the facts and circumstances which . . . constitute an 'other error' by the Assessor pursuant to [MCL 211.7cc(8)]." Petitioners further asserted that respondent made no findings to support its determination denying the interest waiver and that its decision was arbitrary. In their request for relief, petitioners requested that the Tribunal reverse respondent's decision and order that "the waiver of penalty interest be granted . . . ." Respondent countered that the "error" made was not the type of error that MCL 211.7cc(8) contemplated and that petition-

[1] Petitioners filed a separate, earlier appeal of the county treasurer's decision to deny PRE status. The Tribunal determined that petitioners were not entitled to the tax exemption, and this Court affirmed, although it declined to address the "unpreserved argument relating to the waiver of interest based on 'qualified error' under MCL 211.7cc(8) . . . ." *Hardenbergh v Manistee Co*, unpublished per curiam opinion of the Court of Appeals, issued November 24, 2015 (Docket No. 322605), pp 8-9. The Michigan Supreme Court denied petitioners' application for leave to appeal. *Hardenbergh v Manistee Co*, 499 Mich 969 (2016).

ers' request to waive interest was based on equitable principles not contained in the statute.

After a hearing, the Tribunal entered a Final Opinion and Order denying petitioners' interest waiver request. It reasoned that "other errors" are those akin to classification errors and further noted that it was not entirely persuaded that the error at the heart of the case was made by the assessor. Petitioners now appeal.

On appeal, petitioners first argue that the Tribunal's interpretation of MCL 211.7cc(8) was erroneous. We disagree.

"Review of a decision by [the Tribunal] is very limited." *Drew v Cass Co*, 299 Mich App 495, 498; 830 NW2d 832 (2013). Unless fraud is alleged, this Court reviews the Tribunal's decision for a "misapplication of the law or adoption of a wrong principle." *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44, 49; 746 NW2d 282 (2008) (quotation marks and citation omitted). "The [T]ribunal's factual findings will not be disturbed as long as they are supported by competent, material, and substantial evidence on the whole record." *Drew*, 299 Mich App at 499 (quotation marks and citation omitted). "Substantial evidence" is "more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Leahy v Orion Twp*, 269 Mich App 527, 529-530; 711 NW2d 438 (2006) (quotation marks and citation omitted). Finally, this Court reviews de novo issues of statutory construction. *Drew*, 299 Mich App at 499.

"Michigan's principal residence exemption, also known as the 'homestead exemption,' is governed by §§ 7cc and 7dd of the General Property Tax Act [GPTA], MCL 211.7cc and MCL 211.7dd." *Drew*, 299

Mich App at 500 (quotation marks and citation omitted). The GPTA allows a PRE in the instance that the property is owned and occupied as a principal residence. MCL 211.7cc(2). The owner of the property claims the exemption by filing an affidavit attesting that the owner of the property owns it and occupies it as the owner's principal residence. MCL 211.7cc(2). The act also authorizes the county to audit claimed exemptions. MCL 211.7cc(10). In the instance the county denies a claimed PRE, the county treasurer issues a corrected tax bill including interest. MCL 211.7cc(11).

Under certain circumstances, the Department of Treasury may waive the interest accrued in a corrected tax bill issued as a result of a rescinded PRE. MCL 211.7cc(8) provides, in relevant part:

> The department of treasury *may* waive interest on any tax set forth in a corrected or supplemental tax bill for the current tax year and the immediately preceding 3 tax years *if the assessor of the local tax collecting unit files with the department of treasury a sworn affidavit* in a form prescribed by the department of treasury *stating that the tax set forth in the corrected or supplemental tax bill is a result of the assessor's classification error or other error or the assessor's failure to rescind the exemption after the owner requested in writing that the exemption be rescinded*. [Emphasis added.]

The central dispute in this case is the meaning of "other error" in MCL 211.7cc(8). No Michigan case has interpreted the meaning of this phrase and, indeed, the parties cite no such authority. This is thus an issue of first impression.

"While [this Court] recognize[s] that tax exemptions are strictly construed against the taxpayer because exemptions represent the antithesis of tax equality, we interpret statutory language according to common and

approved usage, unless such construction is inconsistent with the manifest intent of the Legislature." *Denton v Dep't of Treasury*, 317 Mich App 303, 309; 894 NW2d 694 (2016) (quotation marks and citation omitted). When construing statutory language, the Court's goal is to discern the Legislature's intent, the best indicator of which is the language used. See *Andrie Inc v Dep't of Treasury*, 496 Mich 161, 167; 853 NW2d 310 (2014). Further, language should be understood in its grammatical context and "effect should be given to every phrase, clause, and word in the statute." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). However, "[t]ax laws generally will not be extended in scope by implication or forced construction, and when there is doubt, tax laws are to be construed against the government." *LaBelle Mgt, Inc v Dep't of Treasury*, 315 Mich App 23, 29; 888 NW2d 260 (2016).

In this case, the GPTA does not define "other error." When a statute does not provide a definition, the Court may rely on the term's ordinary meaning as defined in a dictionary. *People v Crippen*, 242 Mich App 278, 283; 617 NW2d 760 (2000). An "error" is defined as "an act involving an unintentional deviation from truth or accuracy . . . [;] a mistake . . . [;] an instance of false belief . . . ." *Merriam-Webster's Collegiate Dictionary* (11th ed). The term "error" is qualified by the word "other," which is defined as "being the one or ones distinct from that or those first mentioned or implied . . . ." *Id*. In essence, then, the phrase "other error" is a catch-all phrase that includes mistakes different than those specifically mentioned in the statute.

The analysis, however, does not end here, because the phrase "other error" must be understood in the

context in which it is used and not in isolation. "A catch-all provision is usually inserted into a statute to ensure that the language that immediately precedes it does not inadvertently omit something that was meant to be included." *Sebring v City of Berkley*, 247 Mich App 666, 674; 637 NW2d 552 (2001). Under the doctrine of *ejusdem generis*, courts will interpret a catch-all phrase "to include only those things of the same type as the preceding specific list." *Id*.

Here, the preceding type of error listed is a classification error. The other type of error listed is a failure to submit an owner's paperwork rescinding the PRE. In both instances, the assessor has a duty to perform or take action under other statutory provisions. For example, under MCL 211.34c(1), local assessors have a duty to annually classify parcels of property for tax purposes, e.g., as residential, commercial, or agricultural. Similarly, MCL 211.7cc(4) and (5) require assessors to exempt principal residence property from collection of tax or otherwise rescind the exemption upon receipt of PRE rescission paperwork from the owner. Considering that the types of actions listed include those for which a statutory duty exists requiring the assessor to take some action, it is clear, applying the doctrine of *ejusdem generis*, that the phrase "other error" is limited to include all other errors that an assessor may undertake through a statutory grant of authority. Indeed, to interpret the phrase "other error" as broadly encompassing all errors, as petitioners suggest, would make the listed errors of MCL 211.7cc(8) mere surplusage and allow waiver of interest in those instances in which an assessor acted ultra vires. Given that the Legislature coupled the phrase "other error" with specific enumerated errors for which a statutory duty exists, thereby limiting the types of errors to those for which a statutory duty exists,

petitioners' broad interpretation is contrary to the legislative intent of the statute.

While petitioners' reliance on the assessor's advice was unfortunate, an assessor's misinformation regarding a property owner's eligibility for the PRE is not the type of error that qualifies as an "other error" under MCL 211.7cc(8). Nowhere do petitioners assert that an assessor has a statutory duty to advise taxpayers regarding their eligibility for a tax exemption or to otherwise claim the exemption for a taxpayer. In fact, it is expressly the taxpayer's duty to claim the exemption, MCL 211.7cc(2), which petitioners did. And, while petitioners attempt to categorize the error as a "classification" error, this argument shows that petitioners fundamentally misunderstand that it is a taxpayer's duty to claim and prove entitlement to an exemption, whereas it is an assessor's duty to categorize property into certain classifications for tax purposes, not to include exemptions. See MCL 211.34c. Stated differently, petitioners fail to recognize that "classification" has a particular legal meaning under the GPTA that does not include categorizing property as exempt.

Finally, MCL 211.7cc(8) provides that respondent *may* waive interest upon a proper showing as set forth in that subsection. Use of the word "may" indicates that an action is permissive, not mandatory. See, e.g., *In re Bail Bond Forfeiture*, 496 Mich 320, 328; 852 NW2d 747 (2014). Even if, however, petitioners had established that the tax set forth in the corrected tax bill was a result of the assessor's "other error," respondent was still not required to waive the interest. In sum, the Tribunal did not commit an error of law by concluding that the error in the instant case did not qualify as an "other error" under MCL 211.7cc(8), and petitioners did not demonstrate entitlement to the relief requested.

Petitioners next contend that the Tribunal erred by concluding that it lacked authority to rule on whether respondent correctly applied the statute because it "lacks equitable jurisdiction." Because petitioners, however, are not entitled to reversal, the question of relief and whether the Tribunal has the authority to order an equitable remedy is no longer relevant. We therefore decline to address this issue.

Affirmed.

SAWYER, P.J., and BORRELLO and SERVITTO, JJ., concurred.

PEOPLE v HEAD

Docket No. 334255. Submitted March 13, 2018, at Detroit. Decided March 27, 2018, at 9:15 a.m. Leave to appeal denied 503 Mich 918.

Christopher D. Head was convicted in the Wayne Circuit Court, Dana M. Hathaway, J., of involuntary manslaughter, MCL 750.321, second-degree child abuse, MCL 750.136b(3), felon in possession of a firearm, MCL 750.224f, possession of a short-barreled shotgun, MCL 750.224b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, following the fatal shooting of defendant's nine-year-old son, DH, by defendant's 10-year-old daughter, TH, in defendant's home. The involuntary-manslaughter charge against defendant was premised on his gross negligence in storing a loaded, short-barreled shotgun in a readily accessible location in his home where he allowed his children to play while unsupervised by an adult. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 25 to 50 years' imprisonment for the involuntary-manslaughter conviction, 10 to 50 years' imprisonment for the second-degree child abuse conviction, 5 to 50 years' imprisonment each for the convictions of felon in possession of a firearm and possession of a short-barreled shotgun, and two years' imprisonment for the felony-firearm conviction. Defendant appealed.

The Court of Appeals *held*:

1. To prove gross negligence, which is the requisite mental state for the type of involuntary manslaughter charged in this case, a prosecutor must show knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, the ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and the omission, i.e., failure, to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. In this case, there was sufficient evidence of defendant's gross negligence in connection with his involuntary-manslaughter conviction. The evidence demonstrated that defendant kept an illegal, loaded, short-barreled shotgun in an unlocked closet in his bedroom and that he

allowed his children to spend time in that bedroom while unsupervised. Both TH and DH had unsupervised access to the bedroom, and TH entered the bedroom while DH was playing a violent video game. TH suggested that she and DH act out the video game. TH retrieved the loaded shotgun from the closet and accidentally fired the gun, which led to DH's death. A rational trier of fact could find that defendant acted with gross negligence in allowing his children to have unsupervised access to a loaded shotgun. Defendant knew the situation required the exercise of ordinary care and diligence to avert injury—a loaded shotgun poses a danger to young children who are not being monitored by an adult. Defendant also had the ability to avoid the harm by exercising ordinary care and diligence—defendant could have taken actions to avoid the harm, such as removing the ammunition from the weapon or placing the weapon in a secure location where his children would not have access to it—but defendant failed to take those actions. Accordingly, there was sufficient evidence of gross negligence.

2. Causation is an element of involuntary manslaughter. Causation in the criminal context requires proof of factual and proximate causation. Factual causation exists if a finder of fact determines that "but for" defendant's conduct, the result would not have occurred. Proximate causation is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural. If the finder of fact determines that an intervening cause supersedes a defendant's conduct such that the causal link between the defendant's conduct and the victim's injury was broken, proximate cause is lacking and criminal liability cannot be imposed. In this case, it was beyond question that factual causation existed. But for defendant keeping a loaded shotgun in an unlocked closet of the bedroom where the children were playing without supervision, TH could not have obtained the weapon and accidentally shot DH. Proximate causation likewise existed. The result of defendant's conduct was not remote or unnatural; a child dying from an accidental gunshot was exactly the type of harm that could be expected from defendant's conduct of keeping a loaded weapon readily accessible in a room where young children were playing. TH's action of obtaining the weapon and accidentally firing it did not constitute an intervening cause that superseded defendant's conduct. Rather, TH's actions were reasonably foreseeable. Given that young children fail to appreciate the risks posed by loaded firearms, it was foreseeable that a child could accidentally fire a loaded weapon that was readily accessible in a room where the child was playing without super-

vision. Accordingly, there was sufficient evidence of causation regarding involuntary manslaughter.

3. To establish second-degree child abuse based on a reckless act, the prosecution must prove (1) that the defendant was a parent or a guardian of the child or had care or custody of or authority over the child, (2) that the defendant committed a reckless act, (3) that, as a result, the child suffered serious physical harm, and (4) that the child was under 18 years old at the time. Generally, determining whether an act was reckless is a jury question. It was undisputed that the first and fourth elements were met. The second element was met because there was evidence that defendant committed reckless acts by storing a loaded, short-barreled shotgun in his unlocked bedroom closet and then allowing his children to play in the room while unsupervised. Finally, the third element was satisfied because DH died from a gunshot wound to the head and causation was established.

4. Defense counsel affirmatively approved the trial court's jury instructions on involuntary manslaughter, and by expressly approving the jury instructions, defendant waived review of the alleged instructional error. However, even assuming the instructional issue was not waived, defendant's argument still lacked merit. Defendant asserted that the trial court essentially directed the jury to enter a verdict of guilty when the court stated or implied that defendant was the cause of DH's death. However, the trial court explicitly stated that the prosecutor was required to prove beyond a reasonable doubt the elements of involuntary manslaughter and followed M Crim JI 16.10 by reciting the alleged acts that the prosecutor had charged caused DH's death. The instruction did not in any manner direct a verdict on the issue of causation; the trial court did not state or imply that defendant's act had caused the death.

5. To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability exists that the outcome of the proceeding would have been different but for trial counsel's errors. Counsel is not ineffective for failing to advance a meritless position or make a futile motion. Defendant's claim of ineffective assistance of counsel was meritless. Defendant failed to preserve this issue by moving in the trial court for a new trial or an evidentiary hearing. Therefore, review of this issue was limited to mistakes that were apparent from the record. Defendant claimed that defense counsel was ineffective for failing to object to the involuntary-

manslaughter instruction; however, the involuntary-manslaughter instruction was not erroneous. Accordingly, defense counsel was not ineffective for failing to make a meritless objection.

6. A decision whether to admit photographs is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. MRE 402 provides that relevant evidence is generally admissible. MRE 403 provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Photographs may be used to corroborate a witness's testimony, and gruesomeness alone need not cause exclusion. In this case, defendant objected to admission of photographs on the basis of MRE 403, and the trial court overruled the objection, stating that the prejudicial nature of the photographs did not substantially outweigh their relevancy. The photographs admitted in this case corroborated testimony regarding the cause of the victim's death and the nature and extent of his fatal injuries. In addition, the photographs were helpful in establishing the mental state that the prosecutor was required to prove for some of the offenses. The nature and extent of DH's injuries revealed the powerful nature of the short-barreled shotgun and was thus probative of defendant's gross negligence and recklessness in storing a loaded, deadly weapon in a place that was readily accessible to his unsupervised children. Although some of the pictures may have been gruesome, their admission into evidence was useful in establishing the mental state that the prosecutor was required to prove, and gruesomeness alone did not require exclusion. The trial court did not abuse its discretion by admitting the photographs.

7. MCL 769.13 provides, in relevant part, that the prosecuting attorney may seek to enhance the defendant's sentence by filing a written notice of intent within a certain period of time. MCL 769.13 also provides that the notice of intent must be filed with the court and served upon the defendant or his or her attorney; the notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings, and the prosecuting attorney must file a written proof of service with the clerk of the court. MCR 6.112(F) provides that a notice of intent to seek an enhanced sentence pursuant to MCL 769.13

must list the prior convictions that may be relied upon for purposes of sentence enhancement and must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived or eliminated as allowed under MCR 6.113(E), within 21 days after the filing of the information charging the underlying offense. In this case, defendant argued that he was entitled to resentencing because the prosecutor failed to file a proof of service of the fourth-offense habitual offender notice and because he was not properly served with the notice. The prosecutor failed to file a proof of service of the notice of intent to enhance defendant's sentence; however, the error was harmless because defendant had actual notice of the prosecutor's intent to seek an enhanced sentence and defendant was not prejudiced in his ability to respond to the habitual-offender notification. The charging documents in the lower court file all apprised defendant of his fourth-offense habitual-offender status. Moreover, defendant received actual notice on the record at the preliminary examination that he was being charged as a fourth-offense habitual offender. Finally, defendant was not prejudiced by the prosecutor's failure to sign the original felony information and therefore could not establish entitlement to resentencing on that basis.

Affirmed.

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

Ronald D. Ambrose for defendant.

Before: GLEICHER, P.J., and BOONSTRA and TUKEL, JJ.

PER CURIAM. Defendant appeals as of right his jury trial convictions of involuntary manslaughter, MCL 750.321, second-degree child abuse, MCL 750.136b(3), felon in possession of a firearm, MCL 750.224f, possession of a short-barreled shotgun, MCL 750.224b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was

sentenced as a fourth-offense habitual offender, MCL 769.12, to 25 to 50 years' imprisonment for the involuntary-manslaughter conviction, 10 to 50 years' imprisonment for the second-degree child abuse conviction, 5 to 50 years' imprisonment each for the convictions of felon in possession of a firearm and possession of a short-barreled shotgun, and two years' imprisonment for the felony-firearm conviction. We affirm.

This case arises out of the fatal shooting of defendant's nine-year-old son, DH, by defendant's 10-year-old daughter, TH, on November 9, 2015, in defendant's home. The involuntary-manslaughter charge against defendant was premised on his gross negligence in storing a loaded, short-barreled shotgun in a readily accessible location in his home where he allowed his children to play while unsupervised by an adult.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support his convictions of involuntary manslaughter and second-degree child abuse. We disagree.

To determine whether there was sufficient evidence to support a conviction, this Court reviews the evidence de novo, in the light most favorable to the prosecutor, to determine whether a rational trier of fact could have found that the essential elements of the offense were proved beyond a reasonable doubt. *People v Odom*, 276 Mich App 407, 418; 740 NW2d 557 (2007). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "All conflicts in the evidence must be resolved in favor of the prosecution."

Id. "Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

"Manslaughter is murder without malice." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). "The common law recognizes two forms of manslaughter: voluntary and involuntary." *Id*. at 535. Involuntary manslaughter is a catch-all crime that encompasses all homicides that do not constitute murder, voluntary manslaughter, or a justified or excused homicide. *People v Holtschlag*, 471 Mich 1, 7; 684 NW2d 730 (2004). The requisite mental state for the type of involuntary manslaughter charged in this case is gross negligence. See *id*. at 16-17. Gross negligence means wantonness and disregard of the consequences that may ensue. *People v Feezel*, 486 Mich 184, 195; 783 NW2d 67 (2010). Wantonness exists when the defendant is aware of the risks but indifferent to the results; it constitutes a higher degree of culpability than recklessness. *Id*. at 196. To prove gross negligence, a prosecutor must show:

> "(1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another.
>
> (2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.
>
> (3) The omission [i.e., failure] to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another." [*People v McCoy*, 223 Mich App 500, 503; 566 NW2d 667 (1997) (citation omitted).]

Causation is an element of involuntary manslaughter. *People v Tims*, 449 Mich 83, 94; 534 NW2d 675 (1995). Causation in the criminal context requires proof of factual causation and proximate causation.

Feezel, 486 Mich at 194. "Factual causation exists if a finder of fact determines that 'but for' defendant's conduct the result would not have occurred." *Id*. at 194-195. Proximate causation, on the other hand,

> is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural. If the finder of fact determines that an intervening cause supersedes a defendant's conduct such that the causal link between the defendant's conduct and the victim's injury was broken, proximate cause is lacking and criminal liability cannot be imposed. Whether an intervening cause supersedes a defendant's conduct is a question of reasonable foreseeability. [*Id*. at 195 (quotation marks and citations omitted).]

Defendant argues that there was insufficient evidence of gross negligence in connection with his involuntary-manslaughter conviction. We disagree. The evidence demonstrates that defendant kept an illegal, loaded, short-barreled shotgun in an unlocked closet in his bedroom. He allowed his children to spend time in that bedroom while unsupervised. In particular, defendant allowed his nine-year-old son, DH, to play a violent video game in that bedroom while unsupervised. Defendant's 10-year-old daughter, TH, likewise had unsupervised access to defendant's bedroom and entered that bedroom while DH was playing the video game. TH then suggested that she and DH act out the video game. She retrieved the loaded shotgun from the closet and accidentally fired the gun, which led to DH's death. A rational trier of fact could find that defendant acted with gross negligence in allowing his children to have unsupervised access to a loaded shotgun. Defendant knew the situation required the exercise of ordinary care and diligence to avert injury. It goes without saying that a loaded

shotgun poses a danger to young children who are not being monitored by an adult. Defendant had the ability to avoid the harm by exercising ordinary care and diligence. Setting aside the fact that it was illegal for him to possess the weapon, as he was a convicted felon, and the fact that the weapon itself was an illegal short-barreled shotgun, defendant could have taken other actions—short of giving up his illegal possession of the gun—to avoid the harm, such as removing the ammunition from the weapon or placing it in a secure location where his children would not have had access to it. By allowing his young children to play unsupervised in a room where he kept a loaded, readily accessible shotgun, defendant failed to use the requisite care and diligence; he failed to avert a threatened danger where the result was likely to prove disastrous to his children. Therefore, we conclude that there was sufficient evidence of gross negligence.

Defendant's challenge to the causation element is equally devoid of merit. It is beyond question that factual causation exists. But for defendant keeping a loaded shotgun in an unlocked closet of the bedroom where the children were playing without supervision, TH could not have obtained the weapon and accidentally shot DH. Proximate causation likewise exists. The result of defendant's conduct was not remote or unnatural. A child dying from an accidental gunshot is exactly the type of harm that is to be expected from defendant's conduct of keeping a loaded weapon readily accessible in a room where young children were playing. Nor does TH's action of obtaining the weapon and accidentally firing it constitute an intervening cause that superseded defendant's conduct. Rather, TH's actions were reasonably foreseeable. Given that young children fail to appreciate the risks posed by loaded firearms in the same way that adults should, it

is foreseeable that a child could accidentally fire a loaded weapon that was readily accessible in a room where the child was playing without supervision. Although some testimony suggested that defendant told the children not to touch the weapon or to go into the closet and that TH was ordinarily an obedient child, it is far from uncommon for a 10-year-old child to fail to comply with a parent's instructions, and it was for the trier of fact to assess the weight of the evidence and the credibility of witnesses. *Kanaan*, 278 Mich App at 619. Accordingly, there was sufficient evidence of causation regarding involuntary manslaughter.

There also was sufficient evidence of second-degree child abuse. Under MCL 750.136b(3), a person is guilty of second-degree child abuse if any of the following apply:

> (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.
>
> (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
>
> (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

This Court has recently explained:

> To establish second-degree child abuse based on a reckless act, the prosecution must prove (1) that the defendant was a parent or a guardian of the child or had care or custody of or authority over the child, (2) that the defendant committed a reckless act, (3) that, as a result, the child suffered serious physical harm, and (4) that the child was under 18 years old at the time. Generally, determining

> whether an act was reckless is a jury question. [*People v Murphy*, 321 Mich App 355, 360; 910 NW2d 374 (2017) (citation omitted).]

Defendant does not challenge the first and fourth elements, i.e., it is undisputed that defendant was DH's father and that DH was under 18 years old. The second element is satisfied because there was evidence that defendant committed a reckless act. "[I]n order to constitute a 'reckless act' under the statute, the defendant must do something and do it recklessly. Simply failing to take an action does not constitute an act." *Id*. at 361. Defendant committed reckless acts by storing a loaded, short-barreled shotgun in his unlocked bedroom closet and then allowing his children to play in the room while unsupervised. Contrary to defendant's argument, the present case is nothing like *Murphy*, in which this Court held that the prosecutor presented no evidence of an affirmative act by the defendant that led to the child's death but instead presented evidence only of the defendant's inaction, i.e., failing to clean her house to ensure that morphine pills were not in reach of the child. *Id*. The key evidence here consisted not only of defendant's inaction but of his *affirmative* acts of storing a loaded shotgun in an unlocked closet of defendant's bedroom and allowing his children to play in that bedroom while unsupervised. Moreover, defendant knowingly and intentionally committed an act that was likely to cause serious physical harm to a child because defendant stored a loaded, illegal, short-barreled shotgun in a readily accessible location where he allowed his young children to play while unsupervised. Finally, the third element is satisfied because DH died from a gunshot wound to the head, and causation was established for the reasons discussed earlier with respect to the involuntary-manslaughter charge.

II. JURY INSTRUCTIONS

Defendant next argues that the trial court's jury instruction on involuntary manslaughter was erroneous. However, defense counsel affirmatively approved the trial court's instructions. By expressly approving the jury instructions, defendant waived review of the alleged instructional error. See *People v Kowalski*, 489 Mich 488, 504; 803 NW2d 200 (2011). Waiver extinguishes any error, meaning that there is no error to review. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Even assuming the instructional issue was not waived, defendant's argument would still lack merit. The issue is unpreserved because defendant did not object to the jury instruction. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Unpreserved issues are reviewed for plain error affecting a defendant's substantial rights. *Kowalski*, 489 Mich at 505, citing *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

"A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000) (quotation marks and citation omitted). "Jury instructions must clearly present the case and the applicable law to the jury. The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005) (citation omitted). "[A]n imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights." *Kowalski*, 489 Mich at 501-502.

Defendant contends that the trial court essentially

directed the jury to enter a verdict of guilty when the court stated or implied that defendant was the cause of DH's death. Defendant is mistaken. At the beginning of its instruction on involuntary manslaughter, the trial court explicitly stated that the prosecutor was required to prove beyond a reasonable doubt the elements that the trial court then stated. In listing the causation element, the trial court followed M Crim JI 16.10 by reciting the alleged acts that the prosecutor had charged caused DH's death. The instruction did not in any manner direct a verdict on the issue of causation; the trial court did not state or imply that defendant's act had caused the death. On the contrary, the trial court plainly stated at the outset that the prosecutor was required to prove beyond a reasonable doubt the elements that the trial court then listed, including the element of causation.

Moreover, at trial, neither of the parties took the instructions to mean what defendant now argues they meant—that the prosecution was thereby relieved of the burden of proving causation for DH's death. Defendant's attorney argued during closing arguments, after the involuntary-manslaughter instruction was read to the jury, that the evidence showed that DH died as a result of a "terrible accident," which defendant did not cause. On the other side, the prosecutor argued that the evidence proved that defendant caused DH's death; the prosecutor did not mention or imply that the jury could simply assume causation or that the instruction relieved him of the burden of proving causation. Thus, defendant's contention that the trial court erred in instructing the jury on involuntary manslaughter is devoid of merit.

Defendant's related claim of ineffective assistance of counsel is likewise meritless. Defendant failed to pre-

serve this issue by moving in the trial court for a new trial or an evidentiary hearing. See *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). This Court's review of the issue is therefore limited to mistakes that are apparent from the record. *Id*. Whether a defendant was deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *Id*. Any findings of fact are reviewed for clear error, while the legal questions are reviewed de novo. *Id*.

"To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability [exists] that the outcome of the proceeding would have been different but for trial counsel's errors." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). "[E]ffective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Schrauben*, 314 Mich App 181, 190; 886 NW2d 173 (2016). "Counsel is not ineffective for failing to advance a meritless position or make a futile motion." *People v Henry (After Remand)*, 305 Mich App 127, 141; 854 NW2d 114 (2014). Defendant claims that defense counsel was ineffective for failing to object to the involuntary-manslaughter instruction. As discussed, however, the involuntary-manslaughter instruction was not erroneous. Hence, defense counsel was not ineffective for failing to make a meritless or futile objection. *Id*.

III. ADMISSION OF PHOTOGRAPHS

Defendant next argues that the trial court abused its discretion by admitting gruesome photographs. We disagree. "A decision whether to admit photographs is within the sound discretion of the trial court and will

not be disturbed on appeal absent an abuse of discretion." *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009).

Relevant evidence is generally admissible. MRE 402. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. MRE 403 provides:

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

At trial, defendant objected to the admission of the photographs on the basis of MRE 403. The trial court overruled the objection, stating that although the evidence may be prejudicial, the prejudicial nature of the evidence did not substantially outweigh its relevancy, i.e., its probative value.

"In reviewing the trial court's decision for an abuse of discretion, the appellate court must view the evidence in the light most favorable to its proponent, giving 'the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.' " *United States v Moore*, 917 F2d 215, 233 (CA 6, 1990) (citation omitted).[1] "[T]he draftsmen intended that the trial judge be given very substantial discretion in 'balancing' probative value on the one hand and 'unfair prejudice' on the other, and that the trial judge should

[1] The opinions of lower federal courts are not binding on this Court, but those opinions may be considered for their persuasive value. See *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). Reliance on federal authority is particularly appropriate here because the text of FRE 403 and MRE 403 is nearly identical.

not be reversed simply because an appellate court believes it would have decided the matter otherwise." *Id*. (citation, brackets, and some quotation marks omitted).

We find no abuse of discretion by the trial court. All relevant evidence is prejudicial to some extent. Exclusion is required under MRE 403 only when the danger of unfair prejudice substantially outweighs the probative value of the evidence. See *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Thus, "[p]hotographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403." *Gayheart*, 285 Mich App at 227, citing *People v Unger*, 278 Mich App 210, 257; 749 NW2d 272 (2008). Consequently,

> photographs that are merely calculated to arouse the sympathies or prejudices of the jury should not be admitted. However, if a photograph is otherwise admissible for a proper purpose, it is not rendered inadmissible merely because it brings vividly to the jurors the details of a gruesome or shocking accident or crime. [*People v Howard*, 226 Mich App 528, 549-550; 575 NW2d 16 (1997) (citation omitted).]

" 'Photographs may . . . be used to corroborate a witness'[s] testimony,' and '[g]ruesomeness alone need not cause exclusion.' " *Unger*, 278 Mich App at 257, quoting *Mills*, 450 Mich at 76 (second alteration in original). Photographs depicting the nature and extent of a victim's injuries may be probative of the defendant's mental state. *Gayheart*, 285 Mich App at 227. Photographs also may be admitted to explain or corroborate testimony about the cause of the victim's death. *Id*.

As in *Gayheart*, the photographs admitted in this case corroborated testimony regarding the cause of the victim's death and the nature and extent of his fatal

injuries. See *id*. In addition, the photographs were helpful in establishing the mental state that the prosecutor was required to prove for some of the offenses. The nature and extent of DH's injuries revealed the powerful nature of the short-barreled shotgun and were thus probative of defendant's gross negligence and recklessness in storing this loaded, deadly weapon in a place that was readily accessible to his unsupervised children. Although some of the pictures may appear gruesome, their admission into evidence was useful in establishing the mental state that the prosecutor was required to prove, and gruesomeness alone does not require exclusion. *Unger*, 278 Mich App at 257. In addition, the jury acquitted defendant of the charge of second-degree murder, the most serious charge, so it does not appear that the jury made its decision on the basis of an unfair emotional response. Accordingly, the trial court did not abuse its discretion by admitting the photographs into evidence.

IV. HABITUAL-OFFENDER NOTICE

Finally, defendant contends that he is entitled to resentencing because the prosecutor failed to file a proof of service of the fourth-offense habitual-offender notice; defendant also suggests that he was not properly served with the notice. We disagree. This issue is reviewed de novo as a question of law because it involves the interpretation and application of statutory provisions and court rules. See *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017); *People v Hornsby*, 251 Mich App 462, 469; 650 NW2d 700 (2002). Unambiguous language in a statute or court rule is enforced as written. *Comer*, 500 Mich at 287.

MCL 769.13 provides, in relevant part:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under [MCL 769.10, MCL 769.11, or MCL 769.12], by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.
>
> (2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.

Likewise, MCR 6.112(F) provides:

> A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived or eliminated as allowed under MCR 6.113(E), within 21 days after the filing of the information charging the underlying offense.

The purpose of the notice requirement " 'is to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense.' " *People v Morales*, 240 Mich App 571, 582; 618 NW2d 10 (2000) (citation omitted). The failure to file a proof of service of the notice of intent to enhance the defen-

dant's sentence may be harmless if the defendant received the notice of the prosecutor's intent to seek an enhanced sentence and the defendant was not prejudiced in his ability to respond to the habitual-offender notification. *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999).

In this case, defendant is correct that the prosecutor failed to file a proof of service of the notice of intent to enhance defendant's sentence. However, the error is harmless because defendant had actual notice of the prosecutor's intent to seek an enhanced sentence and defendant was not prejudiced in his ability to respond to the habitual-offender notification.

In particular, the charging documents in the lower court file all apprised defendant of his fourth-offense habitual-offender status. Although defendant vaguely asserts that the habitual-offender notice was not properly "served" on defendant or defense counsel, defendant does not specify what he means by this. Defendant does not claim that he and defense counsel never received a copy of the charging documents. Moreover, defendant received actual notice on the record at the preliminary examination that he was being charged as a fourth-offense habitual offender. At the arraignment on the information, defendant waived a formal reading of the information, as permitted by MCR 6.113(B). There was no indication at the arraignment hearing that defendant or his attorney had not received a copy of the felony information. Indeed, MCR 6.113(B) required the prosecutor to give defendant a copy of the felony information, which in this case included the habitual-offender notice. Defendant does not assert that the prosecutor failed to comply with that provision. Because defendant had access to the charging documents, he had notice of the

charges against him, including the habitual offender enhancement, and he also was informed of the habitual-offender enhancement at the preliminary examination.

The conclusion that defendant was not prejudiced and that he received actual notice of the habitual-offender enhancement is further supported by the fact that defendant and defense counsel exhibited no surprise at sentencing when defendant was sentenced as a fourth-offense habitual offender. Also, the fact that the prosecutor was seeking to enhance defendant's sentence as a fourth-offense habitual offender was acknowledged on the record by defendant and defense counsel at a pretrial hearing during the discussion of the prosecutor's final plea offer. Defendant has not asserted in the trial court or on appeal that he had any viable challenge to his fourth-offense habitual-offender status. On the facts of this case, the prosecutor's failure to file a proof of service constituted a harmless error that does not require resentencing.

Defendant notes that the original felony information in the lower court file was unsigned. However, the complaint, which also contained the fourth-offense habitual-offender enhancement notice and which is in the lower court file, was signed, and an amended felony information containing the fourth-offense habitual-offender enhancement notice that was filed shortly before trial was signed. Although a prosecutor must sign the felony information, see MCR 6.112(D), the court rule does not state that the prosecutor must sign the habitual-offender notice, see MCR 6.112(F). Moreover, defendant does not explain how he was prejudiced by the prosecutor's failure to sign the original

felony information. He has thus failed to establish entitlement to resentencing on this basis.

Defendant also asserts that the habitual-offender notice did not indicate that defendant would be subject to a 25-year mandatory minimum sentence.[2] Defendant cites no authority establishing that he was entitled to notification of this mandatory minimum sentence. Defendant has thus failed to properly present this aspect of the issue for appellate review. *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *Id*. at 640-641. The original felony information apprised defendant that he faced a possible sentence of life imprisonment if convicted as a fourth-offense habitual offender, thus conveying the seriousness of the charges he faced. Moreover, defendant was informed before trial that he faced the possibility of a 25-year mandatory minimum sentence. The amended felony information contained the phrase "MANDATORY 25 YEAR SENTENCE" in the fourth-offense habitual-offender notice section. Also, at a pretrial hearing in which defendant rejected a plea offer from the prosecutor, defendant was expressly informed on the record that he faced a 25-year mandatory minimum sentence if convicted as a fourth-offense habitual offender. Therefore, although defendant cites no authority establishing that he was required to be informed of the 25-year mandatory

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[2] See MCL 769.12(1)(a) ("If the subsequent felony is a serious crime or a conspiracy to commit a serious crime, and 1 or more of the prior felony convictions are listed prior felonies, the court shall sentence the person to imprisonment for not less than 25 years.").

minimum sentence, he in fact was informed of it before trial, including when he chose to reject the prosecutor's final plea offer. As a result, defendant's argument lacks merit.

Affirmed.

GLEICHER, P.J., and BOONSTRA and TUKEL, JJ., concurred.

In re GORDON

Docket No. 335582. Submitted February 7, 2018, at Lansing. Decided February 13, 2018. Approved for publication April 3, 2018, at 9:00 a.m.

The Department of Licensing and Regulatory Affairs (LARA) filed an administrative complaint against Julian M. Gordon, Ph.D., asserting that he violated MCL 333.16221(a) (negligence), (b)(*i*) (incompetence), (b)(*vi*) (lack of good moral character), and (h) (violating or aiding and abetting in violation of Article 15 of the Public Health Code, MCL 333.1101 *et seq*., or a rule promulgated under Article 15), and former Mich Admin Code R 338.2515(b) (multiple relationships with a current or former patient) and (g) (psychologist soliciting or engaging in a sexual relationship with a former patient within two years after termination of the treatment or professional relationship). Respondent's psychologist license was revoked in 1999 after he was convicted of multiple counts of criminal sexual conduct. Respondent's license was reinstated in 2011 with certain conditions, including work supervision for a one-year probationary period. While working at Nardin Park Recovery Center as a counselor under the supervision of Dr. Willy Scott, respondent treated AE for substance abuse from 2011 through December 29, 2012, when AE voluntarily left the center to seek treatment elsewhere. Petitioner asserted that respondent allowed AE to move into his home in 2012 and that respondent had initiated a physical relationship with AE. Respondent admitted that AE lived with him beginning in November 2012 but asserted that he was forced into the arrangement because of physical threats by AE. In 2014, respondent obtained a personal protection order (PPO) against AE after AE stabbed respondent, allegedly in response to respondent attempting to touch AE's penis. At the administrative hearing, petitioner withdrew the charge related to former Rule 388.2515(g) given that AE was a necessary witness for the charge and it was not certain whether AE would appear. Instead, petitioner limited the evidence to whether respondent had improperly allowed AE to live with him. The administrative law judge (ALJ) issued a proposal for decision, recommending that the Board of Psychology Disciplinary Subcommittee dismiss the administrative complaint, rea-

soning that petitioner had failed to establish any of the allegations by a preponderance of the evidence. The ALJ found that AE forcibly stayed with respondent, that respondent had informed his supervisor of the situation, and that there were ongoing episodes in which AE threatened respondent. The disciplinary subcommittee rejected the ALJ's findings and concluded that respondent violated MCL 333.16221(b)(*i*) when he voluntarily allowed AE, a patient, to live in his home. Respondent appealed.

The Court of Appeals *held*:

1. Under Const 1963, art 6, § 28, rulings by disciplinary subcommittees of regulated professions are reviewed on appeal to determine whether the subcommittee's decision was supported by competent, material, and substantial evidence on the whole record. A reviewing court may not set aside findings merely because alternative findings could have been supported by substantial evidence on the record. The disciplinary subcommittee's finding that AE's threatening behavior began in November 2013—after AE was already living with respondent—was supported by competent, material, and substantial evidence on the whole record. Although other evidence supported respondent's assertion that the threatening behavior coincided with AE moving into his home, respondent attested in the PPO that the threats began in November 2013, and the subcommittee's findings were entitled to deference in the credibility determination. The disciplinary subcommittee's finding that respondent failed to communicate to his supervisor that AE was threatening him was also supported by competent, material, and substantial evidence on the whole record; given the conflicting evidence presented, the subcommittee's credibility determinations were entitled to deference.

2. MCL 333.16221(b)(*i*) provides that the disciplinary subcommittee shall proceed with sanctions under MCL 333.16226 if it finds that a health-profession licensee is personally disqualified because of incompetence. Under MCL 333.16106(1), the term "incompetence" means a departure from, or failure to conform to, minimal standards of acceptable and prevailing practice for a health profession, whether or not actual injury to an individual occurs. In a disciplinary subcommittee hearing regulating professional licenses, it is unnecessary to establish the applicable standard of care and to demonstrate that the professional breached that standard when the lack of professional care is so manifest that it would be within the common knowledge and experience of the ordinary layperson that the conduct was careless and not conformable to the standards of professional practice

and care employed in the community. The standard of practice for a psychologist was appropriately applied in this case. While respondent testified that he was employed as a counselor at the center, he also testified that he practiced as a psychologist at the center and he was supervised for his practice as a psychologist to fulfill his licensing requirements. Petitioner did not err by failing to establish the standard of practice for a psychologist to measure whether respondent's actions constituted "incompetence" under MCL 333.16221(b)(*i*). Respondent's act of allowing AE to live with him was so lacking in professional care that it was within the common knowledge and experience of the ordinary layperson that the conduct failed to meet minimal standards of acceptable and prevailing practice for a psychologist. Regardless, respondent admitted at the hearing that voluntarily allowing a patient to reside with a psychologist would fall below a minimal standard of acceptable practice for a psychologist.

3. Respondent was not denied a fair hearing when he was unable to confront AE at the hearing. Because petitioner was unsure whether AE would attend the hearing, petitioner removed all allegations from the complaint regarding a sexual relationship between respondent and AE and limited the hearing to whether respondent had allowed AE to live in his home. The disciplinary subcommittee based its findings on respondent's testimony, statements made by respondent to other people regarding the living situation, and documents signed by respondent regarding the PPO and AE's attack, not on statements made by AE. Respondent failed to show that AE's absence from the hearing limited his ability to present relevant evidence or prevented him from exploring any issue.

Affirmed.

REGULATED PROFESSIONS — LICENSEES — STANDARD OF CARE — INCOMPETENCE — EVIDENCE.

MCL 333.16221(b)(*i*) provides that the disciplinary subcommittee of regulated professions shall proceed with sanctions under MCL 333.16226 if it finds that a health-profession licensee is personally disqualified because of incompetence; under MCL 333.16106(1), the term "incompetence" means a departure from, or failure to conform to, minimal standards of acceptable and prevailing practice for a health profession, whether or not actual injury to an individual occurs; in a disciplinary subcommittee hearing regulating professional licenses, it is unnecessary to establish the applicable standard of care and to demonstrate that the professional breached that standard when the lack of profes-

> sional care is so manifest that it would be within the common knowledge and experience of the ordinary layperson that the conduct was careless and not conformable to the standards of professional practice and care employed in the community.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Bridget K. Smith*, Assistant Attorney General, for petitioner.

Chapman Law Group (by *Ronald W. Chapman II* and *Aaron J. Kemp*) for respondent.

Before: RONAYNE KRAUSE, P.J., and FORT HOOD and O'BRIEN, JJ.

PER CURIAM. Respondent, Julian M. Gordon, appeals as of right the final order issued by petitioner, the Department of Licensing and Regulatory Affairs' Board of Psychology Disciplinary Subcommittee, which found that respondent, a psychologist, violated MCL 333.16221(b)(*i*) (incompetence) and suspended respondent's license. We affirm.

I. FACTS

Respondent's psychologist license was revoked in 1999 following his conviction for criminal sexual conduct. His license was reinstated in 2011, but he was placed on probation for a year. During that time, his practice was required to be supervised. After respondent became employed at the Nardin Park Recovery Center, the clinical director, Willy Scott, Ph.D., supervised respondent's psychology practice for "purposes of the board's [re-licensing] requirements."

A complaint filed in June 2015 alleged that respondent previously treated AE, an adult male, for sub-

stance abuse at Nardin Park from June 2011 through December 29, 2012; that in 2012, respondent invited AE to join him at an outing for the area humane society, the two had dinner and drinks, and AE spent the night at respondent's home; and that shortly after, respondent allowed AE to move in with him and respondent initiated physical contact with AE. The complaint further alleged that on May 11, 2014, the police were called to respondent's home after AE stabbed respondent. AE claimed that the stabbing occurred following an altercation in which respondent attempted to touch AE's penis. The complaint asserted that AE was not charged with respect to the incident. The complaint asserted that respondent violated MCL 333.16221(a) (negligence), (b)(*i*) (incompetence), (b)(*vi*) (lack of good moral character), and (h) (violating or aiding and abetting in a violation of Article 15 of the Public Health Code, MCL 333.1101 *et seq*., or a rule promulgated under Article 15), and Mich Admin Code, R 338.2515(b) (involvement in a multiple relationship with a current or former patient) and (g) (psychologist soliciting or engaging in a sexual relationship with former patient within two years after termination of the treatment or professional relationship).[1]

On August 3, 2015, an administrative hearing was held before an administrative law judge (ALJ). At the hearing, petitioner orally amended the complaint to remove the allegation that respondent violated R 338.2515(g) because, although petitioner had subpoenaed AE at two different addresses, petitioner was uncertain whether AE would be appearing and AE was necessary to substantiate that allegation. In its open-

[1] We note that Rule 338.2515 was rescinded in 2015. 2015 Mich Reg 17 (October 1, 2015), p 3. However, the rule was in effect when the alleged events occurred.

ing statement, petitioner claimed that "this case really [came] down to a limited issue that [respondent] allowed a . . . former patient . . . to live with him in his home."

At the hearing, it was established that respondent obtained a personal protection order (PPO) against AE after AE stabbed respondent on May 11, 2014. The PPO indicated that respondent was residing or had resided in the same household as AE. The PPO also indicated that AE had been evicted from respondent's residence on June 30, 2013, and that AE had started threatening respondent around November 2013.[2] According to the PPO, respondent never contacted the police or talked to his Nardin Park supervisor regarding "any concerns or issues with AE" prior to the stabbing incident.

Detective Sergeant Brent Ross testified that after the stabbing, respondent told him that he had met AE approximately a year before the assault and that AE had been his roommate for the previous eight months. An investigator for the Bureau of Professional Licensing testified that during an interview with respondent, respondent had acknowledged that AE had lived with him at some point. According to the investigator, respondent told her that "[AE] would come and go and the door would be left unlocked for him to enter and exit."

Respondent testified that he began treating AE in approximately June 2011 and terminated treatment in December 2012. According to respondent, AE "showed up" at respondent's apartment in October 2012 but did not start living there until November 2012. Respon-

[2] Although respondent signed the PPO, he testified that the PPO was wrong and that the threats had actually "started much earlier than that."

dent testified that AE "forcibly stay[ed] there" from November 2012 until June 2013. Respondent testified that when AE moved in with him, respondent was "extremely frightened" because AE had threatened to harm respondent and to make allegations against him. However, respondent did not call the police. According to respondent, he told Dr. Scott that AE had forced himself into respondent's home "[p]robably [in] November, December." Respondent also testified that he told Dr. Scott that AE was harassing him, but he could not remember if he mentioned that AE was staying in his home.

Respondent further testified that he did not call the police or place anything in AE's patient record about AE harassing him because the Nardin Park administration's judgment was "very bad with a lot of these kinds of situations." Respondent said that he feared reporting AE's actions to the Nardin Park administration because, even though he had done nothing wrong, he "certainly would have lost [his] job." However, respondent later contradicted this testimony. Respondent testified that he "had a long discussion with both [the administrator] Paul Scott and [Dr.] Scott about what was going on" and that he told Nardin Park administration, via a letter, that AE was using his address. However, respondent conceded that nothing in the letter, which was dated December 29, 2012, indicated that AE was threatening respondent, that AE had pushed his way into respondent's home, or that AE had been staying in respondent's house since November. In fact, the letter stated that respondent had "NO contact" with AE since his discharge from Nardin Park. When asked to clarify whether he had told the Nardin Park administration about AE's threats, respondent testified that he had "told Dr. Scott personally" and that he had tried to tell Paul Scott

about it but he was “not easy to talk to, so [respondent] confided in Dr. Scott . . . who was fully understanding of how difficult it [was] to deal with Paul Scott.”

When questioned whether a psychologist allowing a patient to live in his home was consistent with the standard of care for a psychologist, respondent testified:

> That would be in general, but I mean by today’s standards of the ethics code that would be very, very much unusual. I mean, it’s not—for me in my situation, my background, it’s extremely inappropriate. That would not be something I would do. You just asked me and I would not.

Respondent testified that he had tried to resolve the issue by living elsewhere, by trying to have AE involuntarily hospitalized, and, eventually, by talking to the property owner, Gillian Levy. Levy eventually filed a notice for eviction of AE in March 2013. According to Detective Ross, respondent told him during an interview following the May 2014 stabbing that respondent had recently allowed AE to move back in.

Following the hearing, the ALJ issued a proposal for decision, recommending that the Board of Psychology Disciplinary Subcommittee dismiss the administrative complaint. The ALJ’s proposed decision found that AE was “forcibly staying” with respondent, that respondent had informed his supervisor of this, and that there “were ongoing episodes” in which AE threatened respondent. On the basis of these findings, the ALJ concluded that petitioner had failed to establish by a preponderance of evidence any of the allegations in the complaint. However, the disciplinary subcommittee disagreed with the ALJ’s findings and conclusion. Based on the hearing record, the subcommittee made the following findings of fact:

The Disciplinary Subcommittee rejects the findings that patient A.E. forcibly began staying in Respondent's home in October 2012. During a police investigation regarding an altercation in May 2014 between Respondent and A.E., Respondent referred to A.E. as having been his "roommate" for eight months. . . . Additionally, a detective testified that Respondent stated that he had allowed A.E. to move back in after A.E. was evicted . . . and that A.E. had been living with him because A.E. was homeless and Respondent was trying to help him. . . . Furthermore, Respondent signed a statement when filing a petition for a personal protection order against A.E. that stated the threats did not start until November 2013, over a year after A.E. allegedly forcibly began living with Respondent. . . .

The Disciplinary Subcommittee also rejects the finding that Respondent notified Respondent's employer or supervisor that A.E. was forcibly staying in Respondent's home. On December 29, 2012, Respondent provided a signed statement indicating that he had learned from his employer that A.E. used his home address and phone number at another treatment facility. Respondent did not disclose that A.E. had been living in his home for over a month. In fact, Respondent did just the opposite, stating:

> "Since his discharge from NPRC, I have had NO contact with Mr. [E]. In the future, I will be much more careful to inform NPRC administration about any time clients obtain or suggest using information inappropriately." (Respondent's Exhibit C)

In his testimony, Respondent contradicted his own statements by stating that he had told his supervisor, Willy Scott, Ph.D., that A.E. was harassing him and showing up at his home. . . . Later in his testimony, Respondent stated that he "certainly would have lost [his] job" had he told his employer that A.E. was staying in his home. . . . Furthermore, Department Investigator Christine Murray testified that Respondent indicated to her during her investigation that he did not tell anyone at work about A.E. living in his home. . . .

> The Disciplinary Subcommittee finds that Respondent voluntarily allowed A.E. to live in his home. Respondent's statement that A.E.'s threatening behavior began over a year after A.E. began living with Respondent; Respondent's lack of communication to his employer or others regarding the alleged threats during that year; and Respondent's reference in regard to A.E. as his "roommate" to police support that Respondent voluntarily allowed A.E. to live with him in his home.

Based on its findings, the subcommittee made the following conclusions:

> The Disciplinary Subcommittee rejects the conclusion that Petitioner has not proven, by a preponderance of evidence, that Respondent violated section 16221(b)(*i*) of the Public Health Code, 1978 PA 368, as amended, MCL 333.1011 et seq, as alleged in the Administrative Complaint executed February 19, 2015.
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> * * *
>
> The Disciplinary Subcommittee concludes that Respondent's conduct of allowing a patient to live with him constitutes incompetence in violation of section 16221(b)(*i*) of the Public Health Code, supra.

Ultimately, the disciplinary subcommittee issued consequences for respondent's violation, which included a suspension of respondent's license for six months, the requirement that he work under an approved licensed psychologist supervisor upon reinstatement, and that his license be limited for two years following reinstatement. Respondent now appeals.

II. ANALYSIS

A. STANDARD OF REVIEW

"Rulings by disciplinary subcommittees of regulated professions are reviewed on appeal solely under

Const 1963, art 6, § 28." *In re Butler*, 322 Mich App 460, 464; 915 NW2d 734 (2017). Const 1963, art 6, § 28, provides:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

In *Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491, 497; 813 NW2d 763 (2011), this Court stated:

> 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. Substantial evidence is what a reasoning mind would accept as sufficient to support a conclusion. Substantial evidence is more than a mere scintilla but less than a preponderance of 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. Deference must be given to an agency's findings of fact, especially with respect to conflicts in the evidence and the credibility of witnesses. [Quotation marks and citations omitted.]

B. COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE

On appeal, respondent argues that the disciplinary subcommittee's findings of fact were not supported by competent, material, and substantial evidence on the whole record. Respondent alleges that the disciplinary subcommittee "opted to cherry pick facts to support" its

narrative and that the record as a whole suggests a contrary finding. We disagree.

Respondent first argues that the disciplinary subcommittee ignored that AE's threatening behavior actually began *before* November 2013. In support of his argument, respondent relies on his testimony and the testimony of his witness, Levy. While this testimony may have supported a conclusion contrary to that of the disciplinary subcommittee, a reviewing court "may not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record." *Edw C Levy Co v Marine City Zoning Bd of Appeals*, 293 Mich App 333, 341; 810 NW2d 621 (2011). This appeared to be a credibility determination: other evidence contradicted respondent's and Levy's testimony and supported a finding that AE's harassing behavior started in November 2013, not before. In particular, the PPO signed by respondent indicated that the threats started in November 2013. The disciplinary subcommittee also found it significant that respondent never reported the alleged threats to either the police or to his supervisors. Giving deference to the disciplinary subcommittee's findings of fact based on a credibility determination, *Huron Behavioral Health*, 293 Mich App at 497, we conclude that the disciplinary subcommittee's finding was supported by competent, material, and substantial evidence on the whole record.

Respondent also argues that the record does not support the disciplinary subcommittee's finding that he failed to communicate to his supervisor that AE was threatening him. Respondent again relies on his own testimony to rebut the subcommittee's finding. Respondent argues, essentially, that he explained that his fear of reprisal prevented him from reporting AE's threats,

which sufficiently rebuts the subcommittee's finding. While respondent's explanation is plausible, again, we "may not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record." *Edw C Levy Co*, 293 Mich App at 341. The disciplinary subcommittee concluded that respondent had a different reason for not reporting AE's alleged threats: respondent had voluntarily allowed AE to reside with him. The subcommittee found it significant that while AE was living with respondent, he wrote a letter to the Nardin Park administration stating that he had "NO contact" with AE; that respondent gave conflicting statements and changing testimony about whom in the administration he had reported AE's behavior to; and that respondent referred to AE as his "roommate"[3] while police were investigating the May 2014 stabbing. Giving deference to the agency's findings of fact based on credibility determinations and conflicting evidence, *Huron Behavioral Health*, 293 Mich App at 497, we conclude that the disciplinary subcommittee's finding was supported by competent, material, and substantial evidence on the whole record.

C. STANDARD OF CARE

Respondent next argues that petitioner failed to carry its burden of proof that he was "incompetent" because petitioner never established a standard with which to measure "incompetence" for purposes of

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[3] Respondent contests the subcommittee's reliance on this fact because, according to respondent, it "was made under duress and while under the influence of prescription pain medications while [respondent] was still recovering in the hospital" from the May 2014 stabbing. Respondent essentially is contesting the weight that the disciplinary subcommittee gave to this evidence. Therefore, we reject respondent's argument because we may not substitute the agency's judgment for our own. *Huron Behavioral Health*, 293 Mich App at 497.

MCL 333.16221(b)(*i*). Respondent alternatively argues that even were this standard established, petitioner failed to recognize that respondent was employed as a counselor at Nardin Park, not as a psychologist, and the standard of practice applicable to a counselor may be different from the one applicable to a psychologist. We disagree with both arguments.

First addressing respondent's argument that his applicable standard of practice was that of a "counselor," we find that argument unpersuasive. Respondent, throughout his hearing testimony, established that he was practicing as a psychologist at Nardin Park. Specifically, respondent testified that (1) he signed his patient progress reports for AE with his psychology credentials, (2) the 2000 hours of supervision that he was undergoing at Nardin Park was for his practice as a psychologist "in order to fulfill [his] licensing requirements," and (3) Dr. Scott supervised him "for purposes of the board's requirements" that his psychology practice be supervised. Therefore, even though respondent testified that he was employed as a counselor at Nardin Park, he clearly testified that he was practicing as a psychologist.

With regard to respondent's argument that petitioner failed to establish the standard of practice for a psychologist, MCL 333.16221 provides, in relevant part:

> The disciplinary subcommittee shall proceed under section 16226 if it finds that 1 or more of the following grounds exist:
>
> * * *
>
> (b) Personal disqualifications, consisting of 1 or more of the following:
>
> (*i*) Incompetence.

" 'Incompetence' means a departure from, or failure to conform to, minimal standards of acceptable and prevailing practice for a health profession, whether or not actual injury to an individual occurs." MCL 333.16106(1).

We need not address this argument because it is waived. Waiver is the intentional relinquishment of a known right. *Sweebe v Sweebe*, 474 Mich 151, 156-157; 712 NW2d 708 (2006). "It is . . . well-settled that a waiver may be shown by express declarations or by declarations that manifest the parties' intent and purpose." *Id*. at 157.

At the hearing, respondent argued that he was not incompetent because AE forcibly stayed with him without his acquiescence. To that end, respondent repeatedly admitted throughout the hearing that if he voluntarily allowed AE to reside with him, it would fall below an acceptable standard of practice. Respondent testified that allowing a patient to live with him would be "very, very much unusual"; that it would be "extremely inappropriate"; and that if he told that information to the Nardin Park administration, he "certainly would have lost [his] job." Therefore, by respondent's testimony at trial, he expressly conceded that voluntarily allowing a patient to reside with a psychologist would fall below a minimal standard of acceptable practice for a psychologist.

But even if this issue were not waived, respondent's argument would still fail. In the context of medical malpractice, the Michigan Supreme Court has recognized that it is unnecessary "to establish the applicable standard of care and to demonstrate that the professional breached that standard" when "the lack of professional care is so manifest that it would be within the common knowledge and experience of the ordinary

layman that the conduct was careless and not conformable to the standards of professional practice and care employed in the community." *Sullivan v Russell*, 417 Mich 398, 407; 338 NW2d 181 (1983) (quotation marks and citations omitted). This Court has applied this standard in the context of disciplinary subcommittees regulating professional licenses. See *Sillery v Bd of Med*, 145 Mich App 681, 689; 378 NW2d 570 (1985) (Stating that when a professional's work product lacks basic integrity, "it is within the province of the layperson to determine that the conduct constitutes a failure to exercise due care"), citing *Sullivan*, 417 Mich at 407. In this case, we conclude that respondent's voluntarily allowing a patient to live in his home is so lacking of professional care "that it would be within the common knowledge and experience of the ordinary layman that the conduct," *Sullivan*, 417 Mich at 407, failed to meet "minimal standards of acceptable and prevailing practice for a" psychologist, MCL 333.16106.

D. PROCEDURAL DUE PROCESS

Lastly, respondent argues that he was denied a fair hearing because he was denied his constitutional right to confront AE because of AE's absence at the hearing. We disagree. This Court reviews de novo a claim of constitutional error. *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004).

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. Michigan has also adopted this right. Const 1963, art 1, § 20. Although this is an administrative agency case, the agency must still provide adequate procedural due

process to the involved parties. *Livonia v Dep't of Social Servs*, 423 Mich 466, 505; 378 NW2d 402 (1985).

In this case, the initial complaint asserted that respondent had an improper sexual relationship with AE. When it became apparent that AE was not going to appear at the administrative hearing, petitioner amended the complaint to remove this allegation because AE's testimony was necessary to prove it. Afterwards, petitioner limited its evidence to the issue of whether respondent improperly allowed AE to live in his home. AE's testimony on this subject was neither necessary nor required because respondent conceded that AE had lived with him at his residence. After the hearing, the disciplinary subcommittee did not base any of its findings on any statements made by AE; instead it relied entirely on the statements made by respondent. These statements came from respondent's testimony at the hearing, testimony from other persons as to statements respondent had made to them, and statements made by respondent in documents that were submitted at the hearing. Respondent has failed to show that he was unable to present any relevant evidence or that he was unable to adequately explore any issues because of the absence of AE. Accordingly, respondent has not established a violation of due process owing to the inability to confront AE at the hearing.[4]

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[4] Respondent's argument appears to be premised on the notion that he had a right to confront AE because AE was an "adverse witness." However, because AE never appeared at the hearing, AE was not a "witness," let alone an "adverse witness." And as stated, the disciplinary subcommittee relied entirely on respondent's own statements in concluding that he voluntarily allowed AE to live with him. Respondent has provided no authority for the proposition that he had a right to confront AE based solely on the fact that AE was the complainant. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) ("And, where a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned.").

Affirmed.

RONAYNE KRAUSE, P.J., and FORT HOOD and O'BRIEN, JJ., concurred.

PETERSON ESTATE v BRANNIGAN BROTHERS
RESTAURANTS & TAVERNS, LLC

Docket No. 335501. Submitted February 7, 2018, at Lansing. Decided April 3, 2018, at 9:05 a.m. Leave to appeal denied 503 Mich 921.

Helen K. Mueller, as personal representative of the estate of Travis L. Peterson, filed an action in the Ingham Circuit Court against Brannigan Brothers Restaurants & Taverns, LLC; Austin Smith; Donald Suttle, Jr.; Mark McCain; and Shafeek Kanaveh seeking to recover damages on behalf of the estate for the death of Peterson. At certain times, Smith, Suttle, McCain, and Kanaveh were employees of a bar owned by Brannigan Brothers. Peterson, who was a customer of the bar on January 1, 2012, was asked to leave the premises after a dispute. At that time, Smith and McCain were working at the bar, Suttle had returned to the bar to collect payment for the hours he had worked that night before being fired, and Kanaveh was present at the bar but not working. The individual defendants followed Peterson out of the bar, chased after him, and inflicted injuries that resulted in Peterson's death. The court, Joyce Draganchuk, J., granted Brannigan Brothers' motion for summary disposition, reasoning that Brannigan Brothers was not vicariously liable for the individual defendants' actions because they either were not working at the time of the incident or they acted outside the scope and authority of their employment for their own purposes. The court further concluded that the facts did not establish plaintiff's claims for negligent hiring, negligent retention, negligent training, or negligent supervision of the individual employee defendants. Finally, the court dismissed plaintiff's concert-of-action claim against the individual defendants. The trial court entered a default judgment against Suttle, and Kanaveh settled with the estate during the trial. The jury found McCain and Kanaveh not negligent in Peterson's death and found Smith negligent but not the proximate cause of Peterson's death. The jury found that Peterson's and Suttle's negligence caused Peterson's death, apportioning 20% of the fault to Peterson and 80% of the fault to Suttle. Given the jury's verdict, the court entered a judgment in favor of plaintiff with regard to Suttle and entered a judgment of no cause of action with regard to Smith and McCain. Plaintiff appealed.

The Court of Appeals *held*:

1. An employer may be held vicariously liable for the tortious conduct of its employees if that conduct was committed in the course and within the scope of the employee's employment, but not if the act was outside the employee's authority or committed for the employee's own personal purposes. A trial court may decide the issue as a matter of law if it is clear that the employee was acting to accomplish some purpose of his or her own. In this case, the trial court correctly concluded that Brannigan Brothers was not vicariously liable for the individual defendants' actions. Evidence established that Suttle was not an employee when the incident occurred and that Kanaveh was not working at that time. And while Smith and McClain were working at the time of the incident, they clearly acted outside their authority when they chased Peterson down the street and committed a battery.

2. Separate from vicarious liability, an employer may be held directly liable for the negligent hiring, retaining, training, or supervising of an employee; the substance of the claim is that the employer bears some responsibility for bringing an employee into contact with a member of the public despite knowledge that doing so could end poorly. However, employers are not expected to anticipate that their employees will engage in criminal activity without some particularized forewarning. In that regard, to establish a claim of negligent hiring or retention, a plaintiff must prove that the employer had actual or constructive knowledge that made the specific wrongful conduct perpetrated by the employee predictable. The trial court properly dismissed plaintiff's claim of negligent hiring because nothing in the individual defendants' respective histories would have made their wrongful conduct predictable. The court also correctly dismissed plaintiff's negligent retention, training, and supervision claims because, even if Brannigan Brothers' training, retention, and supervision of its employees was incompetent or nonexistent and staff had a tendency to be rough and aggressive, the individual defendants' wrongful conduct was not predictable because the outrageous conduct and loss of self-control was a radical departure from expected social behavior. In addition, although the bar was apparently run poorly, that fact could not have predicted the misconduct or established that it was negligent for staff to allegedly eject Suttle and Peterson from the bar at the same time.

3. Traditionally, under the concert-of-action theory of liability, when a plaintiff can establish that all the defendants acted tortiously pursuant to a common design and that their actions resulted in injury to the plaintiff, all the defendants are liable for

the entire result. MCL 600.2956, as enacted by 1995 PA 161, provides, with certain exceptions, that in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint; the provision does not abolish an employer's vicarious liability for an act or omission of the employer's employee. The 1995 tort-reform legislation eliminated joint and several liability in certain tort actions, requires that the fact-finder in such actions allocate fault among all responsible tortfeasors, and provides that each tortfeasor need not pay damages in an amount greater than his or her allocated percentage of fault. Because MCL 600.2956 expressly provides that the liability of each defendant for damages is several only and is not joint, the concert-of-action theory of liability, which allows for joint liability, is not a viable cause of action. In this case, the trial court correctly concluded that plaintiff's concert-of-action claim against the individual defendants was not a viable claim because MCL 600.2956 preempted that claim. Summary disposition was appropriate even though Brannigan Brothers' vicarious liability was in issue at the time the motion was granted because the concert-of-action theory did not apply to the bar and the issue of vicarious liability was unrelated to the claim of joint liability under the concert-of-action theory.

4. Plaintiffs' evidentiary claims of error related to certain trial witnesses did not provide grounds for reversal.

Affirmed.

TORTS — CONCERT OF ACTION.

Under the concert-of-action theory of tort liability, when a plaintiff can establish that all the defendants acted tortiously pursuant to a common design and that their actions resulted in injury to the plaintiff, all the defendants are liable for the entire result; because MCL 600.2956, as enacted by 1995 PA 161, expressly provides that the liability of each defendant for damages in a tort action is several only and is not joint, the concert-of-action theory of liability, which allows for joint liability, is no longer a viable cause of action in Michigan.

Nolan, Thomsen & Villas, PC (by *Lawrence P. Nolan* and *Gary G. Villas*) for the Estate of Travis L. Peterson.

Conlin, McKenney & Philbrick, PC (by *Allen J. Philbrick*) and *Bursch Law PLLC* (by *John J. Bursch*) for Brannigan Brothers Restaurants & Taverns, LLC.

Fraser Trebilcock Davis & Dunlap, PC (by *Graham K. Crabtree* and *Gary C. Rogers*) for Austin Smith.

Hackney Grover (by *Christian P. Odlum* and *Steven D. Foucrier*) for Mark McClain.

Before: RONAYNE KRAUSE, P.J., and FORT HOOD and O'BRIEN, JJ.

PER CURIAM. Plaintiff Helen Kaye Mueller, the personal representative of the estate of Travis Lee Peterson, appeals by right after a jury trial and entry of a verdict partially in her favor. This matter arises out of the wrongful death of Peterson, who was killed after patronizing a bar owned by defendant Brannigan Brothers Restaurants & Taverns, LLC (Brannigan). After being ejected from the bar, Peterson was chased and physically beaten by bouncers who were then presently or previously employed by the bar. Notwithstanding the judgment partially in her favor, plaintiff appeals by right two evidentiary decisions and two orders granting partial summary disposition. We affirm.

In broad strokes, with the exception of a few critical details, the facts are simple, undisputed, and tragic. Peterson was a business invitee, or more colloquially a patron, of the restaurant or bar owned and operated by Brannigan in downtown Lansing on January 1, 2012, at approximately 2:00 a.m. Some manner of dispute occurred, and Peterson was asked to leave the premises. Peterson did so, and thereafter the individual defendants—Austin Smith, Donald Suttle, Jr., Mark McClain, and Shafeek Kanaveh[1]—pursued Peterson

[1] The surname of defendant Shafeek Kanaveh was also spelled "Kanazeh" in the lower court record.

and attacked him, inflicting injuries that caused his death. None of these facts is seriously contested at this time, nor is it contested that the individual defendants had *some* kind of employment history with the bar. Rather, the only factual issues are whether any of the individual defendants were actually working for the bar at the time, were acting within the scope of their employment, or were the actual cause of Peterson's death. Brannigan was granted summary disposition on the grounds that all individual defendants were "off the clock" in one way or another.

The trial court entered a default judgment against Suttle, Kanaveh settled with the estate partway through trial, the jury found both McClain and Kanaveh not negligent in Peterson's death, and the jury found Smith negligent but not a proximate cause of Peterson's death. The jury found that Peterson's and Suttle's negligence caused Peterson's death. The jury then apportioned 20% of the fault to Peterson and 80% of the fault to Suttle. Accordingly, the trial court entered judgment in favor of plaintiff and against Suttle, and a judgment of no cause of action against Smith and McClain.[2]

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the

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[2] Suttle was independently convicted of second-degree murder arising out of the same events that gave rise to the instant appeal. *People v Suttle*, unpublished per curiam opinion of the Court of Appeals, issued June 3, 2014 (Docket No. 314773).

nonmoving party and grants summary disposition only when the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. A motion brought under MCR 2.116(C)(8) should be granted only when the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the nonmoving party. *Id*. at 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*. at 119-120.

"The decision whether to admit evidence falls within a trial court's discretion and will be reversed only when there is an abuse of that discretion." *People v Duncan*, 494 Mich 713, 722; 835 NW2d 399 (2013). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id*. at 722-723. However, preliminary questions of law, including the interpretation and application of statutes and legal doctrines, are reviewed de novo, and the trial court necessarily commits an abuse of discretion if it makes an incorrect legal determination. *Id*. at 723; *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). This Court also "reviews a trial court's rulings concerning the qualifications of proposed expert witnesses to testify for an abuse of discretion." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Plaintiff first argues that the trial court erred by granting summary disposition in favor of Brannigan. We note that plaintiff alleged several counts against Brannigan and that the parties fail to clearly distinguish the counts alleging vicarious liability from the counts alleging that Brannigan committed torts in its own right. In particular, plaintiff alleged that Brannigan was negligent in its hiring, retention, supervision, and training of its employees. This assertion does

superficially resemble vicarious liability, insofar as the conduct of the employees is relevant. However, plaintiff correctly points out that the negligent hiring, retaining, training, or supervising of an employee can be a direct tort committed by the employer itself, not a matter of vicarious liability. *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412-413; 189 NW2d 286 (1971). We will address the distinct issues separately.

Regarding vicarious liability, plaintiff fairly summarizes the legal principles: broadly, and in relevant part, an employer may be held liable for the tortious conduct of its employee so long as that conduct was "committed in the course and within the scope of the employee's employment," but *not* if the act was outside the employee's authority or committed for the employee's own personal purposes. *Bryant v Brannen*, 180 Mich App 87, 98; 446 NW2d 847 (1989). "While the issue of whether the employee was acting within the scope of his employment is generally for the trier of fact, the issue may be decided as a matter of law where it is clear that the employee was acting to accomplish some purpose of his own." *Id*.

Plaintiff accurately states that Suttle testified that he was working on the night of Peterson's beating. Critically, however, that is the *only* evidence plaintiff submits in support of Suttle having been an employee; on the very same page of his deposition, Suttle *also* testified that as of one minute after midnight, he was no longer an employee. Notably, he had not merely quit for the night, but in fact he had been fired. He testified that by the time of the incident, he had already left work, and then returned to the bar to retrieve his payment for the hours he had worked earlier. Plaintiff's argument that the trial court erred by finding no genuine question of fact that Suttle was not employed

on the night of the incident is technically correct but essentially pettifoggery and substantively immaterial: even though he had been employed at some point during that evening, Suttle was no longer employed at the time he participated in chasing and beating Peterson. Consequently, the trial court correctly held that at the relevant time, Suttle was not in fact employed by Brannigan and that Brannigan could therefore not be vicariously liable for Suttle's tortious misconduct. Brannigan argued in the trial court that there was no dispute that Kanaveh was not working on the night of the incident at all, and all of the testimony we have found supports that assertion. Plaintiff has not cited any evidence or advanced any argument to the contrary. Consequently, Brannigan could not be vicariously liable for any tortious misconduct engaged in by Kanaveh.

Brannigan concedes that Smith and McClain were employed and working at the time of the incident, but he argues that they acted completely outside the scope of their employment by chasing an ejected patron down the street and beating him savagely. Plaintiff observes that Smith testified at his deposition that he participated in the pursuit down the street to protect McClain and to break up the fight, and plaintiff asserts that Smith was therefore acting on behalf of Brannigan and within the scope of his employment, which Smith believed specifically entailed protecting employees. However, it is critical that Smith's testimony was based on his version of events: that Peterson had assaulted McClain and Smith was attempting to protect McClain or break up a fight and that he only punched Peterson because Peterson attacked him and he was unable to retreat. Consequently, this testimony does not support plaintiff's argument to the effect that Smith believed pursuing and assaulting Peterson

would be conduct within the scope of his employment. Rather, Smith's testimony that he was acting within the scope of his employment is clearly dependent on his interpretation of what occurred, which differs critically from plaintiff's interpretation of what occurred. Essentially, it is incompatibly conditional.

Otherwise, plaintiff makes no argument that we can find to the effect that chasing an ejected patron down the street, far off Brannigan's premises, for the purpose of committing a battery was authorized, was remotely similar to any authorized act, or was for any purpose whatsoever that could reasonably be believed to benefit Brannigan. The trial court's holding that Brannigan could not be held vicariously liable for the misconduct of the individual defendants was the only reasonable conclusion to draw from the evidence in this matter. Additionally, even if the trial court had erred by finding that Brannigan had no vicarious liability for the conduct of Smith and McClain, the jury's findings of no negligence as to McClain and no proximate cause as to Smith would render that finding irrelevant and harmless in any event.

However, neither the employees' present employment status nor their departure from the scope of their employment disposes of plaintiff's claims of negligent hiring, retention, training, or supervision. Furthermore, the fact that two of the individual defendants were not technically working for Brannigan at the time of the incident is also not dispositive: the gravamen of negligent hiring or retention is that the employer bears some responsibility for bringing an employee into contact with a member of the public despite knowledge that doing so was likely to end poorly. *Hersh*, 385 Mich at 412-413. In other words, it is not a tort dependent on vicarious liability at all, but rather direct liability.

Consequently, the fact that Brannigan allegedly should have known that the bouncers it hired would commit a grievous assault could *proximately* result in that assault, because it is the "but for" act that caused the bouncers and the patron to be in the same place at the same time.

Nevertheless, a claim of negligent hiring or retention requires actual or constructive knowledge by the employer that would make the *specific* wrongful conduct perpetrated by an employee predictable. See *Brown v Brown*, 478 Mich 545, 553-556; 739 NW2d 313 (2007). In particular, employers are not expected to anticipate that their employees will engage in criminal conduct without some particularized forewarning thereof. *Id*. at 555-556; *Hamed v Wayne Co*, 490 Mich 1, 12-15; 803 NW2d 237 (2011). Thus, lewd and crude commentary is not enough to put an employer on notice that an employee will commit a rape, although an actual threat to commit a rape would. *Brown*, 478 Mich at 555-556. A past history of generally aggressive and irresponsible behavior is not enough to put an employer on notice that the employee would engage in a violent sexual assault. *Hamed*, 490 Mich at 16. Knowledge of an employee having actually committed another rape would justify anticipating that the employee would reoffend if the employer had good reason to know of the prior crime. *Bradley v Stevens*, 329 Mich 556; 46 NW2d 382 (1951). However, employers are not strictly liable for their employees' misconduct that goes beyond what would generate vicarious liability under respondeat superior. *Zsigo v Hurley Med Ctr*, 475 Mich 215, 226-227; 716 NW2d 220 (2006).

Plaintiff asserts that Smith was known to be violent and short-tempered and that he had been charged with assaulting a police officer. Strictly speaking, Smith had

been convicted of *attempted* assault on a police officer pursuant to a plea on March 31, 2003, contemporaneously with an attempted unlawful use of a motor vehicle; an also-contemporaneous charge of larceny was dismissed, and Smith served a total of nine days in jail. It was therefore a decade-old misdemeanor charge, and its predictive value to the incident at issue in this matter is consequently rather poor.

Plaintiff argues that Suttle had a prior manslaughter conviction but provides no criminal docket sheet, and upon further analysis, the situation was considerably more bizarre. Suttle testified that he was convicted of second-degree murder when he was 15 years old. Apparently, he was "playing with a firearm" when it discharged. His "girlfriend," who was 40 or 42 years old at the time and with whom he was having a sexual relationship, gave him the gun in some kind of "almost like a suicide-type deal." He testified that he entered a no-contest plea "just pretty much to hush everything" so that he "wouldn't have to get on the stand." Although a second-degree murder conviction is substantial, the nature of the offense does not easily lend itself to predicting the kind of pursuit and assault that occurred here, especially given the well-known propensity of teenagers to engage in dubious conduct they regret as adults.

Plaintiff argues that Kanaveh had a criminal history of fighting and theft. We have found no public record of any convictions. However, in his deposition, Kanaveh admitted that he had been *charged* criminally on the basis of a fight somewhere in Novi in 2005 or 2006, which he described as "there was some sort of something going on where guys were arguing and fighting and I was punched and then I defended myself and punched a guy back and that was pretty much it

from what I remember." He stated that although he was arrested, charged, and ultimately did go to court, the charge was dropped. He testified that he had also been arrested for attempting to steal a golf cart along with Smith "probably over ten years ago," but he did not recall what ultimately happened beyond paying restitution and presumably having his record expunged eventually. If Kanaveh even had a criminal record, nothing about it would suggest the kind of pursuit and assault that occurred here.

Plaintiff has not argued that McClain had any kind of criminal history insofar as we can find. We have reviewed McClain's deposition testimony, and there is no mention of any prior criminal history or history of violence. There is no public record of McClain being listed as either an active or inactive offender. Obviously, there is no articulated negligent-hiring claim related to McClain.

Consequently, the trial court properly disposed of plaintiff's claim for negligent hiring. Plaintiff's claims of negligent retention, negligent training, and negligent supervision are not necessarily disposed of merely because none of the individual defendants had particularly egregious histories before their hiring. However, those claims still depend on the particular misconduct complained of being foreseeable. Taken entirely at face value, plaintiff argues that there were frequently fights at the bar, that employees received no training, that the owner was drunk and irresponsible, and that the security staff had a tendency toward roughness and aggressiveness. We accept for the sake of argument that Brannigan's training and supervision were grossly incompetent or nonexistent. That would strongly suggest that sooner or later a patron was going to get hurt fighting with the staff on-site or while

being removed from the premises. But that would still not predict security staff chasing an ejected patron down the street and beating him fatally. That outrageous conduct and loss of self-control is such a radical departure from expected social norms that we very much doubt businesses commonly perceive a need to craft rules and training against that degree of blatantly criminal misconduct.

Plaintiff finally argues that Brannigan should be held liable because its staff failed to ensure that Suttle and Peterson left the bar at different times. The only staff member plaintiff suggests should have done so is Pam Muzillo, who is not a named defendant. Additionally, plaintiff concedes that Suttle was a nonemployee at the time, so this is essentially an argument that Brannigan had some obligation to control two unruly patrons after their ejection.

In any event, the cases on which plaintiff relies are not helpful. In *Mills v White Castle Sys, Inc*, 167 Mich App 202, 204, 208; 421 NW2d 631 (1988), this Court held that it was possible for a restaurant to be negligent for failing to eject unruly patrons from its parking lot and failing to summon police upon request after those unruly patrons attacked other customers and were present for some considerable time. In *Marcelletti v Bathani*, 198 Mich App 655, 664; 500 NW2d 124 (1993), this Court noted the general rule that no one is under a duty to protect others from the conduct of third persons. The Court recognized, however, that a "special relationship with either the victim or the person causing the injury" *could* give rise to such a duty when the individual was in a position of control and the third party was foreseeably endangered and that the "proprietor-patron" relationship has been recognized as such a "special relationship." *Id*. In *Taylor v Laban*,

241 Mich App 449, 454-457; 616 NW2d 229 (2000), this Court mostly discussed licensees rather than invitees but observed that a social host is not under any obligation to control guests beyond "refrain[ing] from wilful and wanton misconduct that results in one guest injuring another guest," which is not established by a mere failure to act. Regarding invitees, the *Taylor* Court, *id*. at 453, 454, merely cited *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 502-503; 418 NW2d 381 (1988), in which our Supreme Court held that a merchant was not under a duty to provide armed guards and that "any duty we might impose on defendant to protect his invitees from the criminal acts of third parties would be inevitably vague, given the nature of the harm involved." As already discussed, employers are generally not expected to anticipate criminal acts.

This issue is not as easily addressed as any of the parties suggest. However, the trial court ultimately reached the correct decision. Brannigan could not be held vicariously liable under a respondeat superior theory of liability because the individual defendants were either not working at the time of the incident or were wholly deviating from the scope and authority of that employment for their own purposes. Brannigan could not be held liable for negligent hiring because nothing in the individual defendants' backgrounds would have suggested any serious likelihood that they would commit the complained-of acts in this matter. Brannigan could not be held liable for negligent retention or supervision on these facts because, although it does appear that the bar was poorly run, the history of its internal issues would not predict this particular kind of misconduct. For analogous reasons, Brannigan could not be held negligent simply because its staff ejected Suttle and Peterson at the same time, if indeed that actually occurred.

Plaintiff next argues that the trial court erred by dismissing her "concert of action" claim against the individual defendants. The parties all agree that "concert of action" was a viable cause of action in 1994. Under that "traditional theory," if a plaintiff "can establish that all defendants acted tortiously pursuant to a common design, they will all be held liable for the entire result." *Abel v Eli Lilly & Co*, 418 Mich 311, 337-338; 343 NW2d 164 (1984). However, the parties dispute whether that cause of action survived the enactment of MCL 600.2956, an issue that appears not to have been explicitly determined by any published decision of the courts of this state. We hold that the issue has, however, been determined, albeit somewhat less cleanly stated, and that "concert of action" is in fact no longer a viable cause of action in Michigan.

MCL 600.2956, as enacted by 1995 PA 161, provides:

> Except as provided in [MCL 600.6304], in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

MCL 600.6304 addresses the apportionment of fault and the award of damages in tort actions when there is common liability among multiple tortfeasors. MCL 600.6304(4) specifically states that liability "is several only and not joint." Furthermore, MCL 600.2957(1) similarly provides:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to [MCL 600.6304], in direct proportion to the person's

> percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

Plaintiff primarily advances the argument that by its own express terms, MCL 600.2956 excepts vicarious-liability theories from the abolition of joint and several liability, and because vicarious liability was still an issue at the time the trial court decided the instant motion for summary disposition, concert of action was therefore also a viable claim. However, that is a misreading of both the statute and its entire framework, not to mention a very weak effort at bootstrapping, especially because a plain reading of the complaint shows that the concert-of-action count was alleged only against the individual defendants, not Brannigan. Vicarious liability is premised on agency and the traditional doctrine that a master is responsible for the actions of the master's servant even if the master was not personally at fault. *McClaine v Alger*, 150 Mich App 306, 316-317; 388 NW2d 349 (1986). It has nothing to do with joint liability, and it is a narrow exception to the abolition of joint and several liability left by the Legislature. The significance is that Brannigan is not "off the hook" if any of its alleged employees were found liable for committing a tort while in the scope of their employment, *not* that all of the employees are liable if any of them are. The fact that there is an issue of *respondeat superior* in the case does not render MCL 600.2956 inapplicable to defendants who are not each others' employers.

Plaintiff argues that this Court's opinion in *Urbain v Beierling*, 301 Mich App 114, 132; 835 NW2d 455 (2013), establishes that concert of action remains a viable cause of action. Plaintiff accurately notes that this Court described what the claim entails, relying on

Abel, and upheld the trial court's grant of summary disposition in favor of the defendants because the plaintiff had failed to demonstrate an underlying tort rather than because concert of action was not a viable claim. However, this Court did so in the context of discussing the plaintiff's assertion that the trial court had erred by disposing of both concert-of-action and civil-conspiracy claims, noting that both required an underlying tort that had not been established and explicitly approving of the trial court's observation that " '[b]oth claims are not actionable torts, but rather require a separate tort before liability can attach . . . .' " *Id*. at 131-132. In other words, this Court was not called on to determine whether concert of action was a valid claim, but rather whether the trial court's reasoning had been sound. Construing the absence of an unnecessary pronouncement to be an outright holding to the contrary does not even rise to the level of relying on dicta.

Plaintiff additionally relies on our Supreme Court's decision in *Gerling Konzern v Lawson*, 472 Mich 44, 56; 693 NW2d 149 (2005). Plaintiff correctly notes that our Supreme Court stated that "a 'common liability' exists in situations in which multiple tortfeasors are liable for the same injury to a person or property or for the same wrongful death" and that the "1995 tort reform legislation does not negate the existence of common liability among such multiple tortfeasors." *Id*. However, the case itself concerned the right of contribution for a tortfeasor who had settled for more than the jury ultimately found that tortfeasor liable. The Court went on to observe that what tort reform *did* change was the possibility of a single tortfeasor being liable for the entirety of a common liability and then being required to seek contribution from the other tortfeasors, whereas now "a tortfeasor need only pay a percentage

of the common liability that is proportionate to his fault." *Id*. at 52-54, 56-57. The broader context of the Court's statement was the pronouncement that a settling tortfeasor had "a statutory right to seek contribution from other responsible tortfeasors after having settled with the injured parties in the underlying tort action, and tort reform legislation in 1995 does not alter this right." *Id*. at 62-63. It expressly held that such contribution claims may well be of reduced necessity but remained permissible; otherwise, "the 1995 legislation eliminated joint and several liability in certain tort actions, requires that the fact-finder in such actions allocate fault among all responsible tortfeasors, and provides that each tortfeasor need not pay damages in an amount greater than his allocated percentage of fault." *Id*. at 51.

Plaintiff also relies on an unpublished case[3] that is not precedentially binding. MCR 7.215(C)(1). We think that the opinion itself engaged in a certain amount of somewhat ambiguous semantic hair-splitting, and plaintiff's interpretation thereof is at least not wholly unreasonable on its face. However, that opinion relied on a published case, which in turn held that "[t]he significance of [the tort reform] change is that each tortfeasor will pay only that portion of the total damage award that reflects the tortfeasor's percentage of fault" and that "the trier of fact must consider the fault of each person who contributed to the tort, not only those who are parties to the litigation . . . ." *Smiley v Corrigan*, 248 Mich App 51, 55, 56; 638 NW2d 151 (2001). The opinion certainly did not explicitly hold that concert of action remains a viable claim, and we do not believe any such holding was intended.

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[3] *Lackie v Fulks*, unpublished per curiam opinion of the Court of Appeals, issued June 11, 2002 (Docket No. 231479).

Plaintiff argues that "[i]f the jury was presented with the Plaintiff-Appellant's concert of action theory it could have reasonably found each of these individuals negligent and a proximate cause of [Peterson's] death." The jury *did*, in fact, consider the fault of each of the defendants. Pursuant to MCL 600.2956, none of the defendants in this matter could be found liable for the entirety of Peterson's injuries simply because of an undifferentiated contribution thereto or be liable for any portion thereof without a specifically allocated percentage of fault. Irrespective of whether any case to date has explicitly so held, we do so now: concert of action as a cause of action is incompatible with MCL 600.2956.

Plaintiff next argues that the trial court erred by prohibiting her from impeaching Smith with a prior conviction of attempted joyriding, arguing that this Court has held unlawful use of a motor vehicle to constitute a crime involving dishonesty. Incredibly, plaintiff fails to address MRE 609(c), which states:

> Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

According to the criminal docket sheet plaintiff herself provided, Smith was convicted of attempted unlawful use of a motor vehicle, MCL 750.414, by a plea on March 31, 2003, and he was sentenced to nine days in jail. Ten years from the latest date would have elapsed by April 10, 2013. Although the tortious conduct in this matter occurred in 2012, this claim was not filed until December 13, 2013. Consequently, the trial court correctly found the joyriding conviction inadmissible irrespective of whether it contains an element of theft or

dishonesty. We find plaintiff's argument devoid of even arguable legal merit and impossible to have been based on a reasonable inquiry. MCR 2.114(D)(2). However, because of the trivial ease with which it could be disposed and the fact that Smith is, as will be noted, a prevailing party and already entitled to costs, MCR 7.219(A), we impose no sanctions because any such sanctions would only be punitive. MCR 2.114(E).

Finally, plaintiff argues that the trial court erred by allowing Dr. Benjamin Mosher, the emergency room doctor who treated Peterson, to testify regarding the low likelihood, in his opinion, that Peterson's skull fracture could have been caused by a fall from standing height. We disagree.

Plaintiff stipulated to Mosher's qualifications, despite being offered an opportunity for voir dire, and made a total of two objections during Mosher's testimony. Plaintiff objected to the relevance of how many of Mosher's 9,000 or so patients had presented with a similar skull fracture, which the trial court apparently overruled or otherwise resolved off the record. Plaintiff also objected to Mosher's opinion that a fall from a greater distance would be more likely to cause an injury like the one Peterson suffered, on the grounds that "he's only seen six of this nature," which the trial court overruled. Giving plaintiff the very maximal benefit of the doubt, the latter objection *could* reasonably be construed as a challenge to Mosher's practical expertise to render an opinion about how far of a fall would be necessary to produce an injury similar to the skull fracture Peterson suffered. While minimal, appellate consideration is not precluded merely because a party makes a more developed or sophisticated argument on appeal. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). We prefer to resolve

issues on their merits when possible, so we will construe plaintiff's objections in her favor to the extent we can.

However, plaintiff is limited to challenging Mosher's practical and particular expertise only. Plaintiff's stipulation to Mosher's formal or general expertise and failure to contend in the trial court that Mosher exceeded his field of expertise preclude plaintiff from making that challenge at this time. *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001). "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence . . . ." *Farm Credit Servs of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998). Before admitting expert testimony, a trial court must properly and thoroughly exercise its gatekeeping function under MRE 702 to ensure that "each aspect" of the expert testimony is reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779-781; 685 NW2d 391 (2004). However, the trial court is not obligated to do so sua sponte, but rather is only required to do so upon request, and a failure to bring the issue to the court's attention waives it. See *Craig v Oakwood Hosp*, 471 Mich 67, 82; 684 NW2d 296 (2004). Plaintiff has, quite simply, waived the issue regarding whether Mosher's testimony exceeded his field of expertise.

Nevertheless, pursuant to giving plaintiff the benefit of the doubt, plaintiff did make a specific objection to Mosher's opinion testimony regarding the likelihood of any particular fall causing Peterson's injuries. Plaintiff objected that it called for speculation and conjecture because Mosher had only seen six or so fractures of that nature. Michigan courts have a time-honored tradition of looking to the substance of arguments

rather than nomenclature, which, of course, unambiguously furthers the cause of justice and fairness. See *Hartford v Holmes*, 3 Mich 460, 463 (1855); *In re Traub Estate*, 354 Mich 263, 278-279; 92 NW2d 480 (1958); *Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958); *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011). With that in mind, we construe plaintiff's objection as essentially being an objection to foundation. The trial court overruled the objection without any analysis or argument on the record. We think the issue may have warranted somewhat more thoughtful consideration, but we ultimately conclude that the decision was either correct or harmless.

Mosher was called as a witness by Smith. It was established initially that Mosher had seen "maybe half a dozen" comparable basilar skull fractures like the one Peterson presented with over the course of a career spanning some nine thousand patients. Mosher was asked, *with no objection*, to explain how such a fracture could occur, to which Mosher explained that it could happen from any number of mechanisms, like falling, being struck, being shot, or being involved in a car accident. He further explained that he had never seen a diffused, 11-centimeter fracture like the one Peterson had. He further testified, again *with no objection*, that skull fractures caused by falls from a standing height were typically more local in shape, which was inconsistent with the fracture Peterson had, particularly in combination with Peterson's coma level and internal bleeding. Mosher was asked whether it would make a difference whether a person fell "from a standing height who is 6 foot 2 as opposed to 5 foot 2" (in context, meaning a taller person falling to the ground), to which Mosher replied that he would not expect one foot to make a meaningful difference. When asked about a

10-foot fall, he agreed that such a fall made a fracture like the one Peterson had "more likely than falling from 6 foot 2."

Plaintiff objected when Smith's attorney asked Mosher, "What about another 20 feet?" After the objection was overruled, Mosher agreed that another 20 feet would indeed make such a fracture more likely. However, he then clarified that he was not saying that Peterson's fracture necessarily required a fall from such a height, but rather only that a fall from 20 to 30 feet was more likely to cause such a fracture than a fall from 6 feet. He therefore concluded that it was "highly unlikely" that Peterson's injuries were caused by a fall from standing height and hitting his head on the ground, because he "just [did not] think that that mechanism would sustain the amount of force needed to fracture Mr. Peterson's skull the way it was and sustain the injury and having him be in a coma that he was" and that a punch to the mouth was "unlikely" to have caused Peterson's death. Plaintiff declined to ask Mosher any questions at all.

Given Mosher's stipulated-to expertise and his experience with not only other injuries but particularly with comas and internal bleeding, we do not believe that it would have been an abuse of discretion for the trial court to overrule an objection to foundation, nor did Mosher engage in any inappropriate speculation or conjecture. Furthermore, the jury was made aware that Mosher had little to no other experience with a similar injury. At no point did Mosher opine that it was impossible for Peterson to have sustained the injury from a mere fall. Plaintiff could have followed up on Mosher's lack of experience and highlighted it but elected not to do so. The mere fact that testimony is not advantageous—because it presumably increased the

likelihood that the jury would believe only Suttle, who had a baton, could have inflicted a fatal blow—does not make it improper. Even if the trial court's decision had been erroneous, we are not persuaded that it would have been sufficiently prejudicial to warrant our intervention. MCR 2.613(A).

The trial court is affirmed. Brannigan, Smith, and McClain, being the prevailing parties who actually participated in this appeal, may each tax costs. MCR 7.219(A).

RONAYNE KRAUSE, P.J., and FORT HOOD and O'BRIEN, JJ., concurred.

BAKER v MARSHALL

Docket No. 335931. Submitted March 6, 2018, at Detroit. Decided April 5, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich 861.

Percy Baker filed a complaint in the Wayne Circuit Court against Edward D. Marshall; Hertz Vehicles, LLC; Ernest and Kendra Bradfield; and IDS Property Casualty Insurance Company (IDS) for injuries she sustained in a motor vehicle accident in October 2014. Marshall, driving a car owned by Hertz, ran a red light and broadsided a vehicle owned by Kendra, driven by Ernest, and in which Baker was a passenger. Defendants Marshall and Hertz were dismissed by stipulation, and defendants Ernest and Kendra settled with Baker. Baker claimed she was owed uninsured motorist benefits and personal protection insurance benefits from IDS, the insurance company with which Baker had a no-fault policy. IDS answered the complaint, denying Baker's allegations and raising several affirmative defenses. The answer did not state or otherwise indicate that Baker's fraudulent conduct prevented her from receiving benefits under her policy with IDS. Baker amended her complaint to add additional parties, and IDS generally denied the allegations and raised numerous affirmative defenses, but again, IDS failed to raise fraud as an affirmative defense. IDS later moved for partial summary disposition because both Marshall and Hertz were insured at the time of the accident. Still, IDS did not raise the issue that the policy's fraud-exclusion clause was applicable and barred Baker from recovering benefits. IDS then finally moved for summary disposition of the entirety of Baker's complaint, and for the first time IDS claimed that Baker had fraudulently misrepresented facts in her claim for benefits and that the fraud-exclusion clause in her policy barred her from receiving benefits. Baker argued that IDS had waived the defense of fraud because it had failed to raise the defense as required by MCR 2.111(F)—in IDS's first responsive pleading or amended responsive pleading or in a motion filed before IDS's responsive pleading. The court, Daphne Means Curtis, J., granted summary disposition in favor of IDS, citing the fraud-exclusion clause. Baker appealed.

The Court of Appeals *held*:

An affirmative defense is a defense that does not controvert a plaintiff's prima facie case but that otherwise denies relief to the plaintiff. An affirmative defense accepts the plaintiff's allegations as true but denies that the plaintiff is entitled to recover on his or her claim for some reason not disclosed in the plaintiff's pleadings. Generally, reliance on an exclusionary clause in an insurance policy is an affirmative defense. The fraud exclusion in the policy in this case was an affirmative defense because it did not controvert or deny the existence of Baker's prima facie case. Baker essentially claimed that she had a no-fault policy with IDS and was entitled to benefits under that policy after she sustained injuries in a motor vehicle accident. To controvert that claim, IDS would have had to argue that Baker was not entitled to recover benefits. To claim that Baker was not entitled to benefits because of the fraud-exclusion clause would have required IDS to acknowledge that, in the absence of fraud, IDS would be obligated to pay Baker benefits under her policy. Consequently, the fraud defense was an affirmative defense that was waived when IDS failed to properly raise it in its responsive pleading or in its amended responsive pleading or in a motion filed before its responsive pleading. The trial court erred by granting summary disposition to IDS.

Reversed and remanded.

JANSEN, J., dissenting, disagreed that the alleged fraud was an affirmative defense that had to be pleaded in accordance with the constraints set forth in MCR 2.111(F). IDS argued that Baker was fraudulently misrepresenting the nature and extent of her physical injuries, and therefore, she could not succeed on her claim because she could not successfully prove her prima facie case. Even though IDS referred to Baker's conduct as contractual fraud, it was not. Baker's alleged fraud occurred *after* she contracted with IDS for the policy. Because IDS's fraud argument went to whether Baker could prove her prima facie case, it was not an affirmative defense.

PLEADING — AFFIRMATIVE DEFENSES — FRAUD — NO-FAULT INSURANCE EXCLUSIONARY CLAUSES.

An affirmative defense accepts the plaintiff's allegation as true and even admits the establishment of the plaintiff's prima facie case, but it denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings; under MCR 2.111(F), affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in

accordance with MCR 2.118, although a party who has asserted a defense by motion filed pursuant to MCR 2.116 before filing a responsive pleading need not again assert that defense in a responsive pleading later filed; a defense not asserted in the responsive pleading or by motion as provided by the rules is waived, except for the defense of lack of jurisdiction over the subject matter of the action and failure to state a claim on which relief can be granted; an assertion that an insured is not entitled to benefits because of a fraud-exclusion clause in a no-fault automobile insurance policy does not deny that the plaintiff can establish a prima facie case for benefits; accordingly, that claim is an affirmative defense, and the failure to raise it in accordance with the court rules constitutes a waiver of the defense.

Mike Morse Law Firm (by *Christopher D. Filiatraut*, *Stacey L. Heinonen*, and *Michael J. Morse*) for Percy Baker.

Moffett Vitu Lascoe Packus & Sims, PC (by *Aaron D. Sims* and *Matthew G. Gauthier*) for IDS Property Casualty Insurance Company.

Before: M. J. KELLY, P.J., and JANSEN and METER, JJ.

M. J. KELLY, P.J. In this action for uninsured motorist insurance and personal protection insurance (PIP) benefits, the trial court granted summary disposition to defendant, IDS Property Casualty Insurance Company (IDS), on the ground that plaintiff, Percy Baker, had committed fraud. According to the court, a fraud-exclusion clause in Baker's automobile insurance policy with IDS voided her coverage. Baker appeals as of right, challenging the grant of summary disposition in IDS's favor.[1] Because IDS failed to plead fraud as an affir-

[1] Defendants, Edward Marshall and Hertz Vehicles, LLC, were dismissed from the proceedings pursuant to a stipulated order. Defendants, Kendra Bradfield and Ernest Bradfield, previously settled with Baker. On appeal, Baker only challenges the court's grant of summary disposition to IDS.

mative defense in its answer, amended answer, or in a motion for summary disposition filed in lieu of a responsive pleading, MCR 2.111(F)(3), we conclude that it waived the defense. Accordingly, the trial court erred by granting summary disposition on the basis of fraud. We reverse and remand for reinstatement of Baker's claim against IDS.

I. BASIC FACTS

The basic facts are undisputed. In October 2014, Baker sustained injuries when a vehicle driven by Edward Marshall ran a red light and broadsided the vehicle in which she was a passenger. At the time of the accident, Baker had a no-fault insurance policy with IDS that included uninsured motorist coverage. Baker asserted that as defined in her no-fault policy, Marshall was an uninsured motorist, as was Hertz Vehicles, LLC, the owner of the vehicle Marshall was driving. She submitted a claim for uninsured motorist benefits to IDS, but it was denied. She also sought PIP benefits, which were likewise denied by IDS.

In May 2015, Baker filed a complaint asserting that she was entitled to uninsured motorist insurance benefits under the terms of her policy with IDS. She also asserted that IDS had failed to pay her first-party benefits under the same policy. IDS filed its answer in June 2015. Generally, it denied the allegations that it had wrongfully failed to pay uninsured motorist benefits and PIP benefits under Baker's policy. In its answer, IDS asserted numerous affirmative defenses and reserved the right to file additional affirmative defenses as they "may become known during the course of investigation and discovery." The affirmative defenses raised in the answer did not include a defense that the insurance policy was *void ab initio* on the basis of fraud. In response, Baker denied each of the affirmative defenses

and demanded that, as required by MCR 2.111(F)(3), IDS provide detailed facts in support of each affirmative defense and a recitation of the legal basis for each of those defenses.[2] Baker later amended her complaint, adding claims against additional parties. In its answer to the amended complaint, IDS again generally denied the allegations against it and set forth numerous affirmative defenses, but it once more failed to raise contractual fraud as an affirmative defense.

In February 2016, IDS moved for partial summary disposition, asserting that Baker was not entitled to uninsured motorist benefits under her no-fault policy with IDS because Marshall and Hertz had valid insurance policies or were self-insured at the time of the accident. In doing so, it directed the trial court to the relevant terms of Baker's policy. It did not, at that time, raise any argument that the policy's fraud-exclusion clause was applicable for any reason. Before the court ruled on the motion, IDS moved for summary disposition in May 2016 on the entirety of Baker's claim. For the first time, IDS claimed that Baker had fraudulently misrepresented facts in her claim for benefits and that the fraud-exclusion clause in her policy with IDS therefore applied and barred her from receiving any benefits. Although Baker argued that IDS had waived its fraud defense by failing to raise it as required by MCR 2.111(F), the trial court granted summary disposition on the basis that the fraud-exclusion clause applied.

II. WAIVER OF AFFIRMATIVE DEFENSES

A. STANDARD OF REVIEW

On appeal, Baker argues that the trial court erred by granting summary disposition on the basis of fraud

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[2] It appears that IDS took no action in response to this demand.

because the defense of fraud was waived by IDS's failure to properly raise it as an affirmative defense under MCR 2.111(F). Our review of a grant of summary disposition is de novo. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

B. ANALYSIS

"[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993). MCR 2.111(F) addresses the proper manner to plead affirmative defenses and sets forth the consequences for failing to do so. MCR 2.111(F)(2) provides that "[a] defense not asserted in the responsive pleading or by motion as provided by these rules is waived, except for the defenses of lack of jurisdiction over the subject matter of the action, and failure to state a claim on which relief can be granted." And MCR 2.111(F)(3) provides that "[a]ffirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." Alternatively, "a party who has asserted a defense by motion filed pursuant to MCR 2.116 before filing a responsive pleading need not again assert that defense in a responsive pleading later filed[.]" MCR 2.111(F)(2)(a). It has long been established that under MCR 2.111(F), " '[t]he failure to raise an affirmative defense as required by the court rule constitutes a waiver of that affirmative defense.' " *Dell v Citizens Ins Co of America*, 312 Mich App 734, 753; 880 NW2d 280 (2015), quoting *Stanke*, 200 Mich App at 312. On the record before this Court, it is plain that IDS did not

raise its reliance on the fraud-exclusion clause in its affirmative defenses to either the original or the amended complaint, nor did it first raise it in a motion filed under MCR 2.116 before filing a responsive pleading. Accordingly, under the plain language of MCR 2.111(F)(3), the defense is waived.

In Michigan, "[r]eliance on an exclusionary clause in an insurance policy is an affirmative defense . . . ." *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 657; 899 NW2d 744 (2017). Despite that fact, in an effort to avoid waiver under MCR 2.111(F)(3), IDS directs us to this Court's decision in *Stanke* and argues that under the rationale used in *Stanke* the defense in this case is not an affirmative defense because it directly controverts Baker's prima facie case. We disagree.

In *Stanke*, the defendant insurance company argued for about 17 months that the plaintiff was not entitled to coverage under his parents' no-fault policy because he was not a resident of his parents' domicile. *Stanke*, 200 Mich App at 310-311. Thereafter, the defendant raised a new theory in a motion for summary disposition: the vehicle involved in the accident was an owned vehicle not named on the declarations page of the policy and coverage could be denied because there was an "owned vehicle exclusion" clause in the policy. *Id*. at 311. The trial court, however, concluded that the owned-vehicle-exclusion argument was waived because the defendant had not raised it as a defense in its answer or as an affirmative defense. *Id*. The trial court further denied the defendant leave to amend its answer on the basis of inexcusable delay. *Id*. This Court, however, granted leave and ultimately held that the defense was not waived because it was not an affirmative defense. *Id*. at 315-316. In doing so, this Court defined an affirmative defense as follows:

> An affirmative defense is a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff. In other words, it is a matter that accepts the plaintiff's allegation as true and even admits the establishment of the plaintiff's prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings. For example, the running of the statute of limitations is an affirmative defense. Thus, although the plaintiff may very well have a valid claim and is able to establish a prima facie case, the defendant, as an affirmative matter, may nevertheless establish that the plaintiff is not entitled to prevail on the claim because the defendant can show that the period of limitation has expired and, therefore, the suit is untimely. [*Id*. at 312 (citations omitted).]

The Court then reasoned that the defendant's contention that the driver operated an unnamed but owned vehicle "directly controverts plaintiff's entitlement to prevail" because if that contention were proved, the plaintiff would be unable to establish his prima facie case by showing that there was a policy covering the facts at hand. *Id*. at 313-315.

In this case, however, the existence of the fraud-exclusion clause does not controvert Baker's entitlement to prevail on her prima facie case. Her claim is essentially a claim that she had a no-fault policy with IDS and was entitled to benefits under that policy. In order to directly controvert that claim, IDS would have to argue that, under the language in the policy, she was not entitled to recover benefits. Its claim that Baker is not entitled to benefits on the basis of the fraud-exclusion clause, however, requires IDS to acknowledge that, in the absence of fraud, it would be required to pay her benefits under the policy. Stated differently, in order for fraud to bar Baker's claim, she must first have a claim to be barred. The claim to be barred is the claim

raised in her prima facie case. The fraud defense is therefore an affirmative defense, one that if successful would prevent Baker from recovering under the policy despite the fact that she could otherwise prevail on her prima facie case. Because the fraud defense is an affirmative defense, the failure to raise it constitutes a waiver of that defense. Consequently, the trial court erred by granting IDS summary disposition on the basis of fraud.

Reversed and remanded for reinstatement of Baker's claim against IDS. We do not retain jurisdiction. Baker may tax costs as the prevailing party. MCR 7.219(A).

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

JANSEN, J. (*dissenting*). I respectfully dissent. In my view, it was unnecessary for defendant IDS Property Casualty Insurance Company (IDS) to have pleaded fraud as an affirmative defense, and therefore, the defense has not been waived. On that basis, I would affirm the trial court's grant of summary disposition in favor of IDS.

Contrary to the majority, I find *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307; 503 NW2d 758 (1993), to be on point and persuasive. Because plaintiff's fraud prevents her from establishing a prima facie case, fraud need not have been pleaded as an affirmative defense. *Id*. at 312. Courts are not bound by what litigants choose to label their motions, complaints, or other pleadings. *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Rather, it is our duty to consider the gravamen of the pleading or motion based on a complete reading of the document as a whole. *Stephens v Worden Ins Agency, LLC*, 307 Mich

App 220, 229; 859 NW2d 723 (2014). Accordingly, although IDS referred to plaintiff's alleged fraud as contractual fraud, it is not. IDS is not arguing that plaintiff committed fraud when obtaining her insurance policy and therefore, an exclusionary clause would render that policy void *ab initio*. Admittedly, if that were the case, the trial court would have committed error requiring reversal by granting summary disposition in favor of IDS. See *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 657; 899 NW2d 744 (2017). Rather, the crux of IDS's argument is that plaintiff's injuries are not related to, and actually predate, the underlying accident in this matter, and that therefore, plaintiff is not entitled to recover PIP benefits from IDS. IDS does not argue that even if all of plaintiff's claims are taken as true, it is still excused from liability due to plaintiff's contractual fraud, i.e., it has an affirmative defense. Instead, IDS argues that plaintiff is fraudulently misrepresenting the nature and extent of her physical injuries and therefore cannot succeed on her claim because she cannot successfully prove her prima facie case. The majority has overlooked that important distinction.

Based on the foregoing, I would affirm.

In re PETITION OF BERRIEN COUNTY TREASURER
FOR FORECLOSURE

Docket No. 330795. Submitted November 7, 2017, at Grand Rapids. Decided April 10, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich 1032.

The Berrien County Treasurer filed a petition in the Berrien Circuit Court, seeking the tax foreclosure of seven parcels for unpaid taxes for the years 2008 through 2012. In 2014, New Products Corporation objected to the foreclosure of six of those parcels but allowed the foreclosure process to proceed on the seventh property. In 2015, the court, Sterling R. Schrock, J., granted petitioner's motion for summary disposition under MCR 2.116(C)(4), concluding that it lacked subject-matter jurisdiction because the Tax Tribunal had exclusive and original jurisdiction over respondent's objections. In May 2015, the court entered a judgment of foreclosure on all the parcels and stayed its enforcement, stating that the 21-day period for payment of all forfeited delinquent property taxes, interest, penalties, and fees would begin upon expiration of the stay if respondent filed a timely appeal. Respondent appealed as of right, and petitioner cross-appealed. Petitioner moved for partial peremptory reversal, arguing that the court's stay of enforcement of the judgment erroneously allowed respondent to file a claim of appeal without having paid the full amount of delinquent taxes owed for the seven parcels included in the foreclosure judgment, contrary to MCL 211.78k. In lieu of granting petitioner's motion, the Court of Appeals vacated the May 2015 foreclosure judgment and remanded the case to the circuit court for entry of a new judgment, requiring respondent to pay the full amount owed for all parcels under the foreclosure judgment as a condition to appeal. *In re Petition of Berrien Co Treasurer for Foreclosure*, unpublished order of the Court of Appeals, entered June 10, 2015 (Docket No. 327688). In July 2015, the circuit court amended the foreclosure judgment in accordance with the Court of Appeals' order. In August 2015, respondent paid $35,436.87 in delinquent taxes to redeem five of the six parcels for which it had filed objections but appealed the foreclosure judgment with regard to all six parcels; respondent did not pay the $483,803.75 in delinquent taxes owed on Parcel 11-54-0018-0025-00-8 (Parcel 00-8), the sixth parcel. Petitioner

moved to dismiss the appeal. The Court of Appeals granted the motion to dismiss, concluding that respondent had failed to pay the full amount due under the foreclosure judgment as required by the plain language of MCL 211.78k. Respondent sought leave to appeal, and in lieu of granting leave to appeal, the Supreme Court vacated the Court of Appeals order and remanded the case to the Court of Appeals for consideration as on leave granted of whether MCL 211.78k(7) required payment of the full amount due for all tax parcels listed in the judgment of foreclosure as a condition of appeal when respondent did not challenge the foreclosures for all the parcels.

The Court of Appeals *held*:

MCL 211.78k(7) provides that the foreclosing governmental unit or a person claiming to have a property interest in property foreclosed may appeal in the Court of Appeals the circuit court's order or the circuit court's judgment foreclosing property. Under the statute, the circuit court's foreclosure judgment is stayed until the Court of Appeals has reversed, modified, or affirmed that judgment. If an appeal stays the circuit court's judgment foreclosing property, the circuit court's judgment is stayed only as to the property that is the subject of that appeal and the circuit court's judgment foreclosing other property that is not the subject of the that appeal is not stayed. Accordingly, the portion of the judgment that proceeds to appeal is the part that was appealed and stayed for the purpose of the appeal. To perfect an appeal in a contested case, MCL 211.78k(7) provides that the person appealing the foreclosure judgment must pay to the county treasurer the amount determined to be due to the county treasurer under the judgment within 21 days of the entry of a judgment foreclosing the property. By using the definite article "the" in MCL 211.78k(7)—"a person appealing *the* judgment shall pay to the county treasurer *the* amount determined to be due under *the*" judgment—the Legislature referred to the specific amount determined due by the treasurer for the particular property under foreclosure that is being appealed. Accordingly, MCL 211.78k(7) does not require a person to pay the full amount due for all tax parcels listed in a judgment of foreclosure as a condition of appeal when the person does not seek to challenge the foreclosure for all the tax parcels. In this case, respondent appealed the portion of the foreclosure judgment related to Parcel 00-8. Although respondent redeemed other parcels included within the foreclosure judgment, it did not pay the taxes due for Parcel 00-8—the only parcel challenged in the Court of Appeals—within the statutory 21-day period before filing its appeal. Accordingly, the Court of Appeals lacked jurisdiction over the case because respondent failed to satisfy the MCL 211.78k(7)

condition of appeal. Because it lacked jurisdiction, the Court of Appeals declined to address respondent's remaining arguments.

Appeal dismissed.

TAXATION — FORECLOSURES — APPEALS — PAYMENT OF JUDGMENT AS A CONDITION OF APPEAL.

Under MCL 211.78k(7), a person appealing a foreclosure judgment to the Court of Appeals must pay to the county treasurer the amount determined to be due to the county treasurer under the judgment within 21 days of the entry of a judgment foreclosing the property; MCL 211.78k(7) does not require a person to pay the full amount due for all tax parcels listed in a judgment of foreclosure as a condition of appeal when the person does not seek to challenge the foreclosure for all the tax parcels included in the judgment; in other words, a person need only pay the amount of delinquent taxes owed for the part of the judgment that is appealed.

Dickinson Wright PLLC (by *K. Scott Hamilton*) for petitioner.

Demorest Law Firm, PLLC (by *Stephen D. Kursman* and *Melissa Demorest LeDuc*) for respondent.

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

PER CURIAM. This foreclosure action is before the Court on remand from the Michigan Supreme Court for consideration as on leave granted of "whether MCL 211.78k(7) requires payment of the full amount due for all tax parcels listed in a judgment of foreclosure as a condition of appeal where the taxpayer does not seek to challenge the foreclosures for all of the parcels." *In re Petition of Berrien Co Treasurer For Foreclosure*, 500 Mich 902 (2016). We conclude that it does not.

I. BACKGROUND

Respondent challenged petitioner's June 13, 2014 prayer for the tax foreclosure of six of seven property

tax parcels[1] comprising 12 acres at 489 North Shore Drive, Benton Harbor, Michigan for unpaid taxes for tax years 2008 through 2012. On November 3, 2014, respondent filed objections to the foreclosure of those parcels. All seven of the North Shore properties were removed from the annual petition for foreclosure. Thereafter, the parties filed cross-motions for summary disposition on the respondent's objections. The circuit court granted petitioner's MCR 2.116(C)(4) motion for lack of subject-matter jurisdiction because the court agreed that the Tax Tribunal had exclusive and original jurisdiction to make the factual findings necessary to resolve respondent's objections.[2] A judgment of foreclosure regarding all the North Shore properties was entered on May 20, 2015. The court stayed enforcement of the judgment

> until (a) the Michigan Court of Appeals has reversed, modified, or affirmed the same, and the Michigan Court of Appeals' decision has become final; or (b) until the period by which New Products Corporation may file a claim of appeal has expired without any such claim of appeal having been filed, whichever occurs first. If an appeal is timely filed, the 21-day period for payment of all forfeited delinquent property taxes, interest, penalties and fees shall begin upon expiration of the stay.

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[1] Tax Parcel Nos.: 11-54-0018-0021-02-9; 11-54-0018-0021-01-1; 11-54-0018-0025-00-8 (Parcel 00-8); 11-54-0018-0025-02-4; 11-54-0018-0025-01-6; 11-54-0018-0025-03-2; and 11-54-0018-0024-00-1. Respondent does not challenge the foreclosure of Tax Parcel No. 11-54-0018-0025-02-4 and has allowed the foreclosure process to proceed regarding that parcel only.

[2] The court also held that respondent lacked standing to assert the notice rights of third parties Modern Plastics and the Walter Miller Trust. Respondent asserts that Parcel 00-8 was not properly assessed because the assessment includes real estate owned by two different owners, Modern Plastics and the Walter Miller Trust. In August 2014, the trust quitclaimed its interest in Parcel 00-8 to respondent.

Respondent appealed as of right the circuit court's May 2015 judgment of foreclosure and the underlying grant of petitioner's motion for summary disposition. Petitioner, in turn, filed a motion for partial peremptory reversal, arguing that the circuit court's stay of enforcement of the judgment allowed respondent to file a claim of appeal without having paid the full amount owed on the judgment of foreclosure as required under MCL 211.78k. In lieu of granting the motion, this Court vacated the May 2015 judgment of foreclosure:

> The trial court committed manifest error. MCL 211.78k(7) specifically and unambiguously provides for an appeal of right from a judgment of foreclosure entered under this statutory foreclosure scheme, provided the appellant pays to the county treasurer the amount due on the property within 21 days after entry of the judgment. When granting the right to appeal, the Legislature possesses the "unquestioned authority" to impose as a "jurisdictional condition precedent" to an appeal the condition of payment of the amount of a delinquent tax decree and this condition precedent "may be neither waived by counsel nor dispensed with by court." *In re Petition of Auditor General*, 252 Mich 367, 368-369; 233 NW 348 (1930). We REMAND this matter to the trial court for entry of a new judgment of foreclosure that does not include a provision that relieves New Products Corporation of its statutory obligation to pay the amount owed under the judgment as a condition to appealing. The May 20, 2015 order having been vacated, plaintiff's appeal and defendant's cross appeal are DISMISSED as MOOT. The parties may appeal from the new judgment in accordance with MCL 211.78k(7) and the applicable court rules. This order has immediate effect. MCR 7.215(F)(2). [*In re Petition of Berrien Co Treasurer for Foreclosure*, unpublished order of the Court of Appeals, entered June 10, 2015 (Docket No. 327688).]

On remand, the circuit court entered a July 27, 2015 amended judgment of foreclosure, stating:

> [T]his Amended judgment is stayed until the period by which New Products Corporation may file a claim of appeal from this amended judgment has expired without any such claim of appeal having been filed. If an appeal is filed as to any particular parcel(s), then this Amended Judgment shall be stayed as to the parcel(s) under appeal until the Michigan Court of Appeals has reversed, modified or affirmed the same, and the Michigan Court of Appeals' decision has become final, provided that New Products Corporation complies with MCL 211.78k(7).

On August 14, 2015, respondent paid $35,436.87 to redeem five of the seven parcels and filed a claim of appeal from the amended judgment, initiating this appeal. Petitioner again filed a motion to dismiss in this Court, arguing that respondent had not paid the full amount due under the judgment as required under MCL 211.78k. This Court granted respondent's motion to dismiss, explaining:

> [T]he motion to dismiss this appeal is GRANTED because appellant has failed to pay the amount determined to be due to the county treasurer under the July 27, 2015 amended judgment of foreclosure as required by the plain language of MCL 211.78k(7) for it to pursue this appeal. We must apply this requirement of MCL 211.78k(7) in accordance with its plain and ordinary meaning which requires payment of the full amount due under the judgment as a condition for an appeal, not merely a partial payment. See *Spectrum Health Hospitals v Farm Bureau Mutual Ins Co of Michigan*, 492 Mich 503, 515; 821 NW2d 117 (2012) (regarding requirement to apply statutory language in accordance with its plain and ordinary meaning). In this regard, that MCL 211.78k(7) requires payment of "the amount" determined to be due under the judgment reflects that only one amount is contemplated which can only be the one amount, i.e., the full amount, due under the judgment. See *Robinson v Detroit*, 462 Mich 439, 461-462; 613 NW2d 307 (2000) (discussing meaning of definite article "the"). Because dismissal is required due

to appellant's failure to pay the amount determined to be due under the judgment appealed from we do not need to reach the other issues raised by the parties. [*In re Petition of Berrien Co Treasurer for Foreclosure*, unpublished order of the Court of Appeals, entered March 2, 2016 (Docket No. 330795).]

Respondent filed an application for leave to appeal and a motion for immediate consideration with our Supreme Court on June 1, 2016. In lieu of granting leave to appeal, the Supreme Court issued the following order:

Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals order granting the motion to dismiss the appeal, and remand this case to the Court of Appeals for plenary consideration as on leave granted of whether MCL 211.78k(7) requires payment of the full amount due for all tax parcels listed in a judgment of foreclosure as a condition of appeal where the taxpayer does not seek to challenge the foreclosures for all of the parcels. If the Court of Appeals concludes that MCL 211.78k(7) does not impose such a requirement, it shall reinstate the appeal and proceed in accordance with MCR 7.204. [*In re Petition of Berrien Co Treasurer for Foreclosure*, 500 Mich at 902.]

On remand, this Court entered an order permitting the parties to file briefs addressing only the threshold question in the Supreme Court's order. Thereafter, this Court issued the following order that, in part, defined the scope of the current appeal:

On its own motion, the Court orders that, on further consideration of the December 7, 2016 Michigan Supreme Court order in this matter, this appeal is REINSTATED so that this matter may receive plenary consideration by a case call panel of this Court. Thus, the motion to dismiss this appeal is DENIED without prejudice to the parties addressing in their briefs on appeal for the case call panel the jurisdictional issue of whether MCL 211.78k(7) re-

> quires payment of the full amount due for all tax parcels listed in a judgment of foreclosure as a condition of appeal where the taxpayer does not seek to challenge the foreclosures for all of the parcels and any other issue that the parties may consider relevant to this Court's jurisdiction. [*In re Petition of Berrien Co Treasurer for Foreclosure*, unpublished order of the Court of Appeals, entered March 9, 2017 (Docket No. 330795).]

II. STATUTORY INTERPRETATION

A. STANDARD OF REVIEW

"Statutory interpretation is a question of law, which this Court reviews de novo." *New Props, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 138; 762 NW2d 178 (2009).

"When interpreting the meaning of a statute, our primary goal is to discern the intent of the Legislature by first examining the plain language of the statute." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). "[W]e consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). "Statutory language should be construed reasonably, keeping in mind the purpose of the act." *Twentieth*

Century Fox Home Entertainment, Inc v Dep't of Treasury, 270 Mich App 539, 544; 716 NW2d 598 (2006) (quotation marks and citation omitted).

B. ANALYSIS

A person claiming an interest in a foreclosed property may elect to redeem the property after entry of final judgment, MCL 211.78k(5),[3] allow its foreclosure by the taxing unit, MCL 211.78k(6),[4] or appeal the judgment in the Court of Appeals, MCL 211.78k(7).

With regard to appealing a foreclosure judgment, MCL 211.78k(7) provides:

> The foreclosing governmental unit or a person claiming to have a property interest under section 78i in property foreclosed under this section may appeal the circuit court's order or the circuit court's judgment foreclosing property to the court of appeals. An appeal under this subsection is

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[3] MCL 211.78k(5)(b) requires the circuit court's judgment to specify

> [t]hat fee simple title to property foreclosed by the judgment will vest absolutely in the foreclosing governmental unit, except as otherwise provided in subdivisions (c) and (e), without any further rights of redemption, if all forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section.

[4] MCL 211.78k(6) provides, in pertinent part:

> [F]ee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property. . . .

> limited to the record of the proceedings in the circuit court under this section and shall not be de novo. The circuit court's judgment foreclosing property shall be stayed until the court of appeals has reversed, modified, or affirmed that judgment. If an appeal under this subsection stays the circuit court's judgment foreclosing property, the circuit court's judgment is stayed only as to the property that is the subject of that appeal and the circuit court's judgment foreclosing other property that is not the subject of that appeal is not stayed. *To appeal the circuit court's judgment foreclosing property, a person appealing the judgment shall pay to the county treasurer the amount determined to be due to the county treasurer under the judgment* on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, together with a notice of appeal. If the circuit court's judgment foreclosing the property is affirmed on appeal, the amount determined to be due shall be refunded to the person who appealed the judgment. If the circuit court's judgment foreclosing the property is reversed or modified on appeal, the county treasurer shall refund the amount determined to be due to the person who appealed the judgment, if any, and retain the balance in accordance with the order of the court of appeals. [Emphasis added.]

The italicized language is at issue here.

According to MCL 211.78k(7), when a person claiming to have a property interest in the foreclosed property appeals the foreclosure judgment, the "judgment is stayed only as to the property that is the subject of that appeal." The statute states that "the circuit court's judgment foreclosing other property that is not the subject of that appeal is not stayed." *Id*. In that regard, under MCL 211.78k(5) and (6), the property for which a stay is not issued continues through the foreclosure process by the interested person redeeming the property or allowing the foreclosure to proceed. However,

the portion of the original judgment amount applicable to the property subject to the stay of execution follows the appellate process. The process for perfecting that appeal is discussed in the next section of the statute, MCL 211.78k(7), which provides that "[t]o appeal the circuit court's judgment foreclosing property, a person appealing the judgment shall":

(1) "pay to the county treasurer the amount determined to be due to the county treasurer under the judgment"

(2) "on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or"

(3) "in a contested case within 21 days of the entry of a judgment foreclosing the property under this section,"

(4) "together with a notice of appeal."

This Court's March 2016 order[5] dismissing respondent's appeal did so by emphasizing the definite article "the" before the singular noun "amount" to conclude that "*the amount* determined to be due to the county treasurer under the judgment" meant the full amount due under the judgment. MCL 211.78k(7) (emphasis added). Nowhere in MCL 211.78k(7) is there a reference to the "full amount," however. Instead, MCL 211.78k(7) differentiates property subject to the stay or "the subject of that appeal" from "other property that is not the subject of that appeal" and "is not stayed." As a result, the part of the judgment that proceeds to appeal is the part that was appealed and stayed for the purpose of the appeal. It is true that "[w]here the

[5] *In re Petition of Berrien Co Treasurer for Foreclosure*, unpublished order of the Court of Appeals, entered March 2, 2016 (Docket No. 330795).

Legislature wishes to refer to a particular item, not a general item, it uses the word 'the,' rather than 'a' or 'an.' " *Barrow v Detroit Election Comm*, 301 Mich App 404, 414; 836 NW2d 498 (2013). In this case, the statutory language providing that "a person appealing *the* judgment shall pay to the county treasurer *the* amount determined to be due under *the* judgment" connotes the specific amount determined due by the treasurer for the particular property under foreclosure that is being appealed. MCL 211.78k(7). Accordingly, MCL 211.78k(7) does not require a person to pay the full amount due for all tax parcels listed in an original judgment of foreclosure as a condition of appeal when the person does not seek to challenge the foreclosures for all of the parcels.

The appeal before this Court concerns Parcel 00-8 for which the respondent has made no payments. The Supreme Court pointedly asked us to resolve whether payment of the entire judgment amount was required to maintain an appeal of one of the parcels included in the judgment. Our answer is simply that the payment of the amount owed for parcels that are the subject of the appeal must be paid in their entirety.

That being said, respondent is still required to pay the amount due under the amended judgment of foreclosure for Parcel 00-8 to appeal issues related to the foreclosure of that property in this Court. After the circuit court entered the amended judgment, respondent redeemed five parcels by paying the amount due under the amended judgment for those parcels[6] and

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[6] Respondent challenged the property descriptions for these parcels as overlapping, resulting in double taxation, gaps in the property, and erroneous assessments. Respondent claims it paid the amounts due for the five parcels under protest. It abandoned any argument regarding these parcels on appeal, however, because its focus is only on Parcel 00-8.

allowed one parcel to be foreclosed. This left one parcel, Parcel 00-8, as the subject of appeal. Respondent did not pay the amount due for Parcel 00-8 and argues that it was not required to do so. Its reason for not paying the $483,803.75 in taxes due on Parcel 00-8 has no statutory support in either MCL 211.78k or otherwise. Respondent asserts it "did not pay, and was not legally required to pay, the $483,803.75 claimed to be due for Parcel No. 00-8, because there was never any separate property tax assessment for the Walter Miller Property." While this may be true and a valid reason to appeal the judgment, we lack jurisdiction to consider the legal argument because, again, respondent has not paid the amount due for this parcel, which is a condition of appeal. Respondent's additional argument for not paying the amount due for Parcel 00-8 as a condition of appeal is that payment of the $483,803.75 due under the judgment of foreclosure for this parcel would create a hardship. But there is no hardship exception in MCL 211.78k that would allow respondent to circumvent the requirements for perfecting his appeal. Because the appeal is not perfected, we decline to discuss the merits of respondent's additional arguments regarding jurisdiction and standing.

Respondent's appeal is dismissed.

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

PEOPLE v REICHARD

Docket No. 340732. Submitted March 6, 2018, at Lansing. Decided April 17, 2018, at 9:00 a.m. Leave to appeal sought.

Tiffany L. Reichard was bound over to the Jackson Circuit Court on a charge of open murder. The prosecution's theory was that defendant aided and abetted a felony murder with robbery as the predicate felony. The court, Thomas D. Wilson, J., granted defendant's motion to present evidence of duress at trial, specifically, as a defense to defendant's participation in the predicate felony. Defendant intended to argue that her participation in the armed robbery was under duress and that she was not present during the murder and did not know about the murder until after the fact. The Jackson County Prosecutor filed an interlocutory application for leave to appeal, and the Court of Appeals granted the application.

The Court of Appeals *held*:

It is well established that duress is not a defense to a charge of homicide. The common-law expectation that a person risk or sacrifice his own life rather than taking the life of a third person applies to both the principal to murder and to an aider and abettor to the murder. To support a homicide conviction under an aiding and abetting theory, the prosecutor must show that the defendant intended to aid in committing the murder, that the defendant knew that the principal intended to commit the murder, or that homicide was a natural and probable consequence of the crime the defendant intended to aid and abet—here, armed robbery. If the prosecutor can make this showing, then the defendant will have intentionally or knowingly participated in a homicide or in a crime for which homicide was a natural and probable consequence. Therefore, to allow a duress defense in this context would improperly allow that defense to be used as a defense to murder. Accordingly, a defendant charged with aiding and abetting murder under a felony-murder theory may not raise a duress defense even when the claim of duress applies solely to the predicate felony. The trial court erred by granting defendant's motion to raise duress as a defense to the robbery.

Reversed and remanded.

CRIMINAL LAW — FELONY MURDER — AIDING AND ABETTING — DURESS.

Duress is not a defense to a charge of aiding and abetting murder, even when duress is raised solely as a defense to the predicate felony under a felony-murder theory.

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

Michael A. Faraone PC (by *Michael A. Faraone*) for defendant.

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

SAWYER, P.J. In this interlocutory appeal, we must resolve the question whether duress may be used as a defense to first-degree felony murder when the claim of duress goes to the defendant's participation in the underlying felony. We agree with the prosecutor that it may not.

Defendant is charged with open murder, with the predicate felony being armed robbery. The trial court granted her motion to present evidence of duress at trial.[1] Defendant acknowledges that duress is not a defense to murder but argues that it may be a defense to the predicate felony in a felony-murder charge. The prosecution argues that duress cannot be a defense to murder in any form. We agree with the prosecutor.

This case presents a question of law that we review de novo.[2] As we observed in *People v Henderson*,[3] "it is

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[1] Defendant will apparently take the position at trial that she was threatened or coerced into participating in the armed robbery and served as a lookout, but that she was not in the house during the robbery and that she did not know of the murder until after the fact.

[2] *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

[3] 306 Mich App 1, 5; 854 NW2d 234 (2014).

well established that duress is not a defense to homicide." In *Henderson*, this Court rejected the availability of the duress defense when the defendant claimed to have only been an aider and abettor to the killing. The Court[4] reasoned as follows:

> "The rationale underlying the common law rule is that one cannot submit to coercion to take the life of a third person, but should risk or sacrifice his own life instead." *People v Dittis*, 157 Mich App 38, 41; 403 NW2d 94 (1987). Because duress is not a defense to homicide, the trial court did not err by declining to instruct the jury in this regard with respect to defendant's murder charge. Defendant maintains that the principle that duress is not a defense to homicide is inapplicable when he did not actually commit the murder himself but was instead prosecuted primarily as an aider and abettor to murder. We fail to see the logic in this argument, and defendant provides no supporting authority that an aider and abettor to murder can employ a duress defense even though a principal is not entitled to do so. If directly committing a homicide is not subject to a duress defense, assisting a principal in the commission of a homicide cannot be subject to a duress defense either, considering that an aider and abettor to murder is assisting in taking the life of an innocent third person instead of risking or sacrificing his or her own life. See *Dittis*, 157 Mich App at 41. The underlying rationale articulated in *Dittis* is equally sound and not distinguishable in the context of aiding and abetting murder. The court in *State v Dissicini*, 126 NJ Super 565, 570; 316 A2d 12 (NJ App, 1974), aff'd 66 NJ 411 (1975), in rejecting a similar argument, observed:
>
>> Defendant does not dispute the general rule, but argues that it is applicable only to a defendant who is the actual perpetrator of the killing, and that the defense should be available to one such as he who did not directly kill but only aided and abetted.

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[4] *Id*. at 5-6.

> Authoritative discussion of the point is sparse . . . and this is undoubtedly so because the argument has little merit.
>
> The California Supreme Court has stated that "because duress cannot, as a matter of law, negate the intent, malice or premeditation elements of a first degree murder, we further reject defendant's argument that duress could negate the requisite intent for one charged with aiding and abetting a first degree murder." *People v Vieira*, 35 Cal 4th 264, 290; 25 Cal Rptr 3d 337; 106 P3d 990 (2005). Even the United States Court of Appeals for the Ninth Circuit has noted that duress does not excuse murder and "in many jurisdictions, duress does not excuse attempted murder or aiding and abetting murder[.]" *Annachamy v Holder*, 733 F3d 254, 260 n 6 (CA 9, 2012). We are unaware of any Michigan precedent to the contrary in which the issue was directly confronted.

Moreover, this Court has, with limited analysis and arguably in dicta, rejected duress as a defense to felony murder.[5] These cases, however, did not focus on the issue of duress as it relates to the predicate felony. There does not appear to be a published decision in this state that does so.

We see no logical reason to allow the duress defense to negate the predicate and mitigate the first-degree felony murder down to second-degree murder. As observed in *Henderson*, the public policy of this state is to disallow duress as a defense to homicide. Moreover, this remains true even when the defendant's liability is based upon aiding and abetting. More to the point, because "directly committing a homicide is not subject to a duress defense, assisting a principal in the commission of a homicide cannot be subject to a duress defense either, considering that an aider and abettor to

[5] See *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996), and *People v Etheridge*, 196 Mich App 43, 56; 492 NW2d 490 (1992).

murder is assisting in taking the life of an innocent third person instead of risking or sacrificing his or her own life."[6]

It is the existence of the predicate felony that raises the principal's liability from second-degree murder to first-degree murder. We fail to see why aiding and abetting the murder itself should disallow the duress defense, while aiding and abetting the predicate felony would allow for it. That is, if this were simply a second-degree murder case but the facts otherwise the same, with defendant's liability being based upon an aiding and abetting theory, both defendant and the principal would be guilty of second-degree murder, and the duress defense would be unavailable to defendant. With the addition of the predicate felony, the principal's liability is raised to first-degree murder. Yet defendant's role as an aider and abettor has remained the same, so her criminal responsibility should also be raised to first-degree murder. Simply put, in both cases she aided and abetted a crime that resulted in the taking of a human life.

What is lost in this case is that the real issue is not whether defendant was acting under duress, but whether she actually aided and abetted a criminal homicide. *Henderson*[7] discussed aiding and abetting in rejecting the defendant's argument that there was insufficient evidence to support his conviction as an aider and abettor to the homicide:

> "The phrase 'aids or abets' is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *People v Moore*, 470 Mich

[6] *Henderson*, 306 Mich App at 5-6.

[7] 306 Mich App at 10-11.

56, 63; 679 NW2d 41 (2004). To show that an individual aided and abetted the commission of a crime, the prosecution must establish

> "that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." [*People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citation omitted).]

With respect to the intent element, our Supreme Court in *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006), elaborated:

> We hold that a defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as [for] those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense.

Thus, to convict defendant, the prosecutor will have to show (1) that she intended to aid in the charged offense, or (2) that she knew that the principal intended to commit the charged offense, or (3) that the charged offense was a natural and probable consequence of the crime that she intended to aid and abet.[8]

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[8] *Henderson*, 306 Mich App at 12.

If the prosecutor is able to make this showing, then defendant will have intentionally or knowingly participated in a homicide or, at a minimum, participated in a crime for which homicide was a natural and probable consequence. Therefore, to allow the duress defense in this context would, in fact, allow it to be used as a defense to murder.

For these reasons, we conclude that the trial court erred by granting defendant's motion to raise duress as a defense to the murder charge, including the felony-murder theory.

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

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

FINAZZO v FIRE EQUIPMENT COMPANY

Docket No. 338421. Submitted April 3, 2018, at Detroit. Decided April 17, 2018, at 9:05 a.m.

David Finazzo brought a negligence action in the Washtenaw Circuit Court against Fire Equipment Company (FEC) and Low Voltage Building Technologies, Inc. (LVBT), asserting that defendants were liable for injuries plaintiff received from a fall while working as a security guard at ITC Holdings Corp. Defendants were contractors installing a fire protection system in ITC's computer room. During the installation, plaintiff stumbled on electrical cabling that was lying on the floor pending its installation in the drop-down ceiling. Before the incident, many people, including plaintiff, had safely stepped over the cabling numerous times. Defendants moved for summary disposition on the basis that as contractors working on behalf of the premises possessor, they could avail themselves of the open and obvious danger doctrine. The court, David S. Swartz, J., granted defendants summary disposition and held that plaintiff's claim failed because reasonable minds could not differ in finding that defendants were not negligent and that plaintiff's injuries were the result of plaintiff's own carelessness. Plaintiff appealed.

The Court of Appeals *held*:

1. While the Supreme Court has never adopted wholesale the Restatement of Torts, it has consistently relied on the principles in the Restatement to develop Michigan's law of premises liability. Generally, for a party to be subject to premises liability in favor of persons coming on the land, the party must possess and control the property at issue but not necessarily be its owner. Possession and control can be "loaned" to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility. The Supreme Court has explicitly recognized the principles underlying the rule set forth in 2 Restatement Torts, 2d, § 384, p 289, which provides that one who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he or she were the possessor of the land, for physical harm caused to others upon and outside of

the land by the dangerous character of the structure or other condition while the work is in his or her charge. Comment *c* of § 384 provides that the rule applies to anyone who erects a structure upon land or alters its physical condition on behalf of its possessor, irrespective of whether he or she does so as a servant of the possessor or as a paid or unpaid independent contractor. Comment *d* of § 384 provides that a general contractor employed to do the whole of the work may, by the authority of his or her employer, sublet particular parts of the work to subcontractors and, in that situation, the rule applies to subject the particular contractor or subcontractor to liability for only such harm as is done by the particular work entrusted to him or her. In this case, the rule applies to defendant FEC because FEC was under contract to ITC to make changes to its computer room by installing a fire suppression system. The rule also applies to defendant LVBT because LVBT was employed as a subcontractor of FEC to perform the electrical work for the project. Accordingly, the trial court correctly held that while making changes to the property on behalf of ITC, defendants were subject to the same liability and enjoyed the same freedom from liability as though they were the possessors of the land.

2. A claim based on the condition of the premises is a premises-liability claim. A condition of the land is open and obvious when it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. A premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. But this duty does not extend to having to remove open and obvious dangers absent the presence of special aspects. Special aspects exist and impose a duty of care to protect those lawfully on the premises even if a hazard is open and obvious when the condition is effectively unavoidable or imposes an unreasonably high risk of severe harm. In this case, the undisputed facts established that the cabling on the floor was open and obvious. No factual dispute existed that plaintiff was warned of the cable; he observed the cabling being placed on the floor, and he could have—and, in fact, had—easily avoided it by simply stepping over it. Additionally, no special aspects existed in this case because the cabling on the floor was not effectively unavoidable and did not impose an unreasonably high risk of severe harm. Accordingly, the trial court correctly granted defendants summary disposition on plaintiff's complaint sounding in premises liability because the cabling on the floor was open and obvious and because no special aspects rendered it unavoidable or created an unreasonably high risk of severe harm.

3. Contractors have a common-law duty to perform their work with ordinary care so as not to unreasonably endanger employees of other subcontractors or anyone else lawfully on the worksite. Generally, unless the court can conclude that all reasonable persons would agree the defendant did not create an unreasonable risk of harm, whether a defendant's conduct in the particular case breached this general standard of care is a question of fact for the jury to decide. In this case, the undisputed facts showed that neither defendant breached its duty of ordinary care by creating an unreasonable risk of injury. Defendants warned all present, including plaintiff, that cabling would be on the floor temporarily during the installation work. Plaintiff also safely stepped over the cabling numerous times before he fell. The undisputed facts in this case allowed the trial court to rule that all reasonable persons would agree that defendants did not create an unreasonable risk of harm. Accordingly, the trial court did not err by concluding that reasonable minds would not differ that defendants were not negligent and by granting summary disposition to defendants as to plaintiff's ordinary negligence claim.

Affirmed.

Robert L. Baker for David Finazzo.

Merry, Farnen & Ryan, PC (by *John J. Schutza*) for Fire Equipment Company.

Segal McCambridge Singer & Mahoney (by *David J. Yates*, *Eric P. Conn*, and *Michael P. Wisniewski*) for Low Voltage Building Technologies, Inc.

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

MARKEY, J. Plaintiff filed a negligence complaint sounding in premises liability regarding injuries he received from a fall while working as a security guard at ITC Holdings Corp. (ITC) in Ann Arbor. Defendants were contractors installing a fire protection system in ITC's computer room. During the installation, plaintiff stumbled on electrical cabling that was lying on the floor pending its installation in the drop-down ceiling.

Defendants moved for summary disposition on the basis that as contractors working on behalf of the premises possessor, they could avail themselves of the open and obvious danger doctrine. Defendants asserted the cable on the floor that plaintiff stepped on was open and obvious and without any special aspects that rendered it unavoidable or that created an unreasonably high risk of severe harm. The trial court agreed and granted defendants summary disposition on this basis. The trial court also ruled that plaintiff's ordinary negligence claim failed because reasonable minds could not differ in finding that defendants were not negligent and that plaintiff's injuries were the result of plaintiff's own carelessness. Plaintiff appeals by right. We affirm.

Plaintiff, David Finazzo, was working on July 20, 2012, as a security guard at ITC located at 1901 South Wagner in Ann Arbor, Michigan. ITC had contracted with Fire Equipment Company (FEC) to install a system for suppressing fires, and FEC had subcontracted with Low Voltage Building Technologies, Inc. (LVBT) to perform the electrical work necessary for the project. A 40-foot cable, approximately one-half to one inch in diameter, lay on the floor where the work was being performed. The computer room was secured by a locked door. ITC employees used an access card to enter. Security guards admitted contractors like defendants. Before the incident, many people had entered and exited the computer room through its access door. At one point, plaintiff stepped on the cable and slipped, injuring himself when he fell. Plaintiff asserts that defendants failed to protect him from the hazard created by the cable lying on the floor, and as a result, plaintiff suffered damages.

Defendants argued that as contractor and subcontractor, they were in possession and control of that part of the premises where the work was being performed;

therefore, they could avail themselves of the open and obvious danger doctrine. In support of their position, defendants cited 2 Restatement Torts, 2d, § 384, p 289, certain unpublished decisions of this Court, and more than 20 decisions of other states that have applied § 384. Defendants contended that because the cable on the floor was open and obvious, they are shielded from plaintiff's claim of negligence based on premises liability. According to defendants, the cable on the floor was open and obvious and easily avoidable; plaintiff had been warned about it, and plaintiff had, in fact, safely stepped over it numerous times.

Plaintiff argued that defendants did not possess or control the premises where the work was being performed, i.e., where computer equipment was located, because they could only gain access to the secure room through the actions of plaintiff. He further asserted that ITC was protecting its proprietary information and did not release possession and control of the computer room to anyone. Further, plaintiff argued, his ordinary negligence claim—the act of laying the cable on the floor and leaving the room—survived even if the premises liability claim failed.

The trial court ruled that plaintiff's claim was one of premises liability and that the open and obvious danger doctrine applied for the reasons defendants argued: the cable on the floor was open and obvious and was an avoidable hazard. The trial court also ruled that reasonable minds could not differ; defendants were not negligent, and plaintiff's injuries occurred through plaintiff's own fault. The court granted summary disposition to defendants, and plaintiff now appeals by right.

I. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition to determine if the

moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. *Id*. at 120; MCR 2.116(G)(3)(b). A court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Maiden*, 461 Mich at 120-121. The motion may be granted when the evidence submitted by the parties and viewed in the light most favorable to the nonmoving party shows that there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Lymon v Freedland*, 314 Mich App 746, 755-756; 887 NW2d 456 (2016). " 'A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ.' " *Id*. at 756 (citation omitted).

"Duty" is a legally recognized obligation to conform one's conduct toward another to what a reasonable man would do under similar circumstances. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 155; 555 NW2d 738 (1996). Generally, whether a duty exists is a question of law for the court and subject to de novo review. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012); *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995).

II. THE OPEN AND OBVIOUS DANGER DOCTRINE

We affirm the trial court's application of the open and obvious danger doctrine to the facts of this case and its grant of summary disposition to defendants on that basis.

Plaintiff's claim is based on an injury received from a *condition* of the property—the cable lying on the tile floor pending its installation in the ceiling for the fire suppression system. A claim based on the condition of the premises is a premises liability claim. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). Because plaintiff's injury arose from an allegedly dangerous condition on the land, his action "sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012); see also *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913 (2010).

A condition of the land is open and obvious when "it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). The cable on the floor in this case was open and obvious. No factual dispute exists that plaintiff was indeed warned of the cable; he could see it, and he could have easily avoided it by simply stepping over it. The trial court correctly ruled that while making changes to the property on behalf of its owner/possessor ITC, defendants are "subject to the same liability, and enjoy[] the same freedom from liability, as though [they] were the possessor[s] of the land . . . ." 2 Restatement Torts, 2d, § 384, p 289. Generally, "a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). But this duty does not extend to having to remove open and obvious dangers absent the presence of special aspects. *Id*. at 516-517; *Buhalis*, 296 Mich App

at 693. Special aspects exist and impose a duty of care to protect those lawfully on the premises even if a hazard is open and obvious when the condition is effectively unavoidable or imposes an unreasonably high risk of severe harm. *Hoffner*, 492 Mich at 461; *Lugo*, 464 Mich at 517-518. No special aspects existed in this case.

Generally, however, for a party to be subject to premises liability in favor of persons coming on the land, the party must possess *and* control the property at issue but not necessarily be its owner. See *Kubczak v Chem Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998); *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). This rule is based on the principle that a party " 'in possession is in a position of control, and *normally* best able to prevent any harm to others.' " *Merritt*, 407 Mich at 552, quoting Prosser, Torts (4th ed), § 57, p 351 (emphasis added). In *Kubczak*, 456 Mich at 662, the Court expounded on this principle by quoting *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942):

> "It is a general proposition that liability for an injury due to defective premises ordinarily *depends upon power to prevent the injury* and therefore rests primarily upon him who has control and possession."
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> "Liability for negligence does not depend upon title; a person is liable for an injury resulting from his negligence in respect of a place or instrumentality which is in his control or possession, even though he is not the owner thereof." [Emphasis in *Kubczak*.]

Our Supreme Court has further explained that "[p]ossession and control are certainly incidents of title ownership, but these possessory rights can be 'loaned' to another, thereby conferring the duty to make the prem-

ises safe while simultaneously absolving oneself of responsibility." *Merritt*, 407 Mich at 552-553, citing *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 269; 235 NW2d 732 (1975). The Court in *Orel v Uni-Rak Sales, Co, Inc*, 454 Mich 564, 567 n 2; 563 NW2d 241 (1997), quoting *Quinlivan*, 395 Mich at 269, described the effect of "loaning" possessory rights as follows:

> There is a clear relationship between the "control and possession" principle . . . and the Restatement "duty to make safe." The land or property owner's bundle of possessory responsibilities may be diminished by the "loaning" of one or several of these responsibilities. This "loaning" gives a quantum of "control and possession" to another party. If such quantum of control and possession confers responsibility for an aspect of ownership which gives rise to liability then a "duty to make safe" will be found to exist.

While our Supreme Court has never adopted wholesale the Restatement of Torts, it has consistently relied on the principles in the Restatement to develop Michigan's law of premises liability. See *Hoffner*, 492 Mich at 478-479; *Merritt*, 407 Mich at 552-554; *Lugo*, 464 Mich at 516-517; *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995); *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 92-94; 485 NW2d 676 (1992); *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499-501; 418 NW2d 381 (1988); and *Quinlivan*, 395 Mich at 258-261. As discussed, our Supreme Court has also recognized that a property possessor may "loan" part of its "possession and control" to another, making the other party responsible for the care of invitees with respect to that part of possession and control conferred. See *Merritt*, 407 Mich at 553; *Orel*, 454 Mich at 567 n 2. So the Court has explicitly recognized the principles underlying the rule set forth in 2 Restatement Torts, 2d, § 384, p 289, which provides:

> One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge.

Comment *c* of § 384 indicates that the stated rule would apply to the instant case in which defendant FEC was under contract to ITC to make changes to its computer room by installing a fire suppression system. Comment *c* of § 384 provides, "The rule stated in this Section applies to anyone who erects a structure upon land or alters its physical condition on behalf of its possessor, irrespective of whether he does so as a servant of the possessor or as a paid or unpaid independent contractor." 2 Restatement Torts, 2d, § 384, comment *c*, p 289. The stated rule also applies to defendant LVBT because LVBT was employed as a subcontractor of FEC to perform the electrical work for the project. Comment *d* of § 384 provides, in pertinent part:

> [A] general contractor employed to do the whole of the work may, by the authority of his employer, sublet particular parts of the work to subcontractors. In such a case, the rule stated in this Section applies to subject the particular contractor or subcontractor to liability for only such harm as is done by the particular work entrusted to him. [2 Restatement Torts, 2d, § 384, comment *d*, p 290.]

The imposition of premises liability on FEC and LVBT with respect to their work on the premises while installing the fire suppression system under § 384 is also consistent with the general principle that liability for a dangerous condition should fall on the party having power to prevent injury to others on the premises. *Kubczak*, 456 Mich at 662; *Nezworski*, 301 Mich at 56. Defendants, as contractors performing changes to

the property by methods that were under defendants' control,[1] were also " 'best able to prevent any harm to others.' " *Merritt*, 407 Mich at 552, quoting Prosser, Torts (4th ed), § 57, p 351. So, it is appropriate to impose premises liability on defendants with respect to the work they controlled relating to changing the premises: installing electrical cabling for the fire suppression system. 2 Restatement Torts, 2d, § 384. But the duty imposed on defendants regarding premises liability would not extend to open and obvious conditions that are effectively avoidable and do not impose an unreasonably high risk of severe harm. See *Hoffner*, 492 Mich at 461; *Lugo*, 464 Mich at 517-518.

In this case, the undisputed facts establish that the cable on the floor was open and obvious. *Hoffner*, 492 Mich at 461. There is no factual dispute that plaintiff was warned of the cable; he observed the cabling being placed on the floor, and he could have—and, in fact, had—easily avoided it by taking reasonable action for his own safety and simply stepping over it. The law of premises liability includes the principles that landowners are not insurers and that persons entering the property must exercise common sense and prudent judgment while on the land—they must assume personal responsibility to protect themselves from apparent dangers. *Id*. at 459-460. Consequently, the trial court correctly granted defendants summary disposition on plaintiff's complaint sounding in premises liability because the cabling on the floor was open and obvious and because no special aspects rendered it unavoidable

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[1] "*Random House Webster's College Dictionary* (1995), p 297, defines 'control' as 'exercis[ing] restraint or direction over; dominate, regulate, or command.' Similarly, Black's Law Dictionary defines 'control' as 'the power to . . . manage, direct, or oversee.' " *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 703-704; 644 NW2d 779 (2002) (alterations by the *Derbabian* Court).

or created an unreasonably high risk of severe harm. *Id*. at 456; *Lugo*, 464 Mich at 514, 517-518; *Buhalis*, 296 Mich App at 692-693.

The sheer volume of decisions from other states that support the rule of law stated in § 384 is persuasive. Michigan courts are not bound by foreign authority with respect to questions of state law, but they may find it persuasive. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221 n 6; 761 NW2d 293 (2008). But because Michigan Supreme Court authority supports the underlying rationale of § 384, as previously noted, the sheer volume of foreign authority approving of § 384 is persuasive to our decision of applying it in Michigan also.[2]

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[2] Defendants cite the following jurisdictions as following the common-law rule of § 384: see *Devazier v Whit Davis Lumber Co*, 257 Ark 371, 374-375; 516 SW2d 610 (1974); *Chuck v Bd of Trustees of Leland Stanford Jr Univ*, 179 Cal App 2d 405, 412-413; 3 Cal Rptr 825 (1960); *Mile High Fence Co v Radovich*, 175 Colo 537, 541 n 1; 489 P2d 308 (1971), superseded by statute on other grounds, see *Bath Excavating & Constr Co v Wills*, 847 P2d 1141 (Colo, 1993); *Duggan v Esposito*, 178 Conn 156, 159-160; 422 A2d 287 (1979); *Cockerham v R E Vaughan, Inc*, 82 So 2d 890, 891-892 (Fla, 1955); *Chronopoulos v Gil Wyner Co*, 334 Mass 593, 597; 137 NE2d 667 (1956); *Thill v Modern Erecting Co*, 272 Minn 217, 226-227; 136 NW2d 677 (1965); *Barnett v Equality S&L Ass'n, Inc*, 662 SW2d 924, 927 (Mo App, 1983); *French v Abercrombie*, 156 Mont 356, 365; 480 P2d 187 (1971); *Kragel v Wal-Mart Stores, Inc*, 537 NW2d 699, 707 (Iowa, 1995); *Von Dollen v Stulgies*, 177 Neb 5, 12-13; 128 NW2d 115 (1964); *Harris v Mentes-Williams Co*, 23 NJ Super 9, 12; 92 A2d 498 (App Div, 1952), rev'd on other grounds 11 NJ 559 (1953); *Samuel E Pentecost Constr Co v O'Donnell*, 112 Ind App 47; 39 NE2d 812, 817 (1942); *Savoie v Littleton Constr Co*, 95 NH 67, 71-72; 57 A2d 772 (1948); *Tipton v Texaco, Inc*, 103 NM 689, 696; 712 P2d 1351 (1985); *Broadway v Blythe Indus, Inc*, 313 NC 150, 154-155; 326 SE2d 266 (1985); *Elliott v Rogers Constr, Inc*, 257 Or 421, 430-431; 479 P2d 753 (1971); *Leonard v Commonwealth*, 565 Pa 101, 106; 771 A2d 1238 (2001); *Cook v Demetrakas*, 108 RI 397, 404 n 2; 275 A2d 919 (1971); *Rendleman v Clarke*, 909 SW2d 56, 60 (Tex App, 1995); *Williamson v Allied Group, Inc*, 117 Wash App 451, 456-457; 72 P3d 230 (2003).

Plaintiff also misplaces reliance on *Garrett v Sam H Goodman Bldg Co, Inc*, 474 Mich 948, 948 (2005) ("[S]ummary disposition based on the 'open and obvious' doctrine was improper because neither defendant was the premises possessor."), and *Fraim v City Sewer of Flint*, 474 Mich 1101, 1101 (2006) ("The open and obvious doctrine is inapplicable to this case, because defendant did not possess or control the premises within which plaintiff was injured."). But reading the authority these summary disposition orders cite, we note that both orders stand for the proposition that the assertion of the open and obvious danger defense depends on the theory of liability being advanced. Specifically, the defense applies to premises liability claims.

The Court in *Garrett* cited *Ghaffari v Turner Constr Co*, 473 Mich 16, 23; 699 NW2d 687 (2005). The latter case involved a claim brought under the common-work-area doctrine. The *Ghaffari* Court held that "the open and obvious doctrine and the common work area doctrine are incompatible." *Ghaffari*, 473 Mich at 23. The open and obvious danger doctrine related to the duty of a premises possessor when a plaintiff asserted a premises liability theory. *Id*. The open and obvious danger defense was incompatible with the common-work-area doctrine, which imposes an affirmative duty on general contractors to protect against hazards that are open and obvious. *Id*. at 22-23. Thus, the statement in *Garrett*, 474 Mich at 948, that "summary disposition based on the 'open and obvious' doctrine was improper because neither defendant was the premises possessor" simply means that the open and obvious danger defense was unavailable because premises liability could not be asserted when the defendant was not the possessor of the property. See *Kubczak*, 456 Mich at 660 ("Premises liability is conditioned upon the pres-

ence of possession and control, not necessarily ownership.") (quotation marks and citation omitted); *Merritt*, 407 Mich at 552 ("Premises liability is conditioned upon the presence of both possession and control over the land.").

The same reasoning applies with respect to the statement in *Fraim*, 474 Mich at 1101: "The open and obvious doctrine is inapplicable to this case, because defendant did not possess or control the premises within which plaintiff was injured." The *Fraim* order cited *Lugo*, 464 Mich at 516, which discussed that the open and obvious danger doctrine applies in premises liability cases to limit the duty a premises possessor owes to an invitee.

Finally, if plaintiff's argument were valid—that defendants may not assert the open and obvious danger defense because they did not possess the premises—it follows for the same reason that defendants are not subject to plaintiff's premises liability claim. See *Kubczak*, 456 Mich at 660; *Merritt*, 407 Mich at 552. But if ITC "loaned" some of its possessory rights to defendants, see *Merritt*, 407 Mich at 553; *Orel*, 454 Mich at 567 n 2, such that the rule of Restatement, § 384, applies, then the trial court correctly granted defendants summary disposition on plaintiff's complaint sounding in premises liability because the cabling on the floor was open and obvious with no special aspects making the condition unavoidable or posing an unreasonably high risk of severe harm. *Hoffner*, 492 Mich at 460-462; *Buhalis*, 296 Mich App at 692-693. Under either analysis, the trial court properly granted defendants summary disposition to the extent that plaintiff's claim was one of premises liability.

Plaintiff's argument that the cable was effectively unavoidable also lacks merit. The undisputed facts

establish that the cable on the floor was open and obvious. *Hoffner*, 492 Mich at 461. There is no factual dispute that plaintiff was warned of the cable; he observed the cabling being placed on the floor, and he could have easily avoided it by taking reasonable action for his own safety and simply stepping over it. The law of premises liability includes the related principles that landowners are not insurers and that persons entering the property must exercise common sense and prudent judgment while on the land—invitees too must assume personal responsibility to protect themselves from apparent dangers. *Id*. at 459-460. In sum, the trial court correctly granted defendants summary disposition on plaintiff's complaint sounding in premises liability because the cabling on the floor was open and obvious and because no special aspects rendered the situation unavoidable or created an unreasonably high risk of severe harm. *Id*. at 456; *Lugo*, 464 Mich at 514, 517-518; *Buhalis*, 296 Mich App at 692-693.

III. ORDINARY NEGLIGENCE CLAIM

Contractors have a common-law duty to perform their work with ordinary care so as not to unreasonably endanger employees of other subcontractors or anyone else lawfully on the worksite. *Clark v Dalman*, 379 Mich 251, 262; 150 NW2d 755 (1967). Generally, unless the court can conclude that all reasonable persons would agree the defendant did not create an unreasonable risk of harm, whether a defendant's conduct in the particular case breached this general standard of care is a question of fact for the jury to decide. *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977). In this case, the undisputed facts show that neither defendant breached its duty of ordinary care by

creating an unreasonable risk of injury; therefore, the trial court did not err by concluding that "reasonable minds would not differ that Defendants were not negligent" and granting summary disposition to defendants as to plaintiff's ordinary negligence claim.

To establish a prima facie case of negligence, plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). In discussing the duty at issue in this case, the *Clark* Court noted that a basic rule of the common law

> imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to *unreasonably endanger* the person or property of others. This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another. [*Clark*, 379 Mich at 261 (emphasis added).]

The duty arising from a contract under the common law, the *Clark* Court explained, is that of ordinary care. *Id*. "The general duty of a contractor to act so as not to *unreasonably endanger* the well-being of employees of either subcontractors of inspectors, or anyone else lawfully on the site of the project, is well settled." *Id*. at 262 (emphasis added). The reasonableness of defendants' conduct must be weighed against the principles that persons lawfully on the site must use good judgment and common sense for their own safety, see *Hoffner*, 492 Mich at 459, and factors such as the potential degree of harm and whether the risk at issue is known, see *Case*, 463 Mich at 9 (noting that reasonableness of care under the circumstances represents a sliding scale, depending on the severity of the potential injury); cf. *Lugo*, 464 Mich at 516-518 (no duty to

remove open and obvious dangers unless they are effectively unavoidable or impose an unreasonably high risk of severe harm). While determining whether defendants' conduct in a particular case created an unreasonable risk of injury would normally present a question of fact for the jury to decide, here, the undisputed facts allowed the trial court to find that all reasonable persons would agree that defendant did not create an unreasonable risk of harm. See *Case*, 463 Mich at 7, citing *Moning*, 400 Mich at 438.

In this case, ITC hired FEC to install a fire suppression system for its data processing center (computer room); FEC subcontracted with LVBT to install the necessary electrical connections for the fire suppression apparatus. Plaintiff David Finazzo was working on July 20, 2012, the date of his fall, as a security guard at ITC's facility in Ann Arbor. Plaintiff's job was to permit entry to the computer room for FEC and LVBT personnel and to monitor what was happening to keep the equipment and data secure. Plaintiff was to remain in the computer room while defendants performed their work. Plaintiff watched for two hours as defendants installed metal clad electrical cabling in the drop-down ceiling of the computer room. At some point before 10:30 a.m., defendants laid electrical cabling on the floor to facilitate measuring the proper length to cut for installation. Defendants warned all present, including plaintiff, that cabling would be on the floor temporarily during the installation work. Kimberly Wooden, employed by ITC at the time, testified that she was in and out of the computer room several times while the cabling was on the floor. Plaintiff warned her of its presence each time, and she was able to easily step over it. Plaintiff also safely stepped over the cabling numerous times before he fell.

Plaintiff's testimony, although vague, did not dispute the testimony defendants presented. Plaintiff testified that the computer room was adequately illuminated, that it had a tile floor, and that he could see a 40-foot length of cabling on the floor and could describe its color; he recalled it was one-half to one inch in diameter. Plaintiff also stated that he "probably" knew the cable was on the floor before stepping on it when he went toward the door without looking at the floor. Specifically, plaintiff testified that before he fell, "I would probably assume that I did see the cable." He also acknowledged that defendants "probably told" him about the cables. When plaintiff turned to go to the door, "[he] didn't see the cables on the floor before [he] fell."

Based on the undisputed evidence, it is patent that plaintiff was warned of a known and observable trip hazard lying temporarily on the floor. Plaintiff was aware of the hazard; he and others had successfully and safely traversed the area by simply stepping over the cable numerous times. Unfortunately, it was plaintiff's own lapse of attention that caused him to fall when stepping on the cabling. Thus, for many of the same reasons that the cable on the floor was an open and obvious hazard without special aspects—the cable hazard was *avoidable* and did not create an *unreasonably high risk of severe harm*—we agree that defendants did not breach their general duty to perform their work "so as not to *unreasonably endanger* the well-being of . . . anyone else lawfully on the site of the project . . . ." *Clark*, 379 Mich at 262 (emphasis added). The undisputed facts in this case allowed the trial court to rule that all reasonable persons would agree that defendants did not create an unreasonable risk of harm. See *Case*, 463 Mich at 7, citing *Moning*, 400 Mich at 438.

We affirm. As the prevailing parties, defendants may tax their costs pursuant to MCR 7.219.

SERVITTO, P.J., and O'CONNELL, J., concurred with MARKEY, J.

BRICKEY v MCCARVER

Docket No. 337448. Submitted April 10, 2018, at Detroit. Decided April 17, 2018, at 9:10 a.m. Leave to appeal denied 503 Mich 972.

Tracy and Brandy Brickey filed suit in the Lenawee Circuit Court against Vincent L. McCarver and CR Motors of Adrian, Inc., after Tracy, while driving a motorcycle, was struck by a vehicle driven by McCarver and owned by CR Motors. Plaintiffs alleged that (1) McCarver's negligent operation of the vehicle injured Tracy and caused loss of consortium to Brandy and (2) CR Motors was liable for McCarver's negligence under both Michigan's owner's-liability statute and the doctrine of negligent entrustment. Defendants answered the complaint and moved for summary disposition, arguing that MCL 500.3135(2)(c) of the no-fault act precluded recovery because Tracy's motorcycle was uninsured at the time of the accident. The court, Anna Marie Anzalone, J., granted summary disposition for defendants and denied plaintiffs' subsequent motion for reconsideration. Plaintiffs appealed.

The Court of Appeals *held*:

Under MCL 500.3135(2)(c), a plaintiff is precluded from recovery for damages suffered while operating a motor vehicle if the motor vehicle is both owned by the plaintiff and uninsured in violation of MCL 500.3101. But MCL 500.3135(2)(c) does not preclude a motorcyclist from recovering damages, even if the motorcycle is uninsured, because motorcycles are expressly excluded from the definition of "motor vehicle" set forth in MCL 500.3101(2)(i)(*i*). If the Legislature had intended to preclude motorcyclists from recovery for damages, it could have done so, as it did in other sections of the no-fault act. The trial court erroneously relied on *Braden v Spencer*, 100 Mich App 523 (1980), to conclude otherwise. *Braden* was not binding authority under MCR 7.215(J)(1), and it was not factually or legally analogous. The *Braden* Court relied on the statutory equivalent of MCL 500.3135(3), which protects a defendant from tort liability, not on MCL 500.3135(2)(c), which addresses a plaintiff's right to recover damages and was not enacted at the time *Braden* was decided. Moreover, the plaintiff in *Braden* attempted to recover for damage to his motorcycle, not noneco-

nomic loss as in this case. MCL 500.3135(2)(c) is clear and unambiguous. Therefore, the trial court erred by granting summary disposition for defendants.

Reversed and remanded.

INSURANCE — NO-FAULT — CONTINUING TORT LIABILITY FOR NONECONOMIC LOSSES — BAR TO RECOVERY WHEN AN UNINSURED MOTOR VEHICLE WAS OPERATED BY THE PLAINTIFF — APPLICABILITY TO A MOTORCYCLE OPERATED BY THE PLAINTIFF.

Although MCL 500.3135(2)(c) precludes recovery for damages suffered while operating an uninsured motor vehicle that the plaintiff owns, the statute does not preclude a motorcyclist from recovering damages because the definition of "motor vehicle" in MCL 500.3101(2)(i)(*i*) expressly excludes motorcycles.

Barbara H. Goldman for plaintiffs.

Wilson Elser Moskowitz Edelman & Dicker (by *John T. Eads, III*, and *Carol A. Smith)* for defendants.

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

BOONSTRA, P.J. In this third-party no-fault action, plaintiffs appeal by right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(8). We reverse and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff Tracy Brickey (Tracy) was operating his motorcycle on US-223 when he was struck by a vehicle driven by defendant Vincent McCarver (McCarver) and owned by defendant CR Motors. Tracy was severely injured.

Plaintiffs filed suit against defendants, arguing that (1) McCarver negligently operated a vehicle and caused injury to Tracy, (2) CR Motors was liable for McCarver's negligence under Michigan's owner's-

liability statute, MCL 257.401, and the doctrine of negligent entrustment, and (3) McCarver's negligence additionally resulted in plaintiff Brandy Brickey's loss of consortium. Defendants answered the complaint and also moved for summary disposition under MCR 2.116(C)(8) and (10). Defendants contended in their motion that the motorcycle Tracy was operating at the time of the accident was uninsured and that plaintiffs, accordingly, were precluded from recovery under MCL 500.3135(2)(c). The trial court agreed, relying on *Braden v Spencer*, 100 Mich App 523; 299 NW2d 65 (1980), and granted summary disposition in favor of defendants under MCR 2.116(C)(8) (failure to state a claim on which relief may be granted). The trial court denied plaintiffs' motion for reconsideration. This appeal followed.

II. STANDARD OF REVIEW

A "trial court's ruling on a motion for summary disposition is reviewed de novo on appeal." *ZCD Transp, Inc v State Farm Mut Auto Ins Co*, 299 Mich App 336, 339; 830 NW2d 428 (2012), citing *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). "A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010), citing *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). Summary disposition under MCR 2.116(C)(8) is appropriately granted if the opposing party has failed to state a claim on which relief can be granted. *Id*. "When deciding a motion under (C)(8), this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the nonmoving party." *Dalley*, 287 Mich App at 304-305,

citing *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) "should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998), citing *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

We also review de novo questions of statutory interpretation. *McLean v McElhaney*, 289 Mich App 592, 596; 798 NW2d 29 (2010).

III. ANALYSIS

Plaintiffs argue that the trial court erred by granting summary disposition in favor of defendants because MCL 500.3135(2)(c), by its plain language, applies only to uninsured "motor vehicles," as opposed to motorcycles, and therefore does not limit plaintiffs' right to seek damages in tort. We agree.

"The primary rule of statutory interpretation is that we are to effect the intent of the Legislature." *Stanton v City of Battle Creek*, 466 Mich 611, 615; 647 NW2d 508 (2002), citing *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). " 'To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language.' " *Odom v Wayne Co*, 482 Mich 459, 467; 760 NW2d 217 (2008), quoting *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007). Our primary focus in statutory interpretation "is the language of the statute under review." *People v Harris*, 499 Mich 332, 345; 885 NW2d 832 (2016). If the language is unambiguous, the intent of the Legislature is clear and " 'judicial construction is neither necessary nor permitted.' " *Odom*, 482 Mich at 467, quoting *Lash*, 479 Mich at 187.

The words of the statute provide the best evidence of legislative intent and the policy choices made by the Legislature. See *White v City of Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979). Our role as members of the judiciary is not to second-guess those policy decisions or to change the words of a statute in order to reach a different result. In fact, a "clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993). Therefore, we start by examining the words of the statute, which "should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute." *People v Zajaczkowski*, 493 Mich 6, 13; 825 NW2d 554 (2012). See also *Harris*, 499 Mich at 435; *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012).

"Any issues relating to the soundness of the policy underlying the statute or its practical ramifications are properly directed to the Legislature." *Maier v Gen Tel Co of Mich*, 247 Mich App 655, 664; 637 NW2d 263 (2001). "[W]e may not read into the statute what is not within the Legislature's intent as derived from the language of the statute." *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) (quotation marks and citation omitted).

MCL 500.3135(2)(c) provides, in relevant part:

> (2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:
>
> * * *
>
> (c) Damages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the

> injury occurred and did not have in effect for that motor vehicle the security required by section 3101 at the time the injury occurred.

Section 3101, in turn, provides, "(1) The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." MCL 500.3101(1). "Motor vehicle" is defined, for the purposes of Chapter 31 of the Insurance Code of 1956, as a "vehicle, including a trailer, that is operated or designed for operation on a public highway by power other than muscular power and has more than 2 wheels." MCL 500.3101(2)(i). The definition of "motor vehicle" specifically excludes motorcycles. MCL 500.3101(2)(i)(*i*).

Inasmuch as the statute explicitly excludes motorcycles from the definition of "motor vehicle," and therefore from the preclusive effect of MCL 500.3135(2)(c), the plain language of the statute unambiguously refutes the trial court's statutory interpretation. See *Robinson*, 486 Mich at 15. Moreover, the trial court erroneously relied on *Braden*, 100 Mich App at 529, for the proposition that, despite the explicit exclusion of motorcycles from the definition of "motor vehicle," uninsured operators of motorcycles are subject to the proscriptions of MCL 500.3135(2)(c). First, *Braden* is not binding on this Court given its age, MCR 7.215(J)(1), and second, *Braden* is factually and legally inapposite. In *Braden*, the plaintiff did not sue to recover noneconomic loss, as in this case, but instead filed a complaint "for property damage to his motorcycle resulting when it collided with an automobile owned and operated by [the] defendant." *Braden*, 100 Mich App at 525. The trial court held that, under MCL 500.3135, the defendant was not shielded

from tort liability because the plaintiff was operating a motorcycle—not a "motor vehicle"—at the time of the accident. *Id*. On appeal, this Court reversed, holding that "[t]he exclusion of motorcycles from the [no-fault] act's definition of motor vehicles does not illustrate a legislative intent to exempt motorcyclists from the *effect of the abolition of tort liability* by § 3135." *Id*. at 529 (emphasis added). Defendant contends that this language means that the term "motorcycle" must be read into every provision of MCL 500.3135.

Importantly, however, the statute at issue in *Braden* was quite different from the one that exists today. See MCL 500.3135, as amended by 1979 PA 147. In *Braden*, the Court was solely concerned with the application of what is now MCL 500.3135(3).[1] See *Braden*, 100 Mich App at 525-526. Subsection (2)(c) was not added to the statute until 1995—15 years after *Braden*. See MCL 500.3135, as amended by 1995 PA 222.

Subsection (3) provides, in pertinent part, "(3) Notwithstanding any other provision of law, *tort liability* arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect is abolished . . . ." MCL 500.3135(3) (emphasis added). In other words, while Subsection (2)(c) addresses a party's right to recover damages, Subsection (3) deals with a party's exposure to tort liability. Specifically, Subsection (3) extinguishes tort liability

[1] At the time, Subsection (3) was codified as Subsection (2). MCL 500.3135(2), as amended by 1972 PA 294; MCL 500.3135(3). The relevant language analyzed in *Braden*, however, is identical to the language of Subsection (3) today. See MCL 500.3135(3); *Braden*, 100 Mich App at 526.

for noneconomic losses for drivers of motor vehicles who carry proper insurance, apart from the exceptions found in MCL 500.3135(1). Subsection (3) has nothing to do with a *plaintiff's* right to recover damages and instead has everything to do with a *defendant's* liability, irrespective of the plaintiff or the plaintiff's mode of travel. Accordingly, it was irrelevant in *Braden* that the plaintiff was a motorcyclist because the defendant was, in any event, immune from tort liability for the type of damages the plaintiff sought. *Braden*, 100 Mich App at 529. Consequently, even if we were bound by *Braden*, our decision would not conflict with its essential holding. See *Braden*, 100 Mich App at 529.

In essence, defendants ask this Court to add language into Subsection (2)(c), such that it might read: "Damages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle [*or motorcycle*] the security required by section 3101 [or 3103] at the time the injury occurred." MCL 500.3135(2)(c) (emphasis added). To read the statute in that manner would require an impermissible judicial construction of an unambiguous statute. See *Odom*, 482 Mich at 467, quoting *Lash*, 479 Mich at 187. We decline defendants' invitation to so interpret an unambiguous statutory provision.[2]

Defendants nevertheless contend that Subsection (2)(c) must apply to motorcycles because, although not required by § 3101, motorcycles are still required to be

[2] Even assuming arguendo that *Braden* did support defendants' reading of MCL 500.3135(2), we are mindful that clear statutory language must prevail when "caselaw clearly misinterprets the statutory scheme at issue." *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 201; 895 NW2d 490 (2017); see also *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 190 n 16; 909 NW2d 38 (2017).

insured under MCL 500.3103, and public policy dictates that any operator of a motorcycle—like any operator of a motor vehicle—who has failed to obtain insurance coverage as required by law should be barred from recovering tort damages. Indeed, § 3103 provides, in pertinent part, "(1) An owner or registrant of a motorcycle shall provide security against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by a person arising out of the ownership, maintenance, or use of that motorcycle." MCL 500.3103(1).

However, it is for the Legislature, not this Court, to address the policymaking considerations that are inherent in statutory lawmaking. See *Maier*, 247 Mich App at 664; *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 190 n 16; 909 NW2d 38 (2017). Moreover, defendants' reliance on § 3103 hinders, rather than helps, their argument. The plain language of § 3103 demonstrates that when the Legislature *intends* for corollary rules to exist as between motor vehicles and motorcycles, it explicitly enacts those rules. Therefore, for example, § 3101 creates a requirement that certain motor vehicles are insured, and § 3103 creates a similar requirement for motorcycles. See MCL 500.3101; MCL 500.3103. Similarly, MCL 500.3113, which limits the entitlement of certain persons to recover personal protection insurance benefits, contains the exact language that defendants would have this Court read into MCL 500.3135(2)(c):

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *

> (b) The person was the owner or registrant of a motor vehicle *or motorcycle* involved in the accident with respect to which the security required by section 3101 *or 3103* was not in effect. [MCL 500.3113 (emphasis added).]

The Legislature's omission of a term in one portion of a statute that is contained in another should be construed as intentional. *Michigan v McQueen*, 293 Mich App 644, 672; 811 NW2d 513 (2011). Similarly, the Legislature's use of different terms suggests different meanings. *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009).

The language of MCL 500.3135(2)(c) is unambiguous: individuals injured while operating a motor vehicle that is both owned by them and uninsured in violation of MCL 500.3101 are not entitled to recover damages. Motorcycles are not motor vehicles under the no-fault act. MCL 500.3101(2)(i)(*i*). Accordingly, MCL 500.3135(2)(c) does not limit the right of motorcyclists to recover damages.

Plaintiffs contend in the alternative that, even assuming that MCL 500.3135(2)(c) applies to motorcyclists, the trial court nonetheless erred by dismissing *all* of plaintiffs' claims because Subsection (2)(c) only limits actions for noneconomic damages. Having held that Subsection (2)(c) does not apply to motorcyclists, however, we need not reach that question, which in any event was not raised below until reconsideration. See *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

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

BECKERING and RONAYNE KRAUSE, JJ., concurred with BOONSTRA, P.J.

BUOL ESTATE v THE HAYMAN COMPANY

Docket No. 336903. Submitted April 11, 2018, at Detroit. Decided April 17, 2018, at 9:15 a.m.

Cheryl A. Buol brought an action in the Oakland Circuit Court against The Hayman Company, asserting claims of age, gender, and religious discrimination and wrongful termination of employment under the Elliott-Larsen Civil Rights Act (the ELCRA), MCL 37.2101 *et seq*. Defendant filed a counterclaim, alleging that Buol had violated the Authentic Credentials in Education Act (the ACEA), MCL 390.1601 *et seq*., by falsely representing in her application for employment that she had graduated with a bachelor's degree from the University of Wisconsin-Madison. Following Buol's death, Buol's estate, by personal representative Karen Roe, was substituted as plaintiff in the case. Buol worked for defendant from 1991 through 2014, during which time she received numerous promotions, pay raises, and bonuses; Buol admitted during her deposition that she had made false statements regarding her educational background. The court, Wendy L. Potts, J., granted summary disposition in favor of defendant regarding Buol's ELCRA claims. The trial court also granted summary disposition in favor of defendant on defendant's ACEA counterclaim, reasoning that Buol had admittedly violated MCL 390.1604(2) when she falsely claimed on her resume that she had graduated from the University of Wisconsin-Madison. The court subsequently imposed damages of $100,000 plus costs and reasonable attorney fees under MCL 390.1605. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 390.1604(1) of the ACEA provides that an individual shall not knowingly use a false academic credential to obtain employment or to obtain a promotion or higher compensation in employment. MCL 390.1604(2), in turn, provides that an individual who does not have an academic credential shall not knowingly use or claim to have that academic credential to obtain employment, a promotion, or higher compensation in employment. Accordingly, MCL 390.1604 does not place liability only on a person who knowingly takes advantage of a fake diploma but also on an individual who falsely claims to have an academic

credential. The trial court correctly concluded that MCL 390.1604(2) applied to the facts of this case because Buol knowingly and falsely claimed to have an academic credential—that is, a bachelor's degree from the University of Wisconsin—when she applied for the position with defendant in 1991.

2. Article IV, § 24 of Michigan's 1963 Constitution—the Title-Object Clause—provides that no law shall embrace more than one object, which shall be expressed in its title. To succeed in a title-body challenge, a party must demonstrate that the title of the act does not adequately express its contents such that the body exceeds the scope of the title. The title of an act must express the general purpose or object of the act, but it does not have to serve as an index to all the provisions of the act. Rather, the title must give the Legislature and the public fair notice of the challenged provision. The title violates the fair-notice requirement when the subjects of the title and body of the act are so diverse in nature that they have no necessary connection. The object of a law is its general purpose or aim. An act may include all matters relevant to its object as well as all provisions that directly relate to, carry out, and implement the principal object without violating the Title-Object Clause. The title of an act does not have to mention every provision in the body. Instead, it is sufficient that the act centers to one main general object or purpose declared comprehensively by the title and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to the act's general purpose. Given the ACEA's short title—the Authentic Credentials in Education Act—the public was on notice that the purpose of the statute was to ensure the authenticity or integrity of academic credentials. Although the formal title of the ACEA stated that the act was intended to prohibit the issuance or manufacture of false academic credentials, that language indicated that the purpose of the act was to prohibit the use of fraudulent academic credentials. The body of the statute furthered the general purpose in that its provisions were germane, auxiliary, or incidental to that purpose. Specifically, MCL 390.1604(1) penalized the use of false academic credentials from unqualified institutions to reduce the demand for and impede the issuance of such credentials, and MCL 390.1604(2) penalized the use of fraudulent credentials from qualified institutions. For that reason, the subject expressed in the title of the ACEA was not so diverse in nature from the subjects of the body that the public or the Legislature was deprived of fair notice. Accordingly, plaintiff's unpreserved title-object challenge had no merit.

3. Under MCL 390.1605, a person damaged by a violation of the ACEA may bring a civil action and may recover costs, reasonable attorney fees, and the greater of either the person's actual damages or $100,000. MCL 390.1604(2) prohibits an individual who does not have an academic credential from knowingly using or claiming to have that academic credential to obtain employment, a promotion, or higher compensation in employment. Because the provision requires affirmative conduct—that is, knowingly using or claiming to have that academic credential—the MCL 390.1605 damages provision does not impose strict liability for a violation of the act. Instead, an individual damaged by a violation of the ACEA may only recover damages under MCL 390.1605 if that individual proves actual injury or loss from the violation. In this case, because the trial court failed to make specific findings when it awarded damages to defendant, remand was necessary for the trial court to determine whether defendant was a person damaged by a violation of the ACEA.

Judgment vacated and case remanded for further proceedings. Jurisdiction retained.

1. DAMAGES — AUTHENTIC CREDENTIALS IN EDUCATION ACT.

MCL 390.1604(1) of the Authentic Credentials in Education Act (ACEA), MCL 390.1601 *et seq*., prohibits an individual from knowingly using a false academic credential to obtain employment, a promotion, or higher compensation in employment, and MCL 390.1604(2) prohibits an individual who does not have an academic credential from knowingly using or claiming to have that academic credential to obtain employment, a promotion, or higher compensation in employment; under MCL 390.1605, a person damaged by a violation of the ACEA may bring a civil action and may recover costs, reasonable attorney fees, and the greater of either the person's actual damages or $100,000; damages for a violation of MCL 390.1604(2) are not awarded on the basis of strict liability for a violation; instead, an individual damaged by a violation of the ACEA may only recover damages under MCL 390.1605 if that individual proves actual injury or loss from the violation.

2. CONSTITUTIONAL LAW — TITLE-OBJECT CLAUSE — AUTHENTIC CREDENTIALS IN EDUCATION ACT.

Interpreting MCL 390.1604(2) of the Authentic Credentials in Education Act, MCL 390.1601 *et seq*., to apply to resume fraud does not result in a violation of the Title-Object Clause of the 1963 Michigan Constitution (Const 1963, art IV, § 24).

Maddin, Hauser, Roth & Heller, PC (by *Jonathan B. Frank*) for plaintiff.

The Miller Law Firm, PC (by *Marc L. Newman* and *M. Ryan Jarnagin*) for defendant.

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

BOONSTRA, P.J. Plaintiff, the personal representative of the estate of Cheryl Ann Buol, appeals by right the judgment of the trial court entered in favor of defendant in the amount of $104,611.41 plus costs and attorney fees yet to be determined. We vacate the judgment granting damages to defendant and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In 1991, Buol applied to work for defendant, an apartment management and commercial real estate company. Buol admitted in a deposition that she had falsely represented in her application materials that she had earned a bachelor's degree from the University of Wisconsin-Madison. Buol worked for defendant for the next 23 years, ultimately achieving the position of chief operating officer. Buol received numerous promotions, pay raises, and bonuses over the years, including title enhancements and pay raises between 2011 and 2014. Buol left defendant's employ in 2014; the parties dispute whether she was terminated or resigned. Buol filed a complaint alleging age, gender, and religious discrimination and wrongful termination under the Elliott-Larsen Civil Rights Act (the ELCRA), MCL 37.2101 *et seq*. Defendant filed a counterclaim, alleging that Buol had violated the Authentic Credentials in Education Act (the ACEA), MCL 390.1601 *et seq*., enacted in 2005, by virtue of her fraudulent claim that she possessed a

bachelor's degree. See MCL 390.1604(2). The trial court granted summary disposition in favor of defendant on Buol's ELCRA claims. The trial court also granted summary disposition in favor of defendant on defendant's counterclaim, finding that Buol had violated MCL 390.1604(2). The trial court entered judgment in favor of defendant in the amount of the $100,000 statutory minimum provided by MCL 390.1605.[1] This appeal followed.[2]

II. APPLICABILITY OF THE AUTHENTIC CREDENTIALS IN EDUCATION ACT

Plaintiff[3] argues that the trial court erred by concluding that the ACEA applied in this case, because it only applies to the issuance or manufacture of false academic credentials by "diploma mills" and does not apply to the exaggeration of academic credentials that are otherwise legitimate. We disagree. Although plaintiff did not preserve this issue below, we nonetheless review it as "an issue of law for which all the relevant facts are available." *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).[4]

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[1] The judgment also included $4,611.41 in prejudgment interest, and it provided for "costs and reasonable attorneys' fees." The judgment further provided, in accordance with the parties' agreement, that the amount of costs and attorney fees "will be determined by the [trial] Court following a resolution by the Court of Appeals" of this appeal.

[2] Buol passed away after the filing of this appeal. On January 25, 2018, this Court granted a motion by Buol's estate to substitute parties. *Buol v Hayman Co*, unpublished order of the Court of Appeals, entered January 25, 2018 (Docket No. 336903).

[3] For simplicity, we will sometimes use "plaintiff" to refer to Buol, as well as to her estate and the estate's personal representative.

[4] Plaintiff first raised this issue in a motion for reconsideration of the trial court's order granting summary disposition in favor of defendant on defendant's counterclaim. "Where an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj*, 284 Mich App at 519.

We review de novo questions of statutory interpretation. *Brackett v Focus Hope, Inc*, 482 Mich 269, 275; 753 NW2d 207 (2008).

The goal of statutory interpretation is to discern the intent of the Legislature. See *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012). The first step in this Court's interpretation of a statute is to review the language of the statute itself; if the language is unambiguous, we must give the language its plain and ordinary meaning, without judicial construction. See *id*.

Plaintiff argues that the ACEA does not apply in this case because she did not use a "false academic credential" as defined by the act. Plaintiff is correct to the extent that there was no evidence presented that she used a false academic credential. A "[f]alse academic credential" is defined in the statute as an academic credential that is "issued or manufactured by a person that is not a qualified institution." MCL 390.1602(b). A "qualified institution" is defined in MCL 390.1602(c), and no party argues that the University of Wisconsin is not a qualified institution. But plaintiff's argument ignores the plain language of MCL 390.1604, which states:

> (1) An individual shall not knowingly use a false academic credential to obtain employment; to obtain a promotion or higher compensation in employment; to obtain admission to a qualified institution; or in connection with any loan, business, trade, profession, or occupation.
>
> (2) An individual who does not have an academic credential shall not knowingly use or claim to have that academic credential to obtain employment or a promotion or higher compensation in employment; to obtain admission to a qualified institution; or in connection with any loan, business, trade, profession, or occupation.

While MCL 390.1604(1) addresses the use of a "false academic credential," MCL 390.1604(2) addresses the use of a nonexistent "academic credential" to obtain employment or a promotion or higher compensation in employment. An "academic credential" is defined in the statute as "a degree or a diploma, transcript, educational or completion certificate, or similar document that indicates completion of a program of study or instruction or completion of 1 or more courses at an institution of higher education or the grant of an associate, bachelor, master, or doctoral degree." MCL 390.1602(a). The plain, unambiguous language of MCL 390.1604(2) indicates that the Legislature intended to proscribe false claims, in an employment context, that an individual possesses an academic credential that he or she does not possess.

Notwithstanding the plain language of MCL 390.1604(2), plaintiff asserts that this subsection was "intended to mimic the remainder of the statute" by placing "liability on the person knowingly taking advantage of [a] fake diploma." But that is precisely the conduct that is proscribed by MCL 390.1604(1). We must give meaning to every word of a statute and avoid constructions that render statutory language surplusage or nugatory. *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 649; 732 NW2d 116 (2007). Plaintiff's proposed construction is not only contrary to the plain language of the statute but would render MCL 390.1604(2) largely surplusage. We decline to adopt such a construction. And although plaintiff seeks to bolster her argument by reference to the ACEA's legislative history, "the language of the statute is the best source for determining legislative intent." *City of Fraser v Almeda Univ*, 314 Mich App 79, 97; 886 NW2d 730 (2016) (quotation marks and citation omitted). As in *Fraser*, we decline to base our interpretation on

legislative history; instead, and in light of the unambiguous statutory language, "we look only to the language of [the] statute to determine legislative intent . . . ." *Id.*[5]

In sum, the plain language of MCL 390.1604(2) makes clear that it applies not only to the issuance or manufacture of a false academic credential but additionally when an individual who does not have an academic credential knowingly uses or claims to have that academic credential to obtain employment or a promotion or higher compensation in employment. The trial court therefore did not err by interpreting MCL 390.1604(2) as applying in this case.

III. TITLE-OBJECT CLAUSE

Plaintiff additionally (and cursorily) argues that interpreting MCL 390.1604(2) to apply to "resume fraud" would violate the Title-Object Clause of the Michigan Constitution, Const 1963, art IV, § 24. We disagree.

The Title-Object Clause provides that "[n]o law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title." Const 1963, art IV, § 24. "[T]he purpose of the [Title-Object] clause is to prevent the

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[5] Further, while this Court in *Fraser* noted, albeit without relying on it, that "the legislative analysis of the statute at issue clearly indicates that the purpose of the [ACEA] is to prevent the existence and use of false academic credentials in the state of Michigan," the only issue before the Court in *Fraser* related to the issuance of a false academic credential in violation of MCL 390.1604(1). We do not read *Fraser* to preclude an additional or corollary statutory purpose as set forth in MCL 390.1604(2).

Legislature from passing laws not fully understood, to ensure that both the legislators and the public have proper notice of legislative content, and to prevent deceit and subterfuge." *People v Cynar*, 252 Mich App 82, 84; 651 NW2d 136 (2002) (quotation marks and citation omitted); see also *People v Bosca*, 310 Mich App 1, 83; 871 NW2d 307 (2015). Our Supreme Court has explained that three kinds of challenges may be brought against statutes on the basis of the Title-Object Clause: "(1) a 'title-body' challenge, (2) a multiple-object challenge, and (3) a change of purpose challenge." *People v Kevorkian*, 447 Mich 436, 453; 527 NW2d 714 (1994) (opinion by CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.).

In this case, plaintiff refers us to our analysis of title-body challenges in *Bosca*, thereby presumably indicating that her challenge to MCL 390.1604(2) is of that type. In *Bosca*, this Court stated that to succeed on a title-body challenge, a party must demonstrate that the title of the act "does not adequately express its contents . . . such that the body exceeds the scope of the title." *Bosca*, 310 Mich App at 83 (quotation marks and citations omitted). Additionally, the *Bosca* Court stated that while "[t]he title of an act must express the general purpose or object of the act, . . . the title of an act is not required to serve as an index to all of the provisions of the act. Instead, the test is whether the title gives the Legislature and the public fair notice of the challenged provision." *Id*. (quotation marks and citations omitted). "The fair-notice requirement is violated only where the subjects [of the title and body] are so diverse in nature that they have no necessary connection . . . ." *Id*. (quotation marks and citations omitted). "[A]ll possible presumptions should be afforded to find constitutionality." *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 464; 208 NW2d 469 (1973).

The "object" of a law is its general purpose or aim. See *Pohutski v City of Allen Park*, 465 Mich 675, 691; 641 NW2d 219 (2002). "The 'one object' provision must be construed reasonably, not in so narrow or technical a manner that the legislative intent is frustrated." *Id*. Nor should this Court "invalidate legislation simply because it contains more than one means of attaining its primary object . . . ." *Id*. An act "may include all matters germane to its object, as well as all provisions that directly relate to, carry out, and implement the principal object," and it "may authorize the doing of all things which are in furtherance of the general purpose of the Act" without violating the Title-Object Clause. *Id*. (citations omitted). Finally, the title of the act need not mention every provision in the body; rather, "[i]t is sufficient that the act centers to one main general object or purpose which the title comprehensively declares, though in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental" to the act's general purpose. *Id*. at 691-692 (quotation marks and citations omitted; alteration in original).

Although plaintiff is correct that the ACEA's title does not refer to "resume fraud," we conclude that the subject expressed in the title of the act is not so "diverse in nature" from the subject of the body that the public or the Legislature would be deprived of fair notice. *Bosca*, 310 Mich App at 83. The parties focus on the "short title" of the act, which is the "authentic credentials in education act." MCL 390.1601. The word "authentic" is not defined in the statute, but it is commonly defined to mean "[c]onforming to fact and therefore worthy of trust, reliance or belief" or "[h]aving a claimed and verifiable origin or authorship; not counterfeit or copied." *The American Heritage Dictionary of the English Language* (3d ed). Therefore, the

short title of the act puts the public on notice that the purpose of the statute is to ensure the authenticity or integrity of academic credentials.

The more formal title of the ACEA, however, is "AN ACT to prohibit the issuance or manufacture of false academic credentials; and to provide remedies." 2005 PA 100. This verbiage presents a closer constitutional question in that it does not specifically refer to the authenticity of academic credentials; rather, it uses language that largely parallels that of MCL 390.1604(1) only. But particularly given the presumption of constitutionality, we do not find the title of the act to be so diverse from its body as to raise a constitutional infirmity. The title of the act expresses the purpose of prohibiting the use of fraudulent academic credentials. The body of the statute furthers that general purpose in that its provisions are, at a minimum, germane, auxiliary, or incidental to that purpose. See MCL 390.1604. MCL 390.1604(1) penalizes the use of false academic credentials from unqualified institutions, which aims to reduce the demand for, and thereby to impede the issuance and manufacture of, such credentials, and which thereby furthers and is germane, auxiliary, or incidental to the statute's general purpose. And MCL 390.1604(2) addresses a related issue by prohibiting fraudulent claims concerning credentials from qualified institutions. Without that provision, an individual apprised of the penalty for using a "diploma mill" degree might simply falsify an academic credential from a qualified institution instead. Indulging in the presumption of constitutionality, as we must, we conclude that the title provides fair notice of the conduct proscribed by the body. See *Bosca*, 310 Mich App at 83 (holding that "the title of an act is not required to serve as an index to all of the provisions of the act. Instead, the test is whether the

title gives the Legislature and the public fair notice of the challenged provision.") (quotation marks and citations omitted). Plaintiff's challenge under the Title-Object Clause is without merit.

IV. DAMAGES

Finally, plaintiff argues that the trial court erred when it found defendant to have been "damaged" by a violation of the ACEA and when it awarded defendant the $100,000 statutory minimum as damages. Under MCL 390.1605, "[a] person damaged by a violation of this act may bring a civil action and may recover costs, reasonable attorney fees, and the greater of either the person's actual damages or $100,000.00." We conclude that remand is required for the trial court to determine whether defendant was "a person damaged by a violation of this act."

Defendant argued in the trial court that although it believed it was entitled to damages beginning in 1991 based on plaintiff's fraudulent job application, it was not requesting damages based on that initial fraudulent conduct. Rather, defendant argued that it was damaged by virtue of having made "promotional materials" using plaintiff's biography and by her rise "to the level of chief operating officer." Defendant therefore maintained that it was entitled to damages based on promotions and salary increases that plaintiff received after 2005, when the statute was enacted. Plaintiff argued that her "resume fraud" occurred in 1991 (before the ACEA existed) and that defendant could not seek retroactive application of the ACEA. Plaintiff further argued that her promotions and salary increases were based on merit and her job performance, not on her false bachelor's degree claim back in 1991. The circuit court did not discuss either party's argu-

ment before awarding judgment in favor of defendant in the amount of $104,611.41.

Defendant argues on appeal that it relied on plaintiff's false 1991 representation when hiring plaintiff and in promoting her and paying her salary and bonuses over the years and that it therefore was "damaged." Defendant relies on the affidavit of its president to that effect, filed in support of its motion for summary disposition. Defendant has not, however, identified any action by plaintiff—after 1991—by which she "knowingly use[d] or claim[ed] to have [a non-existent] academic credential to obtain . . . a promotion or higher compensation in employment . . . ." MCL 390.1604(2). Defendant does not claim, for example, that plaintiff ever applied for those promotions or benefits or claimed her nonexistent credential as a basis for receiving them, nor did defendant present any evidence that plaintiff's nonexistent degree prompted its decision to promote her, to increase her compensation, or to pay her bonuses. Rather, defendant contends that plaintiff is "strictly liable" for the statutory minimum damages. We do not find these arguments persuasive, at least on the current record. By requiring that a person "knowingly use or claim" an academic credential, MCL 390.1604(2) requires affirmative conduct, as well as scienter; it does not impose strict liability. See *People v Schumacher*, 276 Mich App 165, 168-171; 740 NW2d 534 (2007) (discussing the difference between a *mens rea* requirement and strict liability). Proof of damages in a tort action generally requires proof of an actual injury or loss. See *Henry v Dow Chem Co*, 473 Mich 63, 74-75; 701 NW2d 684 (2005).

Although defendant asserts that it would have acted *differently* had it been aware of plaintiff's resume

fraud, the trial court never found that plaintiff "knowingly use[d] or claim[ed]" an academic credential after 1991 or that plaintiff's continued silence after 1991 constituted a "knowing[] use or claim." MCL 390.1604(2). The trial court also never evaluated the relative effects (1) of the 1991 resume fraud; (2) of plaintiff's work performance, demonstrated merit, or other considerations on defendant's subsequent determinations to promote plaintiff and to continue to make payments (including increased payments) to her (presumably in return for services rendered); (3) of whether or how defendant was harmed by its publication of promotional materials that reflected plaintiff's claimed academic credential; (4) of whether or how defendant's reputation may have been damaged; and (5) of whether defendant suffered a loss of business or income, or indeed whether it suffered any actual loss because of plaintiff's conduct.

Defendant's reliance on *Fraser* on this point is misplaced. In *Fraser*, the plaintiff promoted employees and increased their salaries as a direct result of the employees' having obtained what turned out to be false academic credentials. *Fraser*, 314 Mich App at 83. The plaintiff also provided tuition reimbursement to the employees; this Court noted that, "[o]verall, plaintiff paid a total of $143,848 to the employees for the purchase of Almeda degrees." *Id*. at 84. This Court concluded that the "plaintiff demonstrated that it was damaged by defendant's acts because it paid for fraudulent academic credentials *and*, *based upon those credentials*, increased employee salaries." *Id*. at 98 (emphasis added).

As in *Fraser*, plaintiff in the instant case used an academic fraud to obtain employment from defendant. However, unlike in *Fraser*, defendant did not reim-

burse plaintiff for tuition for her fake degree, nor has the connection between plaintiff's promotions and salary increases and her false claim of an academic credential—in 1991—been established, apart from the bare fact that, had plaintiff's fraud been discovered, she may not have been in a position to have received those benefits (again, presumably in return for services rendered).

We conclude, in light of the lack of any specific findings by the trial court, or any explanation of its reasoning in granting defendant damages under MCL 390.1605, that remand is required for further proceedings on the issue of whether defendant was "a person damaged by a violation of this act." On remand, the trial court should keep in mind the six-year period of limitations for violations of the ACEA. See *Fraser*, 314 Mich App at 100-101 ("The Act does not contain its own statute of limitations. Therefore, plaintiff's claims are subject to the six-year period of limitations found in MCL 600.5813."). Additionally, the trial court should keep in mind that our Supreme Court has stated that "the continuing violations doctrine is contrary to Michigan law" with regard to the tolling of limitations periods found in Chapter 58 of the Revised Judicature Act of 1961, MCL 600.5801 *et seq*. *Fraser*, 314 Mich App at 101.

Judgment vacated and case remanded for further proceedings consistent with this opinion. We retain jurisdiction.

BECKERING and RONAYNE KRAUSE, JJ., concurred with BOONSTRA, P.J.

TRJ & E PROPERTIES, LLC v CITY OF LANSING

Docket No. 338992. Submitted April 10, 2018, at Lansing. Decided April 17, 2018, at 9:20 a.m. Leave to appeal denied 503 Mich 938.

Petitioner, TRJ & E Properties, LLC, petitioned the Tax Tribunal to reverse the decision of respondent, the city of Lansing, to uncap the taxable value of property that had been transferred to petitioner by TRJ Properties, Inc. (TRJ Properties). In 2015, TRJ Properties owned an apartment building and transferred its interest in that property to petitioner. The ownership interests in petitioner were as follows: 25% by Tony Farida, 25% by Ricky Farida, 25% by Jeffrey Farida, and 25% by Eric Farida. TRJ Properties was owned as follows: 40% by Hamid Farida (the father of Tony, Ricky, Jeffrey, and Eric), 20% by Tony Farida, 20% by Ricky Farida, and 20% by Jeffrey Farida. Petitioner's operating agreement provided that, subject to specific exceptions, "the affirmative vote of a majority of the Shares of all Members entitled to vote on such a matter is required." Respondent determined that this property transfer was an uncapping event under MCL 211.27a(3) and increased the property's taxable value from $468,746 to $535,200. Petitioner petitioned the Tax Tribunal to reverse respondent's decision uncapping the property's taxable value, asserting that the transfer was between commonly controlled entities and thus exempt from uncapping under MCL 211.27a(7)(m). Respondent moved for summary disposition, arguing that the State Tax Commission (STC) had issued Revenue Administrative Bulletin (RAB) 1989-48, which provides that common control only exists when ownership is identical or when the same five or fewer people have an 80% interest in both properties, and therefore an uncapping event occurred in this case because the same five or fewer people only had a 60% shared interest in the properties. Petitioner also moved for summary disposition, arguing that TRJ Properties and petitioner were commonly controlled because the same siblings owned a controlling interest in each entity, where a controlling interest was 50% or more of the combined voting power in each entity, or, alternatively, that common control existed under RAB 2010-1 because a parent indirectly controlled, through his or her children, both

entities. The Tax Tribunal rejected respondent's argument that RAB 1989-48 applied and declined to adopt the requirements in RAB 1989-48; instead, the Tax Tribunal applied the plain language of MCL 211.27a, which provides that a transfer of ownership uncaps a property's taxable value for the following tax year but that a transfer of ownership does not include a transfer of real property among other legal entities if the entities involved are commonly controlled. The Tax Tribunal noted that Tony, Ricky, and Jeffrey's 60% interest in TRJ Properties controlled that entity and that Tony, Ricky, and Jeffrey's 75% interest in petitioner also controlled that entity. Petitioner's articles of organization provided that "a mere majority of shares of all members is required to act." Accordingly, the Tax Tribunal concluded that both entities were controlled by three of the four Farida brothers and thus were commonly controlled. Therefore, the Tax Tribunal held that MCL 211.27a(7)(m) applied and the property's taxable value remained capped. Respondent appealed.

The Court of Appeals *held*:

1. The General Property Tax Act (GPTA), MCL 211.1 *et seq*., provides for the taxation of real and personal property. Under MCL 211.27a(2), a property's taxable value is generally determined by the lesser of (1) the property's current state equalized value or (2) the property's taxable value in the previous year, minus losses, multiplied by 1.05 or the inflation rate, plus all additions. Under MCL 211.27a(3), the property's taxable value is uncapped when the property is transferred. However, there are several exceptions under which a transfer of ownership will not uncap the property's taxable value. MCL 211.27a(7)(m) provides that a transfer of real property among corporations or other legal entities will not uncap the property's taxable value if the entities involved are commonly controlled. While the GPTA does not define "commonly controlled" in MCL 211.27a or elsewhere, it does define "under common control with" as it relates to personal property taxation exemptions in MCL 211.9o(7), which provides, in pertinent part, that "under common control with" means the possession of the power to direct or cause the direction of the management and policies of a related entity, directly or indirectly, whether derived from a management position, official office, or corporate office held by an individual; by an ownership interest, beneficial interest, or equitable interest; or by contractual agreement or other similar arrangement. While this definition does not expressly or directly apply to MCL 211.27a(7)(m), it was a reliable and persuasive indication of the Legislature's intent and it allows consistency throughout the GPTA's legislative scheme. Furthermore, this definition was particularly appropriate because it

recognizes that different percentages of control may be necessary to direct the management of different corporate entities and because it focuses on the actual control of the business on the basis of its corporate structure. As a practical matter, no single percentage will apply universally to diverse corporate structures, and therefore no specific percentage was adopted as the definition of common control. In this case, the Tax Tribunal did not err when it determined that TRJ Properties and petitioner were commonly controlled. Tony, Ricky, and Jeffrey controlled 60% of TRJ Properties and 75% of petitioner. According to petitioner's operating agreement, a mere majority was required for it to act. While petitioner did not provide an operating agreement for TRJ Properties, petitioner repeatedly asserted that only 50% of the combined voting power of TRJ Properties was required for it to act, and respondent never disputed this fact. Therefore, both entities were actually controlled by Tony, Ricky, and Jeffrey. Accordingly, the Tax Tribunal did not commit an error of law or adopt a wrong principle when it determined that TRJ Properties and petitioner were commonly controlled under MCL 211.27a(7)(m).

2. The Tax Tribunal was not required to follow the STC's transfer-of-ownership guidelines and related revenue administrative bulletins, including RAB 1989-48, to determine whether the transfer was excluded from uncapping under MCL 211.27a. The Tax Tribunal properly held that it was not bound to follow STC guidelines that impose requirements not present within the statute's plain language. Furthermore, the STC guidelines in RAB 1989-48 did not provide any interpretation of MCL 211.27a(7)(m), and therefore the Tax Tribunal properly applied the general rules of statutory construction to the statute. Accordingly, the Tax Tribunal properly granted summary disposition in favor of petitioner and concluded that respondent had erroneously uncapped the taxable value of petitioner's property under MCL 211.27a.

Affirmed.

TAXATION — PROPERTY TAX — TAXABLE VALUE — TRANSFER OF PROPERTY — UNCAPPING — COMMONLY CONTROLLED ENTITIES.

MCL 211.27a(7)(m) provides that a transfer of real property among corporations or other legal entities will not uncap the property's taxable value if the entities involved are commonly controlled; the GPTA does not define "commonly controlled" in MCL 211.27a or elsewhere; because different percentages of control may be necessary to direct the management of different corporate entities that have diverse corporate structures, no specific percentage can be used to define common control.

Peter Ellenson for TRJ & E Properties, LLC.

F. Joseph Abood and *Gregory S. Venker* for the city of Lansing.

Amicus Curiae:

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Chief Legal Counsel, and *Matthew B. Hodges*, Assistant Attorney General, for the Department of Treasury.

Before: O'BRIEN, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM. Respondent, city of Lansing, appeals by right an order of the Michigan Tax Tribunal granting summary disposition in favor of petitioner, TRJ & E Properties, LLC, and concluding that respondent had erroneously uncapped the taxable value of property that had been transferred to petitioner by a commonly controlled entity, TRJ Properties, Inc. (TRJ Properties). We affirm.

In 2015, TRJ Properties owned an apartment building and transferred its interest in that property to petitioner. The ownership interests in petitioner are as follows: 25% by Tony Farida, 25% by Ricky Farida, 25% by Jeffrey Farida, and 25% by Eric Farida. TRJ Properties was owned as follows: 40% by Hamid Farida, 20% by Tony Farida, 20% by Ricky Farida, and 20% by Jeffrey Farida. Hamid is the father of Tony, Ricky, Jeffrey, and Eric. Petitioner's operating agreement provides that, subject to specific exceptions, "the affirmative vote of a majority of the Shares of all Members entitled to vote on such a matter is required."

Respondent determined that the property transfer was an uncapping event under MCL 211.27a(3) and

increased the property's taxable value from $468,746 to $535,200. Petitioner petitioned the Tax Tribunal to reverse respondent's decision uncapping the property's taxable value, asserting that the transfer was between commonly controlled entities and thus exempt from uncapping under MCL 211.27a(7)(m).

Respondent moved for summary disposition, asserting that the facts were not in dispute and that respondent was entitled to judgment as a matter of law. Respondent argued that the State Tax Commission (STC) had issued Revenue Administrative Bulletin (RAB) 1989-48, which provides that common control only exists when ownership is identical or when the same five or fewer people have an 80% interest in both properties. Respondent argued that an uncapping event occurred in this case because the same five or fewer people only had a 60% shared interest in the properties.

Petitioner also moved for summary disposition. Petitioner argued that TRJ Properties and petitioner were commonly controlled because the same siblings owned a controlling interest in each entity, where a controlling interest was 50% or more of the combined voting power in each entity. Petitioner alternatively argued that common control existed under RAB 2010-1 because a parent indirectly controlled, through his or her children, both entities. Because Hamid was the father of all the siblings who had an ownership interest in each entity, petitioner argued that Hamid constructively controlled 100% of both entities and that, accordingly, no uncapping event occurred.

The Tax Tribunal determined that the parties had effectively moved for summary disposition under MCR 2.116(C)(10). The Tax Tribunal noted that respondent was arguing that the common-control rules of RAB

1989-48 applied, but not the constructive-ownership rules in RAB 2010-1. It rejected respondent's argument that RAB 1989-48 applied and declined to adopt the requirements in RAB 1989-48 because "[t]o apply such a rule would be to add requirements not present in the statute, and thus exercising legislative power without authority, by creating law or changing the laws enacted by the Legislature." Instead, the Tax Tribunal applied the plain language of MCL 211.27a, which provides that a transfer of ownership uncaps a property's taxable value for the following tax year, MCL 211.27a(3), but that a transfer of ownership does not include "[a] transfer of real property . . . among . . . other legal entities if the entities involved are commonly controlled," MCL 211.27a(7)(m).

In this case, the Tax Tribunal noted that Tony, Ricky, and Jeffrey's 60% interest in TRJ Properties controlled that entity and that Tony, Ricky, and Jeffrey's 75% interest in petitioner also controlled that entity. Petitioner's articles of organization showed that "a mere majority of shares of all members is required to act." Accordingly, the Tax Tribunal concluded that both entities were controlled by three of the four Farida brothers and thus were commonly controlled. Therefore, the Tax Tribunal held that MCL 211.27a(7)(m) applied and that "the property's taxable value remains capped." This appeal followed.

Respondent argues that the Tax Tribunal erred when it determined that these two entities were commonly controlled for purposes of MCL 211.27a(7)(m) because RAB 1989-48 provides that common control requires 80% of the combined voting power be shared between two entities and, in this case, the combined voting power of the people who controlled the two entities was 60% and 75%, respectively. We disagree.

This Court reviews de novo a lower tribunal's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A party is entitled to summary disposition under MCR 2.116(C)(10)[1] if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 120.

This Court's review of a decision by the Tax Tribunal is limited. *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527; 817 NW2d 548 (2012). When a party does not dispute the facts or allege fraud, this Court reviews whether the tribunal "made an error of law or adopted a wrong principle." *Id*. at 527-528. This Court reviews de novo the interpretation and application of tax statutes. *Id*. at 528. If the plain and ordinary meaning of a statute's language is clear, this Court will not engage in judicial construction. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 141; 783 NW2d 133 (2010). When interpreting a statute, this Court's goal is to give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). The language of the statute itself is the primary indicator of the Legislature's intent. *Id*.

The General Property Tax Act (GPTA), MCL 211.1 *et seq*., provides for the taxation of real and personal property. Generally, a property's taxable value is determined by the lesser of (1) the property's current state equalized value or (2) the property's taxable value in the previous year, minus losses, multiplied by 1.05 or the inflation rate, plus all additions. MCL 211.27a(2).

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[1] Generally, the Tax Tribunal's rules of procedure govern the proceedings before the Tax Tribunal, but if no applicable rule exists, the Michigan Court Rules apply. *Signature Villas, LLC v City of Ann Arbor*, 269 Mich App 694, 705; 714 NW2d 392 (2006).

This limitation, which is based on Const 1963, art 9, § 3, effectively caps increases on a property's taxable value so that "any yearly increase in taxable value is limited to either the rate of inflation or 5 percent, whichever is less." *Mich Props*, 491 Mich at 528-529. "[T]he property's taxable value is uncapped when the property is transferred." *Id*. at 529-530; see also MCL 211.27a(3).

However, there are several exceptions under which a transfer of ownership will not uncap the property's taxable value. *Detroit Lions, Inc v City of Dearborn*, 302 Mich App 676, 694; 840 NW2d 168 (2013). One of these exceptions is "[a] transfer of real property . . . among corporations . . . or other legal entities if the entities involved are commonly controlled." MCL 211.27a(7)(m). This is the exception that the parties dispute in this case—specifically, the meaning of the phrase "commonly controlled" and what percentage of common ownership renders two entities commonly controlled.

This Court has only addressed common control in two published decisions, and neither decision determined that a specific percentage of ownership constitutes common control. In *Sebastian J Mancuso Family Trust v City of Charlevoix*, 300 Mich App 1, 7-8; 831 NW2d 907 (2013), this Court held that two trusts were not commonly controlled when they had the same trustees. This Court reasoned that the common-control exception[2] did not apply because trustees only manage the property, but the statute applies when there is a change in the ownership of the property. *Id*. at 7.

[2] At that time, the common-control exception was located at MCL 211.27a(7)(*l*), but the statutory language has not changed. See 2015 PA 243 (adding Subdivision (d) and relettering the subsequent subdivisions).

Accordingly, the common-control exception does not apply to a transfer of property from one owner to a new owner even if the trustees of both owners are the same. *Id*. at 8. And in *Detroit Lions*, 302 Mich App at 694, this Court concluded that two entities—Ford Land and WCF Land—were not commonly controlled because, while William Clay Ford, Sr., owned WCF Land, "it is undisputed that Ford Land . . . is not under the control of Mr. Ford." Neither case addressed what amount of control constitutes common control.

We turn to principles of statutory interpretation to determine the meaning of "commonly controlled." This Court generally interprets statutes with consideration of "[t]he fair and natural import of the terms employed, in view of the subject matter of the law . . . ." *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 274; 744 NW2d 10 (2007) (quotation marks and citation omitted). This Court should read phrases "in the context of the entire legislative scheme." *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014). While the GPTA does not define "commonly controlled" in MCL 211.27a or elsewhere, it does define "under common control with" as it relates to personal property taxation exemptions. MCL 211.9o(7) provides, in pertinent part:

> As used in this section:
>
> * * *
>
> (b) "Control", "controlled by", and "under common control with" mean the possession of the power to direct or cause the direction of the management and policies of a related entity, directly or indirectly, whether derived from a management position, official office, or corporate office held by an individual; by an ownership interest, beneficial

> interest, or equitable interest; or by contractual agreement or other similar arrangement.[3]

While we recognize that this definition does not expressly or directly apply to MCL 211.27a(7)(m), it is a reliable and persuasive indication of the Legislature's intent and allows consistency throughout the GPTA's legislative scheme. See *Madugula*, 496 Mich at 696; *Sun Valley Foods Co*, 460 Mich at 236. And this definition is particularly appropriate because it recognizes that different percentages of control may be necessary to direct the management of different corporate entities. For instance, if an entity requires a supermajority to undertake any action, a mere majority of common shareholders would not be sufficient to constitute common control of the entities under this definition.

Further, this definition focuses on the actual control of the business on the basis of its corporate structure. Numerous federal decisions tie the meaning of "common control" to the actual control of the business. See, e.g., *Chao v A-One Med Servs, Inc*, 346 F3d 908, 915 (CA 9, 2003); *Vittoria North America, LLC v Euro-Asia Imports Inc*, 278 F3d 1076, 1084 (CA 10, 2001). This

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[3] The remainder of MCL 211.9o(7)(b) contains additional language:

> There is a rebuttable presumption that control exists if any person, directly or indirectly, owns, controls, or holds the power to vote, directly or by proxy, 10% or more of the ownership interest of any other person or has contributed more than 10% of the capital of the other person. Indirect ownership includes ownership through attribution or through 1 or more intermediary entities.

It is not necessary to address any rebuttable presumption of common control in this case because a mere majority of the shares of all members was required to act, and Tony, Ricky, and Jeffrey controlled more than that majority of shares in both entities.

Court may consider foreign authority as persuasive authority when deciding issues of state law. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221 n 6; 761 NW2d 293 (2008). As a practical matter, no single percentage—whether the 80% that respondent suggests or the more than 50% that petitioner suggests —will apply universally to diverse corporate structures. For this reason, we decline to adopt any specific percentage as the definition of common control. Moreover, if the Legislature had intended such a particular requirement, it could have specifically defined the phrase "commonly controlled" accordingly.

In this case, the Tax Tribunal did not err when it determined that TRJ Properties and petitioner were commonly controlled. Tony, Ricky, and Jeffrey controlled 60% of TRJ Properties and 75% of petitioner. According to petitioner's operating agreement, a mere majority is required for it to act. While petitioner did not provide an operating agreement for TRJ Properties, petitioner repeatedly asserted that only 50% of the combined voting power of TRJ Properties was required for it to act, and respondent never disputed this fact. Therefore, both entities were actually controlled by Tony, Ricky, and Jeffrey. Accordingly, the Tax Tribunal did not commit an error of law or adopt a wrong principle when it determined that TRJ Properties and petitioner were commonly controlled under MCL 211.27a(7)(m).

In reaching our conclusion, we also reject respondent's argument that the Tax Tribunal was required to follow the STC's transfer-of-ownership guidelines and related revenue administrative bulletins, including RAB 1989-48, to determine whether the transfer was excluded from uncapping under MCL 211.27a. As the Tax Tribunal held, it is not bound to follow STC

guidelines that impose requirements not present within the statute's plain language. Further, the STC guidelines did not provide any interpretation of MCL 211.27a(7)(m), and therefore the Tax Tribunal properly applied the general rules of statutory construction to the statute.

It is well established that "agency interpretations are entitled to respectful consideration, but they are not binding on courts and cannot conflict with the plain meaning of the statute." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008). "[A]gencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature." *Id*. at 98. An agency's interpretation may be helpful "when the law is 'doubtful or obscure . . . .' " *Id*. at 103 (citation omitted). However, agency interpretations of statutes are not entitled to deference when they conflict with the language of a statute. *Id*. at 108.

In *Rovas*, the Michigan Supreme Court considered the meaning of the word "false" in MCL 484.2502(1)(a). *Id*. at 111-112. The Public Service Commission (the PSC) had determined that the statute penalized factually inaccurate statements. *Id*. at 112. However, the PSC did not analyze the statutory language or provide a rationale for its conclusion that the word "false" meant untrue or incorrect. *Id*. at 113. Accordingly, the PSC had not provided any construction of the statute, and there was no construction for a reviewing court to respectfully consider. *Id*. Because the PSC had failed to offer any construction, the Supreme Court had to provide "an interpretation of the plain language of the statute." *Id*.

RAB 1989-48 stated that its purpose was "to define 'entities under common control' for single business tax

purposes." RAB 1989-48, p 1. In "Types of Controlled Groups," RAB 1989-48 discusses both "Parent-Subsidiary Group of Entities" and "Brother-Sister Group of Entities" as types of entities under common control. RAB 1989-48, pp 1-2. For purposes of parent-subsidiary groups, RAB 1989-48 provides that groups are under common control if "[a] controlling interest in each of the organizations . . . is owned (directly and indirectly) by one or more of the other organizations," with "controlling interest" defined as follows:

> A controlling interest means:
>
> 1. Corporations: 80 percent of total combined voting power of all classes of stock entitled to vote, OR, at least 80 percent of the total value of the shares of all classes of stock of such corporation.
>
> 2. Trusts and estates: ownership of an actuarial interest of at least 80 percent of such trust or estate. [Actuarial interest defined: IRC #1.414(c)-2 (b)(2)(ii)]
>
> 3. Partnerships: 80 percent of the profits or capital
>
> 4. Sole proprietorships: ownership of such proprietorship. [RAB 1989-48, pp 1-2 (bracketed information in original).]

For the purposes of brother-sister groups, RAB 1989-48 provides:

> The term "brother-sister group of entities under common control" means two or more entities engaged in a business activity, providing the following exists:
>
> 1. The same five or fewer persons who are individuals, estates or trusts own (directly and indirectly) a controlling interest in each entity (see page 6 for constructive ownership rules), and
>
> 2. Taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such entity, such persons are in effective control of each entity. The five or fewer persons, whose

> ownership is considered for purposes of the controlling interest requirement for each organization, must be the same persons whose ownership is considered for purposes of the effective control requirement. [RAB 1989-48, p 2.]

For brother-sister groups, the examples provide that common ownership exists when "combined identical ownership . . . is greater than 50%." RAB 1989-48, Example 5, p 4.

In this case, like in *Rovas*, RAB 1989-48 provides no statutory construction; thus, there was nothing for the Tax Tribunal to respectfully consider. Therefore, the Tax Tribunal did not err by interpreting the plain language of MCL 211.27a(7)(m) and applying general rules of statutory construction to that subdivision. Accordingly, the Tax Tribunal properly granted summary disposition in favor of petitioner and concluded that respondent had erroneously uncapped the taxable value of petitioner's property under MCL 211.27a.

Affirmed.

O'BRIEN, P.J., and CAVANAGH and STEPHENS, JJ., concurred.

WILMINGTON SAVINGS FUND SOCIETY, FSB v CLARE

Docket No. 336715. Submitted March 13, 2018, at Lansing. Decided April 19, 2018, at 9:05 a.m.

Wilmington Savings Fund Society, FSB, was substituted as plaintiff in an action brought by Ocwen Loan Servicing, LLC, in the Saginaw Circuit Court seeking a judicial foreclosure, among other relief, with regard to residential property that had been purchased by defendants Roger and Nancy Clare (defendants) in 2006 and financed through a mortgage issued by defendant Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Quicken Loans, Inc. In May 2009, the mortgage was assigned to OneWest Bank, FSB. In August 2010, OneWest initiated foreclosure-by-advertisement proceedings against the property. In November 2010, after a sheriff's sale, a sheriff's deed was granted to OneWest, subject to a 12-month redemption period. In December 2010, OneWest quitclaimed the property to the Federal National Mortgage Association (Fannie Mae). In November 2011, the redemption period expired. Shortly thereafter, Fannie Mae commenced district court eviction proceedings against defendants for possession of the property. The district court ultimately ruled that Fannie Mae failed to show that it held valid title to the property, and Fannie Mae did not appeal. A year and a half later, in September 2014, Ocwen, acting as attorney-in-fact for OneWest, the last party to hold the mortgage before the sheriff's sale, recorded what the parties refer to as an "expungement affidavit" in Saginaw County. The affidavit indicated that OneWest agreed to set aside the sheriff's deed, reinstate the mortgage and note as if the foreclosure had not occurred, and render void any conveyance made subsequent and pursuant to the sheriff's deed. The affidavit further indicated that the foreclosure sale, sheriff's deed, and any subsequent conveyance were being set aside pursuant to the order issued by the district court. In October 2014, OneWest assigned the mortgage to Ocwen. In February 2015, Ocwen filed the instant action in the Saginaw Circuit Court, seeking a determination of interests in land and a judicial foreclosure. After the suit was filed, the mortgage was assigned at least twice, the last one being an assignment to plaintiff, Wilmington Savings Fund Society. Plaintiff asserted

that the 2010 sheriff's sale was voided by the expungement affidavit and that as a result, the mortgage should be reinstated and the parties returned to the positions they were in before the sheriff's sale. Plaintiff requested that the court enter a judgment invalidating the sheriff's sale, rescinding the sheriff's deed, reinstating the mortgage, and granting judicial foreclosure of the property. In the alternative, plaintiff sought to amend its complaint to add claims of equitable mortgage and unjust enrichment. The court, Andre R. Borrello, J., granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). The court ruled that plaintiff lacked standing because it no longer had any interest in the property as the mortgage had been extinguished and the expungement affidavit was without effect, and it denied plaintiff's motion for leave to amend its complaint on the ground that the proposed amendment would not correct the standing defect and would therefore be futile. Plaintiff appealed.

The Court of Appeals *held*:

1. The circuit court erred by concluding that plaintiff lacked standing to bring this action. Plaintiff had standing to litigate its interest in the property under MCL 600.2932(1), which provides, in part, that any person who claims any right in, title to, equitable title to, interest in, or right to possession of land may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff. Plaintiff also has standing to seek judicial foreclosure under MCL 600.3115, which provides, in part, that whenever a complaint is filed for the foreclosure or satisfaction of any mortgage on real estate or land contract, the court has power to order a sale of the premises which are the subject of the mortgage on real estate or land contract. Further, plaintiff, as the purported owner of the quitclaim deed and the purported holder of the mortgage and note, is a proper party to adjudicate those claims.

2. The circuit court correctly concluded that plaintiff had no valid mortgage to enforce because the mortgage was extinguished at the end of the redemption period following the foreclosure and sale and the "expungement affidavit" had no legal effect. A party cannot set aside a foreclosure sale simply through the unilateral filing of an expungement affidavit. Plaintiff argued that the recording of an expungement affidavit to set aside foreclosure sales is provided for in MCL 565.451a, which states, in pertinent part, that an affidavit stating facts relating to certain matters that may affect the title to real property in this state, including

the knowledge of the happening of any condition or event that may terminate an estate or interest in real property, and made by any person having knowledge of the facts and competent to testify concerning those facts in open court may be recorded in the office of the register of deeds of the county where the real property is situated. MCL 565.453 provides that such an affidavit may be received in evidence in any civil cause, in any court of this state and by any board or officer of the state in any suit or proceeding affecting the real estate and shall be prima facie evidence of the facts and circumstances therein contained. However, the cases on which plaintiff relied for the proposition that an affidavit filed pursuant to MCL 565.451a could serve to expunge a foreclosure sale and revive an extinguished mortgage were not binding, and there was no statutory basis for concluding that the Legislature intended for a party to be able to rescind a foreclosure sale and revive a mortgage by merely recording an affidavit that it agreed to do so. Therefore, the trial court properly dismissed plaintiff's judicial foreclosure action because the mortgage interest on which plaintiff relied was extinguished at the termination of the redemption period.

3. In light of the conclusion that plaintiff had standing, the case was remanded for the trial court to rule on the merits of plaintiff's motion to amend.

Affirmed in part and remanded for further proceedings.

PROPERTY — STATUTES — AFFIDAVITS RELATING TO MATTERS AFFECTING TITLE.

MCL 565.451a provides, in pertinent part, that an affidavit stating facts relating to certain matters that may affect the title to real property in this state, including the knowledge of the happening of any condition or event that may terminate an estate or interest in real property, and made by any person having knowledge of the facts and competent to testify concerning those facts in open court may be recorded in the office of the register of deeds of the county where the real property is situated; an affidavit filed under this provision cannot expunge a foreclosure sale and revive an extinguished mortgage.

Dickinson Wright PLLC (by *K. J. Miller* and *Robert Avers*) for plaintiff.

Peterson & Calunas, PLLC (by *Andrew G. Peterson*) for defendants.

Before: STEPHENS, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM. Defendants Roger and Nancy Clare (defendants) purchased a house financed through a mortgage issued by defendant Mortgage Electronic Registration Systems, Inc. (MERS), an entity in privity with plaintiff, Wilmington Savings Fund Society, FSB.[1] The mortgagee foreclosed on the mortgage for nonpayment. Following an unsuccessful action for possession, plaintiff filed this action to set aside the foreclosure, reinstate the mortgage, and obtain judicial foreclosure. The trial court granted defendants summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). Plaintiff appeals by right. We affirm in part and remand for proceedings consistent with this opinion.

I. PERTINENT FACTS

The material facts in this case are not in dispute. Defendants executed a mortgage on real property located in Hemlock, Michigan, in favor of MERS, as nominee for Quicken Loans, Inc. The mortgage secured a $250,600 loan from Quicken Loans to defendant Roger Clare. In May 2009, the mortgage was assigned to OneWest Bank, FSB. In August 2010, OneWest initiated foreclosure-by-advertisement proceedings against the property. In November 2010, after a sheriff's sale, a sheriff's deed was granted to OneWest, subject to a 12-month redemption period. In December 2010, OneWest quitclaimed the property to the Federal

[1] The mortgage was transferred or sold repeatedly during the relevant period. However, it is not disputed that all of the various mortgagees were in privity with each other.

National Mortgage Association (Fannie Mae). In November 2011, the redemption period expired.

Shortly thereafter, Fannie Mae commenced district court eviction proceedings against defendants for possession of the property. In March 2012, the case proceeded to a bench trial. At the close of Fannie Mae's proofs, defendants moved for a directed verdict, which the court granted. An order dismissing the case with prejudice was entered on March 5, 2012. Fannie Mae appealed the district's court ruling in the circuit court, which concluded that the basis for the district court's decision was not clear and remanded with direction that the district court make findings of fact and conclusions of law. On December 18, 2012, the district court issued its opinion on remand, which stated that Fannie Mae "has failed to show that title to the property was properly passed to it, the proofs being of a hearsay nature, without full documentation regarding the chain of title. . . . No evidence was presented from the prior title holders showing a valid transfer of title to the plaintiff." Fannie Mae did not appeal the district court's ruling on remand.

A year and a half later, in September 2014, Ocwen Loan Servicing, LLC, acting as attorney-in-fact for OneWest, the last party to hold the mortgage before the sheriff's sale, recorded what the parties refer to as an "expungement affidavit" in Saginaw County. The affidavit read, in pertinent part:

> 5. That OneWest Bank, FSB agrees to set aside the above Sheriff's Deed, making it void and of no force or effect, thus reinstating and reviving the above mortgage and Note, as if the foreclosure had not occurred. Additionally, any conveyance made subsequent and pursuant to the Sheriff's Deed is likewise set aside, making it void and of no force and effect. The foreclosure sale, Sheriff's Deed, and any subsequent conveyance are being set aside pur-

suant to an order issued by the 70th Judicial Court of the State of Michigan under Case No. 11-2817-LT.

* * *

7. That the mortgage referenced in Paragraph 2 above is hereby reinstated and is again in full force and effect.

In October 2014, OneWest assigned the mortgage to Ocwen.

In February 2015, Ocwen filed the instant action in circuit court seeking a determination of interests in land and a judicial foreclosure. After the suit was filed, the mortgage was assigned at least twice, the last one being an assignment to plaintiff. Plaintiff asserted that the 2010 sheriff's sale was voided by the expungement affidavit and that as a result, the mortgage should be reinstated with the parties returned to the positions they were in before the sheriff's sale. Plaintiff requested that the trial court enter a judgment invalidating the sheriff's sale, rescinding the sheriff's deed, reinstating the mortgage, and granting judicial foreclosure of the property. In the alternative, plaintiff sought to amend its complaint to add claims of equitable mortgage and unjust enrichment.

The trial court issued a written opinion and order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). As an initial matter, the court concluded that the suit was not barred by res judicata or collateral estoppel arising out of the 2012 district court case. Neither party has asserted that this was error. The trial court also concluded that plaintiff lacked standing because it no longer had any interest in the property as the mortgage had been extinguished and the expungement affidavit was without effect. Lastly, it denied plaintiff's motion for leave to amend its complaint on the ground that the proposed amend-

ment "would do nothing to correct the standing defect," and therefore, any such amendment would be futile.

II. LEGAL ANALYSIS

Plaintiff makes three arguments on appeal. First, that the trial court erred by concluding that plaintiff lacked standing. Second, that the court erred by finding that the expungement affidavit was without effect. Third, that the court erred by not allowing plaintiff to amend its complaint. We agree with plaintiff that it had standing to bring its action; however, we affirm the trial court's ruling that the expungement affidavit has no legal effect and that as a result, plaintiff's claim based on the mortgage fails as a matter of law. Finally, we conclude that plaintiff's motion to amend its complaint should be decided by the trial court on remand.

A. STANDING

Plaintiff correctly argues that it had standing to bring this suit. Whether a party has standing is reviewed de novo as a question of law. *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008). In *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010), our Supreme Court overruled its prior cases adopting the United States Supreme Court's approach to standing and held "that Michigan standing jurisprudence should be restored to a limited, prudential doctrine" under which "a litigant has standing whenever there is a legal cause of action." The Court explained that "the standing inquiry focuses on whether a litigant is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable." *Id*. at 355 (quotation marks and citation omitted).

In *Trademark Props of Mich, LLC v Fed Nat'l Mtg Ass'n*, 308 Mich App 132; 863 NW2d 344 (2014), we considered this issue in the context of a foreclosure and followed *Lansing Sch Ed Ass'n*, stating:

> MCL 600.2932(1) reflects the Legislature's intent to confer standing on individuals claiming an interest in real property. The statute authorizes suits to determine competing parties' respective interests in land[.] This litigation involves an action to quiet title filed by plaintiff because the parties dispute their respective interests in the condominium unit. Plaintiff's assertion that defendants cannot establish a superior interest in the property is premised on the merits of the litigation. Whether a party can succeed on the merits of the substantive claim is not the appropriate inquiry when reviewing standing. Accordingly, we reject plaintiff's argument regarding standing. [*Id*. at 137-138 (quotation marks and citations omitted).]

Plaintiff has standing under MCL 600.2932(1)[2] to litigate its interest in the property. Plaintiff also has standing under MCL 600.3115[3] to seek judicial foreclo-

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[2] MCL 600.2932(1) provides:

> Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

[3] MCL 600.3115 provides:

> Whenever a complaint is filed for the foreclosure or satisfaction of any mortgage on real estate or land contract, the court has power to order a sale of the premises which are the subject of the mortgage on real estate or land contract, or of that part of the premises which is sufficient to discharge the amount due on the mortgage on real estate or land contract plus costs. But the circuit judge shall not order that the lands subject to the mortgage be sold within 6 months after the filing of the complaint for foreclosure of the mortgage or that the lands which are the subject of the land contract be sold within 3 months after the filing of the complaint for foreclosure of the land contract.

sure. Further, plaintiff, as the purported owner of the quitclaim deed and the purported holder of the mortgage and note, is a proper party to adjudicate those claims. *Lansing Sch Ed Ass'n*, 487 Mich at 355.

B. VALIDITY OF THE EXPUNGEMENT AFFIDAVIT

The trial court concluded that plaintiff had no valid mortgage to enforce because (1) the mortgage was extinguished at the end of the redemption period following the foreclosure and sale and (2) the "expungement affidavit" had no legal effect. As noted, the court was incorrect in concluding that these legal determinations left plaintiff without standing. However, these findings defeat plaintiff's claim on the merits.

Plaintiff does not dispute that its right to enforce the mortgage was extinguished at the end of the redemption period.[4] Indeed, it was this recognition that led plaintiff to record an affidavit in an attempt to revive the extinguished mortgage. The controlling question then is whether plaintiff's "expungement affidavit" had legal effect. The affidavit was recorded on September 23, 2014, and states in pertinent part:

> 5. That OneWest Bank, FSB agrees to set aside the above Sheriff's Deed, making it void and of no force or effect, thus reinstating and reviving the above mortgage and Note, as if the foreclosure had not occurred. Additionally, any conveyance made subsequent and pursuant to the Sheriff's Deed is likewise set aside, making it void and of no force and effect. The foreclosure sale, Sheriff's Deed, and any subsequent conveyance are being set aside pursuant to an order issued by the 70th Judicial Court of the State of Michigan under Case No. 11-2817-LT.
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> * * *

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[4] "Foreclosure of a mortgage extinguishes it." *Mtg & Contract Co v First Mtg Bond Co*, 256 Mich 451, 452; 240 NW 39 (1932).

> 7. That the mortgage referenced in Paragraph 2 above is hereby reinstated and is again in full force and effect.

We agree with the trial court that a party cannot set aside a foreclosure sale simply through the unilateral filing of an expungement affidavit. Plaintiff argues that the recording of an expungement affidavit to set aside foreclosure sales is provided for in MCL 565.451a, which states, in pertinent part:

> An affidavit stating facts relating to any of the following matters that may affect the title to real property in this state and made by any person having knowledge of the facts and competent to testify concerning those facts in open court may be recorded in the office of the register of deeds of the county where the real property is situated:
>
> * * *
>
> (b) Knowledge of the happening of any condition or event that may terminate an estate or interest in real property.

MCL 565.453 provides, in turn, as follows:

> The affidavit, whether recorded before or after the passage of this act, may be received in evidence in any civil cause, in any court of this state and by any board or officer of the state in any suit or proceeding affecting the real estate and shall be prima facie evidence of the facts and circumstances therein contained.

Plaintiff relies on decisions of the United States Court of Appeals for the Sixth Circuit that relied on an unpublished opinion of this Court. However, this Court is not bound by the Sixth Circuit's interpretation of Michigan law, *Commonwealth Land Title Ins Co v Metro Title Corp*, 315 Mich App 312, 320 n 3; 890 NW2d 395 (2016), and this Court's unpublished opinions do not constitute binding precedent, MCR 7.215(C)(1);

Paris Meadows, LLC v City of Kentwood, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

The Sixth Circuit's reading of Michigan law is set forth in *Wuori v Wilmington Savings Fund Society*, 666 F Appx 506, 510 (CA 6, 2016). In that case, the Sixth Circuit considered whether an affidavit filed pursuant to MCL 565.451a(b) could serve to expunge a foreclosure sale and revive an extinguished mortgage. The court stated:

> While other states have similar statutory provisions, only Michigan appears to interpret this provision to allow mortgagees who have foreclosed upon a mortgage to record an "expungement affidavit" that sets aside the foreclosure sale and sheriff's deed and reinstates the underlying mortgage, simply by stating in the affidavit . . . that the mortgagee will not rely on said foreclosure sale and will treat such sale as having not been held. [*Id*. (quotation marks and citation omitted).]

The Sixth Circuit called this an "admittedly curious practice," noting that "the expungement affidavit is not stating facts about a 'happening of any condition' that affects the land other than those facts *first stated in the affidavit itself*—that is, the affidavit is at once purporting to create a condition that affects the land . . . *and* attest to the happening of that condition." *Id*. The Sixth Circuit elsewhere concluded that "foreclosure cases in Michigan have accepted the use of an affidavit expunging a sheriff's sale, yet very few have actually considered the validity of such a practice under the authority of" MCL 565.451a. *Connolly v Deutsche Bank Nat'l Trust Co*, 581 F Appx 500, 505 (2014). In fact, we have *never* considered the question whether MCL 565.451a(b) provides authority for a former mortgagee to expunge a foreclosure by filing an affidavit unilaterally setting aside the sheriff's deed and reinstating a mortgage for no reason other than the filing of the

affidavit itself. We now consider that question and conclude that this "admittedly curious practice" is not permitted under the statute. *Wuori*, 666 F Appx at 510.

The plain language of the statute does not include any indication that an affidavit may be used to *create* a condition. It necessarily follows that a party cannot unilaterally revoke a foreclosure sale by recording an affidavit that is itself the claimed condition. There is no statutory basis for concluding that the Legislature intended for a party to be able to rescind a foreclosure sale and revive a mortgage by merely recording an affidavit that it "agrees" to do so.[5] We may not read language into unambiguous statutes. See *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

Plaintiff relies primarily on our unpublished opinion in *Freund v Trott & Trott, PC*, unpublished per curiam opinion of the Court of Appeals, issued October 25, 2011 (Docket No. 299011). This case is neither binding precedent nor on point. In *Freund*, the mortgagor challenged the validity of a sheriff's sale. *Id*. at 2. The mortgagor claimed that the mortgage was never valid because the lender was not properly licensed and that even if it was, the mortgagee had failed to provide proper notice of the sheriff's sale. *Id*. We held that the errors relating to the issuance of the mortgage were

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[5] Plaintiff suggests that the affidavit in which OneWest "agree[d] to set aside the above Sheriff's Deed" is effective because (1) the district court ruled that the foreclosure was invalid and (2) the expungement affidavit merely "effectuated the [district court] opinion and provided [the] Borrowers with the relief requested in the district court." We reject both arguments. The district court opinion does not state that the foreclosure was invalid; only that the present holder of the deed had not presented a prima facie case that it was the titleholder. Moreover, a court does not require a party to "effectuate" its rulings for them to have effect or to record that it "agrees" with that ruling. The district court did not direct plaintiff to record any changes in the status of the deed. Instead, plaintiff recorded its self-serving interpretation of the district court opinion as an attempt to cloak its unilateral action with judicial authority.

insufficient to render the mortgage invalid. *Id*. at 3. As to the validity of the sheriff's sale, we concluded that the issue was moot because the mortgagee had filed an affidavit setting aside the sheriff's sale. *Id*. However, in *Freund*, the mortgagor did not object to the consideration of the affidavit or contend that it was ineffective under MCL 565.451a or for any other reason. To the contrary, in *Freund*, it was the mortgagor who submitted the mortgagee's affidavit and requested that we consider it, a proposition to which the mortgagor had no objection. In other words, the Court in Freund *accepted* the parties' mutual agreement that the affidavit was effective; it did not consider whether the affidavit was effective in the context of statute or precedent. It serves as a good example of why unpublished decisions are "not precedentially binding . . . ." MCR 7.215(C)(1).[6]

In sum, the trial court properly dismissed plaintiff's judicial foreclosure action because the mortgage interest on which plaintiff relied was extinguished at the termination of the redemption period.

C. DENIAL OF MOTION TO AMEND COMPLAINT

The trial court concluded that any amendment filed by plaintiff would be futile in light of the ruling that

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[6] In the only published case addressing this question, the Court expressed skepticism regarding the use of expungement affidavits to invalidate foreclosure sales and indicated that an independent basis for setting aside a foreclosure sale is necessary. *Trademark*, 308 Mich App at 140-141. Most recently in *OneWest Bank, FSB v Jaunese*, unpublished per curiam opinion of the Court of Appeals, issued March 19, 2015 (Docket No. 320037), we expressed skepticism about whether an affidavit of expungement could revive a mortgage, stating "we question" whether "an affidavit in and of itself can generally void a foreclosure . . . especially in the context of a situation where there are conflicting interests and positions." *Id*. at 12 n 8.

plaintiff lacked standing. In light of our ruling that plaintiff has standing, its motion to amend must be addressed on the merits. Plaintiff asks us to make this determination on appeal, but we decline to do so before the trial court has had an opportunity to consider the question. Accordingly, we remand to the trial court to rule on the merits of plaintiff's motion to amend.

Affirmed in part and remanded. We do not retain jurisdiction.

STEPHENS, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ., concurred.

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 February 21, 2018:

RAMOS v INTERCARE COMMUNITY HEALTH NETWORK, Docket No. 335061. The Court orders that a special panel shall not be convened pursuant to MCR 7.215(J) to resolve a conflict between this case and *Reo v Lane Bryant, Inc*, 211 Mich App 364; 536 NW2d 556 (1995).