MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

October 15, 2009, through December 29, 2009

CORBIN R. DAVIS
CLERK OF THE SUPREME COURT

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Research Director: LARRY S. ROYSTER

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PEOPLE v GARLAND

Docket No. 284300. Submitted August 5, 2009, at Grand Rapids. Decided August 18, 2009. Approved for publication October 15, 2009, at 9:00 a.m.

Edward F. Garland was convicted by a jury in the Livingston Circuit Court, David J. Reader, J., of one count of first-degree home invasion, two counts of first-degree criminal sexual conduct (CSC I) (sexual penetration occurring during the commission of any other felony), and two counts of third-degree criminal sexual conduct (CSC III) (sexual penetration with knowledge that the victim was physically helpless). Defendant appealed, alleging that his conviction of four separate CSC counts where there were only two acts of penetration violated the double jeopardy protection against multiple punishments for the same offense. Defendant also alleged violation of his right to confront the witnesses against him and that hearsay evidence was erroneously admitted at his trial.

The Court of Appeals *held*:

1. The Legislature did not clearly express an intention in the criminal sexual conduct chapter of the Michigan Compiled Laws to impose multiple punishments, therefore, to address defendant's double jeopardy issue, the elements of the CSC offenses that he was convicted of must be compared using the test stated in *Blockburger v United States*, 284 US 299 (1932). Under the *Blockburger* test, if each offense requires proof of a fact that the other does not then there is no violation of double jeopardy.

2. For each of the two acts of sexual penetration alleged, defendant was charged, tried, and convicted of separate criminal offenses. Each of those offenses, MCL 750.520b(1)(c) and 750.520d(1)(c), contains an element that the other does not. CSC I and CSC III are separate offenses for which defendant was properly convicted and sentenced without violating the double jeopardy protection against multiple punishments.

3. The evidence supports the trial court's determination that the victim was unavailable to testify at the trial. Admission of the victim's preliminary examination testimony did not violate defendant's right to confront the witnesses against him.

4. The Confrontation Clause does not restrict state law from determining the admissibility of nontestimonial hearsay evidence. The victim's statements to the nurse who took the victim's medical history and conducted an examination when the victim sought medical care on the day the assault occurred were nontestimonial and were reasonably necessary for her treatment and diagnosis. The statements were admissible as an exception to the hearsay rule under MRE 803(4) and did not violate defendant's right to confront the witnesses against him. Defense counsel was not ineffective for failing to object to the admission of the statements on Confrontation Clause grounds.

Affirmed.

1. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — MULTIPLE PUNISHMENTS — CRIMINAL SEXUAL CONDUCT.

The crimes of first-degree criminal sexual conduct for sexual penetration occurring during the commission of any other felony and third-degree criminal sexual conduct for sexual penetration with knowledge that the victim was physically helpless each contain an element that the other does not; the crimes are separate offenses for which a defendant may be properly convicted and sentenced as a result of a single act of penetration without violating the double jeopardy protection against multiple punishments (MCL 750.520b[1][c]; MCL 750.520d[1][c]).

2. EVIDENCE — FORMER TESTIMONY — UNAVAILABLE WITNESSES.

Former testimony is admissible at trial where the witness is unavailable for trial and was subject to cross-examination during the prior testimony; a witness is unavailable if the witness is unable to be present or to testify because of then-existing physical illness or infirmity (US Const, Am VI; Const 1963, art 1, § 20; MRE 804 [a][4] and [b][1]).

3. EVIDENCE — CRIMINAL LAW — TESTIMONIAL HEARSAY — NONTESTIMONIAL HEARSAY — CONSTITUTIONAL LAW — RIGHT TO CONFRONT WITNESSES.

Testimonial hearsay evidence is inadmissible against a criminal defendant unless the declarant is unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant; the Confrontation Clause does not restrict state law from determining the admissibility of hearsay evidence that is nontestimonial; statements are testimonial if the primary purpose of the statements or the questioning that elicits them is to establish or prove past events potentially relevant to later criminal prosecution (US Const, Am VI; Const 1963, art 1, § 20).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *David L. Morse*, Prosecuting Attorney, and *William J. Vailliencourt, Jr.*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Douglas W. Baker*) for defendant.

Before: OWENS, P.J., and TALBOT and GLEICHER, JJ.

PER CURIAM. Defendant appeals as of right the judgment of sentence reflecting his convictions of home invasion in the first degree, MCL 750.110a(2); two counts of criminal sexual conduct in the first degree (CSC I) (sexual penetration occurring during the commission of a felony), MCL 750.520b(1)(c)[1]; and two counts of CSC in the third degree (CSC III) (sexual penetration with knowledge that the victim was physically helpless), MCL 750.520d(1)(c).[2] We affirm.

I. FACTS

On the evening of May 21, 2005, the victim and her sister went to a bar with their friend, Barb, and defendant. Once they arrived at the bar, the group had drinks and danced. At around 11:00 p.m. the victim's sister became nauseated and dizzy and she and the victim called for a ride home. Upon arriving at her sister's apartment, the victim realized that she had Barb's keys in her pocket. The victim put the keys outside on the welcome mat for Barb to pick up, then went to sleep.

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[1] After defendant's commission of the offense, MCL 750.520b(1) was amended by 2006 PA 165, 2006 PA 169, and 2007 PA 163.

[2] After defendant's commission of the offense, MCL 750.520d(1) was amended by 2007 PA 163.

Barb and defendant drove to pick up her keys, and then defendant drove Barb back to her car, where they parted ways for the evening. At some point after falling asleep, the victim was awakened by someone having contact with her vaginal area. At first, the victim could not move. Later, when she was able to move, she sat up and saw defendant and asked him, "where's Barb?" The victim passed out again and then later felt defendant kissing her lips and felt something inside her vaginal area. The victim never invited defendant to the apartment, nor did she consent to any sexual activity with defendant.

II. DOUBLE JEOPARDY

Defendant argues that his conviction of four separate counts of CSC where there were only two acts of penetration violates the prong of double jeopardy protection that prohibits multiple punishments. We review de novo questions of law, such as a double jeopardy challenge. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). Defendant correctly observes that

> [t]he United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. The prohibition against double jeopardy . . . protects against multiple punishments for the same offense. [*Nutt*, *supra* at 574.]

To determine whether a defendant has been subjected to multiple punishments for the "same offense," we must first look to determine whether the Legislature expressed a clear intention that multiple punishments be imposed. *People v Smith*, 478 Mich 292, 316; 733 NW2d 351 (2007). Where the Legislature clearly intends to impose such multiple punishments, there is no double jeopardy violation. *Id*. Where the Legislature

has not clearly expressed an intention to impose multiple punishments, the elements of the offenses must be compared using the *Blockburger*[3] test. *Id*. at 316-318.

Under the *Blockburger* test, if each offense "requires proof of a fact which the other does not" then there is no violation of double jeopardy. *Id*. at 311 (quotation marks and citations omitted). However, because the *Blockburger* test is simply a tool used to ascertain legislative intent, the focus must be on a comparison of the abstract legal elements of the offenses and not on the particular facts of the case. *People v Ream*, 481 Mich 223, 238; 750 NW2d 536 (2008). Nowhere in the CSC chapter, MCL 750.520 *et seq*., does the Legislature clearly express its intention to impose multiple punishments. Thus, the *Blockburger* test must be applied.

In the instant case, the prosecution alleged two acts of sexual penetration: sexual intercourse and cunnilingus. For each act, defendant was charged, tried, and convicted of two criminal offenses: CSC I on the theory that a sexual penetration had occurred during a home invasion (counts II and IV), and CSC III on the theory that the victim was physically helpless (counts III and V).

First, the crimes of CSC I and CSC III are codified in the CSC chapter of the Michigan Compiled Laws as separate statutes. Second, although CSC I and CSC III both require a sexual penetration, the commission of CSC I does not necessarily require commission of CSC III and vice versa. We now compare the abstract, statutory elements of the two CSC crimes of which defendant was convicted, MCL 750.520b(1)(c) and MCL 750.520d(1)(c). MCL 750.520b(1)(c) requires proof that the sexual penetration occurred "under circumstances

[3] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

involving the commission of any other felony." This is not an element of MCL 750.520d(1)(c). MCL 750.520d(1)(c) requires proof that the sexual penetration occurred and was accompanied by the actor knowing or having "reason to know that the victim [was] . . . physically helpless." This is not an element of MCL 750.520b(1)(c). Thus, under the *Blockburger* test, because each offense contains an element that the other does not, CSC I and CSC III are separate offenses for which defendant was properly convicted and sentenced, without violating defendant's double jeopardy protection against multiple punishments.

Defendant cites *People v Johnson*, 406 Mich 320; 279 NW2d 534 (1979), and *People v Malkowski*, 198 Mich App 610; 499 NW2d 450 (1993), for the proposition that a single act of penetration, even though accompanied by multiple aggravating circumstances, cannot result in multiple CSC convictions and sentences. However, defendant's reliance on those cases is misplaced. In *Johnson* and *Malkowski*, our Courts held that a defendant could not be charged with and convicted of multiple counts of CSC I pursuant to MCL 750.520b arising from a single act of penetration because each of the enumerated aggravating factors in MCL 750.520b were " 'alternative ways of proving criminal sexual conduct in the first degree' " rather than separate offenses. *Johnson*, *supra* at 331 (citation omitted). In contrast, defendant, in this case, was charged with and convicted of two separate offenses under separate statutes, CSC I and CSC III, for each act of penetration. See *Blockburger*, *supra* at 304. (" 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' ") (Citation omitted.) Thus,

Johnson and *Malkowski* do not apply in this case. See *People v Dowdy*, 148 Mich App 517, 521-522; 384 NW2d 820 (1986) (*Johnson* only applies in cases where there are multiple punishments under *one* statute for a single act of penetration).

III. CONFRONTATION CLAUSE

Defendant next argues that admission of the victim's preliminary examination testimony violated defendant's right to confront the witnesses against him and violated the rule against hearsay. We review a trial court's factual findings for clear error. *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996).

Former testimony is admissible at trial under both MRE 804(b)(1) and the Confrontation Clause as long as the witness is unavailable for trial and was subject to cross-examination during the prior testimony. MRE 804(b)(1); *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Defendant claims only that the record does not support the trial court's factual finding that the victim was unavailable. A witness is unavailable if he or she "is unable to be present or to testify at the hearing because of . . . then existing physical . . . illness or infirmity[.]" MRE 804(a)(4).

Based on the evidence on the record showing that the victim was experiencing a high-risk pregnancy, that she lived in Virginia, and that she was unable to fly or travel to Michigan to testify, the trial court did not clearly err by determining that the victim was unavailable.

Further, because the issue of unavailability was a preliminary question for the trial court to decide before the admission of evidence, the rules of evidence did not apply. MRE 104(a). Therefore, defendant's argument that the victim's sister's testimony was hearsay or unreliable because no basis for her information was

established is without merit. In addition, although the second of the two notes from a physician regarding whether the victim should fly simply stated that the victim should not fly, rather than stating that the victim should not fly or travel long distance as the first note did, this did not undermine the trial court's factual finding, because the victim's sister testified that the victim was unable to fly or travel and the prosecution represented to the trial court that the victim was unable to travel to Michigan to testify. The trial court had no reason to disbelieve the prosecution's representation, *People v Dunbar*, 463 Mich 606, 617 & n 13; 625 NW2d 1 (2001) (no reason not to accept the representations of an officer of the court bound by a duty of candor to a tribunal), and defense counsel could have clarified any possible ambiguity in the sister's answer to the compound question by requesting clarification.

IV. HEARSAY AND INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that admission of the victim's statements to a nurse violated the rule against hearsay and his right to confront the witnesses against him. Defendant also argues that defense counsel's failure to object to the admission of those statements on Confrontation Clause grounds constituted ineffective assistance of counsel. We disagree.

"Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment" are admissible as an exception to the hearsay rule. MRE 803(4); *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992). The rationale

supporting the admission of statements under this exception is the existence of (1) the reasonable necessity of the statement to the diagnosis and treatment of the patient, and (2) the declarant's self-interested motivation to speak the truth to treating physicians in order to receive proper medical care. *Id*.

The victim's statements to the nurse were reasonably necessary for her treatment and diagnosis. The victim went to the hospital for medical care the morning of the assault. She was directed to LACASA, a nonprofit organization in Livingston County that provides free and confidential comprehensive services for sexual assault survivors, for such medical care. The nurse was the first person to take a history from the victim and examine the victim, which she did at 6:00 p.m. on the day of the assault. The police investigation occurred after, and separate from, the nurse's taking of the history and examination. The nurse testified that the patient's history is very important because it tells her how to treat the patient and how to proceed with the examination. Then, considering the victim's history, the nurse provides medical treatment to the victim.

Moreover, the victim had a self-interested motivation to speak the truth to the nurse in order to obtain medical treatment. The victim in this case was over the age of ten and thus there was a rebuttable presumption that she understood the need to tell the truth to the nurse. *People v Crump*, 216 Mich App 210, 212; 549 NW2d 36 (1996); *People v Van Tassel (On Remand)*, 197 Mich App 653, 662; 496 NW2d 388 (1992). The fact that the victim did not have any immediately apparent physical injuries did not rebut this presumption. Often, the injuries inflicted on the victim in a sexual assault, such as transmission of a sexually transmitted disease,

immune deficiency virus, or psychological trauma, are impossible to detect at first but still require diagnosis and treatment. *Meeboer*, *supra* at 328-329.

The admission of the victim's statements to the nurse did not violate defendant's right to confront the witnesses against him because the statements were nontestimonial.

Both the United States and Michigan constitutions guarantee a criminal defendant the right to confront the witnesses against him or her. US Const, Am VI; Const 1963, art 1, § 20. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant is unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, *supra* at 68; *People v Lonsby*, 268 Mich App 375, 377; 707 NW2d 610 (2005). However, if the hearsay is nontestimonial, the Confrontation Clause does not restrict state law from determining admissibility. *Crawford*, *supra* at 68.

Statements are testimonial if the "primary purpose" of the statements or the questioning that elicits them "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

In *People v Spangler*, 285 Mich App 136, 154; 774 NW2d 702 (2009), this Court stated:

> [I]n order to determine whether a sexual abuse victim's statements to a SANE [sexual assault nurse examiner] are testimonial, the reviewing court must consider the totality of the circumstances of the victim's statements and decide whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency.

Here, unlike in *Spangler*, where the factual record was not developed enough to determine whether the victim's statements were testimonial, we have a factual record that sufficiently indicates that under the totality of the circumstances of the complainant's statements, an objective witness would reasonably believe that the statements made to the nurse objectively indicated that the primary purpose of the questions or the examination was to meet an ongoing emergency. *Id.* at 156-157.

For the same reasons that the victim's statements to the nurse were reasonably necessary for her treatment and diagnosis, we conclude that the victim's statements were nontestimonial. Although the nurse does collect evidence during the course of the examination after taking a patient's history and the nurse is required to report the assault and turn over the evidence to law enforcement officials, the nurse is not involved in the police officer's interview of the victim after the examination and is not personally involved in the officer's investigation of the crime. The victim in this case did not have any outwardly visible signs of physical trauma; therefore, the nurse could not have treated her with antibiotics and emergency birth control unless she knew her history. Thus, we hold that, on these facts, the circumstances did not reasonably indicate to the victim that her statements to the nurse would later be used in a prosecutorial manner against defendant. *People v Jambor (On Remand)*, 273 Mich App 477, 487; 729 NW2d 569 (2007).

Because the Confrontation Clause did not bar admission of the victim's statements to the nurse, defense counsel was not ineffective for failing to object to their admission on Confrontation Clause grounds. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003)

("Defense counsel is not required to make a meritless motion or a futile objection.").

Affirmed.

VYLETEL-RIVARD v RIVARD

Docket No. 285210. Submitted September 2, 2009, at Detroit. Decided October 15, 2009, at 9:05 a.m.

Carole L. Vyletel-Rivard brought an action against Gregory T. Rivard in the Wayne Circuit Court, Family Division, seeking a divorce. The parties entered into an arbitration agreement pursuant to the domestic relations arbitration act, MCL 600.5070 *et seq*., to submit the issues of property and debt division, child support, parenting time, spousal support, costs and fees, and "[o]ther contested domestic relations matters" to arbitration. Plaintiff requested, in part, an award of permanent or long-term spousal support, and asked for an award of alimony in gross to compensate her for contracting the human papillomavirus (HPV) from defendant. The arbitrator issued his award on November 13, 2007, which included, in part, an award of $210,000 alimony in gross for plaintiff's "personal injury claim" of contracting HPV. On November 22, 2007, plaintiff filed a request for clarifications. On November 27, 2007, defendant filed a motion to correct errors or omissions. The arbitrator responded by letter on December 7, 2007, clarifying certain portions of the award, acknowledging certain errors, and revising the award. The arbitrator also rejected defendant's claim that the arbitrator exceeded his authority by awarding the $210,000 to plaintiff for her contraction of HPV. On December 18, 2007, defendant filed a motion to correct errors or omissions in the December 7, 2007, award. Following further correspondence between the parties and the arbitrator, the arbitrator issued his last dispositive ruling regarding two issues that had arisen on March 24, 2008. On March 28, 2008, defendant filed a motion to vacate the part of the arbitration awards of November 13, 2007, and December 7, 2007, concerning the award of $210,000 for plaintiff contracting HPV. The court, Muriel D. Hughes, J., denied the motion to vacate because it concluded that the motion was not timely filed, and the court entered a judgment of divorce. Defendant appealed from the denial of his motion to vacate the arbitration award.

The Court of Appeals *held*:

1. At the time the arbitrator issued his November 13, 2007, award and December 7, 2007, revised award defendant was required under MCR 3.602(J)(2) to file his motion to vacate within

21 days after the award was delivered. The date that the 21-day period begins is ambiguous to the extent that MCL 600.5078, by allowing a party, upon receiving a written award, to file a motion to correct errors or omissions, contemplates that the written award may be modified. Therefore, the date the 21-day period begins is dependent on whether a motion to correct errors or omissions is filed. If a motion to correct errors or omissions is not filed, the 21-day period begins on the date that the initial written award is delivered. If a motion to correct errors or omissions is filed, the 21-day period begins on the date that the arbitrator's decision on the motion is delivered. Therefore, defendant was required to file his motion to vacate within 21 days of the delivery of a copy of the arbitrator's December 7, 2007, decision. The defendant did not file his motion to vacate within that 21-day period. The order denying the motion to vacate must be affirmed.

2. MCL 600.5078(3) allows a party to file a motion to correct errors or omissions within 14 days after the award is issued. The "award" clearly refers to the initial written award referenced in MCL 600.5078(1). Therefore, the only motions to correct errors or omissions that are authorized by MCL 600.5078(3) are the ones filed within 14 days after the initial written award is issued. Defendant's second motion to correct errors or omissions was filed more than 14 days after the arbitrator issued the initial written award on November 13, 2007. Therefore, defendant did not have any legal authority to file the second motion.

Affirmed.

1. ARBITRATION — DOMESTIC RELATIONS ARBITRATION AWARDS — VACATION OF AWARDS — TIME LIMITATION.

The date that the 21-day period within which to file a motion to vacate a domestic relations arbitration award begins is dependent on whether a party files a motion to correct errors or omissions in the award; the 21-day period begins on the date that the initial written award is delivered if a motion to correct errors or omissions is not filed; the 21-day period begins on the date that the arbitrator's decision on a motion to correct errors or omissions is delivered if a motion to correct errors or omissions is filed (MCL 600.5078; MCR 3.602[J][2][2007]).

2. ARBITRATION — DOMESTIC RELATIONS ARBITRATION AWARDS — MOTIONS TO CORRECT ERRORS AND OMISSIONS.

A motion to correct errors or omissions in a domestic relations arbitration award must be filed within 14 days after the initial written award is issued (MCL 600.5078[1] and [3]).

Tucker Tobin, PC (by *Margaret M. Tobin*), for plaintiff.

Ihrie O'Brien (by *Deborah F. O'Brien* and *Dawn M. Prokopec*) for defendant.

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

PER CURIAM. Defendant appeals as of right with regard to a judgment of divorce. Specifically, defendant challenges the trial court's April 4, 2008, order denying his motion to vacate the arbitration award as to tort damages. Because we conclude that defendant's motion to vacate was not timely filed, we affirm.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

The parties, married in 1988 and the parents of two minor children, separated in November 2005. Plaintiff filed a complaint for divorce the following month. Pursuant to the domestic relations arbitration act (DRAA), MCL 600.5070 *et seq.*, the parties entered into a domestic relations arbitration agreement, whereby they submitted the issues of property and debt division, child support, parenting time, spousal support, costs and fees, and "[o]ther contested domestic relations matters" to arbitration. Plaintiff claimed that defendant, by drinking excessively, engaging in numerous affairs, and infecting her with the human papillomavirus (HPV), caused the breakdown of the marriage. In addition to requesting an award of permanent or long-term spousal support, plaintiff asked for an award of alimony in gross for her contraction of HPV.

The arbitrator issued his award on November 13, 2007. Pertinent to the present appeal, plaintiff was awarded spousal support in the amount of $3,200 a

month for seven years. She was also awarded $210,000 as alimony in gross for her "personal injury claim" of contracting HPV. Defendant was to pay the $210,000 in monthly installments of $2,500 over seven years.

On November 22, 2007, plaintiff filed a request for clarifications. Likewise, on November 27, 2007, defendant filed a motion to correct errors or omissions. Defendant argued, in part, that the arbitrator exceeded the scope of his authority when he awarded plaintiff $210,000 for her tort claim because, although the parties had agreed to allow the arbitrator to decide "[o]ther contested domestic relations matters," plaintiff had not pleaded a tort claim nor had she requested personal injury damages in her complaint. On December 7, 2007, the arbitrator responded by letter to plaintiff's clarification requests and defendant's motion to correct errors or omissions. The arbitrator clarified portions of the arbitration award, acknowledged certain errors, and revised the award.[1] The arbitrator also rejected defendant's claim that he exceeded his authority by awarding $210,000 to plaintiff for her contraction of HPV, finding that defendant had notice of plaintiff's personal injury claim and that the parties tried the claim without objection.

On December 18, 2007, defendant filed a motion to correct errors or omissions in the award dated December 7, 2007. Defendant complained that the arbitrator, in finding that he had notice of plaintiff's personal injury claim, ignored significant aspects of the case's

[1] For example, according to the arbitration award issued November 13, 2007, defendant was to pay plaintiff one-half of the value of his interest in Detroit Name Plate Etching (DNPE) in four yearly installments, the first payment due on December 31, 2007, and the balance would earn interest at the rate of two points above prime. In the December 7, 2007, letter, the arbitrator conceded that an interest rate two points above prime could be usurious, and he capped the interest rate at seven percent.

history, such as the fact that plaintiff, during her testimony, acknowledged that she chose not to pursue a tort action against defendant and the fact that plaintiff did not make a specific request for tort damages until after the close of proofs. In her response, plaintiff claimed that, pursuant to the DRAA, defendant did not have any authority to file his second motion to correct errors or omissions.

Written correspondence continued between the parties and the arbitrator until the end of March 2008. From a review of the correspondence, it does not appear that the arbitrator addressed defendant's argument that he had ignored significant aspects of the case when he found that defendant had notice of plaintiff's personal injury claim. Nor does it appear that the arbitrator ever directly addressed plaintiff's claim that defendant did not have any authority to file his second motion to correct errors or omissions. Two other issues had become the focus of the parties and the arbitrator. The first issue, raised in defendant's second motion to correct errors or omissions, was whether defendant's interest in Detroit Name Plate Etching (DNPE) should be reduced by $80,000, the amount defendant borrowed to cover the deficiency that resulted from the sale of the marital home.[2] The second issue was whether defendant could be required to purchase life insurance to secure his spousal and child support obligations.[3] The arbitrator issued his last dispositive rul-

[2] In the arbitration award, plaintiff received 50 percent of defendant's interest in DNPE, and the parties had stipulated that any deficiency from the sale of the marital home would be paid by defendant and "adjusted by way of a subtraction from [plaintiff's] share of the division of [DNPE]."

[3] In the arbitration award, defendant was ordered to maintain the parties' children and plaintiff as beneficiaries of a life insurance policy in the declining balances of child and spousal support owed. In his November 27, 2007, motion to correct errors or omissions, defendant claimed that he could not be compelled to purchase life insurance to secure his

ing on these two issues on March 24, 2008, when he ordered plaintiff to revise the proposed judgment of divorce that she had filed in the trial court and had moved the trial court to enter. Three days later, on March 27, 2008, plaintiff submitted to defendant a revised proposed judgment of divorce.

On March 28, 2008, defendant, pursuant to MCL 600.5081(2)(c), filed a motion to vacate "the arbitration awards" of November 13, 2007, and December 7, 2007, as to tort damages. Defendant argued that the arbitrator exceeded his powers when he awarded plaintiff $210,000 for her contraction of HPV because the parties' arbitration agreement did not authorize the arbitrator to decide a personal injury claim, nor could the personal injury claim be categorized as a "contested domestic relations matter []" because the claim was not pleaded in the complaint. In response, plaintiff argued that defendant's motion to vacate should be denied as untimely because, contrary to the applicable court rule, it was not filed within 21 days of the December 7, 2007, award. In the alternative, plaintiff argued that defendant consented to the arbitration of her personal injury claim when he presented evidence regarding the contraction of HPV and asserted the defenses of "contribution [sic] negligence, and causation." Plaintiff claimed that because defendant expressly consented to the arbitration of the claim, defendant could not argue that plaintiff failed to adequately plead the claim or that the arbitrator exceeded his authority in deciding

support obligations. The arbitrator, in his December 7, 2007, letter, affirmed the directive that defendant secure his support obligations with a life insurance policy. Defendant did not raise the issue in his December 18, 2007, motion to correct errors or omissions. On January 8, 2008, plaintiff submitted a memorandum of law regarding the arbitrator's authority to order security for support obligations. It is unclear from the record why plaintiff submitted the memorandum.

the claim. Defendant asserted that his motion to vacate was timely because it was filed within 21 days of the arbitrator's final modification of the arbitration award. He argued that an arbitration award is not final until the arbitrator has addressed all issues, and there is no authority to suggest that a party to arbitration is required to file piecemeal motions to vacate.

The trial court denied defendant's motion to vacate because it concluded that the motion was not timely filed. It stated that the applicable court rule, MCR 3.602(J), provides that a motion to vacate must be filed within 21 days after the date of the arbitration award, and because the court rule did not refer to the "final award," it reasoned that for purposes of MCR 3.602(J), the date of the arbitration award was December 7, 2007. The trial court also addressed the substantive merits of the motion to vacate. It concluded that defendant impliedly consented to the arbitration of the personal injury claim because the claim was tried and briefed at arbitration and defendant made no objection until after the award was issued. A judgment of divorce was entered.

II. ANALYSIS

On appeal, defendant argues that the trial court erred when it concluded that his motion to vacate was not timely filed. Defendant also asserts that, because plaintiff did not plead a tort claim in the complaint and because he did not impliedly consent to the arbitration of a tort claim, the arbitrator exceeded his authority when he awarded plaintiff $210,000 for her contraction of HPV.

A. STANDARDS OF REVIEW

We review de novo a trial court's ruling on a motion to vacate or modify an arbitration award. *Washington v*

Washington, 283 Mich App 667, 671; 770 NW2d 908 (2009). We also review de novo the interpretation of court rules and statutes. *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 555; 692 NW2d 58 (2004).

B. MOTION TO VACATE

We first address defendant's argument that the trial court erred by concluding that his motion to vacate was not timely filed. Defendant moved to vacate the arbitration award pursuant to MCL 600.5081(2)(c). MCL 600.5081(2) provides:

> If a party applies under this section, the court shall vacate an award under any of the following circumstances:
>
> (a) The award was procured by corruption, fraud, or other undue means.
>
> (b) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights.
>
> (c) The arbitrator exceeded his or her powers.
>
> (d) The arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

MCL 600.5081 does not contain a time requirement for when a motion to vacate on the basis that the arbitrator exceeded his or her powers must be filed.[4]

MCR 3.602(J)(3) currently provides that "[a] motion to vacate an [arbitration] award must be filed within 91 days after the date of the award. . . . A motion to vacate

[4] The statute does contain a time requirement for when a motion to vacate on the basis of corruption, fraud, or undue means must be filed. Pursuant to MCL 600.5081(4), such a motion must be made within 21 days after the grounds are known or should have been known.

an award in a domestic relations case must be filed within 21 days after the date of the award." The current subsection (J)(3) was added to MCR 3.602 in October 2007, effective January 1, 2008. See 480 Mich cxlv-cxlvi (2007). Before the October 2007 amendment, MCR 3.602(J)(2) provided that "[a]n application to vacate an award must be made within 21 days after delivery of a copy of the award to the applicant . . . ." There was no reference in MCR 3.602 to domestic relations arbitration cases, and the court rule expressly applied to "statutory arbitration under MCL 600.5001-600.5035," MCR 3.602(A). Nonetheless, in *Valentine v Valentine*, 277 Mich App 37, 39 n 1; 742 NW2d 627 (2007), this Court held that because of the directive of MCL 600.5081(6), that "[o]ther standards and procedures relating to review of arbitration awards described in subsection (1) are governed by court rule," MCR 3.602 applies to domestic relations arbitration cases. Consequently, on appeal, defendant does not dispute that, for his motion to vacate to have been timely, it must have been filed within 21 days after delivery of the award.

Defendant claims that his motion to vacate was timely filed because it was filed within 21 days after the arbitrator, on March 24, 2008, issued his final ruling on the issues raised by the parties. He contends that the term "award" as used in MCR 3.602(J)(2) refers to the "final" arbitration award. Plaintiff argues that because MCR 3.602(J)(2) contains no language modifying the term "award," the term refers to the initial award issued by the arbitrator.

The rules governing statutory construction apply to the interpretation of court rules. *Reed v Breton*, 279 Mich App 239, 242; 756 NW2d 89 (2008). Court rules are to be interpreted to give effect to the intent of the Supreme Court, the drafter of the rules. *Fleet Business*

Credit, LLC v Krapohl Ford Lincoln Mercury Co, 274 Mich App 584, 591; 735 NW2d 644 (2007). The starting point is the language of the court rule. *Wilcoxon v Wayne Co Neighborhood Legal Services*, 252 Mich App 549, 553; 652 NW2d 851 (2002). If the language of the rule is clear and unambiguous, then no further judicial interpretation is required or allowed. *Id.* Only when the language is ambiguous is judicial construction appropriate. *Id.* "[A] provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or when it is *equally* susceptible to more than a single meaning." *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (citation omitted; emphasis in original). If judicial construction is required, this Court must adopt a construction that best accomplishes the purpose of the court rule. See *Adams Outdoor Advertising, Inc v Canton Charter Twp*, 269 Mich App 365, 371; 711 NW2d 391 (2006). While the Court may consider a variety of factors, it should always use common sense. *Id.*

MCR 3.602(J)(2), on its face, appears to state an unambiguous time requirement: a motion to vacate an arbitration award must be filed within 21 days after delivery of a copy of the award to the party. However, the date the 21-day period begins is ambiguous, to the extent that MCR 3.602(J)(2) applies to the DRAA, when MCL 600.5078 is considered.[5] In relevant part, MCL 600.5078 provides:

> (1) Unless otherwise agreed by the parties and arbitrator in writing or on the record, the arbitrator shall issue the written award on each issue within 60 days after either the end of the hearing or, if requested by the arbitrator, after receipt of proposed findings of fact and conclusions of law.

[5] A provision similar to MCL 600.5078(3) is not contained in the provisions of statutory arbitration.

* * *

> (3) An arbitrator under this chapter retains jurisdiction to correct errors or omissions in an award until the court confirms the award. Within 14 days after the award is issued, a party to the arbitration may file a motion to correct errors or omissions. The other party to the arbitration may respond to such a motion within 14 days after the motion is filed. The arbitrator shall issue a decision on the motion within 14 days after receipt of a response to the motion or, if a response is not filed, within 14 days after expiration of the response period.

By allowing a party, upon receiving the written award, to file a motion to correct errors or omissions, the statute clearly contemplates that the written award issued by the arbitrator may be modified. Thus, MCL 600.5078 implicitly contemplates two awards: (1) the initial written award, and (2) the initial award as modified by any decision on a motion to correct errors or omissions. The term "award" in MCR 3.602(J)(2) could refer, with equal susceptibility, to either of the two awards contemplated by MCL 600.5078. Consequently, it is ambiguous whether the 21-day period of MCR 3.602(J)(2) begins when the initial written award is delivered to the party or when the decision on the motion to correct errors or omissions is delivered.

Guided by the fact that the Legislature has authorized a party to a domestic relations arbitration to file a motion to correct errors or omissions, we hold that the date the 21-day period of MCR 3.602(J)(2) begins is dependent on whether a motion to correct errors or omissions is filed. If a motion to correct errors or omissions is not filed, then the 21-day period begins on the date the initial written award is delivered. However, if a motion to correct errors or omissions is filed, then the 21-day period begins on the date the arbitrator's decision on the motion is delivered. This construction of

MCR 3.602(J)(2) recognizes that the initial written arbitration award may be modified, and it does not require a party to move to vacate the arbitration award until such modifications are, in fact, made or denied.

In this case, after the arbitrator issued the initial written arbitration award on November 13, 2007, plaintiff filed a request for clarifications and defendant filed a motion to correct errors or omissions. The arbitrator issued his decision on the clarification requests and the motion to correct errors or omissions on December 7, 2007. Thus, pursuant to MCR 3.602(J)(2) and our above holding, defendant was required to file his motion to vacate within 21 days of delivery of a copy of the December 7, 2007, decision.

Defendant did not move to vacate the arbitration award within 21 days after delivery of a copy of the December 7, 2007, decision. Rather, defendant chose to file a second motion to correct errors or omissions; this motion requested the correction of errors or omissions in the December 7, 2007, decision. However, reviewing the language of MCL 600.5078(3), we conclude that defendant did not have any legal authority to file the second motion to correct errors or omissions. According to MCL 600.5078(3), a party may file a motion to correct errors or omissions "[w]ithin 14 days after *the award* is issued" (emphasis added). "[T]he award" clearly refers to the initial written award referenced in MCL 600.5078(1). Thus, the only motions to correct errors or omissions that are authorized by MCL 600.5078(3) are the ones filed within 14 days after the initial written award is issued. Defendant's second motion to correct errors or omissions was filed December 18, 2007, more than 14 days after the arbitrator issued the initial written award on November 13, 2007, and, therefore, it was filed outside the period permitted by statute.

As already stated, defendant did not file a motion to vacate within the 21-day period permitted by MCR 3.602(J)(2). The motion to vacate was not filed until March 28, 2008, more than $3\frac{1}{2}$ months after the arbitrator issued the December 7, 2007, decision. On appeal, defendant makes no argument that an untimely filing of a motion to vacate should not result in the denial of the motion. Indeed, MCR 3.602(J)(2) states that a motion "to vacate an award *must* be made within 21 days after delivery . . . ." (Emphasis added.) The term "must" indicates that something is mandatory. *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532-533; 660 NW2d 384 (2003); *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 130; 573 NW2d 61 (1997). Accordingly, because defendant's motion to vacate was not timely filed, we affirm the trial court's order denying the motion to vacate.[6]

Affirmed.

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[6] Because of our conclusion that defendant's motion to vacate was not timely filed, we need not address defendant's argument that the arbitrator exceeded his authority when he awarded plaintiff $210,000 for her contraction of HPV.

PEOPLE v BEMER

Docket No. 284739. Submitted October 6, 2009, at Lansing. Decided October 15, 2009, at 9:10 a.m.

Jeffrey L. Bemer pleaded guilty in the Jackson Circuit Court to unarmed robbery. The court, Edward J. Grant, J., sentenced defendant to 71 to 180 months in prison, and defendant applied for leave to appeal that sentence. In lieu of granting leave to appeal and in an unpublished order, entered December 21, 2006 (Docket No. 274648), the Court of Appeals ordered the trial court to rescore the sentencing guidelines and resentence defendant. After revising the score for one offense variable (OV), the trial court sentenced defendant to 57 to 180 months in prison. Defendant moved for resentencing, arguing that the trial court had erroneously scored OV 13 by considering an uncharged robbery that should have been included only in the conduct forming the basis of his score under OV 12, resulting in a lower OV point total. The trial court denied the motion, and defendant applied for delayed leave to appeal. The Court of Appeals denied leave to appeal in an unpublished order, entered May 15, 2008 (Docket No. 284739). In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 482 Mich 1117 (2008).

The Court of Appeals *held*:

The trial court erred by concluding that it could choose to not use the uncharged robbery when assessing points under OV 12 and instead use that conduct to score the OV that yielded the highest OV point total. MCL 777.22(1) requires the trial court to score both OV 12 and OV 13 when calculating a defendant's recommended minimum sentence range under the guidelines for any crime against a person (which includes unarmed robbery). The uncharged robbery occurred a few hours before the unarmed robbery for which defendant was being sentenced. Therefore, it was a contemporaneous felonious criminal act, as that term is defined in MCL 777.42(2), that the trial court was required to use when scoring OV 12. MCL 777.43 requires a trial court to assign points for OV 13 on the basis of a defendant's felonious acts that constitute a continuing pattern of criminal behavior, regardless of

whether an act resulted in a conviction. While the uncharged robbery would ordinarily be considered when scoring OV 13, MCL 777.43(2)(c) prohibits a trial court from considering conduct used in scoring OV 12 unless the conduct was related to membership in an organized criminal group, which it was not in this case. A trial court must score OV 12 using all conduct that qualifies as contemporaneous felonious criminal acts before proceeding to score OV 13, so the trial court erred in this case by considering the uncharged robbery when it scored OV 13. Because the recommended minimum sentence range for defendant is 19 to 38 months when OV 12 and OV 13 are properly scored, he must be resentenced.

Sentence vacated, and case remanded for resentencing.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES — SCORING OFFENSE VARIABLES — CONTEMPORANEOUS FELONIOUS CRIMINAL ACTS — CONTINUING PATTERN OF CRIMINAL BEHAVIOR.

A sentencing court must score offense variable (OV) 12 (contemporaneous felonious criminal acts) using all conduct that qualifies as contemporaneous felonious criminal acts before proceeding to score OV 13 (continuing pattern of criminal behavior) (MCL 777.42, 777.43).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Henry C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Rolf E. Berg*) for defendant.

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

PER CURIAM. Defendant appeals by leave granted the sentence imposed after he pleaded guilty to unarmed robbery, MCL 750.530. The trial court sentenced defendant to 57 to 180 months in prison. On appeal, this Court must determine whether the trial court properly scored offense variables (OVs) 12 and 13. Specifically, this Court must determine how a defendant's uncharged criminal conduct must be scored when it could

be scored under either OV 12 or OV 13, but not both. We conclude that, when OV 12 and OV 13 are read together, it is clear that all conduct that can be scored under OV 12 must be scored under that OV before proceeding to score OV 13. Therefore, the trial court erred when it concluded that it could score the conduct at issue under the variable that yielded the highest total points. For this reason, we reverse defendant's sentence and remand for resentencing consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

In October 2005, defendant entered the convenience store of a gas station located in Jackson County. Defendant purchased some items, but then asked the clerk for a tin of chewing tobacco. After the clerk rang up the tobacco, defendant pulled out a butcher's knife, brought it up to the attendant's chest, reached over the counter, and took all the $20 bills from the cash register.[1] Defendant then fled.

A few hours before the robbery in Jackson County, defendant allegedly robbed another convenience store in a gas station that was located in neighboring Washtenaw County. The Washtenaw County prosecutor apparently did not bring charges for that robbery.

After defendant's arrest for the robbery in Jackson County, the prosecutor agreed to drop the armed robbery charge, see MCL 750.529, in exchange for defendant's plea of guilty to the less serious offense of unarmed robbery. In addition, the prosecutor agreed that he would not seek a sentence enhancement under MCL 769.10 for defendant's prior felony conviction for

[1] When pleading to the present offense, defendant denied that he held the knife up to the clerk, but admitted that he had a knife in his hand where the clerk could see it.

resisting and obstructing a police officer. Defendant pleaded guilty to unarmed robbery in May 2006.

The trial court sentenced defendant in August 2006. At the sentencing hearing, the trial court indicated that it had changed the score for several variables. The trial court first noted that OV 1 should properly be scored at 15 points rather than 5. The trial court also determined that there were two victims within the meaning of OV 9: the clerk who was attending the store and the store itself. The trial court also increased OV 19 from zero points to 10 to reflect the fact that defendant left the jurisdiction and ultimately had to be extradited from Florida. Finally, the trial court examined whether OV 13 should be scored using defendant's prior conviction for resisting and obstructing an officer along with the uncharged robbery in Washtenaw County.

Defendant's counsel argued that the trial court should not score OV 13 using defendant's alleged commission of the robbery in Washtenaw County. The trial court disagreed and offered to hold a hearing to make findings of fact regarding that robbery. After some discussion, defendant's trial counsel indicated that he thought OV 13 was properly scored at zero points, but declined the trial court's offer to hold a hearing on the matter. Although the trial court noted that defendant had not been charged for the robbery in Washtenaw County,[2] it stated that it was satisfied—given the information previously supplied to the court—that defendant had committed that robbery. The trial court then determined that OV 13 should be scored at 25 points on

[2] The trial court did not make any findings concerning the possibility that defendant would eventually be charged for the robbery in Washtenaw County. However, the parties have proceeded on the assumption that defendant would not be subject to prosecution for this robbery. Therefore, we shall proceed accordingly.

the basis of its finding coupled with the existence of the felony at issue in this case and defendant's prior felony. With the revisions, defendant's recommended minimum sentence range was 36 to 71 months. The trial court elected to sentence defendant to a minimum of 71 months and a maximum of 180 months in prison.

Defendant then applied for leave to appeal his sentence. Given the prosecutor's confession of error regarding the scoring of OV 9, and in lieu of granting leave to appeal, this Court ordered the trial court to rescore the guidelines and resentence defendant. See *People v Bemer*, unpublished order of the Court of Appeals, entered December 21, 2006 (Docket No. 274648). This Court also stated that on remand, "either party shall be entitled to raise any other issue affecting sentencing." *Id.*

With the revision to the OV 9 score, the new recommended minimum sentence range was 29 to 57 months. In February 2007, the trial court sentenced defendant under the revised range to 57 months to 180 months in prison. Defendant then moved for resentencing on the basis that the trial court had erroneously scored OV 13. The trial court held a hearing to consider the scoring issue in September 2007. At the hearing, defendant's trial counsel argued that the uncharged robbery in Washtenaw County should be scored at 5 points under OV 12 and, because OV 13 provides that conduct scored under OV 12 cannot also be scored under OV 13, the proper score for OV 13 was zero points. This would then decrease the OV total by an additional 20 points.

The trial court disagreed that the uncharged robbery should be scored under OV 12. The trial court noted that if the uncharged robbery were scored under OV 12, there would not be sufficient remaining crimes to score OV 13. The trial court stated that because it had to

score OV 13 if it could, it had to consider the uncharged robbery under OV 13 rather than OV 12. For that reason, it denied the motion for resentencing.

Defendant then applied for delayed leave to appeal in this Court, which this Court denied "for lack of merit in the grounds presented." *People v Bemer*, unpublished order of the Court of Appeals, entered May 15, 2008 (Docket No. 284739). After this Court denied leave to appeal, defendant sought leave to appeal in our Supreme Court. In lieu of granting leave to appeal, our Supreme Court remanded the case to this Court for consideration as on leave granted. *People v Bemer*, 482 Mich 1117 (2008). Further, the Supreme Court instructed this Court to "address whether a sentencing judge has discretion under MCL 777.22(1) and MCL 777.42(1) to purposely score offense variable 12 at zero points in order to achieve a higher score under offense variable 13." *Id.* at 1117-1118.

II. SCORING OV 12 AND OV 13

A. STANDARD OF REVIEW

The proper interpretation of the sentencing guidelines is a question of law that this Court reviews de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004).

B. ANALYSIS

1. SCORING OFFENSE VARIABLES

Unarmed robbery is an offense covered by the sentencing guidelines. MCL 777.16y. Accordingly, the trial court had to impose a minimum sentence within the range calculated under the sentencing guidelines. MCL 769.34(2). In order to determine the applicable range,

the trial court first had to score defendant's prior record variables (PRVs) and OVs, see MCL 777.21(1)(a) and (b), and then use those totals to determine "the recommended minimum sentence range from the intersection of the offender's offense variable level and prior record variable level" on the sentencing grid for the offense class to which unarmed robbery belongs. MCL 777.21(1)(c). The trial court was not required to score every OV enacted by the Legislature; rather, MCL 777.22 provides for the scoring of certain variables depending on the offense category of the crime. Unarmed robbery is in the category designated as crimes against a person. MCL 777.16y. MCL 777.22(1) provides: "For all crimes against a person, score offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 20." Under the clear dictates of this statutory language, trial courts do not have any discretion in the scoring of the listed variables—each variable must be scored.

2. SCORING OV 12 AND OV 13

Under MCL 777.42, the trial court had to determine whether defendant engaged in any "contemporaneous felonious criminal acts." If defendant did not engage in any contemporaneous felonious criminal acts, the trial court had to score OV 12 at zero points. MCL 777.42(1)(g). However, if defendant did engage in contemporaneous felonious criminal acts, the trial court had to evaluate the number of acts and whether the acts constituted crimes against a person or other crimes, see MCL 777.42(1)(a) to (f), and then assign "the number of points attributable to the [corresponding subdivision of the statute] that has the highest number of points," MCL 777.42(1). A felonious criminal act is defined to be contemporaneous if the act occurred within 24 hours of the sentencing offense and will not result in a separate

conviction. MCL 777.42(2)(a). However, MCL 777.42(2)(c) specifically provides that the trial court should not score conduct that was scored under OV 11, even though that conduct might otherwise constitute a contemporaneous felonious criminal act.

In this case, the trial court found that defendant had committed another robbery within hours of the robbery for which the trial court was sentencing defendant. Further, OV 11 did not apply to that conduct. See MCL 777.41. Thus, under the plain language of MCL 777.42(1)(d), the trial court had to score OV 12 at 5 points.

Under MCL 777.43, the trial court must score points under OV 13 on the basis of a defendant's felonious acts that constitute a continuing pattern of criminal behavior. If the sentencing offense was part of a pattern of felonious criminal activity involving three or more crimes against a person, the trial court must score OV 13 at 25 points. Former MCL 777.43(1)(b).[3] If there was no pattern of felonious criminal activity, the trial court must score OV 13 at zero points. MCL 777.43(1)(g). When determining the appropriate points under this variable, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Although MCL 777.43(2)(a) clearly requires a trial court to consider all crimes within a 5-year period, this requirement must be understood in light of MCL 777.43(2)(c), which prohibits a trial court from considering conduct that was scored under MCL 777.41 and MCL 777.42 unless the conduct scored under those statutes was related to "membership in an organized criminal group . . . ." Accordingly, the trial court must

[3] This section is now codified at MCL 777.43(1)(c) after amendment by 2008 PA 562.

generally consider all crimes within a 5-year period except those crimes that were already scored under OV 11 and OV 12.

In the present case, defendant committed three offenses within the period applicable to OV 13: resisting and obstructing an officer, the unarmed robbery for which he was being sentenced, and the uncharged robbery that occurred just hours before the sentencing offense. Because all these crimes were crimes against a person, the offenses could constitute a pattern of felonious criminal activity involving three or more crimes against a person within the meaning of former MCL 777.43(1)(b), now MCL 777.43(1)(c).[4] Therefore, on the surface, the trial court was required to assign 25 points for OV 13. See *id*. However, as already noted, the trial court could not consider any conduct that was scored under OV 12 when determining the appropriate score under OV 13, unless the conduct at issue was related to defendant's participation in a criminal group. MCL 777.43(2)(c). Defendant's uncharged robbery was not related to any involvement in a criminal group. Accordingly, if it was properly scored under OV 12, the trial court could not consider it when scoring OV 13. The trial court recognized the limitations imposed under MCL 777.43(2)(c), but nevertheless determined that it could choose not to score the uncharged offense under OV 12 and, thereby, make it possible to score the conduct under OV 13. We do not agree that the trial court had this discretion.

The sentencing guidelines are a comprehensive and integrated statutory scheme designed to promote uniformity and fairness in sentencing. See *People v Bell*, 477 Mich 963 (2006) (MARKMAN, J., dissenting). For that

[4] Defendant does not contest that the crimes otherwise constituted a "pattern" within the meaning of the statute.

reason, the individual sentencing variables cannot be read in isolation, but instead must be read as a harmonious whole. *People v Cannon*, 481 Mich 152, 157 n 4; 749 NW2d 257 (2008). Typically, there is nothing to preclude a particular factor—in this case, criminal conduct—from serving as the basis underlying the scoring of multiple variables. Indeed, with regard to OV 13, a trial court may properly consider conduct that was already considered when scoring the defendant's PRVs. However, MCL 777.43(2)(c) specifically prohibits a trial court from considering conduct scored under MCL 777.42 when determining the score applicable under MCL 777.43(1). When construed in light of the Legislature's command that the trial court must score *both* OV 12 and OV 13, see MCL 777.22(1), the limitation provided under MCL 777.43(2)(c) must be understood to mean that, when scoring OV 13, the trial court cannot consider any conduct that was or *should have been* scored under MCL 777.42. That is, the trial court cannot avoid the limitation provided under MCL 777.43(2)(c) by simply ignoring its duty to properly score OV 12. Rather, consistent with the requirements of MCL 777.22(1) and MCL 777.43(2)(c), the trial court must score OV 12—and must score it using all conduct that qualifies as contemporaneous felonious criminal acts—before it can proceed to properly score OV 13.[5]

We also find inapposite the prosecution's reliance on *People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001), for the proposition that contemporaneous of-

[5] Given the limitations stated under MCL 777.42(2)(c) and MCL 777.43(2)(c), it is evident that the Legislature recognized the potential for overlap between these variables and concluded that, as a matter of public policy, it did not want a single criminal act resulting in scores under each variable. Further, these prohibitions strongly suggest that the Legislature intended trial courts to first score criminal acts under OV 11, then under OV 12, and finally under OV 13.

fenses are always properly considered under OV 13. In *Harmon*, the Court concluded that OV 13 was properly scored in light of the defendant's four concurrent convictions. *Id.* at 532. However, the propriety of using conduct that could have been scored under OV 12 to score OV 13 was not itself at issue. And, even if it had been, the four contemporaneous crimes each resulted in convictions. Thus, they were ineligible for consideration under OV 12. See MCL 777.42(2)(a)(*ii*). Because they could not be scored under OV 12, their use in scoring OV 13 did not implicate the prohibition stated in MCL 777.43(2)(c). For this reason, *Harmon* provides no useful guidance on the matter currently before this Court.[6]

III. CONCLUSION

The trial court erred when it determined that it could choose not to score defendant's uncharged robbery under OV 12, even though the uncharged robbery constituted a contemporaneous felonious criminal act, in order to use it in scoring OV 13. Under MCL 777.22(1) and MCL 777.43(2)(c), the trial court had to score conduct that constituted a contemporaneous felonious act within the meaning of MCL 777.42 under OV 12 before it could proceed to score OV 13. Further, to the extent that the trial court should have scored defendant's uncharged robbery under MCL 777.42, it could not serve as a basis for scoring OV 13. See MCL 777.43(2)(c). When defendant's uncharged robbery is scored under OV 12 rather than OV 13, defendant's recommended minimum sentence range is 19 to 38

[6] The prosecution also relies on two unpublished cases that purportedly determined that a trial court has the discretion to score OV 13 or OV 12, but not both, on the basis of contemporaneous criminal conduct that could be scored under OV 12. To the extent that these cases could be said to stand for that proposition, we find them unpersuasive and decline to follow them. See MCR 7.215(C)(1).

months in prison. See MCL 777.64. Because the change in the total OV points alters the recommended minimum sentence range, we must vacate defendant's sentence and remand for resentencing. See *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006).

We vacate defendant's sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

ZWIERS v GROWNEY

Docket No. 286828. Submitted September 1, 2009, at Lansing. Decided October 22, 2009, at 9:00 a.m.

Barbara Zwiers brought an action in the Kent Circuit Court against Sean Growney, M.D., and Michigan Pain Consultants, PC, alleging medical malpractice. Defendants moved for summary disposition, alleging that plaintiff's premature filing of her complaint and affidavit of merit 181 days after serving her notice of intent (NOI) to file her claim on defendants, instead of one day later or at least 182 days following the service of the NOI as required by MCL 600.2912b(1), was ineffective to commence the action and the period of limitations had subsequently expired. The court, Paul J. Sullivan, J., agreed with defendants and granted the motion for summary disposition. Plaintiff appealed, alleging that the court should have amended the filing date to the following day or disregarded the procedural error as permitted by MCL 600.2301.

The Court of Appeals *held*:

1. Plaintiff made a good-faith attempt to comply with the requirements of MCL 600.2912b(1). The fact that plaintiff filed suit one day early in no way defeated the purpose and goal of § 2912b to promote settlement. The parties were not engaged in settlement negotiations when the suit was filed. Filing the suit a day early did not increase the costs of the medical malpractice litigation. Allowing the case to be dismissed without any review of the potential merits of the allegations is contrary to the Legislature's intent to have injured parties receive compensation for meritorious medical malpractice claims.

2. MCL 600.2301 is applicable to the entire NOI process and any compliance failures under the NOI statute, MCL 600.2912b. The authority to invoke MCL 600.2301 rests on a two-pronged test, requiring consideration of whether a substantial right of a party is implicated and whether a cure of the error or defect would further the interests of justice. Substantial rights would be implicated and affected if prejudice flowed from the error or defect at issue. Defendants were not prejudiced in any form or manner by plaintiff's filing the action one day early. Defendants' substantial rights were not implicated or affected. There would be no harm if

a court corrected or disregarded the premature filing. Plaintiff made a good-faith effort to comply with MCL 600.2912b and a harmless error occurred. The furtherance of justice demands relief under MCL 600.2301. The trial court erred by granting summary disposition in favor of defendants. The order granting summary disposition must be reversed, the lawsuit must be reinstated, and the case must be remanded for further proceedings.

Reversed and remanded.

ACTIONS — MEDICAL MALPRACTICE — NOTICE OF INTENT TO FILE CLAIM — PREMATURE FILING — CURE FOR PREMATURE FILING.

The statutory provision that gives courts the power to cure or disregard any error or defect in any process, pleading, or proceeding in the furtherance of justice may be employed to address any compliance failures under the statute regarding notice of intent to commence a medical malpractice action; the authority to invoke the power to cure or disregard any error or defect rests on a two-pronged test, requiring consideration of whether a substantial right of a party is implicated and whether a cure of the error or defect would further the interests of justice; substantial rights would be implicated and affected if prejudice flowed from the error or defect (MCL 600.2301, 600.2912b).

Kuiper Orlebeke PC (by *Jon J. Schrotenboer*) for plaintiff.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg, John C. O'Loughlin,* and *Jason R. Sebolt*) for defendants.

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

MURPHY, P.J. In this medical malpractice lawsuit, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(7). At issue is whether plaintiff's case was properly dismissed when she mistakenly filed her complaint and affidavit of merit 181 days after serving her notice of intent (NOI) on defendants, instead of commencing her action one day later or at least 182 days following service of the notice, as required by

MCL 600.2912b(1). The trial court dismissed the action, ruling that the premature filing of the complaint and affidavit was ineffective to commence the action and that the period of limitations had subsequently expired. While *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005), standing alone, would compel us to affirm, *Burton* did not address or consider MCL 600.2301, which, in the furtherance of justice, permits a court to amend any process or proceeding and to disregard any error or defect in the proceedings if substantial rights are not affected. In *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), our Supreme Court interpreted MCL 600.2301, determining that it was implicated and applicable with respect to compliance failures under the NOI statute, MCL 600.2912b. On the strength of MCL 600.2301 and *Bush*, and given plaintiff's good-faith effort to comply with the NOI statute, a failure to show that the legislative purpose behind enactment of the NOI statute was harmed or defeated, and given that defendants' substantial rights were not affected, we reverse and remand in the "furtherance of justice." This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleged that she suffered injuries resulting from defendant Dr. Sean Growney's negligent placement of an intrathecal morphine pain pump on September 2, 2005. On August 30, 2007, plaintiff served her NOI on defendants. On February 27, 2008, she filed her complaint and accompanying affidavit of merit. Plaintiff does not dispute that her complaint and affidavit of merit were filed one day too early in contravention of the 182-day notice and waiting period set forth in MCL 600.2912b(1). To be in

compliance with MCL 600.2912b(1), the complaint and affidavit needed to be filed on or after February 28, 2008. The period of limitations, tolled by the NOI, MCL 600.5856(c), expired shortly thereafter.

The record indicates that the error in filing the complaint and affidavit a day early was entirely inadvertent, with counsel mistakenly interpreting his file note that the notice period expired on February 27, 2008, to mean that said date was the earliest the summons and complaint could be filed. There is no claim by the parties that they were involved in settlement negotiations on the date the complaint was filed, nor do defendants claim that plaintiff filed her pleadings a day early in bad faith; it was a simple mistake, but one that ultimately deprived plaintiff of her day in court.

Defendants moved for summary disposition, arguing that under *Burton*, *supra*, a complaint filed before the statutory waiting period expires does not effectively commence the action and, if the period of limitations elapses in the meantime, dismissal with prejudice is required. The trial court agreed and granted defendants' motion, indicating that it lacked discretion to rule otherwise.

II. ANALYSIS

A. STANDARD OF REVIEW AND MCR 2.116(C)(7)

This Court reviews de novo a trial court's decision on a motion for summary disposition in order to determine whether the moving party is entitled to judgment as a matter of law. *Bush*, *supra* at 164. Questions of statutory interpretation are also reviewed de novo on appeal. *Id.* Finally, review de novo is likewise applicable with respect to the issue whether a court properly dismissed an action

on the basis of the statute of limitations. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003).

Summary disposition is proper when a "claim is barred because of . . . [the] statute of limitations . . . ." MCR 2.116(C)(7). The following principles are applicable to motions brought pursuant to MCR 2.116(C)(7):

> [T]his Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [*RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008)(citations omitted).]

B. RELEVANT STATUTORY PROVISIONS AND RULES OF STATUTORY CONSTRUCTION

Before a medical malpractice action can be filed, a plaintiff must give a potential defendant notice in compliance with MCL 600.2912b. *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 704-705; 575 NW2d 68 (1997). MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, 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.

The instances in which the 182-day notice and waiting period do not apply, MCL 600.2912b(3) and (8), are not implicated under the circumstances of this case.

MCL 600.5856 addresses the tolling of the statute of limitations and provides, in pertinent part:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> * * *
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

Considering that the general limitations period for medical malpractice actions is two years from the date the claim accrued, MCL 600.5805(6); *Potter v McLeary*, 484 Mich 397, 405; 774 NW2d 1 (2009), plaintiff's claim would ordinarily have become time-barred during the notice period and, therefore, the tolling provision of § 5856(c) was implicated, tolling the statute of limitations during the notice period.

The other statutory provision that is the subject of argument in this case is MCL 600.2301, which plaintiff contends provided the trial court a discretionary basis to reject dismissal of the case. MCL 600.2301 provides, in full:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

This case requires us to not only contemplate the Michigan Supreme Court's holdings in *Burton* and *Bush* but to interpret MCL 600.2912b and MCL 600.2301. Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. *Id.* at 549. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *Id.* We must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. *Id*. This Court must avoid a construction that would render any part of a statute surplusage or nugatory. *Bageris v Brandon Twp*, 264 Mich App 156, 162; 691 NW2d 459 (2004). " 'The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended.' " *Shinholster*, *supra* at 549 (citation omitted). If the wording or language of a statute is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and we must enforce the statute as written. *Id.* "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

C. *BURTON v REED CITY HOSP CORP*

Defendants contend that *Burton* mandates affirmance of the trial court's ruling dismissing the case. Standing alone, *Burton* does indeed call for us to affirm dismissal of plaintiff's action. In *Burton*, the plaintiff

filed his medical malpractice complaint and affidavit of merit before the expiration of the notice period provided in MCL 600.2912b(1). Our Supreme Court stated that the case presented "the question whether a complaint alleging medical malpractice that is filed before the expiration of the notice period provided by MCL 600.2912b tolls the period of limitations." *Burton*, *supra* at 747. The Court found that § 2912b(1) was unambiguous in expressing that a person "shall not" commence an action until the notice period has expired; therefore, a complaint that is filed before the notice period expires "is ineffective to toll the limitations period." *Id.* The *Burton* Court further ruled:

> The directive in § 2912b(1) that a person "shall not" commence a medical malpractice action until the expiration of the notice period is similar to the directive in § 2912d(1) that a plaintiff's attorney "shall file with the complaint an affidavit of merit . . . ." Each statute sets forth a prerequisite condition to the commencement of a medical malpractice lawsuit. The filing of a complaint before the expiration of the statutorily mandated notice period is no more effective to commence a lawsuit than the filing of a complaint without the required affidavit of merit. In each instance, the failure to comply with the statutory requirement renders the complaint insufficient to commence the action. [*Id.* at 753-754 (omission in original).]

Thus, when plaintiff here filed suit one day premature in violation of MCL 600.2912b(1), i.e., 181 days after giving notice instead of 182 days, she did not technically commence the medical malpractice action for purposes of the statute of limitations. It is the filing of a complaint and affidavit of merit in a medical malpractice suit that typically further tolls the statute of limitations. *Kirkaldy v Rim*, 478 Mich 581, 585; 734 NW2d 201 (2007), citing MCL 600.5856(a) and MCL 600.2912d. But because plaintiff did not effectively

commence her action, even though the parties proceeded with the litigation, the clock on the two-year period of limitations resumed running and then expired. After expiration of the limitations period, defendants filed their motion for summary disposition.

Although application of *Burton* alone would require us to affirm the summary dismissal of plaintiff's case, the Court in *Burton*, as opposed to the case at bar, was not presented with an argument under MCL 600.2301. And that statutory provision has now been construed by the Supreme Court in *Bush* in the context of its application to the requirements in the NOI statute. Given that *Burton* did not address MCL 600.2301 and that *Bush* has shed new light on MCL 600.2301 and its effect on the NOI statute, and considering that plaintiff has posed an argument to us under § 2301, we are obligated to discuss and analyze whether *Burton* should be followed under the circumstances of this case. We cannot blindly follow *Burton* if MCL 600.2301 and *Bush* demand a different outcome.

D. *BUSH v SHABAHANG*

The decision in *Bush* had not yet been issued when the trial court made its ruling, or when the parties filed their appellate briefs. In *Bush*, the Court addressed the question whether a substantively defective NOI, timely mailed, precluded the tolling of the statute of limitations on a medical malpractice claim. The Court concluded "that the 2004 amendments of MCL 600.5856 . . . significantly clarified the proper role of an NOI provided pursuant to MCL 600.2912b[,]" and the Court held that, "if an NOI is timely, the statute of limitations is tolled despite defects contained therein." *Bush*, *supra* at 161. Moreover, the Court held "that the purpose of

the NOI statute is better served by allowing for defects in NOIs to be addressed in light of MCL 600.2301, which allows for amendment and disregard of 'any error or defect' where the substantial rights of the parties are not affected and the cure is in the furtherance of justice." *Id.* The *Bush* Court addressed the interplay between MCL 600.2912b and MCL 600.2301, reasoning and stating:

> In determining legislative intent, we should also consider other relevant statutory provisions. To that end, we consider the Revised Judicature Act (RJA) to see if other appropriate remedies exist that are consistent with the intended purpose of § 2912b. We have long recognized that the RJA does provide a mechanism to cure certain defects within pleadings in MCL 600.2301. We note that the language of § 2301 goes beyond the limited concept of amendment of "pleadings" and allows for curing of certain defects in any "process, pleading or proceeding."
>
> * * *
>
> Service of an NOI is clearly part of a medical malpractice "process" or "proceeding" in Michigan. Section 2912b mandates that "an action alleging medical malpractice" in Michigan "shall not commence . . . unless the person has given the health professional or health facility written notice . . . ." Since an NOI must be given before a medical malpractice claim can be filed, the service of an NOI is a part of a medical malpractice "proceeding." As a result, § 2301 applies to the NOI "process." As Justice CAVANAGH opined in his dissent in *Boodt* [*v Borgess Med Ctr*, 481 Mich 558, 567-572; 751 NW2d 44(2008], this Court has for several decades applied MCL 600.2301 or its predecessor (which contained nearly identical language) to allow amendment of documents that, although not aptly characterized as pleadings, might well fall under the broad category of a "process" or "proceeding." Accordingly, we hold that § 2301 may be employed to cure defects in an NOI.
>
> We recognize that § 2301 allows for amendment of errors or defects, whether the defect is in form or in

> substance, but only when the amendment would be "for the furtherance of justice." Additionally, § 2301 mandates that courts disregard errors or defects when those errors or defects do not affect the substantial rights of the parties. Thus, the applicability of § 2301 rests on a two-pronged test: first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice. If both of these prongs are satisfied, a cure will be allowed "on such terms as are just." [*Bush*, *supra* at 176-178 (citations omitted; omissions in original).]

With respect to the furtherance-of-justice prong of the test, the Court explained that it is satisfied "when a party makes a good-faith attempt to comply with the content requirements of § 2912b." *Id.* at 178. A court should only consider dismissal when the plaintiff has not made a good-faith attempt to comply with § 2912b. *Id.*

Applying the standards to the case, the *Bush* Court found that the NOI defects did not warrant dismissal and that the defects fell "squarely within the ambit of § 2301 and *should be disregarded or cured by amendment*." *Id.* at 180 (emphasis added). Our Supreme Court, finding that a good-faith attempt to comply with § 2912b had been made, held that the defects could be cured under § 2301 because the substantial rights of the parties were not affected and that disregard or amendment of the defects would be in the furtherance of justice. *Id.* at 180-181.

We conclude that the concepts and principles cited and relied on in *Bush* are equally applicable here for the reasons that we shall explore below in our discussion.

E. DISCUSSION

We begin by noting the importance of recognizing the purpose for which the NOI requirement was enacted by the Legislature. In *Neal*, *supra* at 705, this Court explained:

> The purpose of the notice requirement is to promote settlement without the need for formal litigation and reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs. Senate Legislative Analysis, SB 270, August 11, 1993; House Legislative Analysis, HB 4403-4406, March 22, 1993.

See also *Bush*, *supra* at 174.

The fact that plaintiff filed suit one day early in no way defeated the purpose and goal of § 2912b to promote settlement. There is no indication in the parties' arguments or the record that the parties were on the verge of settlement or even engaged in settlement negotiations when suit was filed. This is not a case in which plaintiff defiantly and abruptly filed an action, halting settlement talks. Moreover, the act of filing suit a day early certainly did not increase the costs of the medical malpractice litigation. Furthermore, allowing the case to be dismissed without any review whatsoever of the potential merits of plaintiff's serious allegations of medical malpractice would fly directly in the face of the Legislature's intent to have injured parties receive compensation for *meritorious* claims.

We now turn to *Bush* and its implications and impact with respect to the case at bar. We recognize that *Bush* dealt with a violation or defect in regard to the NOI content requirements of § 2912b(4) and not a violation or defect in the proceedings arising out of § 2912b(1). However, *Bush* makes it abundantly clear that MCL 600.2301 is applicable to the entire NOI process and any compliance failures under the NOI statute. *Bush*, *supra* at 176-177 (service of an NOI is part of a medical malpractice proceeding and as a result "§ 2301 applies to the NOI 'process' "). The *Bush* Court stated that § 2301 goes beyond the amendment of pleadings and

reaches defects in any process, pleading, or proceeding. *Id.* at 176. MCL 600.2301 expressly speaks of errors or defects in the proceedings, and it cannot reasonably be disputed that the premature filing of a complaint under § 2912b(1) constitutes an error or defect in the proceedings. MCL 600.2301 also addresses the power of amendment relative to process, pleadings, and proceedings, and the concept of "process" clearly encompasses the issuance of a summons, the filing of a complaint, service of the summons and complaint on a defendant, and the overall commencement of an action that compels a defendant to respond. See MCR 2.101 *et seq.* Additionally, the filing of a complaint is part of any civil "proceedings." See MCR 2.001 and 2.101(B).

Pursuant to *Bush*, the authority to invoke MCL 600.2301 rests on a two-pronged test, requiring consideration of (1) whether a substantial right of a party is implicated and (2) whether a cure of the error or defect would further the interests of justice. *Bush*, *supra* at 177.

In applying the first prong of the test where the contents of the plaintiff's NOI were deficient, the *Bush* Court stated:

> A defendant who has enough medical expertise to opine in his or her own defense certainly has the ability to understand the nature of claims being asserted against him or her even in the presence of defects in the NOI. Accordingly, we conclude that no substantial right of a health care provider is implicated. [*Id.* at 178.]

This analysis is comparable to examining whether a party would be prejudiced by the defect or error in the proceedings. Substantial rights would be implicated and affected if prejudice flowed from the defect or error at issue. Here, defendants were not prejudiced in any form or manner by plaintiff's filing the medical malpractice

action one day early. There was no evidence of interrupted settlement negotiations on the date of filing, and defendants had the time and opportunity to investigate plaintiff's allegations as evidenced by defendants' response to plaintiff's NOI under MCL 600.2912b(7). Therefore, defendants' substantial rights were not implicated or affected, and thus there would be no harm if a court corrected or disregarded the premature filing of the complaint and affidavit of merit.

As indicated above, the second prong of the test, i.e., whether a cure is in the furtherance of justice, entails consideration of whether there was a good-faith attempt to comply with MCL 600.2912b. *Bush*, *supra* at 178. Nothing in the record here suggests anything but a good-faith effort to comply with the NOI statute; a harmless mistake occurred. There is no indication that plaintiff intentionally filed suit early or that she filed early in an effort to subvert the legal process and to gain an unfair advantage over defendants. There was a complete absence of bad faith on plaintiff's part, and the furtherance of justice demands relief under MCL 600.2301. Accordingly, both prongs of the test enunciated in *Bush* are satisfied.

We note that *Bush* is not the only case that lends support for our ruling under MCL 600.2301. Among others cases, in *Gratiot Lumber & Coal Co v Lubinski*, 309 Mich 662, 668-669; 16 NW2d 112 (1944), the Michigan Supreme Court addressed a predecessor statute to MCL 600.2301, which contained language nearly identical to that found in the statute today, and the Court indicated that a liberal construction in the furtherance of justice should be given relative to the statute, because its aim was to abolish technical errors and to have cases disposed of in accordance with the parties' substantial rights.

Under the circumstances of this case in which a complaint was inadvertently filed *one day early on a 182-day waiting period* and in which no one was harmed or prejudiced by the premature filing, it would simply constitute an injustice to deprive plaintiff of any opportunity to have the merits of her case examined and addressed by a court of law. It would indeed be an understatement to say that summary dismissal of this action on such a hyper-technical basis is placing form over substance. We conclude that the Legislature, through enactment of MCL 600.2301, contemplated circumstances such as those that exist today and decided to give the necessary statutory authority to the courts to rectify harmless defects and errors in accordance with the parameters set in § 2301.

With respect to tailoring a remedy, under the plain language of § 2301, and consistent with *Bush*, a court can amend any process, pleading, or proceeding on terms that are just, or it can disregard any harmless error or defect in the proceedings. Whether we characterize it as amending the filing date of the complaint and affidavit of merit to February 28, 2008, thereby meeting the 182-day requirement of the NOI statute, or simply disregarding the procedural error in filing the complaint and affidavit one day premature, the relief that we are awarding plaintiff ultimately provides her with the opportunity to proceed with the litigation. Plaintiff's medical malpractice lawsuit is hereby reinstated under the authority of MCL 600.2301. The trial court erred by granting summary disposition in favor of defendants.

III. CONCLUSION

Pursuant to MCL 600.2301 and its interpretation by the *Bush* Court, we reverse the trial court's order

granting summary disposition in favor of defendants. We hold that the error or procedural defect in filing the complaint and affidavit of merit one day before the 182-day notice period elapsed did not affect defendants' substantial rights, was a simple mistake made in good faith in an effort to comply with MCL 600.2912b(1), and did not defeat the legislative purpose behind enactment of the NOI statute. Therefore, reversal is necessary to further justice.

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

FISHER v BLANKENSHIP

Docket No. 285852. Submitted August 11, 2009, at Lansing. Decided October 22, 2009, at 9:05 a.m.

Brian Fisher (Fisher) and Kim Fisher brought an action in the Macomb Circuit Court against Derrick Blankenship, Greg Nickel, and Leanna G. Nickel, seeking noneconomic tort damages for injuries that Fisher sustained when Blankenship collided with the Fishers' truck while driving the Nickels' car. Fisher lost a front tooth when his face struck the steering wheel, and, because the surrounding teeth were not in good condition, his dentist decided to extract his remaining top teeth and fit him with a partial upper denture. Fisher claimed that the denture was difficult to insert and remove, altered his appearance, and caused him to drool, among other hardships. Defendants moved for summary disposition on the ground that there was no genuine issue of material fact regarding whether Fisher's injury amounted to a serious impairment of body function and permanent serious disfigurement under MCL 500.3135(1). The court, David F. Viviano, J., denied the motion, ruling that there were material factual questions with regard to whether Fisher had suffered a permanent serious disfigurement and how the injury had affected Fisher's employment, family life, and household duties. Defendants appealed.

The Court of Appeals *held*:

1. The trial court erred to the extent that it denied defendants' motion for summary disposition on the ground that there were questions of fact regarding the nature and extent of Fisher's injuries. Although defendants repeatedly referred to Fisher's loss of a single tooth, their analysis addressed the changes in Fisher's life occasioned by the use of his dentures, thereby effectively admitting that the nature and extent of Fisher's injury included the loss of all the teeth necessary to accommodate his prosthesis. Accordingly, the nature and extent of Fisher's injury was undisputed.

2. Fisher's loss of teeth and concomitant need for a dental prosthesis constitutes a serious impairment of body function as a matter of law because Fisher must forever depend on his dentures, which are painful and difficult for him to use, in order to participate in everyday life activities such as eating and speaking. The fact that Fisher would have eventually required dentures to correct his preex-

isting dental problems does not prevent the tooth loss at issue from meeting the tort threshold because the aggravation or triggering of a preexisting condition can constitute a compensable injury.

3. The plain meaning of "permanent serious disfigurement," a phrase that the Legislature did not define, is a long-lasting and significant change that mars or deforms the injured person's appearance. When determining whether a plaintiff has established a threshold disfigurement, courts must objectively examine the physical characteristics of the injury on a case-by-case basis and determine whether, in light of common knowledge and experience and considering the full spectrum of the injured person's life activities, the injury's physical characteristics significantly mar or deform the injured person's overall appearance. Given that the statutory provision at issue does not limit recovery to those disfigurements that are always visible, whether the disfigurement is serious must be determined with regard to the injury's physical characteristics under a totality of the circumstances, which necessarily includes those times when the disfigurement is fully exposed to view. Therefore, in making this determination, courts must consider the effect of the disfigurement on the injured person's appearance when the person is not using devices designed to conceal the disfigurement. In this case, it is clear that Fisher's loss of teeth mars or deforms his overall appearance, and that this disfigurement will last for the remainder of his life. The trial court should have denied defendants' motion for summary disposition on this basis.

Affirmed.

K. F. KELLY, J., dissenting, agreed that there was no factual dispute regarding the nature and extent of Fisher's injuries, but opined that the trial court erred by denying defendants' motion for summary disposition because, viewing the evidence in plaintiffs' favor, plaintiffs did not establish an injury that met the statutory threshold.

1. INSURANCE — NO-FAULT — WORDS AND PHRASES — PERMANENT SERIOUS DISFIGUREMENTS.

A "permanent serious disfigurement," for purposes of the statutory threshold for recovering noneconomic tort damages resulting from a motor vehicle accident, is a long-lasting and significant change that mars or deforms a person's appearance (MCL 500.3135[1]).

2. INSURANCE — NO-FAULT — PERMANENT SERIOUS DISFIGUREMENTS — DETERMINATIONS OF PERMANENT SERIOUS DISFIGUREMENT.

To establish whether a plaintiff has established a disfigurement that meets the tort threshold for recovering noneconomic damages,

> courts must objectively examine the physical characteristics of the injury, without the use of devices designed to conceal the disfigurement at issue, on a case-by-case basis and determine whether, in light of common knowledge and experience and considering the full spectrum of the injured person's life activities, the injury's physical characteristics significantly mar or deform the injured person's overall appearance (MCL 500.3135[1]).

Goodman Acker, PC (by *Barry J. Goodman* and *Kevin Z. Komar*), for plaintiffs.

Garan Lucow Miller, P.C. (by *Caryn A. Gordon*), for defendants.

Before: M. J. KELLY, P.J., and K. F. KELLY and SHAPIRO, JJ.

M. J. KELLY, P.J. In this automobile negligence action, defendants Derrick Blankenship, Greg Nickel, and Leanna G. Nickel appeal by leave granted the trial court's order denying their motion for summary disposition. On appeal, we must determine whether the trial court erred when it refused to dismiss the suit of plaintiffs Brian Fisher (Fisher) and Kim Fisher on the ground that they failed to establish that Fisher's injury amounted to a serious impairment of body function or a permanent serious disfigurement. Because we conclude that Fisher's injury met both the serious impairment and permanent serious disfigurement thresholds, we affirm. We have decided this appeal without oral argument under MCR 7.214(E).

I. BACKGROUND

Plaintiffs sued defendants to recover damages for injuries that Fisher sustained in an automobile accident in February 2004. Fisher was stopped at a red light when Blankenship struck Fisher's truck from behind.

Greg and Leanna Nickel owned the car driven by Blankenship. The impact of the collision pushed Fisher's car into the car in front of him and caused him to strike his mouth and nose on the steering wheel.

Fisher sustained damage to one of his front teeth, which was "pushed all the way back." He also received an abrasion to the bridge of his nose, and reported left knee and right hand pain. Later that same day, Fisher went to the emergency room of a hospital. The hospital staff treated him for his abrasion and confirmed that he had sustained a dental injury. The staff released him with a prescription for Tylenol and recommended that he see a dentist about the tooth.

Michael Harris, D.D.S., informed plaintiff that he had fractured his tooth and would have to have it removed. Initially, Dr. Harris replaced the missing front tooth with a single implanted post and crown in March or April 2004. However, because of the existing condition of Fisher's surrounding teeth, this was only a temporary measure. Fisher, who was 41 years old at the time of the accident, admitted that he had "some dental issues" before the accident. He had lost teeth in the back of his mouth, and Dr. Harris had told him that he would eventually need dentures to replace his top front teeth. Indeed, Fisher acknowledged that, before the accident, he and Dr. Harris had discussed that he might need to have dentures of the same type that he now has when he turned 50 or 55 years of age. However, the accident and resulting loss of the front tooth apparently accelerated Fisher's need for dentures. Ultimately Dr. Harris decided that the best course of action was to extract all of Fisher's top front teeth—fourteen in total—and replace them with a partial upper denture, which attached to implanted posts. This procedure was performed in March 2007.

Fisher testified that no physicians or dentists had restricted his current activities. He missed a few days of work because of the dental work, but otherwise did not miss any work because of the accident. He was able to perform the usual household chores. There was no significant effect on his usual social life. Fisher was able to eat as much as he did before, but had trouble eating certain foods like corn on the cob. He testified that the dental work altered his appearance by making his top lip protrude a bit further, and he felt uncomfortable with his current appearance because of the denture. He also testified that it now felt awkward to kiss his wife. However, he admitted that his friends had told him that his new teeth looked better than his originals. Fisher also testified that he drools occasionally because of the denture, and that the denture has altered his speech.

Fisher stated that the process involved in removing and replacing the denture each day was frequently painful, frustrating, and upsetting. He stated that he has problems with a severe gag reflex and that the process could take between 45 minutes to one hour when having difficulty. As of the date of his deposition, he had not sought counseling to address these problems or his discomfort with his current appearance and he was not taking medication to deal with the discomfort.

Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that Fisher's injury did not amount to a serious impairment of body function or a permanent serious disfigurement as required by MCL 500.3135(1). The trial court denied the motion, explaining that material questions of fact existed concerning how the injury had affected Fisher's employment, family life, and his household duties and whether he suffered a permanent serious disfigurement.

II. SERIOUS IMPAIRMENT

Defendants argue that the trial court should have granted their motion for summary disposition on the ground that plaintiffs failed to show that Fisher suffered a threshold injury. We review de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2002).

Under MCL 500.3135(1), a person is subject to tort liability for noneconomic loss caused by his or her use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. A "serious impairment of body function" is "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7).

A. NATURE AND EXTENT OF THE INJURY

To establish whether an injury constitutes a serious impairment, the reviewing court is to first determine whether a factual dispute exists "concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function." *Kreiner v Fischer*, 471 Mich 109, 131-132; 683 NW2d 611 (2004). If there is a material factual dispute, a court may not decide the issue as a matter of law. If no material question of fact exists regarding the nature and extent of the plaintiff's injuries, the question is one of law. *Id.* at 132.

In the present case, plaintiffs argue that there is a material factual dispute concerning the nature and extent of Fisher's injury. Specifically, plaintiffs rely on

defendants' statements in their brief on appeal wherein defendants assert that the only injury suffered by Fisher was the loss of a single tooth. In their brief on appeal, and specifically in their reply to plaintiffs' brief on appeal, defendants emphatically deny that there is any factual dispute concerning the nature and extent of Fisher's injury:

> Defendants do not dispute that Plaintiff [lost] his front tooth as a result of this motor vehicle accident. Moreover, Defendants do not dispute that three years after the accident, Plaintiff chose to have his remaining upper teeth removed and to use an upper dental implant for his top teeth. The dispute in this case is whether [Fisher's] injury impacted his overall ability to lead his normal life to satisfy the statutory threshold of a serious impairment of a body function; and whether he suffered a permanent serious disfigurement.

Given these assertions, defendants ask this Court to reject plaintiffs' attempts to establish a question of fact concerning the nature and extent of Fisher's injury. We agree that there is no material dispute concerning the nature and extent of Fisher's injury. However, we reach this conclusion on the basis of defendants' admission that the nature and extent of the injury includes Fisher's loss of teeth beyond the first, which necessitated the dentures.

On appeal, defendants repeatedly referred to Fisher's loss of a single tooth. However, defendants also repeatedly argued that there was no material factual dispute concerning the nature and extent of Fisher's injury, and they acknowledged that plaintiffs' position is that Fisher's loss of *teeth* and their replacement by a prosthetic device constituted a serious impairment of body function and serious disfigurement. Defendants also specifically rely on MCL 500.3135(2)(a) for the proposition that whether Fisher's lost teeth and need for a prosthe-

sis constitutes a serious impairment or serious disfigurement is to be determined as a matter of law. Notably, defendants have argued not that there is a question of fact concerning the nature and extent of the injury, but that the dispute is not material because—even accepting plaintiffs' position on the nature and extent of Fisher's injury—that injury does not meet the threshold. Indeed, defendants analyzed the issue by reference to the changes in Fisher's life occasioned by the use of his dentures. Therefore, taking these statements in context and as a whole, we conclude that defendants have—for purposes of this appeal—effectively admitted that the nature and extent of Fisher's injury includes the loss of all the teeth removed to facilitate Fisher's use of his prosthesis.[1] For that reason, we conclude there is no factual dispute concerning the nature and extent of Fisher's injury.

B. FISHER'S ABILITY TO LEAD HIS NORMAL LIFE

When a court determines the nature and extent of a plaintiff's injuries as a matter of law, it must then proceed to the second step in the analysis and determine whether "an 'important body function' of the plaintiff has been impaired." *Kreiner*, 471 Mich at 132. When a court finds an objectively manifested impairment of an important body function, it then must determine whether "the impairment affects the plain-

[1] Indeed, we note that defendants' statements might even amount to a formal concession regarding the nature and extent of Fisher's injury such that defendants could be precluded from asserting otherwise before a jury. See *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698 (1996) (noting that judicial admissions are " 'formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of that fact' ") (citation omitted).

tiff's general ability to lead his or her normal life." *Id.* This process involves an examination of the plaintiff's life before and after the accident to objectively determine whether any change in lifestyle "has actually affected the plaintiff's 'general ability' to conduct the course of his life." *Id.* at 132-133. "Merely '*any* effect' on the plaintiff's life is insufficient because a de minim[is] effect would not, as objectively viewed, affect the plaintiff's 'general ability' to lead his life." *Id.* at 133. The *Kreiner* Court provided a non-exclusive list of objective factors that may be used in making this determination. These factors include: "(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery." *Id.* In addition, "[s]pecific activities should be examined with an understanding that not all activities have the same significance in a person's overall life." *Id*. at 131. Thus, where limitations on sporting activities "might not rise to the level of a serious impairment of body function for some people, in a person who regularly participates in sporting activities that require a full range of motion, these impairments may rise to the level of a serious impairment of a body function." *Williams v Medukas*, 266 Mich App 505, 509; 702 NW2d 667 (2005). However, "[a] negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Kreiner*, 471 Mich at 137.

With regard to residual impairments, the *Kreiner* Court noted, "[s]elf-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point." *Id.* at 133 n 17. However, this Court has held that "[t]he necessary corollary of this language is that physician-imposed

restrictions, based on real or perceived pain, can establish the extent of a residual impairment." *McDanield v Hemker*, 268 Mich App 269, 282-283; 707 NW2d 211 (2005). A physician need not offer a medically identifiable or physiological basis for imposing restrictions based on pain; however, a recitation of a physiological basis provides support for the conclusion that the restrictions are physician-imposed, rather than self-imposed. *Id*. at 284-285. In addition, this Court has recognized the difference between self-imposed limitations caused by pain, and self-imposed limitations based on physical inability, which can support a finding that the plaintiff has suffered a threshold injury. *Id*. at 283; *Williams*, 266 Mich App at 509.

As a preliminary matter, we disagree with defendants' implicit contention that, since Fisher eventually would have had to use dentures or some other device because of his existing condition, his loss of teeth could not constitute a threshold injury. Although there is evidence that Fisher already had dental problems, the aggravation or triggering of a preexisting condition can constitute a compensable injury. See *Wilkinson v Lee*, 463 Mich 388, 394-395; 617 NW2d 305 (2000). Thus, a jury could reasonably find that Fisher suffered a serious impairment based on the accelerated loss of teeth caused by the accident. Notwithstanding this, defendants also argue that Fisher can essentially lead his normal life with his prosthesis; and, for that reason, the loss of teeth does not amount to a serious impairment of body function.

In *Moore v Cregeur*, 266 Mich App 515, 516-517; 702 NW2d 648 (2005), this Court discussed serious impairment in the context of a plaintiff whose accident left her with retina damage that resulted in permanent loss of visual acuity, a deterioration in her vision to 20/60, and

a partial loss of peripheral vision. Responding to the defendants' argument that the plaintiff had not suffered a threshold injury because she could use artificial aids to allow her to perform her previous tasks, the *Moore* Court held:

> Defendants suggest that, because plaintiff can still pursue all these activities, albeit with the aid of devices such as magnifiers and special lighting, or with retraining, the injuries do not rise to the level of affecting plaintiff's general ability to lead her normal life. We reject this application of the *Kreiner* standard. Although "minor changes in how a person performs a specific activity may not change the fact that the person may still 'generally' be able to perform that activity," *Kreiner*, *supra* at 131, we do not believe that plaintiff's inability to perform the activities she performed before the accident without the aid of special devices and significant retraining constitutes a "minor change" in how plaintiff performs those activities. By this standard, plaintiff could have lost her right eye entirely and the loss still would not have affected her general ability to lead her normal life because she could learn to perform the same activities with just one eye. The fact that plaintiff has had to take special steps to pursue the activities she routinely pursued in the past is clear evidence that her vision loss has affected her general ability to lead her normal life. [*Id.* at 520-521.]

We find *Moore* applicable here. Fisher cannot eat without the "special device" of his denture implant. He also presented evidence of his pain and difficulty in using this device[2] as well as evidence that he drools occasionally because of the denture, and that the denture has altered his speech. Like the plaintiff's vision impairment in *Moore*, Fisher's tooth "loss will affect every aspect of [his] life to some degree and will affect certain specific activities . . . even more." *Id*. at 521. In

[2] We note that we have reviewed the video evidence in which Fisher demonstrated how he inserts his dentures.

addition, this Court recently held that a plaintiff who elected to have knee replacement surgery after his knee was injured in a car crash had established a serious impairment of body function; this was in part because he "is still missing a portion of his body that he will never retrieve" and now "must forever depend on an artificial joint for his mobility . . . ." *Caiger v Oakley*, 285 Mich App 389, 395; 775 NW2d 828 (2009). Although this case involves a set of prosthetic teeth rather than a prosthetic joint, the same analysis applies: Fisher must forever rely on a prosthetic device in order to participate in everyday life activities such as eating and speaking.[3]

Under the facts of this case, Fisher's loss of teeth and the concomitant need for a prosthesis constitutes a serious impairment of body function as a matter of law.

III. PERMANENT SERIOUS DISFIGUREMENT

As we have already noted, there is no material factual dispute concerning the nature and extent of Fisher's injuries. For that reason, whether Fisher's injuries constitute a permanent serious disfigurement is a question of law for the court. MCL 500.3135(2)(a).[4]

In order to determine whether Fisher's injuries meet the disfigurement threshold, we must first determine what type of injury the Legislature contemplated when

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[3] In addition, there is some evidence that Fisher's denture system might not be a permanent solution. Dr. Harris admitted that Fisher may or may not have to undergo more surgery or have more implants "since no one knows how long mini-implants last. So far they have been successful for five years." Thus, there is evidence that Fisher's residual impairment might worsen with time.

[4] For this reason, the trial court erred to the extent that it determined that summary disposition was inappropriate because there was a question of fact regarding whether Fisher's injuries amounted to a permanent serious disfigurement.

it set the threshold. The best indicator of the Legislature's intent is the language actually used in the statute. *Kreiner*, 471 Mich at 129. Although the Legislature has determined that persons injured in an auto accident should be able to recover noneconomic damages if the injured person has suffered a "permanent serious disfigurement," MCL 500.3135(1), the Legislature has not further defined this term. When a term has not been defined by the Legislature or acquired a peculiar meaning under the law, this Court gives the words their ordinary meaning. *Ford Motor Co v Woodhaven*, 475 Mich 425, 439; 716 NW2d 247 (2006), citing MCL 8.3a.

Under the plain language of MCL 500.3135(1), in order to meet the disfigurement threshold, a plaintiff must have a disfigurement that is both permanent and serious. To disfigure something is to "mar the appearance or beauty of," to "deform," or to "deface." *Random House Webster's College Dictionary* (1997). Hence, with regard to a person, a disfigurement is something that mars, deforms, or defaces the person's appearance. Further, the disfigurement is permanent if it will exist perpetually or is otherwise "long-lasting," and will be considered serious if it is "significant" or "not trifling." *Id.* Thus, a threshold disfigurement is a long-lasting and significant change that mars or deforms the injured person's appearance.

In assessing whether a particular change in appearance meets the disfigurement threshold, this Court has held that the determination depends on the physical characteristics of the injury rather than the effect of the injury on the plaintiff's ability to lead a normal life. *Kosack v Moore*, 144 Mich App 485, 491; 375 NW2d 742 (1985). Thus, the focus must be on the outward appearance of the injury, which necessarily entails a case-by-

case assessment. Likewise, whether the change in appearance is significant enough to be considered serious is an objective determination that must be made as a matter of common knowledge and experience. See *Nelson v Myers*, 146 Mich App 444, 446 n 2; 381 NW2d 407 (1985). Finally, whether an injury constitutes a serious disfigurement must be determined with regard to the injured person's appearance while engaged in a "full spectrum" of life activities rather than in an isolated "perusal" of the injured person's immediate appearance. See *Owens v Detroit*, 163 Mich App 134, 140-141; 413 NW2d 679 (1987).[5] Consequently, when determining whether a plaintiff has established a threshold disfigurement, courts must objectively examine the physical characteristics of the injury on a case-by-case basis and determine whether, in light of common knowledge and experience and considering the full spectrum of the injured person's life activities, the injury's physical characteristics significantly mar or deform the injured person's overall appearance.

In this case, it is clear that Fisher's loss of teeth mars or deforms his overall appearance. Thus, the loss of teeth is a disfigurement. It is also abundantly clear that the disfigurement will last for the remainder of his life. Consequently, Fisher has suffered a permanent disfigurement. The only question is whether the disfigurement is significant enough to be considered "serious" within the meaning of MCL 500.3135(1).

It seems beyond dispute that, in the absence of any corrective measures, the loss of fourteen teeth would

[5] We acknowledge that *Kosack*, *Nelson*, and *Owens* were all decided before the Legislature amended MCL 500.3135 in 1995. See 1995 PA 222. However, with 1995 PA 222, the Legislature did not effect a change in the definition of a permanent serious disfigurement, and we find the analyses employed in these cases with regard to assessing whether an injury constitutes a permanent serious disfigurement to be persuasive.

constitute a serious disfigurement. Nevertheless, defendants argue that Fisher's appearance has not been significantly altered by the loss of his teeth given his use of a prosthesis to correct his appearance. Specifically, defendants argue that, with his dentures in place, Fisher's overall appearance is actually better than it was before the accident. This argument presumes that a disfigurement must be assessed in light of the steps that the injured party has taken or could take to conceal the disfigurement from view during his or her daily routine. Under this logic, a person with severe burn scars on his or her back would not have a serious disfigurement because he or she could cover the scarring with clothing and forever eschew those life activities that would expose the scars to public view. However, the statute does not limit recovery for disfigurement to those disfigurements that are always visible, and we will not read such a limitation into the statute. See *Paschke v Retool Industries*, 445 Mich 502, 511; 519 NW2d 441 (1994) ("Where the statutory language is clear, the courts should neither add nor detract from its provisions."). As this Court has already recognized, a disfigurement may be more visible during some life activities and less visible during other life activities. See *Owens*, 163 Mich App at 140-141. Thus, whether the disfigurement is serious must be determined with regard to the injury's physical characteristics under a totality of the circumstances, which necessarily includes those times when the disfigurement is fully exposed to view. Moreover, we do not agree that a disfigurement's seriousness is in any way diminished because the only persons who will see it when fully exposed are the injured person or those persons who are intimately connected to the injured person; a serious disfigurement remains a serious disfigurement even when hidden from the general public. For these reasons,

we hold that courts must consider the effect of the disfigurement on the injured person's appearance without the use of devices designed to conceal the disfigurement, such as the dentures in this case.[6] We do not, however, hold that the need—or lack thereof—for a prosthetic device cannot be considered when determining the seriousness of the disfigurement. Indeed, the fact that an injured person requires, or does not require, the use of a prosthesis to mitigate the disfiguring effects of an injury will often be evidence of the seriousness of the disfigurement.[7]

Applying the above considerations to this case, we conclude that Fisher's ability to partially conceal his disfigurement through the use of dentures does not render his disfigurement less serious. Rather, we conclude that the need for such a prosthesis is evidence that the disfigurement itself is so serious that one cannot reasonably expect Fisher to appear in public without it. Further, even when he uses the dentures, his appearance is significantly altered: his upper lip protrudes, he drools, and his speech is altered. Therefore, taking into consideration the effect of Fisher's injury on his appearance with regard to the full spectrum of his life activities, we conclude that Fisher's injury amounts to a permanent serious disfigurement.

The trial court erred to the extent that it denied defendants' motion for summary disposition because it concluded that there were questions of fact regarding the nature and extent of Fisher's injuries. The nature

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[6] We note that this case is not one in which the injured person was able to obtain a permanent cosmetic correction of the disfigurement. Under such cases, the permanent correction might very well mitigate the seriousness of the disfigurement to such a degree that it would no longer meet the threshold.

[7] An injured person's ability to readily conceal a disfigurement might also be relevant to a determination of damages.

and extent of Fisher's loss of teeth was not disputed, and the loss of teeth constituted both a serious impairment of body function and a permanent serious disfigurement as a matter of law. Hence, the trial court should have denied defendants' motion on that basis. However, this Court will affirm where the trial court came to the right result even if for the wrong reason. *Coates v Bastian Bros*, *Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007).

Affirmed. As the prevailing parties, plaintiffs may tax costs under MCR 7.219(A).

SHAPIRO, J., concurred.

K. F. KELLY, J. (*dissenting*.) I dissent. I do not disagree with the majority that there is no factual dispute regarding the nature and extent of plaintiff's[1] injuries: He fractured one front tooth and it was replaced with an implant. And, over three years after the accident, this implant and additional front teeth were replaced with a partial denture.[2] I do, however, disagree with the majority's conclusion that plaintiff suffered a serious impairment of body function or a permanent serious disfigurement as contemplated under § 3135(1) of the no-fault act, MCL 500.3135(1). Contrary to the majority, I would hold that the trial court erred by denying defendants' motion for summary disposition because plaintiffs failed to show a threshold injury under

[1] Because Kim Fisher's claims are derivative in nature, "plaintiff" refers to Brian Fisher only.

[2] Fisher testified that he would have needed the dental work performed eventually, even absent the fracture to the front tooth resulting from the accident. Several of his back teeth had already been replaced.

§ 3135(1) of the act. Accordingly, I would remand for entry of judgment in defendants' favor.

I. STANDARD OF REVIEW

Our review of a trial court's decision on a motion for summary disposition is de novo. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 423; 766 NW2d 878 (2009). Summary disposition under MCR 2.116(C)(10) should be granted where the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

II. SERIOUS IMPAIRMENT

MCL 500.3135(1) states in relevant part: "A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, *serious impairment of body function, or permanent serious disfigurement*." (Emphasis added.) "Serious impairment of body function" is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). It follows that to determine whether a person has suffered a serious impairment of an important body function, courts must consider whether a plaintiff is generally able to lead the normal life he or she led before the accident. *Kreiner v Fischer*, 471 Mich 109, 132-133; 683 NW2d 611 (2004). This analysis is highly plaintiff-specific: for example, a plaintiff who can no longer throw a baseball may or may not be "seriously impaired" depending on whether the plaintiff was a professional baseball player or "an accountant who likes to play catch with his son every once in a while." *Id.* at 134 n 19. The overall course of the specific plaintiff's "entire

normal life" before and after the accident must be compared because "[m]erely '*any* effect' on the plaintiff's life is insufficient because a de minim[is] effect would not, as objectively viewed, affect the plaintiff's 'general ability' to lead his life." *Id*. at 133 (emphasis in original). Accordingly,

> [i]n determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. [*Id.* at 132-133.]

Our Supreme Court has articulated a non-exhaustive list of objective factors to assist courts in evaluating whether a plaintiff's general ability to conduct his or her normal life has been affected. *Id*. at 133. Those factors include:

> (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. [*Id.*]

Turning to the facts of this case, it is my opinion that there is no genuine issue of material fact that plaintiff did not suffer a serious impairment of body function. Plaintiff *admitted* at his deposition that his injuries do not affect his ability to perform the normal tasks of daily life. No physicians or dentists have restricted his activities in any way. He remains employed as a machine operator at Textron Fasteners, the same job he held before the accident, and he conceded that the condition of his mouth did not affect his ability to

perform his job functions. He missed a couple days of work because of the dental work involved, but otherwise did not miss any work because of the accident. He takes no medication for pain. He continues to perform his usual household chores. He continues to engage in his favorite hobby: building home theatres. There is no effect on his usual social life. Plaintiff is able to eat as much as he did before the accident and his weight has remained constant. While plaintiff suffers some difficulty and discomfort in removing and replacing his new upper dentures,[3] the record is devoid of any indication that this affected his ability to conduct the course of his normal life.

Objectively viewed, and based on *plaintiff's own testimony*, there is no "difference between the plaintiff's pre- and post-accident lifestyle [that] has actually affected the plaintiff's 'general ability' to conduct the course of his life." *Id.* at 133.[4] On this record, the trial court clearly erred by denying defendants' motion for summary disposition.

III. PERMANENT SERIOUS DISFIGUREMENT

The record also demonstrates no genuine issue of material fact that plaintiff did not suffer a permanent serious disfigurement. With regard to determining whether an injury is a "permanent serious disfigurement" under § 3135(1), the disfigurement must, at

[3] At the time of his deposition, plaintiff had only had the denture for four months.

[4] The majority's attempts to favorably compare the facts of the instant case to *Caiger v Oakley*, 285 Mich App 389; 775 NW2d 828 (2009), is unavailing. In *Caiger*, as a result of injuries, the plaintiff lost his employment, continued to suffer chronic pain, remained medically restricted from continuing his trade, and was permanently prevented from engaging in his hobby of woodworking. Comparatively, the effect of plaintiff's injuries in this case is minuscule.

least, be severe. *Minter v Grand Rapids*, 275 Mich App 220, 228; 739 NW2d 108 (2007), rev'd in part 480 Mich 1182 (2008). The seriousness of a disfigurement "depends on its physical characteristics rather than its effect on [a] plaintiff's ability to live a normal life." *Nelson v Myers*, 146 Mich App 444, 446; 381 NW2d 407 (1985); *Minter*, *supra* at 228, 242-243. While the emotional impact of a disfigurement on a plaintiff is relevant, that subjective factor must be reviewed in an objective manner to determine whether the disfigurement is truly serious or severe. *Minter*, *supra* at 229; *Nelson*, *supra* at 446. A plaintiff's embarrassment or sensitivity about his or her appearance are subjective reactions to a condition that must be objectively judged by the trial court, and such reactions do not always create a question of fact. *Nelson*, *supra* at 446. And determining the seriousness[5] of a disfigurement is a matter of common knowledge and experience for the courts unless there is a question regarding the nature and extent of the disfigurement. MCL 500.3135(2)(a); *Kern v Blethen-Coluni*, 240 Mich App 333, 338; 612 NW2d 838 (2000); *Nelson*, *supra* at 444, 446.

Here, viewing the evidence in a light most favorable to plaintiff, he has suffered at most a permanent disfigurement:[6] he fractured one tooth and it was removed and replaced with an implant. Eventually, plain-

[5] Although MCL 500.3135(2) does not define "serious," it is defined in Black's Law Dictionary (5th ed) as "important; weighty; momentous; grave; great . . . ."

[6] I have assumed for sake of argument that plaintiff's condition is permanent. Black's Law Dictionary (5th ed) defines "permanent" as "[c]ontinuing or enduring in the same state . . . without fundamental or marked change, not subject to fluctuation . . . fixed . . . ." Here, plaintiff's disfigurement—his missing teeth—was remedied with a denture so that he no longer suffers from the disfigurement; in other words, the condition was fixable. Moreover, this disfigurement, as caused by the accident, was also not permanent in the sense that he would have had to

tiff also had to have the implant removed, along with additional front teeth, and replaced with a denture four to nine years earlier than he would have had to otherwise. While plaintiff is dissatisfied with his appearance when wearing his partial upper denture, an objective review of the physical characteristics of the disfigurement shows that plaintiff's condition is quite far from serious. Simply put, his missing teeth, and a subsequent use of a denture, do not rise to the level of a serious or severe disfigurement. This is because the disfigurement he has suffered has been fixed so that the impairment is no longer a deformity. In fact, photographs of plaintiff wearing his denture depict a normal-looking man with straighter-than-average front teeth.

Plaintiff complains of his appearance when wearing the denture. But even when objectively considering his subjective reaction, plaintiff's disfigurement cannot be considered serious. As noted, pictures of plaintiff depict a normal-looking man. Further, plaintiff conceded at his deposition that his denture looks better than his old teeth, and his friends have told him that his new teeth looked better than his originals. Thus, even by his own testimony, plaintiff does not suffer from a disfigurement severe enough to be considered "serious" within the meaning of § 3135(1). Defendants' motion for summary judgment should have been granted on this basis as well.

IV. CONCLUSION

The trial court erred in denying defendants summary disposition, and the majority now compounds that error. Particularly with respect to the issue of serious

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have the denture by the time he was 50 to 55 years old to remedy pre-existing conditions. Thus, the disfigurement as caused by the accident only lasted four to nine years.

impairment, the majority is clearly not happy with the requirements of *Kreiner*. However, until modified or changed by either the Legislature or our Supreme Court, it remains the law and this Court is required to apply it in an intellectually honest manner. I would reverse and remand for entry of judgment in defendants' favor.

PEOPLE v ROPER

Docket No. 285137. Submitted October 6, 2009, at Lansing. Decided October 22, 2009, at 9:10 a.m.

Andre A. Roper was convicted by a jury in the Washtenaw Circuit Court, Archie C. Brown, J., of second-degree murder. Defendant appealed, challenging both the weight and the sufficiency of the evidence and the court's decision to permit the prosecution to introduce evidence of specific acts of prior conduct by defendant for the purpose of showing defendant's aggressive character.

The Court of Appeals *held*:

1. There was sufficient evidence to establish that defendant had the requisite malice to convict him of second-degree murder. Malice may be inferred from defendant's use of a knife to stab the victim. Defendant's act of grabbing a knife, brandishing it, and then stepping up and swinging it at the victim at close range establishes that defendant intentionally set in motion a force likely to cause death or great bodily harm that was in obvious disregard of the life-endangering consequences. Defendant's intent may be inferred from the fact that, after he stabbed the victim, he followed the victim out of the trailer and began to kick and stomp on him while taunting him.

2. There was sufficient evidence from which the jury could conclude beyond a reasonable doubt that defendant did not in fact fear for his life or fear great bodily injury from the victim and therefore was not justified in using deadly force against the victim. The evidence was sufficient to rebut defendant's claim of self-defense.

3. Sufficient evidence was presented from which the jury could conclude that defendant was not provoked to the extent necessary to mitigate the homicide from murder to manslaughter.

4. The trial court did not abuse its discretion in determining that defendant's conviction was not against the great weight of the evidence. The trial court properly denied defendant's motion for a new trial.

5. A prosecutor may present rebuttal evidence concerning specific instances of conduct to prove a defendant's character,

notwithstanding the limitations imposed under MRE 405, when all the following are true: the defendant places his or her character at issue through testimony on direct examination; the prosecution cross-examines the defendant about specific instances of conduct tending to show that the defendant did not have the character trait he or she asserted on direct examination; the defendant denies the specific instances raised by the prosecution in whole or in part during the cross-examination; and the prosecution's rebuttal testimony is limited to contradicting the defendant's testimony on cross-examination.

6. Defendant clearly put his character for aggression at issue on direct examination. Defendant repeatedly denied the relevant conduct when the prosecution cross-examined defendant about specific instances of conduct that tended to show that he had an aggressive character. The prosecution therefore was properly allowed to call a rebuttal witness to testify about the specific instances denied by defendant on cross-examination.

7. The probative value of the rebuttal evidence was not substantially outweighed by the danger of unfair prejudice. The trial court's instruction to the jury that it should use the rebuttal evidence only when considering defendant's character for aggression or peacefulness adequately safeguarded defendant's rights.

Affirmed.

CRIMINAL LAW — EVIDENCE — CHARACTER EVIDENCE — REBUTTAL EVIDENCE — SPECIFIC INSTANCES OF CONDUCT.

A prosecutor may present rebuttal evidence concerning specific instances of conduct to prove a defendant's character, notwithstanding the limitations imposed under MRE 405, when all the following are true: the defendant places his or her character at issue through testimony on direct examination; the prosecution cross-examines the defendant about specific instances of conduct tending to show that the defendant did not have the character trait he or she asserted on direct examination; the defendant denies the specific instances raised by the prosecution in whole or in part during the cross-examination; and the prosecution's rebuttal evidence is limited to contradicting the defendant's testimony on cross-examination.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *David A. King*, Assistant Prosecuting Attorney, for the people.

Peter Ellenson for defendant.

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

PER CURIAM. Defendant appeals as of right his conviction by a jury of second-degree murder. MCL 750.317. The trial court sentenced defendant to serve 250 months to 720 months in prison for the conviction. On appeal, defendant challenges the sufficiency and the weight of the prosecutor's evidence and challenges the trial court's decision to permit the prosecutor to introduce evidence of specific acts of prior conduct by defendant for the purpose of showing defendant's aggressive character. We conclude that the jury's verdict was fully supported by the evidence. We also conclude that the prosecutor could properly cross-examine defendant about specific instances of conduct tending to show his aggressive character after defendant presented testimony tending to permit an inference that he could not have committed the charged crime because he had a character for peacefulness. Furthermore, once defendant unequivocally denied on cross-examination that he had committed the acts giving rise to an inference of aggressiveness, we conclude that the prosecutor could properly call rebuttal witnesses to testify about the specific instances that defendant denied. Because there were no errors warranting relief, we affirm.

I. BASIC FACTS

Defendant's conviction arises from the stabbing death of his roommate, Anthony Jones, in August 2007. At that time, defendant lived in a trailer with three other young men: Larry Farmer, Theodore Morrow, and Jones. The roommates were all friends and socialized together.

On the night at issue, Jones, Morrow, and defendant went to a nightclub that they often went to on Thursday nights. Farmer did not attend because he was in California. Morrow testified that when they arrived, they ordered drinks. However, when the bartender returned, defendant was gone. Morrow said that he and Jones ended up paying for defendant's drink. When defendant returned, Morrow said that he and Jones confronted defendant by telling him that they did not "appreciate him . . . not footing his part of the bill." Morrow said that defendant agreed to pay for the next round and then had his girlfriend, Chelsea Morris, actually pay for the next round.

Morrow stated that everything seemed normal on the drive home from the bar. When they got back to the trailer, Morrow took a beer from the refrigerator and sat down at the computer table in the living room area to play video games. Morrow testified that he called his girlfriend and asked her to come over. At some point after they got back, Jones again confronted defendant about the "situation" with the drinks. Morrow said that Jones also began to bring up other roommate issues such as food and drinks missing from the refrigerator. During the argument, Morrow said that he would state his agreement with Jones, but otherwise continued to play the video game.

Defendant testified that, when they got back to the trailer, Jones began to yell at him about the round of drinks back at the bar: " 'It wasn't cool you know. You know we don't have really money for that blah, blah, blah, you know.' " Defendant said that Morrow chimed in as well and would every so often agree and say " 'dude that wasn't cool.' " Defendant stated that Jones eventually got in his face and Morrow told him to " 'chill.' "

Morrow agreed that Jones got into defendant's face and at one point pushed defendant, who stumbled back into the computer table and spilled Morrow's beer. Morrow said he got some tissue, cleaned up the spill, and then returned to his video game. Morrow stated that defendant seemed surprised by the shove, but the argument continued with just words. Morrow testified that he did not take the argument too seriously. At some point, defendant and Jones moved into the adjacent kitchen area.

Defendant testified that Jones chest-bumped him and then pushed him into the computer table. At this point, defendant said he began to back into the kitchen and Jones approached him and punched him. Defendant said that he saw Jones with his shirt off and approaching again when defendant grabbed a knife from the kitchen counter. Defendant testified that Jones stopped at this point and said, " 'you going to grab a knife mother fucker, you pussy' or some shit like that." Defendant said that Jones then lunged his shoulders forward. Defendant testified that, at that point, he stepped up and swung the knife at Jones.

Morrow testified that he was playing his video game as defendant and Jones moved into the kitchen. He then heard what sounded like a noise from body-on-body contact or body-on-inanimate-object contact and heard Jones say, " 'what the fuck you're going to grab a knife.' " At that, Morrow turned toward the kitchen and saw Jones run toward the back of the trailer. Morrow said that there was blood everywhere and defendant was holding a knife.

Morrow immediately got up, pulled defendant's arms behind his back, and told him to drop the knife. Morrow said that defendant was very angry, but only lightly resisted his efforts. Morrow testified that, while he was

telling defendant to drop the knife, defendant was saying, "fuck that, fuck him." Morrow said defendant eventually dropped the knife, but not before Jones ran outside. Morrow stated that he let defendant go and then proceeded to call 911.

A 911 tape revealed that Jones also called 911 and told the operator that his roommate had stabbed him and that he was bleeding to death. At some point Jones fell to the ground and stopped speaking with the 911 operator.

Defendant testified that he was concerned about the severity of Jones's injury and went outside to see what he was doing. When defendant got outside he went up to Jones and began to kick him in the ribs. Defendant said he kicked him because he was still angry and told Jones "you shouldn't have fucked with me." Morrow testified that when he came out of the trailer he saw defendant kicking Jones and stating: " '[W]ho's tough now, you're not such a tough guy now are you.' " Morrow stated that he yelled at defendant to stop and that defendant eventually went to his car and drove quickly from the area. Defendant's angry tones were apparently audible on the recording of Jones's phone call to 911, which was still being recorded even after Jones stopped speaking.

Defendant's ex-girlfriend, Sarah Makela, testified that defendant called her about that time. She said that defendant was hysterical and asked for the phone number of her lawyer. She said that he told her that he "snapped," stabbed Jones, kicked him, stomped on his head, and left him on the ground "gurgling." She said that defendant explained that Jones kept pushing him, which she took to mean that Jones was in defendant's face about something.

Morrow and his girlfriend, who had just arrived, tried to assist Jones. Morrow's girlfriend testified that every time Morrow tried to perform CPR, Jones would cough up blood.

A medical examiner testified that Jones had suffered a single knife wound to his neck. The wound was on Jones's left side and proceeded downward more than three inches into Jones's neck. The knife severed Jones's external carotid artery and his throat. Jones bled extensively into his stomach, aspirated some blood, and died from acute loss of blood.

Defendant was arrested and eventually tried on a single charge of open murder. Defendant did not contest that he caused Jones's death by stabbing him. However, he asserted that it was justifiable as self-defense or, in the alternative, that he did so under circumstances that amounted to manslaughter rather than first- or second-degree murder. The jury rejected these defenses and returned a verdict of guilty on the charge of second-degree murder.

II. SUFFICIENCY AND WEIGHT OF THE EVIDENCE

A. STANDARD OF REVIEW

We shall first address defendant's challenges to the sufficiency and the weight of the evidence against him. In challenges to the sufficiency of the evidence, this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006).

In contrast to a challenge to the sufficiency of the evidence, a motion for a new trial based on a belief that

the verdict was against the great weight of the evidence does not implicate issues of constitutional magnitude and, for that reason, the decision to grant a new trial is committed to the discretion of the trial court. *People v Lemmon*, 456 Mich 625, 634 n 8; 576 NW2d 129 (1998). Accordingly, this Court reviews a trial court's decision on a motion regarding the great weight of the evidence for an abuse of discretion. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). A trial court abuses its discretion when it selects an outcome that is not within the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

B. MALICE

Defendant first contends that there was insufficient proof that he had the requisite malice to convict him of second-degree murder. In order to convict a defendant of second-degree murder, the prosecution must prove: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Malice may be "inferred from evidence that the defendant 'intentionally set in motion a force likely to cause death or great bodily harm.' " *Mayhew*, 236 Mich App at 125, quoting *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). "The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences." *Mayhew*, 236 Mich App at 125, citing *Goecke*, 457 Mich at 466.

At trial, Morrow testified that, after he heard some sound in the kitchen, he heard Jones exclaim, " 'what the fuck, you're going to grab a knife.' " Morrow turned to see Jones running away, holding his head and bleeding, while defendant stood holding a knife. Morrow restrained defendant because defendant was walking after Jones while still clutching the knife. Defendant stated, "fuck him you know I don't give a fuck." Morrow felt defendant resist him when Jones ran out the front door. Defendant only released the knife after Morrow demanded that he do so several times.

As Morrow called 911, defendant followed Jones outside and then proceeded to kick Jones while taunting him: "[W]ho's tough now, you're not such a tough guy now are you" and "mother fucker you think you can fuck with me[.]" Morrow stated that defendant appeared very angry. When Morrow told defendant to stop kicking Jones, defendant got in his car and drove away. Defendant then called his current girlfriend, Morris, and a former girlfriend, Makela, crying and hysterical, and told them that he "snapped" because Jones kept "pushing me and pushing and pushing." Despite his agitated state, however, defendant had the presence of mind to request the number of a lawyer, and he fell asleep soon after he killed Jones. The police located defendant during the following day leaving his counsel's office. Defendant informed the booking agent in the jail in an "everyday normal" manner that he had "just killed [his] best friend yesterday."

This evidence was sufficient to establish the requisite malice. Defendant admitted he had grabbed a knife and stabbed Jones. Malice may be inferred from defendant's use of a knife. *People v Carines*, 460 Mich 750, 760; 597 NW2d 130 (1999). Further, defendant's act of grabbing a knife, brandishing it, and then stepping up and

swinging it at Jones at close range establishes that defendant intentionally set in motion a force likely to cause death or great bodily harm that was in obvious disregard of the life-endangering consequences. *Mayhew*, 236 Mich App at 125. Moreover, defendant's intent may be inferred from the fact that, after he stabbed Jones, he followed Jones out of the trailer and began to kick and stomp on him while taunting him. See *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005) (noting that intent may be inferred from circumstantial evidence). Accordingly, there was sufficient evidence from which a jury could conclude that defendant had the requisite malice for second-degree murder.

C. SELF-DEFENSE AND MANSLAUGHTER

Defendant also argues that there was insufficient evidence to rebut his claim of self-defense or his mitigating circumstances defense.

At trial, defendant presented the defense of self-defense. "In Michigan, the killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990); see also MCL 780.972(1)(a) (providing that a person may use deadly force against another if the person "honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual"). "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

Defendant also presented a mitigation defense: he argued that his conduct only amounted to voluntary manslaughter. Voluntary manslaughter requires a showing that (1) defendant killed in the heat of passion, (2) this passion was caused by an adequate provocation, and (3) there was no lapse of time during which a reasonable person could have controlled his passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). "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"; that is, adequate provocation is "that which would cause the reasonable person to lose control." *Id.* at 389 (citations omitted).

There was sufficient evidence from which a jury could conclude beyond a reasonable doubt that defendant did not in fact fear for his life or fear great bodily injury at Jones's hands. There was evidence that Jones was not armed and that Jones's actions, although confrontational and physical, were not particularly violent. According to Morrow, the dispute did not appear to be so serious that he thought it would become a physical fight; indeed, he continued to play his computer game throughout the argument. Likewise, there was no evidence that defendant suffered a physical injury during the altercation with Jones; and, although he testified at trial that Jones had punched him, he did not tell either Makela or Morris that Jones punched him. At best, the evidence adduced at trial suggested that defendant believed Jones might continue to hit him. Furthermore, defendant did not indicate that he feared death or serious bodily injury during the fight or say to anyone he contacted immediately after the fight that he had such fear. Rather, he merely stated that Jones kept pushing him and pushing him and that he eventually "snapped."

Defendant points to the size differences between him and Jones in support of his self-defense claim. However, the jury was free to draw its own conclusions about this evidence or reject it outright. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Even if, as defendant contends, Jones punched defendant while they were in the kitchen, defendant was not permitted to immediately resort to the use of deadly force to defend himself. See *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993) (noting that, generally, a defendant is not entitled to use any more force than is necessary to defend himself or herself); MCL 780.972(1) and (2) (stating the conditions under which an individual is privileged to use deadly force or force other than deadly force). Instead of leaving the kitchen, punching Jones back, or requesting help from Morrow, defendant grabbed a knife and stabbed Jones with sufficient force to penetrate his neck by more than three inches. Moreover, the fact that defendant pursued Jones outside belies his claim that he feared for his life. On the basis of the evidence, a rational jury could conclude that defendant did not fear death or great bodily harm at Jones's hands and, therefore, was not justified in using deadly force against him.

Similarly, the prosecution presented sufficient evidence to establish that defendant's actions were not provoked to the extent necessary to mitigate the homicide from murder to manslaughter. What constitutes adequate provocation is usually a question of fact for the jury. *Pouncey*, 437 Mich at 391. The argument in this case was about minor issues occurring between roommates. Although there were some verbal exchanges, such exchanges are not usually sufficient to constitute adequate provocation. *Id.* Further, the physical dispute was apparently not significant enough to cause Morrow to be concerned and attempt to inter-

vene. On the basis of this evidence, a reasonable jury could conclude that defendant's alleged passion was not caused by provocation that would cause a reasonable person to lose control. *Id.* at 388. As our Supreme Court has explained, "[n]ot every hot-tempered individual who flies into a rage at the slightest insult can claim manslaughter." *Id.* at 389. On the basis of the evidence, the jury was free to reject defendant's claim that he acted in the heat of passion, and we will not second-guess that determination. *Wolfe*, 440 Mich at 514-515.

D. GREAT WEIGHT OF THE EVIDENCE

Defendant also argues that his conviction was against the great weight of the evidence. Specifically, defendant contends that the evidence clearly demonstrated that he either acted in self-defense or out of passion sufficient to mitigate his actions from murder to manslaughter. In order to warrant a new trial on the ground that a verdict is against the great weight of the evidence, the evidence presented at trial must preponderate so heavily against the verdict that "it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003). Conflicting testimony alone will not typically warrant reversal. Rather, where there is conflicting testimony, unless "it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id.* (citations omitted).

Defendant's arguments concerning the weight of the evidence largely mirror his claims about the sufficiency of the evidence. Defendant highlights the fact that Jones initiated the argument and pushed and hit him.

He also places emphasis on the evidence concerning the size difference between Jones and him, the evidence that he only stabbed Jones once, that he "snapped" and was crying hysterically after the stabbing, and that he had knowledge that Jones could be violent when drunk. However, none of this evidence impeached the evidence supporting the verdict to the extent that it was robbed of any probative value or contradicted the physical facts. *Id*. The size difference between them was not so significant that one had to conclude that defendant feared for his life or feared great bodily harm, and there was also evidence that defendant himself had an aggressive and violent character. Moreover, even though defendant argues that he was faced with a known raging, violent drunk, Morrow testified that no one was actually drunk, and Morrow's testimony was supported by the medical examiner's testimony. Conflicting testimony regarding Jones's level of intoxication does not create sufficient grounds for a new trial. *Lemmon*, 456 Mich at 642-643. Defendant's hysterical state was also not so extreme that he was prevented from obtaining the number for a lawyer and falling asleep soon after he killed Jones. Given these facts, we cannot conclude that the trial court abused its discretion when it determined that the jury's verdict must be left undisturbed. *Lueth*, 253 Mich App at 680.

III. CHARACTER EVIDENCE

A. STANDARD OF REVIEW

Defendant finally argues that the trial court erred when it permitted the prosecution to present evidence of specific acts by defendant for the purpose of showing that defendant had a violent and aggressive character. This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *Martin*, 271 Mich App at 315.

However, this Court reviews de novo whether a rule or statute precludes admission of evidence as a matter of law. *Id.* A trial court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

B. THE ADMISSION OF CHARACTER EVIDENCE

Relevant evidence is generally admissible. *Id.* at 355; MRE 402. However, although evidence of character might very well be relevant to a fact at issue, the rules of evidence strictly limit both the circumstances under which character evidence may be admitted and the types of character evidence that may be admitted. See *People v VanderVliet*, 444 Mich 52, 62; 508 NW2d 114 (1993) (noting that MRE 404 limits the admission of otherwise logically relevant evidence concerning character); MRE 405 (establishing the methods by which character may be proved). Such evidence is strictly limited because of its highly prejudicial nature; there is a significant danger that the jury will overestimate the probative value of the character evidence. *VanderVliet*, 444 Mich at 62 n 11, 63-64. Accordingly, MRE 404(a) prohibits the introduction of evidence concerning a person's character "for the purpose of proving action in conformity" with that character. Similarly, MRE 404(b)(1) prohibits the introduction of evidence concerning "other crimes, wrongs, or acts" in order to "prove the character of a person in order to show action in conformity therewith." Thus, a prosecutor may not normally call witnesses to testify about a defendant's character or present evidence of other acts performed by the defendant in order to show that the defendant has a particular character and that the defendant acted in conformity with his or her character with regard to the events at issue. MRE 404(a); MRE 404(b)(1).

Notwithstanding the general prohibition against the use of character evidence and other-acts evidence that may implicate character, there are circumstances under which it is proper to admit either direct character evidence or other-acts evidence that implicates character. Notably, MRE 404(b)(1) specifically recognizes that other-acts evidence may be admissible for a non-character purpose, such as to prove motive, intent, or identity, even though the same evidence might permit an inference about character. See *Yost*, 278 Mich App at 355 (stating that evidence that is inadmissible under one rule may nevertheless be admissible under another rule, but with a limiting instruction under MRE 105); *VanderVliet*, 444 Mich at 64-65 (noting that MRE 404 is not implicated by the admission of evidence for a purpose other than to establish action in conformity with character).

In addition to the admission of other-acts evidence for a purpose other than to prove character, the rules of evidence permit the admission of evidence to prove character under specific limited circumstances. See, e.g., MRE 404(a)(2) (permitting the introduction of evidence concerning an alleged homicide victim's character for aggression under limited circumstances); MRE 608(a) (permitting a party to demonstrate a witness's character for truthfulness or untruthfulness in the form of opinion or reputation testimony); MRE 609 (permitting a party to impeach the credibility of a witness through evidence that the witness has been convicted of a crime containing an element of dishonesty or false statement, or involving a certain type of theft). One important exception to the rule that character evidence is generally inadmissible to prove action in conformity with character is found under MRE 404(a)(1).

Under MRE 404(a)(1) a defendant may offer evidence that he or she has a character trait that makes it less likely that he or she committed the charged offense. But once a defendant chooses to present evidence of his or her character, the prosecutor may also present evidence concerning that same character trait to rebut the defendant's evidence. See MRE 404(a)(1) (stating that evidence of a pertinent character trait may be offered "by an accused, or by the prosecution to rebut the same"). With this background in mind, we now turn to the character evidence presented in this case.

C. DEFENDANT'S CHARACTER FOR PEACEFULNESS

In the present case, the prosecutor unsuccessfully moved for permission to call witnesses who would testify about specific instances where defendant engaged in violent conduct. The prosecution wanted to call defendant's ex-girlfriend, Makela, to testify about several instances where defendant drank and then attacked her under circumstances that suggested that defendant could be easily provoked to violence. Similarly, the prosecutor wanted to call witnesses to testify about an incident that took place in the bathroom of the trailer where defendant threatened them with a knife after drinking and engaging in horseplay. The prosecution argued that the evidence would be offered for a purpose other than to prove defendant's character consistent with MRE 404(b)(1). The trial court ultimately denied the motion and ordered the prosecutor to refrain from eliciting any testimony concerning these matters at trial. For that reason, the prosecutor did not present any other acts evidence during her case-in-chief.

At trial, defendant chose to testify on his own behalf. During his testimony, defendant described the events

leading up to the stabbing and suggested that he feared Jones. Toward the end of his direct examination, defendant's trial counsel inquired into defendant's state of mind when he stabbed Jones:

> *Q.* Okay. Two people have described—I'm sorry strike that. Two people have testified that in describing what happened that night to them you used the phrase quote I snapped, close quote. Do you agree with that?
>
> *A.* Yes, sir.
>
> *Q.* Tell us about it.
>
> *A.* To the point that where I was pushed so far that I, I did, I just snapped and you know I'm not the person that you know would want to do anything like that, especially to a friend. But he was continually verbally and physically pushing me, pushing me and pushing me and pushing me I just snapped.
>
> *Q.* Did you make a conscious decision to, to hurt Mr. Jones?
>
> *A.* Absolutely not.

After defendant's trial counsel finished his direct examination, the prosecutor got up and immediately began to question defendant about his character for aggression:

> *Q.* And so Anthony [Jones] was pushing you. He was asking you why didn't you pay for your bar tab. Why do you drink all of our stuff out of the refrigerator. Why don't you pay your way, wasn't he?
>
> *A.* Yes, ma'am.
>
> *Q.* And so you didn't like that, did he—did you?
>
> *A.* No, ma'am.
>
> *Q.* And he was doing that in front of Teddy [Morrow]?
>
> *A.* Yes, ma'am.
>
> *Q.* And Teddy was agreeing with him?

A. Yes, ma'am.

Q. And so he was verbally pushing you and you can only be pushed so far that's what you told Chelsea [Morris] and that's what you told Sarah Makela?

A. Yes, ma'am.

Q. And that's kind of what you do, right, when you're confronted with a situation that you don't like or where someone's, someone's verbally talking to you and saying things to you that you don't like that's how you react with violence, isn't it?

A. No, ma'am.

Q. No?

A. No, ma'am.

Q. Isn't that how you reacted against L.J., Larry Farmer?

When the prosecutor asked about the specific instance involving Farmer, defendant's trial counsel objected and noted that the trial court had prohibited this evidence from admission under MRE 404(b). The prosecutor responded that defendant had opened the door by introducing evidence of his peaceful character during his testimony on direct examination. For this reason, the prosecutor argued that she could now cross-examine defendant about specific instances of conduct tending to rebut defendant's character for peacefulness. The trial court agreed and permitted the prosecution to cross-examine defendant regarding the incident in the bathroom where defendant threatened others with a knife and regarding incidents of abuse involving his ex-girlfriend, Makela.

On appeal, defendant first argues that the trial court erred when it concluded that defendant put his own character at issue on direct examination. Defendant contends that his statement about what he "would 'not want to do' " did not place his character at issue. For

that reason, he further argues, the prosecutor could not present any character evidence.

When read in context, it is clear that defendant's testimony was not merely an expression of remorse about the stabbing. Defendant was specifically responding to a request by his attorney to describe how he "snapped." After this question, defendant stated that Jones kept pushing him and that this led to the stabbing. He explained: "[Y]ou know I'm not the person that you know would want to do anything like that, especially to a friend. But he was continually verbally and physically pushing me, pushing me and pushing me and pushing me [and] I just snapped." Thus, defendant very clearly stated that he was not the sort of person who would do "anything like that"—that is, who would resort to violence without provocation. Further, he stated that this was especially true with regard to friends. These statements are not equivocal. Defendant explicitly asserted that his actions during the fight were atypical of his character and invited the jury to conclude that he must have been severely provoked given that he did not have an aggressive or violent character. Because defendant placed his character for aggression or violence at issue on direct examination, the trial court did not err when it permitted the prosecutor to take steps to rebut defendant's assertion. MRE 404(a).

Defendant next argues that, even if he did "open the door" to the prosecutor's use of character evidence, the trial court nevertheless erred when it permitted the prosecutor to call a witness to testify about specific instances of conduct that reflected on defendant's character. Defendant argues that the prosecutor could properly cross-examine the character witness—in this case defendant himself—about specific instances, but could not call a rebuttal witness to testify about those specific

instances. Defendant contends that the prosecutor could only call a rebuttal witness to offer an opinion about defendant's character or to testify about his reputation.

MRE 405(a) governs the permissible methods for proving character in most cases: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct." Accordingly, a party's ability to present evidence of a person's character is quite limited; the party may only call witnesses to offer testimony concerning their personal opinion of that person's character or to testify about that person's reputation. Moreover, although MRE 405(a) permits "inquiry" into specific instances of conduct, it limits such inquiries to cross-examination. The limitation regarding specific instances of conduct stated in MRE 405(a) is in stark contrast to the permissive rule stated in MRE 405(b): "In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct." Given the differences between MRE 405(a) and MRE 405(b), the limitation in MRE 405(a) must be understood to prohibit the presentation of evidence regarding specific instances of conduct to prove character in any case except those covered under MRE 405(b). See, e.g., *People v Champion*, 411 Mich 468, 471; 307 NW2d 681 (1981).

After the trial court determined that defendant had put his character at issue, the prosecutor continued her cross-examination of defendant by setting the stage for inquiries into specific instances reflecting defendant's character for aggression and violence:

Q. When you're in a position, Mr. Roper, that someone's saying something that you don't like or they're acting in a way that you don't like you aren't opposed to reacting to them with violence, isn't that true?

A. No, I am opposed.

After this the prosecutor asked defendant about an instance where he, Farmer, and Morrow's brother were "shot-gunning" beers in the bathroom. The prosecutor asked defendant if he threatened Farmer and Morrow's brother with the knife they were using to puncture the cans of beer after Farmer and Morrow's brother made comments to defendant and engaged in physical horseplay. Defendant admitted the incident, but denied that he threatened Farmer and Morrow's brother. Instead, he characterized his actions as part of the horseplay.

The prosecutor next asked defendant about several instances of violence involving his ex-girlfriend, Makela. She asked about an incident where he allegedly threw Makela against a tree and repeatedly shoved her down and told her to "stay down bitch." She also inquired about an incident where Makela barricaded herself in her bedroom and defendant broke in and attacked her. She also asked about a time when defendant purportedly left a party with Makela and became agitated with her, dragged her by her throat to the car, and eventually got on top of her, slammed her head into the concrete, and threatened to kill her.

The prosecutor's inquiries into these specific instances of conduct while cross-examining defendant were well within the scope of that which is permissible under MRE 405(a). Each of the inquires involved events where defendant became agitated after relatively minor provocation and then resorted to threats of physical violence or actually engaged in physical violence. Thus, this line of cross-examination served the proper pur-

pose of testing defendant's assertion about his peaceful character by suggesting that defendant's character is actually the opposite—he is aggressive and easily provoked to violence. And had the prosecutor limited her inquiries into specific conduct to this line of questioning, there would be no question that the prosecutor acted appropriately. However, this was not the end of the evidence concerning these specific instances of defendant's conduct.

After the defense rested, the prosecutor called Makela as a rebuttal witness. During her rebuttal testimony, Makela testified in detail about each of the incidents, and her testimony portrayed the incidents in more violent and degrading terms than were suggested by the questions the prosecutor posed to defendant. Indeed, Makela testified that defendant broke her arm during one incident, and in another he tricked her into thinking that he was hurt and then grabbed her and smeared blood in her face. Thus, Makela's testimony strongly suggested that defendant had an aggressive character and that, when defendant had been drinking, he was very easily provoked into fits of violence.

This case did not involve a charge or defense where defendant's character was an essential element. Accordingly, the prosecutor could not present evidence of specific instances of conduct for the purpose of proving defendant's character under MRE 405(b). Likewise, under MRE 405(a), the prosecutor could inquire into specific instances of conduct through defendant's cross-examination, but normally would not be able to call a witness to prove character through testimony regarding specific instances of conduct. Our Supreme Court emphasized this latter point in *Champion*, 411 Mich at 471.

In *Champion*, the defendant called two witnesses who testified that the defendant had a good reputation

in the community for truthfulness and veracity and for being a peaceful and law-abiding citizen. *Id.* at 469. On cross-examination of these witnesses, the prosecutor did not inquire into the witnesses' knowledge about specific instances of misconduct in which the defendant may have engaged. *Id.* Rather, the prosecutor called a rebuttal witness to testify about the defendant's use and sale of drugs. *Id.* at 470. Our Supreme Court held that, under MRE 405(a), the prosecutor could have tested the witnesses' knowledge of the defendant by asking them on cross-examination about specific instances of the defendant's conduct, but could not call a rebuttal witness to testify directly about the specific instances of misconduct. *Champion*, 411 Mich at 470-471. Rather, the rebuttal witness could only testify with regard to reputation. *Id.* at 471. For that reason, our Supreme Court reversed the defendant's conviction and ordered a new trial. *Id.*

However, the facts in *Champion* are different from the facts in this case in several important ways. Although the defendant in *Champion* placed his character at issue, he did not do so through his own testimony. As a result, the prosecutor in *Champion* did not cross-examine the defendant about specific instances of conduct as permitted under MRE 405(a), which the prosecutor in this case did. Likewise, in this case, defendant undermined the prosecutor's efforts to challenge his assertion regarding his character for aggression. Defendant initially denied any memory of the incidents with Makela, then denied specific conduct, and eventually began to deny the incidents altogether:

> *Q.* So it's your testimony that what happened . . . that those things never happened?
>
> *A.* Not in that way, ma'am.

Q. Well originally you said that you didn't remember them happening. So did they remember—

A. I remember—

Q. —did they happen or did they not happen, let's start with that?

A. Well if she has statements that said they were there then I'm sure that I was there with her. But I'm not—I'm not going to agree if that's the way that everything happened.

Q. Well your original testimony was that you didn't remember.

A. I don't remember exactly all the details. But not—

Q. But that doesn't mean it didn't happen then, does it?

A. —but I would remember—I think I would remember if I would do something like that. And no ma'am, I did not.

Thus, unlike the situation in *Champion*, the prosecutor in this case was left with a situation where she could not rebut defendant's denials without calling a witness to testify about the specific instances of conduct that defendant denied. The trial court implicitly relied on this difference when it recognized that defendant's testimony on cross-examination altered the nature of the prosecutor's permissible proofs. Indeed, when discussing whether the prosecutor would be able to call a rebuttal witness regarding the incident where defendant purportedly threatened Farmer and Morrow's brother with a knife, the trial court noted that defendant had admitted that incident. On the basis of that the trial court indicated that the witness's testimony "would have to be limited at this point just to [defendant's] dispute at the end of his testimony." Specifically, the trial court stated that the testimony would have to be limited to testimony "[r]egarding the fact that [defendant] was not joking around. He was serious." Consequently, in order to properly decide this issue, we

must first determine whether Michigan law recognizes an exception to the permissible forms of inquiry into character under MRE 405(a) under facts such as those present here—that is, whether a prosecutor may elicit testimony through a rebuttal witness concerning specific instances of conduct where a defendant places his character at issue on direct examination and then denies the occurrence of specific instances of conduct on cross-examination. We conclude that our Supreme Court recognized such an exception in *People v Vasher*, 449 Mich 494; 537 NW2d 168 (1995).

The defendant in *Vasher* was charged with three counts of first-degree criminal sexual conduct after he allegedly sexually penetrated his four-year-old granddaughter and two other three-year-old girls. *Id.* at 496. The defendant testified in his own defense and denied having assaulted the children. *Id.* On direct examination, the defendant's trial counsel asked the defendant if he had at any time engaged in sexual activity with any of the children. *Id.* at 502. The defendant answered that he did not: " 'None whatsoever. I love those children like they are my own. They call me grandpa, Paw-Paw Frank, because they love me.' " *Id.* at 502. On cross-examination, the prosecutor questioned the defendant about his sexual philosophy. Specifically, the prosecutor asked whether the defendant had told the mother of one of the victims " 'that girls of thirteen should have sex with men in the family such as uncles, fathers, grandfathers so they know what sex is like, know what good sex is?' " *Id.* at 498. The defendant denied that he had ever said that. *Id.*

After the defendant denied having told the victim's mother that he thought it was proper for men in a family to initiate the girls in the family to sexual activity, the prosecutor called the girl's mother as a

rebuttal witness. *Id.* at 503. She testified that, with regard to having sex with children, the defendant told her that " 'the farmers and the Indians used to break the children, so that in later life they would know whether they got a fair deal or not.' " *Id.* Further, when the prosecutor asked her whether the defendant had told her that " 'it was the right and duty of fathers, grandfathers, uncles to instruct young females so they would know what good sex was?' " *Id.* at 503-504. She responded: " 'Exactly.' " *Id.* at 504.

Writing for the majority, Justice WEAVER noted that the Court of Appeals had determined that this line of questioning was an improper impeachment based on character. *Id.* at 502. Justice WEAVER disagreed that the questioning was improper; she explained that the defendant had placed his character for being a loving family man who would not consider molesting young girls at issue when he stated that he loved the children as his own and asserted that they referred to him as " 'Paw-Paw Frank.' " *Id.* at 502-503. Thus, she concluded, the prosecution could properly question the defendant about his peculiar sexual philosophy under MRE 404(a)(1). Justice WEAVER then turned to the propriety of the prosecution's rebuttal witness.

In examining whether it was proper for the prosecutor to offer extrinsic evidence to impeach the defendant, Justice WEAVER noted that the general rule is that a witness may not be contradicted regarding collateral matters. *Id.* at 504. However, she concluded that the rebuttal testimony was not on a collateral matter:

> Here, the rebuttal evidence was narrowly focused on refuting defendant's denial that he had told Ms. Culkar about his belief that it was acceptable for family members to initiate young girls into sexual activity. This in turn was in direct response to defendant's testimony on direct examination in which he stated that he had not had sexual

> activity with the young girls because "I love those children like they are my own. They call me grandpa, Paw-Paw Frank, because they love me." Because this was a matter so closely bearing on defendant's guilt or innocence, it was not error for the prosecutor to have impeached defendant. [*Id.*]

Further, Justice WEAVER stated that it was not error for the prosecutor to have waited to present this evidence until the rebuttal phase of the trial. *Id.* at 504-505. She noted that where rebuttal testimony is "a simple contradiction of the defendant's testimony that directly tended to disprove the exact testimony given by the witness, it was proper rebuttal testimony." *Id.* at 505. Because the rebuttal testimony was not on a collateral matter and was limited to directly contradicting the defendant's denial, it was proper. *Id.* at 506.

Although the majority opinion did not frame the issue as an exception to the limitations on character evidence imposed by MRE 405, as was recognized by the dissenting justices, the majority opinion effectively creates an exception to the general rule that a party may not prove character through evidence of specific instances of conduct. Writing for the three dissenting justices, Justice CAVANAGH stated that he was suspicious of the conclusion that the defendant had placed his character at issue. *Id.* at 507. Nevertheless, even assuming that the defendant had put his character at issue, he stated that MRE 405 limited the form of the prosecutor's rebuttal. *Id.* at 507. Thus, he concluded, the only evidence that the prosecution could have presented on rebuttal was opinion or reputation evidence. *Id.* at 507-508. Justice CAVANAGH lamented that the majority's holding ignored MRE 405(a) and longstanding precedent: "With no discussion or analysis, the majority cavalierly casts aside over seventy years of this Court's precedent along with the Rules of Evidence by holding that specific instances of conduct may be used on

rebuttal to establish character." *Id.* at 509. Instead, he stated that he would have concluded that the prosecutor "was bound by the defendant's answer that he never told anyone that children should have sex with their male relatives, because this was a collateral matter, and a witness may not be impeached with extrinsic evidence on collateral matters." *Id.* at 512.

Under the majority's holding in *Vasher*, a prosecutor may present rebuttal evidence concerning specific instances of conduct to prove a defendant's character, notwithstanding the limitations imposed under MRE 405, when all the following are true: (1) the defendant places his or her character at issue through testimony on direct examination; (2) the prosecution cross-examines the defendant about specific instances of conduct tending to show that the defendant did not have the character trait he or she asserted on direct examination; (3) the defendant denies the specific instances raised by the prosecution in whole or in part during the cross-examination; and (4) the prosecution's rebuttal testimony is limited to contradicting the defendant's testimony on cross-examination. *Vasher*, 449 Mich at 504-506.

In this case, defendant clearly put his character for aggression at issue on direct examination. He effectively invited the jury to conclude that he must have suffered adequate provocation because he was not the type of person who would want to hurt people—especially friends. Further, when the prosecutor cross-examined defendant about specific instances of conduct that tended to show that he had an aggressive character, defendant repeatedly denied the relevant conduct. Therefore, the prosecutor could properly call Makela to testify about the specific instances denied by defendant on cross-examination. *Id.*

D. MRE 403

Defendant also argues that the prosecutor's rebuttal testimony concerning specific instances of defendant's conduct was highly prejudicial and should have been excluded under MRE 403. Otherwise relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. In this case, the rebuttal testimony was highly probative of defendant's character for aggression. Further, although there is always a risk that the jury will give character evidence undue weight or use it for an improper purpose, see *VanderVliet*, 444 Mich at 72-73, we do not agree that the probative value of the evidence was "substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. Finally, we find it noteworthy that, consistently with MRE 105, the trial court instructed the jury that it could only use the evidence concerning the incident in the bathroom and the incidents with Makela when considering defendant's character for aggression or peacefulness:

> You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime or you must find him not guilty.

We believe that this instruction properly safeguarded defendant's rights. *VanderVliet*, 444 Mich at 74-75.

IV. CONCLUSION

The evidence adequately supported the jury's verdict, and the verdict was not against the great weight of

the evidence. Moreover, the trial court did not err when it concluded that defendant had placed his character for aggression at issue and did not err when it permitted the prosecutor to call a rebuttal witness to testify concerning the specific instances of conduct denied by defendant on cross-examination. We also reject defendant's contention that the prosecutor engaged in misconduct by cross-examining defendant about the specific instances of conduct and calling a rebuttal witness to contradict defendant's denials. The prosecutor's questions and decision to call a rebuttal witness were proper.

There were no errors warranting relief.

Affirmed.

In re PETITION OF THE WAYNE COUNTY TREASURER FOR FORECLOSURE

Docket No. 282995. Submitted October 13, 2009, at Detroit. Decided October 27, 2009, at 9:05 a.m.

The Wayne County Treasurer petitioned the Wayne Circuit Court for the entry of a judgment of foreclosure against property owned by the Prayer Temple of Love. The property had been forfeited to the petitioner as a result of delinquent property taxes, including delinquent water and sewerage charges. The Prayer Temple objected to the entry of a judgment of foreclosure and petitioned to set aside the past forfeiture, asserting that the property was used for religious purposes and was therefore exempt from property taxes and also that it simply could not afford to pay the water and sewerage assessments. The court, Mary Beth Kelly, J., agreed with the Prayer Temple's claim that the property was exempt from the assessed taxes, except the delinquent water and sewerage levies. The court concluded that because the Treasurer had not contested the Prayer Temple's inability to pay the water and sewerage levies, those delinquencies should be included in the next year's forfeiture and foreclosure proceeding if they remained unpaid. The court entered an order denying the petition for foreclosure and setting aside the past forfeiture. The Treasurer appealed, alleging that the circuit court lacked jurisdiction to determine the tax-exempt status of the property and that the Tax Tribunal had exclusive jurisdiction to determine the tax-exempt status of the property.

The Court of Appeals *held*:

Resolving the question regarding the parcel's exemption status involves the kind of factual issues that require the Tax Tribunal's expertise and is simply a direct challenge to a tax assessment per se. It therefore falls squarely within the Tax Tribunal's exclusive jurisdiction under MCL 205.731(a). The Tax Tribunal provides the exclusive forum to determine whether the property is exempt from property tax. The circuit court lacked jurisdiction to declare the property exempt from property tax. The order setting aside the

forfeiture and dismissing the petition for foreclosure must be reversed and the case must be remanded to the circuit court for further proceedings.

Reversed and remanded.

TAXATION — TAX TRIBUNAL — JURISDICTION — ASSESSMENTS — EXEMPTIONS.

The Tax Tribunal has exclusive and original jurisdiction over proceedings for review of agency actions relating to property tax assessments; a direct challenge to the validity of a tax assessment that is based on a claim that the property is exempt from property tax falls within the Tax Tribunal's exclusive jurisdiction (MCL 205.731[a]).

Edward M. Thomas, Corporation Counsel, and *Richard G. Stanley,* Assistant Corporation Counsel, for the Wayne County Treasurer.

Before: DAVIS, P.J., and WHITBECK and SHAPIRO, JJ.

DAVIS, P.J. The Wayne County Treasurer appeals as of right a circuit court order denying the Treasurer's petition for tax foreclosure against property owned by Prayer Temple of Love and setting aside a prior forfeiture against the same property. We reverse and remand.

The Prayer Temple owns a parcel of property on Woodward Avenue in the city of Highland Park in Wayne County. The parcel has a single tax assessment identity, but it contains three lots on which a church, an activity center, and an outreach center are located. The Treasurer assessed taxes against the Prayer Temple's property for the year 2004, and that assessment apparently included delinquent water and sewerage charges. In 2006, the Treasurer commenced the instant foreclosure action under the General Property Tax Act (GPTA), MCL 211.1 *et seq*. The Prayer Temple raised a number of objections to entry of a foreclosure judgment, and it petitioned to set aside the past forfeiture. Among other arguments, the Prayer Temple asserted that the

property was used for religious purposes and was therefore exempt from property taxes,[1] and that it simply could not afford to pay the assessments. The circuit court agreed that the property was exempt from the assessed taxes, other than the delinquent water and sewerage levies. The circuit court also concluded that, because the Treasurer had not contested the Prayer Temple's inability to pay, the delinquent water and sewerage levies should be included in the next year's forfeiture and foreclosure proceeding if they remained unpaid.

The only issue we have been asked to address in this appeal is whether the circuit court possessed subject-matter jurisdiction to decide whether the Prayer Temple's property was exempt. The Treasurer argues, as it did below, that the Michigan Tax Tribunal has exclusive jurisdiction. We agree.

We review this issue de novo because it concerns the circuit court's subject-matter jurisdiction to determine exemption issues in a foreclosure action under the GPTA. *In re Petition by Wayne Co Treasurer for Foreclosure of Certain Lands for Unpaid Prop Taxes*, 265 Mich App 285, 290; 698 NW2d 879 (2005). In general, "circuit courts are presumed to have subject-matter jurisdiction unless jurisdiction is expressly prohibited or given to another court by constitution or statute." *Id.* at 291. The Tax Tribunal Act, MCL 205.701 *et seq*.,

[1] Pursuant to MCL 211.7s,

> [h]ouses of public worship, with the land on which they stand, the furniture therein and all rights in the pews, and any parsonage owned by a religious society of this state and occupied as a parsonage are exempt from taxation under [the General Property Tax Act]. Houses of public worship includes buildings or other facilities owned by a religious society and used predominantly for religious services or for teaching the religious truths and beliefs of the society.

grants the Tax Tribunal exclusive jurisdiction to decide various property tax matters based on "either the subject matter of the proceeding (*e.g.*, a direct review of a final decision of an agency relating to special assessments under property tax laws) or the type of relief requested (*i.e.*, a refund or redetermination of a tax under the property tax laws)." *Wikman v City of Novi*, 413 Mich 617, 631; 322 NW2d 103 (1982). The Tax Tribunal has jurisdiction under MCL 205.731(a) to determine whether a taxpayer is entitled to a property tax exemption because the determination relates to an assessment. See *American Golf of Detroit v Huntington Woods*, 225 Mich App 226, 229; 570 NW2d 469 (1997); *Nicholson v Birmingham Bd of Review*, 191 Mich App 237, 240-241; 477 NW2d 492 (1991).

The Tax Tribunal has exclusive and original jurisdiction over proceedings for review of agency actions relating to property tax assessments. MCL 205.731(a). However, the circuit court is the proper forum for a foreclosure action.[2] MCL 211.78h. And in any such foreclosure action, a person claiming an interest in a tax parcel "set forth in the petition for foreclosure" is expressly permitted to "contest the validity or correctness of the forfeited unpaid delinquent taxes" on the ground that the "property was exempt from the tax in question, or the tax was not legally levied." MCL 211.78k(2)(c). The provisions of the Tax Tribunal Act "are effective notwithstanding the provisions of any statute, charter, or law to the contrary." MCL 205.707. Nevertheless, statutes sharing a common purpose must be read in pari materia and we must give every word or

[2] We note that forfeiture is not the same as foreclosure. Pursuant to MCL 211.78g(1), property is forfeited to the county treasurer on March 1 of each tax year for certain delinquent taxes, but a subsequent foreclosure judgment is necessary for the county treasurer to obtain possession.

phrase in them some meaning while avoiding conflict, if at all possible. See *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). The circuit court is not, therefore, entirely without jurisdiction to entertain arguments against forfeiture that are based on a claimed tax exemption.

Critically, the nature of arguments against forfeiture is limited. "The need to preserve the tribunal's exclusive jurisdiction is especially great where . . . factual issues requiring the tribunal's expertise are present." *Michigan Consolidated Gas Co v China Twp*, 114 Mich App 399, 403; 319 NW2d 565 (1982). Its "membership is well-qualified to resolve the disputes concerning those matters that the Legislature has placed within its jurisdiction: assessments, valuations, rates, allocation and equalization." *Romulus City Treasurer v Wayne Co Drain Comm'r*, 413 Mich 728, 737; 322 NW2d 152 (1982). The Tax Tribunal has no jurisdiction to hold statutes invalid or to consider constitutional matters; only the circuit court may do so. *WPW Acquisition Co v City of Troy (On Remand)*, 254 Mich App 6, 8; 656 NW2d 881 (2002). Thus, if a challenge to a tax assessment rests solely on an argument that the tax assessment was made under authority of an illegal statute, the circuit court would have jurisdiction over the matter. But merely phrasing a claim in constitutional terms will not divest the Tax Tribunal of its exclusive jurisdiction. *Wikman*, *supra* at 647. Here, the Prayer Temple's argument is not that the tax was assessed pursuant to an illegal statute, but rather that the factual circumstances make the tax assessment illegal under unchallenged statutes.

Where a forfeiture challenge does not require any findings of fact, but rather only construction of law—where no factual issues requiring the tribunal's exper-

tise are present—the circuit court has jurisdiction to consider the issue. *Joy Mgt Co v Detroit*, 176 Mich App 722, 728; 440 NW2d 654 (1989), overruled in part on other grounds by *Detroit v Walker*, 445 Mich 682, 697 n 20 (1994). However, *Joy Mgt Co* addressed only a challenge to the method used to enforce payment of a tax assessment. We conclude that the same reasoning applies to any challenge to a tax assessment based not on the validity of the assessment per se, but on peripheral issues relevant to enforcing a tax assessment. Here, however, the Prayer Temple's challenge is directly to the validity of the tax assessment itself.

The Prayer Temple specifically argues that the property tax assessment is invalid because the "houses of public worship" exception, MCL 211.7s, applies. The basis for the property tax assessment in this case was the Prayer Temple's outreach center, which had been leased to a private party at least until 2003. The Treasurer argues that the outreach center falls outside the "houses of public worship" exception in MCL 211.7s.[3] Under the circumstances, we find that resolving this challenge—to a parcel's exemption status—involves the kind of factual issues that require the Tax Tribunal's expertise, and it is simply a direct challenge to a tax assessment per se. It therefore falls squarely within the Tax Tribunal's exclusive jurisdiction. Similar to the Court in *State Treasurer v Eaton*, 92 Mich App 327; 284 NW2d 801 (1979), we conclude that the Tax Tribunal provides the exclusive forum to determine whether the property is exempt from property tax.[4] See

[3] Nothing in this opinion is intended to express any view regarding whether MCL 211.7s does apply.

[4] For proceedings commenced before January 1, 2007, a taxpayer invoked the Tax Tribunal's jurisdiction by filing an appeal, after a proper protest before the local board of review, as provided in MCL 205.735 (subsequently MCL 205.735a). *Simmons Airlines, Inc v Negaunee Twp*,

Simmons Airlines, Inc v Negaunee Twp, 192 Mich App 456, 460-462; 481 NW2d 760 (1992).

This matter is a direct challenge to a tax bill and thus within the Tax Tribunal's jurisdiction. *Grosse Ile Comm for Legal Taxation v Grosse Ile Twp*, 129 Mich App 477, 486; 342 NW2d 582 (1983). As a matter of law, the circuit court lacked jurisdiction to declare the parcel exempt from property tax. The parties briefed other issues, but they are unnecessary for us to address in light of our above analysis and the parties' assertions at oral argument that they have become moot. We therefore express no opinion regarding any other matter raised by the parties below or in their briefs on appeal.

The trial court's order setting aside the forfeiture and dismissing the petition for foreclosure is reversed, and the case is remanded to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction.

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192 Mich App 456; 481 NW2d 760 (1992); see also *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 542-543; 656 NW2d 215 (2002).

DELTA ENGINEERED PLASTICS, LLC v
AUTOLIGN MANUFACTURING GROUP, INC

MOON ROOF CORPORATION OF AMERICA v
AUTOLIGN MANUFACTURING GROUP, INC

PROTO-PLASTICS, INC v AUTOLIGN MANUFACTURING
GROUP, INC

Docket Nos. 283786, 283787, and 283788. Submitted July 14, 2009, at Detroit. Decided October 27, 2009, at 9:10 a.m.

Proto-Plastics, Inc., brought an action in the Monroe Circuit Court against Autolign Manufacturing Group, Inc., seeking monetary and injunctive relief as a result of Autolign's failure to pay for plastic parts that Proto-Plastics produced for Autolign using plastic injection molds owned by Autolign. Proto-Plastics also asserted a statutory lien on the molds in its possession from which it had produced the parts, under the molder's lien act, MCL 445.611 *et seq*. Delta Engineered Plastics, LLC, and Moon Roof Corporation of America, shortly thereafter, brought separate similar actions in the circuit court against Autolign, seeking the same remedies. Although the three lawsuits were never officially consolidated, the trial court, Joseph A. Costello, Jr., J., effectively treated the matters as consolidated cases. Upon learning that Wamco 34, Ltd., was a lender to Autolign and asserted a first-priority lien and security interest with regard to substantially all Autolign's assets, all the parties stipulated the addition of Wamco as an intervening defendant. Wamco then filed countercomplaints for claim and delivery, seeking possession of the molds and permission to sell them and apply the proceeds to Autolign's indebtedness to Wamco. The court eventually ruled that Wamco established that it was a secured creditor with a security interest that had priority over plaintiffs' possessory interest in the molds. The court ordered that Wamco have possession of the molds and authorized Wamco to sell them. The Court of Appeals denied plaintiffs' claims of appeal and applications for leave to appeal the trial court's order in unpublished orders, because the order granting Wamco relief was not a final order. After the trial court entered final consent judgments in favor of plaintiffs and against Autolign, plaintiffs appealed and their appeals were consolidated.

The Court of Appeals *held*:

Pursuant to the Uniform Commercial Code, MCL 440.9333(2), plaintiffs' possessory liens provided for under the molder's lien act, MCL 445.618, have priority unless the molder's lien act provides otherwise. There is no express provision in the molder's lien act stating that an interest such as Wamco's has absolute, unequivocal priority over possessory liens such as plaintiffs' liens. Therefore, plaintiffs' possessory liens were entitled to priority over Wamco's interest in the molds. The trial court's order granting declaratory relief in favor of Wamco and possession of the molds and authority to sell them must be reversed and the cases must be remanded to the trial court for a determination of plaintiffs' damages and appropriate remedies.

Reversed and remanded.

LIENS — UNIFORM COMMERCIAL CODE — MOLDER'S LIENS — SECURITY INTERESTS.

The Uniform Commercial Code provides that a possessory lien on goods has priority over a security interest in the goods unless the possessory lien is created by a statute that expressly provides otherwise; the molder's lien act does not expressly provide that a possessory lien on any die, mold, or form in a molder's possession provided for under the act does not have priority over a security interest in any die, mold, or form (MCL 440.9333[2], 445.618).

Schafer and Weiner, PLLC (by *Daniel J. Weiner, Joseph K. Grekin,* and *Ryan Heilman*), for Proto-Plastics, Inc., Delta Engineered Plastics, LLC, and Moon Roof Corporation of America.

Plunkett Cooney (by *Douglas C. Bernstein* and *Kristen M. Netschke*) for Wamco 34, Ltd.

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

SERVITTO, J. Plaintiffs appeal as of right the trial court's order granting declaratory relief in favor of intervening defendant, Wamco 34, Ltd. (Wamco), and additionally granting Wamco possession of and authorization to sell plastic injection molds on the basis of the trial court's determination that Wamco had a priority interest in the molds. We reverse and remand.

Plaintiffs are in the plastic injection molding business. Defendant Autolign Manufacturing Group, Inc. (Autolign), is a plastic injection molder that produced parts for use in the automotive industry. Apparently, there was a fire at Autolign's business in late December 2006 or early January 2007, and Autolign was unable to continue producing parts. Autolign subcontracted its work, requesting that plaintiffs produce parts using molds owned by Autolign, and agreeing that Autolign would pay plaintiffs for the parts produced. Autolign delivered the various molds to plaintiffs and plaintiffs produced the parts. Autolign, however, failed to pay for all the parts produced. In April 2007, Autolign entirely ceased its operations.

Plaintiff Proto-Plastics, Inc., brought an action against Autolign claiming an account stated/open account, breach of the parties' contracts, and that Autolign was unjustly enriched by Proto-Plastics' manufacture and delivery of parts without payment from Autolign. Proto-Plastics also asserted a statutory lien on the molds in its possession, from which it produced the parts, under the molder's lien act, MCL 445.611 *et seq*. Proto-Plastics sought both monetary damages and injunctive relief. Plaintiffs Delta Engineered Plastics, LLC, and Moon Roof Corporation of America, shortly thereafter, filed similar complaints against Autolign. Although the three lawsuits were never officially consolidated, the trial court effectively treated the matters as consolidated cases.

Upon learning that Wamco was a lender to Autolign, and asserted a first-priority lien and security interest in substantially all Autolign's assets, all parties stipulated the addition of Wamco as an intervening defendant. Wamco filed countercomplaints in all three cases for claim and delivery, contending that plaintiffs were in

possession of molds that represented a portion of Autolign's assets used to secure repayment of its debt to Wamco, and that the molds were now Wamco's property. Wamco also sought a declaration that its interest in the molds, and its right to the proceeds from the sale of the same, was superior to the interests/rights of the plaintiffs. Wamco asked the trial court's permission to take possession of the molds, to sell the molds, and to apply the proceeds to Autolign's indebtedness to Wamco.

Wamco moved, in all three cases, for a declaration that it was entitled to the above-described relief. The trial court ruled that Wamco had established that it was a secured creditor of Autolign, and that Wamco's security interest had priority over the plaintiffs' possessory interest in the molds. The trial court ordered that Wamco was entitled to possess and to liquidate the molds.

Plaintiffs sought to appeal the above ruling in this Court, but the claims of appeal were dismissed for lack of jurisdiction, because the trial court's order granting Wamco's motion was not a final order, appealable as of right, unpublished orders of the Court of Appeals, entered August 1, 2007 (Docket Nos. 279621, 279622, and 279623). This Court also denied plaintiffs' applications for leave to appeal, unpublished orders of the Court of Appeals, entered August 9, 2007 (Docket Nos. 279781, 279783, and 279786). After the trial court entered final consent judgments in favor of plaintiffs and against Autolign, these consolidated appeals, as of right, followed.

Although it was not termed as such, Wamco's motion before the trial court was essentially a motion for summary disposition. Wamco requested that the trial court grant all the relief requested in its countercom-

plaints and resolve all issues in favor of Wamco. After reviewing the pleadings and other relevant evidence, the trial court granted Wamco all its requested relief. Accordingly, we will review this matter as a grant of summary disposition in favor of Wamco, pursuant to MCR 2.116 (C)(10).

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered, in a light most favorable to the nonmoving party, when reviewing a motion brought under MCR 2.116(C)(10). *Id*. at 626.

The instant matters also involve issues of statutory interpretation, which we review de novo on appeal. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). In determining the meaning of a statute, the following rule applies:

> "The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. Statutory language should be construed reasonably, keeping in mind the purpose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate." [*Gateplex Molded Products, Inc v Collins & Aikman Plastics, Inc*, 260 Mich App 722, 726; 681 NW2d 1 (2004), quoting *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997) (citations omitted).]

Ownership rights in dies, molds, and forms is addressed in MCL 445.611 *et seq*. This act, 1981 PA 155, effective January 1, 1982, provides at MCL 445.618:

> A molder has a lien, dependent on possession, on any die, mold, or form in the molder's possession belonging to a customer for the amount due the molder from the customer for plastic fabrication work performed with the die, mold, or form. A molder may retain possession of the die, mold, or form until the amount due is paid.

There is no dispute that plaintiffs are molders, that they had possession of Autolign's molds, that they performed plastic fabrication work with the molds, and that Autolign failed to pay plaintiffs for their completed work. According to the above statutory provision, plaintiffs had a possessory lien on the molds until the amount due for their plastic fabrication work was paid.

In addition, there is no apparent dispute that Wamco also had an interest in the molds by virtue of a continuing collateral mortgage and a security agreement granting liens upon Autolign's real property and assets, and the assignment of all rights, title, and interest to the same to Wamco, executed in 2005. The essential issue in the instant cases concerns the interplay between the molder's lien act and the Uniform Commercial Code (UCC). This Court must determine whether the plaintiffs held the superior interest in the molds or the proceeds from the sale of the molds under the molder's lien act, or whether Wamco's UCC security interest had priority. There is no existing caselaw on the molder's lien act and this precise issue. The instant cases thus appear to present an issue of first impression in Michigan.

The parties agree that the Legislature set forth the UCC's lien priority scheme at MCL 440.9333, and that this statute is applicable to the instant cases. The statute provides:

> (1) As used in this section, "possessory lien" means an interest, other than a security interest or an agricultural lien, that meets all of the following:
>
> (a) It secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business.
>
> (b) It is created by statute or rule of law in favor of the person.
>
> (c) Its effectiveness depends on the person's possession of the goods.
>
> (2) *A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise*. [Emphasis added.]

The comment to this section states:

> 2. **"Possessory Liens."** This section governs the relative priority of security interests arising under this Article and "possessory liens," i.e., common-law and statutory liens whose effectiveness depends on the lienor's possession of goods with respect to which the lienor provided services or furnished materials in the ordinary course of its business. As under former Section 9-310, the possessory lien has priority over a security interest unless the possessory lien is created by a statute that expressly provides otherwise. If the statute creating the possessory lien is silent as to its priority relative to a security interest, this section provides a rule of interpretation that the possessory lien takes priority, even if the statute has been construed judicially to make the possessory lien subordinate.

It was the purpose of the UCC to prefer a service lien, common law or statutory, where the service provider retained possession of the goods, over a perfected security interest, except where the lien is statutory and the statute expressly provides otherwise. See, e.g., *Nickell v Lambrecht*, 29 Mich App 191; 185 NW2d 155 (1970).

Plaintiffs accurately state that pursuant to MCL 440.9333, their possessory liens provided for under the

molder's lien act have priority unless the molder's lien act expressly provides otherwise. According to plaintiffs, because the molder's lien act does not expressly grant priority to any other interest, their liens are first in priority.

Wamco argues, however, that the molder's lien act specifically grants priority to holders of prior liens, such as itself. Wamco contends that the Legislature intended molder's liens to be inferior to the interests of a secured creditor. Wamco relies on the Molder's Lien Act at MCL 445.618d(1):

> If the sale is for a sum greater than the amount of the lien, *the proceeds shall first be paid to the prior lienholder who has a perfected lien in an amount sufficient to extinguish that interest*. Any excess shall next be paid to the molder who possesses a lien under this act in an amount sufficient to extinguish that interest. Any remainder shall then be paid to the customer. [Emphasis added.]

Wamco contends that because, according to the plain language of the above statute, the proceeds from the sale of molds are first paid to satisfy a prior claim of a holder of a perfected lien, a secured creditor such as itself has the priority interest.

However, the statutes preceding MCL 445.618d(1) must be considered in order to provide context and to give meaning to all the statutory provisions. MCL 445.618, as previously quoted, sets forth the molder's right to a lien on a mold. Before a molder can enforce a lien afforded pursuant to MCL 445.618, MCL 445.618a requires written notice of the claim of lien be provided to the customer. MCL 445.618b goes on to provide that if the molder has not been paid the amount due within 90 days after the notice was received by the customer, the molder may sell the mold at public auction, if the molder still possesses the

mold and if the molder has complied with MCL 445.618c. MCL 445.618c(1) provides, in relevant part:

> Before a molder may sell the die, mold, or form, the molder shall notify, by registered mail, return receipt requested, the customer *and any person whose security interest is perfected by filing*. [Emphasis added.]

It is only then that we look to MCL 445.618d, which refers to "the sale" by a *molder* in possession of a mold, seeking to recover the amount due the molder from a customer for plastic fabrication work performed using the mold. If read in context, MCL 445.618d provides that if the sale of a mold by a molder with a possessory lien is for a sum greater than the amount due the holder of the possessory lien, the proceeds from the mold's sale shall first be paid to a holder of a prior perfected lien in an amount sufficient to extinguish the interest of the holder of the prior perfected lien. Once the interest of the holder of the perfected lien is extinguished, any remaining funds shall be paid to the molder who possesses a lien pursuant to the molder's lien act, in an amount sufficient to extinguish the lien.

We conclude that MCL 445.618d only applies if a molder sells the mold, and only if the sale is for a sum greater than the amount due to the molder for the unpaid product. In the situation before us, however, MCL 445.618d was not triggered. Instead, Wamco took possession of the molds, pursuant to the trial court's order, and apparently sold the molds. Accordingly, MCL 445.618d is inapplicable to the present facts and can provide no basis for Wamco's claim of priority.

Moreover, while Wamco urges this Court to interpret MCL 445.618d as providing that Wamco's security interest has priority over plaintiffs' possessory liens, the molder's lien act that created the possessory lien does not "expressly" provide the same. Once again,

MCL 440.9333(2) clearly states, "A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that *expressly* provides otherwise." (Emphasis added.) In the instant matters, the possessory molders' liens are created by statute, however, the provision in the molder's lien act relied on by Wamco simply sets forth the distribution of any proceeds following *the sale of a mold by a molder*. As noted in *Gateplex Molded Products*, *supra* at 727, "MCL 445.618d [of the molder's lien act] discusses the distribution of the sale proceeds upon the sale of the mold, including giving the excess of the proceeds to the customer." Because MCL 440.9333(2) is controlling, and there is no express provision in the molder's lien act stating that an interest such as Wamco's has absolute, unequivocal priority over possessory liens such as plaintiffs', plaintiffs' possessory liens were entitled to priority over Wamco's interest in the molds.

The parties spend a considerable amount of time debating whether there is a distinction between a lien and a security interest for purposes of their statutory interpretations. Specifically, plaintiffs assert that even if MCL 445.618d were to be interpreted as Wamco contends (i.e., placing the interest of a holder of a prior perfected lien in a priority position over the interest of a holder of a possessory lien), Wamco was still not entitled to its requested relief because Wamco was not a lienholder, as specified in MCL 445.618d. According to plaintiffs, because Wamco's interest was created by a security agreement, its interest was a security interest—which is distinct from a lien. Wamco responds that the distinction makes no difference in this case because, either way, it was entitled to priority.

Because we decline to read MCL 445.618d as "expressly" stating that the interest of a holder of a prior

perfected lien is superior to that of the holder of a possessory lien, we need not determine whether Wamco's interest in the molds was a security interest or a lien, or whether there is a distinction between the two under the relevant statutes. There is no need to address any distinction because Wamco relies entirely on MCL 445.618d as the basis for its claim to priority.

Reversed and remanded to the trial court for a determination of plaintiffs' damages and appropriate remedies. Plaintiffs, being the prevailing parties, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

In re JONES

Docket No. 290194. Submitted August 5, 2009, at Grand Rapids. Decided October 27, 2009, at 9:15 a.m.

The Department of Human Services petitioned the Kent Circuit Court, Family Division, for an order terminating the parental rights of Jasmine J. McCoy and Michael A. Jones, Sr., to their minor child. The court, Daniel V. Zemaitis, J., entered an order terminating McCoy's parental rights pursuant to MCL 712A.19b(3)(*l*), which states that the court may terminate a parent's parental rights if it finds by clear and convincing evidence that the "parent's rights to another child were terminated as a result of proceedings under [MCL 712A.2(b)] or a similar law of another state." McCoy appealed.

The Court of Appeals *held*:

1. The trial court erred by basing its termination order on MCL 712A.19(3)(*l*) because, although McCoy's parental rights to another child had been terminated previously, the termination was not as a result of proceedings under MCL 712A.2(b) of the juvenile code but was a voluntary termination under the Adoption Code, MCL 710.21 *et seq*., that occurred after proceedings under MCL 712A.2(b) had been initiated to terminate McCoy's parental rights to that child. The error was harmless, however, because termination of McCoy's parental rights under MCL 712A.19b(3)(m) was fully justified. That statute provides that parental rights may be terminated where the "parent's rights to another child were voluntarily terminated following the initiation of proceedings under [MCL 712A.2(b)] or a similar law of another state."

2. The trial court did not clearly err by determining that termination of McCoy's parental rights was in the child's best interests.

Affirmed.

Lori L. Canfield for Jasmine Jouvaughn McCoy.

Before: OWENS, P.J., and TALBOT and GLEICHER, JJ.

OWENS, P.J. Respondent mother, Jasmine McCoy, appeals as of right the trial court's order terminating her parental rights to her minor son pursuant to MCL 712A.19b(3)(*l*). We affirm.

Respondent does not formally challenge that sufficient evidence supported the grounds for termination, but nevertheless asserts her unwillingness to concede that a statutory basis for termination exists. Although respondent has failed to properly bring this issue to our attention and has not briefed its merits, we elect to consider it because the record is factually sufficient. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 632; 673 NW2d 111 (2003).

We first consider the statutory ground found by the trial court to warrant termination of respondent's parental rights to her son. The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(*l*), which states: "The parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter or a similar law of another state." While it is true that respondent's parental rights to her daughter were previously terminated, the termination was not "as a result of proceedings under section 2(b) of this chapter . . . ." Proceedings under MCL 712A.2(b) had been initiated regarding respondent's daughter, respondent's daughter had been made a temporary ward of the court following adjudication, and a supplemental petition seeking termination of respondent's and the father's parental rights was filed. Facing possible involuntary termination of their rights as requested in that petition, respondent and the father instead voluntarily released the child to the Department of Human Services under the Michigan Adoption Code, MCL 710.21 *et seq*., on June 20, 2007. Their rights were then terminated under the Adoption

Code and their daughter was committed to the Department of Human Services, all on June 20, 2007. Following that termination, the court on July 3, 2007, attempted to again terminate their rights to their daughter, make the child a permanent ward of the court, and commit the child to the Department of Human Services, this time under the Michigan juvenile code, MCL 712A.1 *et seq*., giving as the legal reason the parents' voluntary release of their parental rights to her under the Adoption Code. That attempted termination under the juvenile code was without effect and was clearly improper, because the parents no longer possessed any parental rights that could be terminated. Their parental rights had previously been terminated under the Adoption Code, a completely separate statutory proceeding from a termination under the juvenile code. Once a parent voluntarily releases his or her child to the Department of Human Services or to a child placement agency under the Adoption Code, and the release is accepted by the court, and the court enters an order terminating that parent's rights to the child, that parent no longer has any parental rights subject to termination under the juvenile code.

In the case before us, respondent's parental rights to her son were terminated under MCL 712A.19b(3)(*l*), which only applies to a prior involuntary termination under the Michigan juvenile code or a similar law of another state. It does not apply to a voluntary termination under the Adoption Code. Because respondent's parental rights to her daughter were terminated voluntarily under the Adoption Code and because the subsequent attempted termination of her rights under the juvenile code was invalid and of no effect, the court clearly erred by terminating respondent's parental rights to her son under MCL 712A.19b(3)(*l*).

However, the court's error was harmless because termination was fully justified under MCL 712A.19b(3)(m), which states: "The parent's rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of this chapter or a similar law of another state." The same judge had terminated respondent's parental rights to her prior child following the voluntary release of those rights under the Adoption Code, which release followed the initiation of proceedings under § 2(b) of the juvenile code. Because a court may take judicial notice of its own files and records, it is without question that termination of respondent's parental rights to her son would be fully justified under MCL 712A.19b(3)(m).

Respondent argues that termination of her parental rights was clearly not in the child's best interests. Under MCL 712A.19b(5), as amended by 2008 PA 199, effective July 11, 2008, once the court finds that a statutory ground for termination has been established, it shall order termination of parental rights if it finds "that termination of parental rights is in the child's best interests[.]" We review the trial court's best interests decision for clear error. MCR 3.977(J); *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003).

Although there was evidence that respondent took some positive steps to address issues concerning anger and emotional control by attending anger management and other classes, a psychological evaluation revealed that respondent had not resolved those issues. Testimony also revealed that respondent failed to display appropriate parenting during parenting time, and that she continued to involve herself in situations of domestic violence. Because the child was removed from respondent's custody shortly after birth and was less than five months old at the time of the termination hearing,

respondent had not established a relationship with him. In light of this evidence, the trial court did not clearly err by determining that termination of respondent's parental rights was in the child's best interests.

Respondent also argues that the trial court improperly allowed Susan Blackburn, a program director at a foster care agency, to offer an opinion regarding the risk that a person infected with HIV (human immunodeficiency virus) could transmit it to another person. We disagree.

A trial court's evidentiary rulings in a child protection proceeding are reviewed for an abuse of discretion. *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008). "An abuse of discretion occurs when the trial court chooses an outcome that falls 'outside the range of principled outcomes.' " *Id.*, quoting *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). The relevancy and admissibility of evidence depends on the purpose for which it is offered. See *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000), and *People v Hackett*, 421 Mich 338, 362-363; 365 NW2d 120 (1984) (opinion by KAVANAGH, J.). Here, the testimony was permitted only to explain the basis for the witness's concerns about respondent's conduct of kissing the child on the mouth and "somewhat sucking on his bottom lip," which the witness believed could expose the child to "germs" and, if there were a "sore or something" in the mouths of both the child and respondent, could create a risk of HIV transmission. Furthermore, the trial court specifically indicated that it did not rely on the witness's testimony for a medical basis regarding the risk of HIV transmission, and instead only considered the testimony in light of "what's in the marketplace about this particular problem." Considering the limited purpose for which the testimony was

permitted and considered, the trial court did not abuse its discretion by allowing it.

Whether there was evidence to support the trial court's later finding that HIV is "transmitted by bodily fluids, one of which is significant kissing," presents a distinct question. The court's earlier statement that it was considering Blackburn's testimony in light of "what's in the marketplace about this particular problem" suggests a form of judicial notice. See MRE 201(b). We find it unnecessary to consider the basis for the trial court's finding, however, because it is clear from its best interests decision that any error with respect to this limited matter was harmless. MCR 2.613(A); *In re Utrera*, *supra* at 21. The record discloses that the trial court considered several factors in its assessment of the child's best interests, including respondent's past history, her unfavorable psychological evaluation, her inappropriate parenting techniques during parenting time, her continued involvement with domestic violence, and the young age of the child.

Affirmed.

In re GEROR

Docket No. 283527. Submitted July 16, 2009, at Detroit. Decided August 6, 2009. Approved for publication November 3, 2009, at 9:00 a.m.

Jennifer L. Geror, a developmentally disabled person, petitioned the Genesee County Probate Court for the recovery of attorney fees from Farm Bureau General Insurance Company of Michigan, the no-fault insurer liable to pay benefits in connection with the accident that caused her injuries. The court, Jennie E. Barkey, J., ordered Farm Bureau to pay petitioner's attorney fees, and Farm Bureau appealed.

The Court of Appeals *held*:

1. Under MCL 700.1303(1)(*i*), a probate court has jurisdiction to hear a contract action brought by a ward. Because petitioner's mother was appointed as her guardian, the probate court had jurisdiction to hear petitioner's action arising out of the insurance contract with Farm Bureau and to award attorney fees.

2. MCL 500.3107(1)(a), part of the no-fault act, provides for the payment of expenses incurred for the reasonably necessary services for an injured person's care. In this case, petitioner's father alleged that the actions of her guardian had negatively affected petitioner's health. Acting as petitioner's attorney, Craig L. Wright investigated, sought assessment by a medical professional, reviewed the medical professional's reports, and attended depositions. Wright's ultimate task was to investigate the facts and determine whether petitioner was receiving the necessary care and represent her interests in a dispute over who would provide her future care. His legal services were directly related to petitioner's care, and his attorney fees were allowable under MCL 500.3107(1)(a).

Affirmed.

GUARDIAN AND WARD — CONTRACTS — PROBATE COURT — JURISDICTION OF PROBATE COURT — DEVELOPMENTALLY DISABLED PERSONS.

A probate court has jurisdiction under MCL 700.1303(1)(*i*) to hear a dispute between a ward and an insurer arising out of an action on an insurance contract and to award attorney fees.

Wright and Metcalf, Attorneys at Law P.C. (by *Craig L. Wright* and *Jason A. Metcalf*), for Jennifer L. Geror.

Willingham & Coté, P.C. (by *John A. Yeager* and *Leon J. Letter*), for Farm Bureau General Insurance Company of Michigan.

Before: SAAD, C.J., and SAWYER and BORRELLO, JJ.

PER CURIAM. Farm Bureau General Insurance Company of Michigan appeals the probate court's order that required Farm Bureau to pay petitioner's attorney fees. We affirm.

Respondent argues that the probate court lacked jurisdiction to order Farm Bureau to pay the petitioner's attorney fees. We disagree.

Subject matter jurisdiction is a legal issue that we review de novo on appeal. *In re Haque*, 237 Mich App 295, 299; 602 NW2d 622 (1999). "Probate courts are courts of limited jurisdiction. Const 1963, art 6, § 15. The jurisdiction of the probate court is defined entirely by statute." *In re Wirsing*, 456 Mich 467, 472; 573 NW2d 51 (1998). "[T]he Mental Health Code provides that, except in the case of minors, a guardian for a developmentally disabled person may be made pursuant only to chapter 6 of the Mental Health Code, [MCL 330.1600 *et seq.*]." *In re Neal*, 230 Mich App 723, 727; 584 NW2d 654 (1998), citing MCL 330.1604(2).

Respondent argues that MCL 330.1615, the section of the Mental Health Code pertaining to attorney fees, contains no provision that grants the probate court the authority to order payment of attorney fees by third parties like respondent. However, we conclude that this statute does not control the issue.

While it is true that appointment of a guardian for a developmentally disabled person must be done pursuant to the Mental Health Code, *Neal*, *supra* at 727, the issue here is attorney fees arising from an action on an insurance contract. And this Court found that question to be within the probate court's jurisdiction in *In re Shields Estate*, 254 Mich App 367; 656 NW2d 853 (2002). The Court explained:

> Under MCL 700.1303(1)(i), the probate court has jurisdiction to "[h]ear and decide a contract proceeding or action by or against an estate, trust, or *ward*." The statute imposes no limits on the types of contract actions and, further, the Legislature explained in MCL 700.1303(3) that the purpose of the statute was to simplify the disposition of actions involving estates. . . . Accordingly, the probate court had jurisdiction to decide this case. [*Id.* at 369 (emphasis added).]

This reasoning applies here because, according to MCL 700.1108(a), as used in the Estates and Protected Individuals Code, " 'ward' means an individual for whom a guardian is appointed." Petitioner is a developmentally disabled person and her mother, Laurie Geror, was appointed petitioner's guardian. Therefore, petitioner is a ward, and the probate court had jurisdiction under MCL 700.1303(1)(*i*) to hear her contract dispute with respondent and to award attorney fees.

Defendant also contends that the attorney fees of petitioner's attorney, Craig L. Wright, are not "allowable expenses" under the no-fault act, MCL 500.3101 *et seq*. We disagree.

Determining what is an allowable expense under the no-fault act is a question of law, reviewed de novo. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005). " 'The no-fault insurance act is remedial in nature and must be liber-

ally construed in favor of persons intended to benefit thereby.' " *Gauntlett v Auto-Owners Ins Co*, 242 Mich App 172, 179; 617 NW2d 735 (2000) (citations omitted). "[S]ubject to the other provisions of the act, 'an insurer is liable to pay [personal protection insurance] benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle . . . .' " *Sprague v Farmers Ins Exch*, 251 Mich App 260, 266; 650 NW2d 374 (2002), quoting MCL 500.3105(1). These personal protection insurance benefits " 'are payable only for "[a]llowable expenses." [MCL 500.3107] defines allowable expenses as "consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." ' " *Sprague*, *supra* at 267 (citations omitted).

This Court has previously ruled that expenses associated with both guardianship and other services can be allowable expenses. In *Heinz v Auto Club Ins Ass'n*, 214 Mich App 195, 197-198; 543 NW2d 4 (1995), this Court held that "the no-fault act is not limited strictly to the payment of medical expenses" and, furthermore, that MCL 500.3107(1)(a) "provides for the payment of expenses incurred for the reasonably necessary services for an injured person's care." Though *Heinz* framed the issue as a question whether services are reasonably necessary for an injured person's care, respondent cites several cases that specifically address the recovery of expenses by guardians. Here the probate court observed that Wright was not seeking to recover fees as a guardian, but, rather, as an attorney who provided legal services directly to petitioner, the injured individual.

The question, therefore, is whether, pursuant to *Heinz*, Wright's legal services were "reasonably necessary services for an injured person's care." *Id.* at 198.

Costs for "room and board, attendant care, modifying vehicles for paralyzed individuals, rental expenses, and similar costs have been found by this Court to be reasonably necessary expenses under [MCL 500.3107(1)(a)]." *Hamilton v AAA Michigan*, 248 Mich App 535, 545; 639 NW2d 837 (2001).

In the case at bar, Lawrence Geror, petitioner's father, filed three emergency petitions claiming that petitioner's health had been negatively affected by the actions of Laurie Geror, her guardian. Wright, acting as petitioner's attorney, visited petitioner's home, and while petitioner appeared to be healthy and receiving adequate care, Wright determined that a medical professional should assess the situation. The nurse subsequently assigned to the case produced several reports, which Wright reviewed in order to make recommendations for petitioner's care. In preparation for the hearing on guardianship, Wright also attended depositions of the medical professionals who testified regarding whether petitioner's needs were being met.

Wright's ultimate task was to investigate the facts and determine whether petitioner was receiving the necessary care, as well as represent her interests in a dispute over who, ultimately, would provide her future care. Wright's legal services were directly related to petitioner's care, and therefore Wright's attorney fees are allowable expenses pursuant to MCL 500.3107(1)(a).

Affirmed.

PEOPLE v DIPIAZZA

Docket No. 284946. Submitted August 24, 2009, at Grand Rapids. Decided November 3, 2009, at 9:05 a.m.

Robert L. Dipiazza was adjudicated in the Muskegon Circuit Court, Timothy G. Hicks, J., under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*., for attempted third-degree criminal sexual conduct, MCL 750.92, 750.520d(1)(a), on August 29, 2004, with regard to a consensual sexual relationship defendant had with his 15-year-old girlfriend when he was 18 years old. He was sentenced to probation and required to register as a sex offender under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. He successfully completed his probation on November 18, 2005, and, under the terms of HYTA, his case was dismissed and he has no conviction on his record, but he continued to be required to register as a sex offender. On January 25, 2008, defendant petitioned to have his name removed from the sex offender registry or, in the alternative, have the period that he was required to register reduced from 25 to 10 years. The trial court denied the request to have defendant's name removed from the registry but granted the request to reduce his period of registration to 10 years. Defendant appealed by leave granted.

The Court of Appeals *held*:

1. The determination whether legislation provides punishment, for purposes of the prohibition against cruel or unusual punishment, requires consideration of the totality of the circumstances and particularly legislative intent, the design of the legislation, the historical treatment of analogous measures, and the effects of the legislation.

2. The Legislature's intent in enacting SORA with its nonpublic registry was not to chastise, deter, or discipline an offender, but rather to assist law enforcement officers and the people of Michigan in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. This intent was somewhat frustrated when SORA was amended in 1999 to create the public sex offender registry that is available to everyone. Therefore, SORA was again amended in 2004 to provide that a person who is "convicted" no longer included an offender assigned

to youthful trainee status if the assignment occurred after October 1, 2004, unless such status was revoked or an adjudication of guilt was entered. It is incongruous that a teen who engaged in consensual sex and is assigned youthful trainee status after October 1, 2004, was not considered dangerous enough to require registration, but a teen such as defendant who was assigned such status before October 1, 2004, is required to register. The implied purpose of SORA is not served by this requirement.

3. The design of HYTA is that an individual assigned to youthful trainee status shall not suffer a civil disability or loss of right or privilege except to the extent that the individual is required to register pursuant to SORA. Therefore, the registration requirement results in a disability as well as a loss of a right or privilege suffered by defendant.

4. There is no historical antecedent that relates to requiring a defendant to register as a sex offender when the defendant was a teenager engaged in consensual sex and the defendant was assigned to a youthful trainee status after October 1, 1995, when HYTA first required an individual assigned to youthful trainee status to register under SORA, but before October 1, 2004, when the registration requirement was amended.

5. Defendant suffered financial and emotional consequences as a result of being required to register as a sex offender. Given the totality of the circumstances, the registration requirement of SORA, as applied to defendant, constituted punishment.

6. Determining whether a punishment is cruel or unusual requires consideration of the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties for other crimes in this state, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation.

7. The penalty in this case was very harsh although the offense was not very grave.

8. Defendant would not have had to register had he been assigned to youthful trainee status one month later but was required in this case to register along with rapists and pedophiles, and the sex offender registry does not provide a description of an offender's offense to help determine the seriousness of the offense and the threat posed by the offender.

9. States vary widely in how they prosecute consensual teen sex.

10. The registration requirement, as applied to defendant, was excessive and punitive because the registration was not tied to a finding that the safety of the public was threatened.

11. There was no goal of rehabilitation in this case. Requiring defendant to register as a sex offender for 10 years was cruel or unusual punishment that violates Const 1963, art 1, § 16. The order of the trial court must be vacated and the case must be remanded for the entry of an order consistent with the Court of Appeals opinion.

Vacated and remanded.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Tony Tague*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

Legal Aid of Western Michigan (by *Miriam Aukerman* and *Kristin Hanratty*) for defendant.

Amici Curiae:

Christine A. Pagac, *Michael J. Steinberg*, and *Kary L. Moss* for the American Civil Liberties Union Fund of Michigan, the Jacob Wetterling Resource Center, Stop It Now!, the Association for the Treatment of Sexual Abusers, and the Professional Advisory Board to the Coalition for a Useful Registry.

Richard B. Ginsberg for the Criminal Defense Attorneys of Michigan.

Before: SERVITTO, P.J., and FITZGERALD and BANDSTRA, JJ.

FITZGERALD, J. Defendant appeals by leave granted the April 1, 2008, order denying his request to have his name removed from the sex offender registry, but granting his request to reduce his period of registration under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, to 10 years. We vacate the order and remand.

I. FACTS AND PROCEDURAL HISTORY

In 2004, when defendant was 18 years old, he had a consensual sexual relationship with NT, who was nearly 15 years old.[1] NT's teacher discovered a photograph of defendant and NT in bed together and defendant's hand was on NT's breast. The teacher informed the prosecuting attorney.

Defendant was adjudicated under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*, for attempted third-degree criminal sexual conduct (CSC), MCL 750.92, MCL 750.520d(1)(a), on August 29, 2004, and was sentenced to probation. Defendant also was required to register as a sex offender. Defendant successfully completed his probation on November 18, 2005, and, under the terms of HYTA, his case was dismissed and he has no conviction on his record. However, defendant continues to remain required to register as a sex offender.

On January 25, 2008, defendant petitioned the trial court asking that his name be removed from the sex offender registry because the requirement to register, as it applies to him, violates the Cruel or Unusual Punishment Clause of the Michigan Constitution, Const 1963, art 1, § 16. In the alternative, defendant requested that the period that he is required to register as a sex offender be reduced from 25 years to 10 years. Defendant argued that, because he was adjudicated under HYTA and successfully completed his probation, he does not have a conviction and so requiring him to register as a sex offender wrongfully identifies him as one who has been convicted of a sex crime. He further

[1] The consensual nature of the sexual relationship is not in dispute. Defendant and NT married in April 2009 and their first child was due in June 2009.

argued that requiring him to register on the public registry is cruel or unusual punishment because it harms his economic livelihood. Defendant also mentioned that, because of amendments to SORA that became effective on October 1, 2004, had he been convicted only six weeks later he would not have had to register on the public registry.[2]

At the hearing on defendant's petition, the trial court stated, "if I had some discretion yours is one of those Romeo and Juliet cases where I would probably grant your relief." However, finding its decision dictated by the holding in *In re Ayres*, 239 Mich App 8; 608 NW2d 132 (1999), on April 1, 2008, the trial court denied defendant's request to have his name removed from the sex offender registry, but granted defendant's request to reduce his period of registration under SORA to 10 years.

II. BACKGROUND

A. HOLMES YOUTHFUL TRAINEE ACT

HYTA is essentially a juvenile diversion program for criminal defendants under the age of 21. Under the act,

> if an individual pleads guilty to a criminal offense, committed on or after the individual's seventeenth birthday but before his or her twenty-first birthday, the court of record having jurisdiction of the criminal offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee. [MCL 762.11(1).]

An assignment to youthful trainee status does not constitute a conviction of a crime unless the court revokes the defendant's status as a youthful trainee.

[2] There are two databases, one accessible only by law enforcement and one accessible by the public.

MCL 762.12. If the defendant's status is not revoked and the defendant successfully completes his or her assignment as a youthful trainee, the court "shall discharge the individual and dismiss the proceedings." MCL 762.14(1). A defendant assigned to the status of youthful trainee "shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee." MCL 762.14(2). "Unless the court enters a judgment of conviction against the individual for the criminal offense . . . , all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection . . . ." MCL 762.14(4).

Before 1995, various forms of MCL 762.14 existed, none of which required a person assigned to youthful trainee status to register as a sex offender. However, effective October 1, 1995, MCL 762.14 provided that "[a]n individual assigned to youthful trainee status for a listed offense enumerated in section 2 of the sex offenders registration act is required to comply with the requirements of that act." MCL 762.14(3).

B. THE SEX OFFENDERS REGISTRATION ACT

In 1994, Michigan adopted the Sex Offenders Registration Act.[3] SORA, as first enacted, made registry information confidential and closed to inspection except for law enforcement purposes. Thus, effective October 1, 1995, an offender assigned to youthful trainee status had to register as a sex offender under SORA, but the registry was not public. As of September 1, 1999, however, SORA was amended to create the public sex offender registry (PSOR), which can be accessed by

[3] 1994 PA 286, 287, 294, and 355.

anyone through the Internet. The PSOR provides names, aliases, addresses, physical descriptions, birth dates, photographs, and specific offenses for all convicted sex offenders in the state of Michigan. MCL 28.728(4)(a).

Effective October 1, 2004, the definition of "convicted" in SORA was amended to include:

> (A) Being assigned to youthful trainee status under sections 11 to 15 of chapter II of the code of criminal procedure, 1927 PA 175, MCL 762.11 to 762.15, *before October 1, 2004.*
>
> (B) Being assigned to youthful trainee status under sections 11 to 15 of chapter II of the code of criminal procedure, 1927 PA 175, MCL 762.11 to 762.15, *on or after October 1, 2004 if the individual's status of youthful trainee is revoked and an adjudication of guilt is entered.*[4]

Thus, as of October 1, 2004, "convicted" no longer included being assigned to youthful trainee status if the assignment occurred after October 1, 2004, unless such status was revoked or an adjudication of guilt was entered. Because defendant was assigned to youthful trainee status on August 29, 2004, he was considered "convicted" of attempted third-degree CSC for purposes of registering as a sex offender. See *People v Rahilly*, 247 Mich App 108, 115; 635 NW2d 227 (2001) ("[W]hile MCL 762.14(2) provides that the assignment of an individual to youthful trainee status does not result in a conviction, for purposes of the SORA, assignment to youthful trainee status, in fact, constitutes a conviction.").

III. ANALYSIS

Defendant argues that because he was adjudicated under HYTA he has no conviction under that act and,

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[4] MCL 28.722(a)(*ii*), as amended by 2004 PA 240 (emphasis added).

therefore, labeling him as a convicted sex offender on the PSOR violates the Cruel or Unusual Punishment Clause of the Michigan Constitution. This Court reviews constitutional questions de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

A. DO THE REGISTRATION AND NOTIFICATION REQUIREMENTS OF SORA IMPOSE PUNISHMENT ON DEFENDANT?

In *In re Ayres*, this Court had to determine whether requiring juveniles who had been convicted of certain specified sex offenses to register as sex offenders violated Michigan's prohibition against cruel or unusual punishment. This Court first recited the applicable general rules:

> Statutes are presumed to be constitutional, and the courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. The party challenging a statute has the burden of proving its invalidity. [*Ayres, supra* at 10 (citations omitted).]

This Court found instructive "two recent federal court decisions that have held that the registration and notification requirements of Michigan's Sex Offenders Registration Act, as applied to adult offenders, do not impose 'punishment' under the Eighth Amendment of the United States Constitution." *Id.* at 14. This Court quoted *Doe v Kelley*, 961 F Supp 1105, 1109 (WD Mich, 1997):

> "On its face, the notification scheme is purely regulatory or remedial. It imposes no requirement on the registered offender, inflicts no suffering, disability or restraint. It does nothing more than create a mechanism for easier public access to compiled information that is otherwise available to the public only through arduous research in criminal court files." [*Ayres, supra* at 15.]

This Court also quoted the following language from *Lanni v Engler*, 994 F Supp 849, 854 (ED Mich, 1998):

> "Dissemination of information about a person's criminal involvement has always held the potential for negative repercussions for those involved. However, public notification in and of itself has never been regarded as punishment when done in furtherance of a legitimate government interest. . . . The registration and notification requirements can be more closely analogized to quarantine notices when public health is endangered by individuals with infectious diseases. . . . Whenever notification is directed to a risk posed by individuals in the community, those individuals can expect to experience some embarrassment and isolation. Nonetheless, it is generally recognized that the state is well within its rights to issue such warnings and the negative effects are not regarded as punishment." [*Ayres, supra* at 18.]

But this Court observed in *Ayres* that

> the portion of the act that was the primary focus of constitutional scrutiny in *Kelley* and *Lanni*—the public notification provision—is obviously not at issue in the present case because respondent, a juvenile offender, is expressly exempted from this section of the act. As previously noted, registration information pertaining to juveniles not charged as adults is confidential and is to be used only by law enforcement personnel. MCL 28.728(2); MSA 4.475(8)(2), MCL 28.730(2), (3); MSA 4.475(10)(2), (3). Consequently, respondent cannot complain that the "sting of notification," *Lanni*, *supra* at 854, subjects him to undue public ostracism that confounds the purpose of the Juvenile Code. [*People v Poindexter*, 138 Mich App 322; 361 NW2d 346 (1984)].
>
> Indeed, in our view, the fact that public access to registration data regarding juveniles is foreclosed only serves to underscore the federal courts' ultimate conclusion that the registration requirement of the act is not, in the constitutional sense, a form of "punishment." Reiterating the *Lanni* court's observation, *supra* at 853, "A law

> designed to punish a sex offender would not contain these strict limitations on public dissemination." The Legislature's restrictive approach in applying the act to juvenile offenders, carefully circumscribing access to such registration data and exempting juvenile offenders from the public notification requirements of the act, evinces a broad remedial, not punitive, purpose. [*Id*. at 18-19.]

This Court arrived at the following conclusion:

> In light of the existence of strict statutory safeguards that protect the confidentiality of registration data concerning juvenile sex offenders, we conclude that the registration requirement imposed by the act, as it pertains to juveniles, neither "punishes" respondent nor offends a basic premise of the juvenile justice system—that a reformed adult should not have to carry the burden of a continuing stigma for youthful offenses. The confidential collection and maintenance of juvenile offender registration data by law enforcement authorities serves an important remedial function and is not so punitive in form and effect as to render it unconstitutional "punishment" under Const 1963, art 1, § 16. [*Id*. at 21.]

Ayres was decided under SORA as first enacted, when public access to registration data was foreclosed. The essential underpinning of the conclusion in *Ayres* that the registration requirement imposed by SORA does not punish was the fact that strict statutory guidelines protected the confidentiality of registration data concerning juvenile sex offenders. This premise is no longer valid, however, because the creation of the PSOR in 1999 eliminated the confidential nature of the sex offender registry. Indeed, in *People v Wentworth*, 251 Mich App 560, 568-569; 651 NW2d 773 (2002), this Court, while not directly presented with the issue, questioned the continuing validity of *Ayres*:

> In *Ayres*, *supra*, we held that the juvenile registration requirements of the SORA did not constitute cruel or

> unusual punishment in part because juveniles were exempt from the public notifications requirements of the act. *Ayres*, *supra* at 20-21. We also concluded "[i]n light of the existence of strict statutory safeguards that protect the confidentiality of registration data concerning juvenile sex offenders" that the act did not offend the premise of our juvenile justice system that "a reformed adult should not have to carry the burden of a continuing stigma for youthful offenses." *Id.* at 21. However, the recent amendment of the statute removing those confidentiality safeguards raises questions about the continuing validity of our holding in *Ayres*. . . . [W]e invite the Legislature to reconsider whether the implied purpose of the act, public safety, is served by requiring an otherwise law-abiding adult to forever be branded as a sex offender because of a juvenile transgression.

Defendant argues that publicly labeling him as a convicted sex offender and requiring him to register pursuant to SORA, where he was assigned to youthful trainee status as a result of conduct that occurred during a Romeo and Juliet relationship with his girlfriend before October 1, 2004, constitutes punishment that is cruel or unusual.

This Court first must determine whether the registration requirement constitutes punishment in accordance with the facts of this case. " '[P]unishment, generally, is the deliberate imposition, by some agency of the state, of some measure intended to chastise, deter or discipline an offender.' " *Ayres*, *supra* at 14, quoting *Kelley, supra* at 1108. Utilizing the factors set forth in *Ayres*, " 'determining whether government action is punishment requires consideration of the totality of circumstances, and particularly (1) legislative intent, (2) design of the legislation, (3) historical treatment of analogous measures, and (4) effects of the legislation.' " *Id.* at 14-15, quoting *Kelley, supra* at 1108. See also *People v Golba*, 273 Mich App 603, 618; 729 NW2d 916 (2007).

With respect to legislative intent, MCL 28.721a indicates the Legislature's intent in enacting SORA:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.

The Legislature's intent as set forth in express terms was not to chastise, deter, or discipline an offender, but rather to "assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. However, the Legislature's intention was frustrated in situations such as this, prompting in part the October 1, 2004, amendment of SORA. The 2004 amendment was motivated, in part, by concerns that "the reporting requirements are needlessly capturing individuals who do not pose a danger to the public, and who do not pose a danger of reoffending." House Legislative Analysis, HB 4920, 5195, and 5240, November 12, 2003, at 1.

The concern also existed that

> [s]uccessful completion of sentence-like conditions [under HYTA] results in dismissal of the charges and the person is deemed as having no conviction. However, under the Sex Offenders Registry Act, trainee status is defined as a

> "conviction," and trainees are required to register like other sex offenders and remain on the public list for 25 years. Many feel that the requirement to be registered as a sex offender works against the philosophy of HYTA, which is to give a break to first-time offenders who are likely to be successfully rehabilitated. In the case of many convictions involving youthful offenders, offenses often involve consensual sex between young teen lovers. Since these youths hardly fit the definition of "sexual predator", and since successful completion of trainee status results in no conviction, advocates for youthful offenders have long desired the laws to be amended to exclude non-predatory youths convicted of sex crimes to be exempted from mandatory registration with the sex offenders registry. [*Id.* at 2.]

It is incongruous to find that a teen who engages in consensual sex and is assigned to youthful trainee status after October 1, 2004, is not considered dangerous enough to require registration, but that a teen who engaged in consensual sex and was assigned to youthful trainee status before October 1, 2004, is required to register. The implied purpose of SORA, public safety, is not served by requiring an otherwise law-abiding adult to forever be branded as a sex offender because of a juvenile transgression involving consensual sex during a Romeo and Juliet relationship.

With respect to the design of the legislation, the courts in *Kelley*, *supra* at 1109, and *Lanni*, *supra* at 853, concluded that the notification scheme in SORA was purely regulatory and remedial. The courts indicated that the statute did not impose a requirement on the registered offender, or inflict suffering, disability, or restraint. *Kelley*, *supra* at 1109; *Lanni*, *supra* at 853. However, the Michigan Supreme Court has recognized that there is a social stigma attached to convictions themselves. *People v Smith*, 423 Mich 427, 445 n 2; 378 NW2d 384 (1985). And the Court in *Mollett v City of Taylor*, 197 Mich App 328, 343; 494 NW2d 832 (1992), has referred

to a stigma as a disability, and it further indicated that a stigma or disability may deny an individual freedom to take advantage of some employment opportunities, which is precisely what defendant asserted happened to him in this case. Moreover, HYTA provides that an individual assigned to youthful trainee status "shall not suffer a civil disability or loss of right or privilege," MCL 762.14(2), *except* to the extent that the individual is required to register pursuant to SORA. MCL 762.14(3). Consequently, the language of HYTA implies that the requirement for a youthful trainee to register as a sex offender results in a disability as well as a loss of a right or privilege.

In this case, defendant actually suffered a disability and losses of rights or privileges. Under HYTA, "all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection . . . ." MCL 762.14(4). Thus, unlike in *Kelley* and *Lanni*, where the courts indicated that the registration requirement did "nothing more than create a method for easier public access to compiled information that is otherwise available to the public through tedious research in criminal court files," in this case, the registration requirement created public access to compiled information that was otherwise closed to public inspection. *Lanni*, *supra* at 853; *Kelley*, *supra* at 1109. The SORA requirement that youthful trainees register as sex offenders was effective before SORA added its public notification procedures. Because MCL 762.14 is designed to prevent youthful trainees from suffering a disability or losses of privileges and rights except with respect to requiring registration, and because there was no public dissemination of the sex offender registry at the time, it seems clear the Legislature did not intend to punish youthful trainees by requiring them to register.

The dissemination of nonpublic information through SORA, however, had the opposite effect. The later SORA amendment removing those assigned to trainee status after October 1, 2004, appeared to rectify that issue.

The amendment, however, did not assist defendant's case. That defendant is suffering a disability and a loss of privilege is further confirmed by the fact that there are not strict limitations on public dissemination as there were in *Lanni*. The *Lanni* court noted that the registry limited searches so that a person living in a particular zip code can only search that zip code on the registry. *Lanni, supra* at 853. Consequently, the court in *Lanni* concluded that a law designed to punish a sex offender would not contain such strict limitations on dissemination. *Id*. Searches on the sex offender registry are no longer limited, however, to the searcher's zip code, but rather the registry provides a searcher with information about every person registered as a sex offender living in every zip code in the state.

The historical treatment of analogous measures is next considered under the *Ayres* test for determining whether governmental action constitutes punishment. However, no analogous measure exists, nor is there an historical antecedent that relates to requiring a defendant to register as a sex offender when the defendant was a teenager engaged in consensual sex and the defendant was assigned to youthful trainee status after October 1, 1995, but before October 1, 2004.

Finally, under the *Ayres* test, the effects of the legislation are considered. A user of the Michigan PSOR is provided with information stating that the intent of PSOR is "to better assist the public in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders" and that PSOR

is "intended to provide the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger." See PSOR <http://www.mipsor.state.mi.us> (accessed May 13, 2009). While the government has always had the authority to warn the public about dangerous persons and such warnings have never been understood as imposing punishment, *Kelley*, *supra* at 1111, in this case, the warning is not about the presence of an individual who is dangerous. Nevertheless, by including defendant's name on the sex offender registry, the government is effectively warning the public that defendant is dangerous, thus publicly labeling defendant as dangerous. Such warning or "branding" in the context of this case clearly constitutes punishment.

Further, the basic premise of HYTA is "to give a break to first-time offenders who are likely to be successfully rehabilitated" by having the offender's act not result in a conviction of a crime and by requiring that the offender's record not be available for public inspection. House Legislative Analysis, HB 4920, 5195, and 5240, November 12, 2003, at 2. However, the PSOR provides a "Conviction Date" of July 13, 2004, for defendant. See PSOR <http://www.mipsor.state.mi.us> (accessed May 13, 2009). Consequently, requiring defendant to register for 10 years forces him to retain the status of being "convicted" of an offense, thus frustrating the basic premise of HYTA.

Defendant convincingly asserts that the effects on him have been devastating. Defendant argues that he has been unable to find work as a result of being listed on the sex offender registry. He asserts that when he applies for work, he correctly states that he does not have a criminal record. However, because information about him is publicly available through the sex offender

registry, which can be accessed through the Internet, employers still discover the information. Defendant asserts that he applied unsuccessfully for approximately 75 jobs at fast-food establishments, factories, foundries, retail establishments, and the local mall. He was unable to find work through temporary agencies or with the assistance of job counselors. He was able to get hired at Burger King and Meijer, but in both cases was let go after the results of the record check were returned, which indicated that he was a registered sex offender. Defendant contends that while he can honestly tell employers that he does not have a criminal record, this is of little use when information about him is publicly available on the Internet. Thus, being listed on the registry has resulted in devastating financial and emotional consequences for him. He further asserts that because of his inability to work, he must rely on food stamps. He was also diagnosed with depression and believes that this was the direct result of the emotional and financial consequences of having to register as a sex offender. On the basis of the foregoing, defendant asserts that the financial and emotional consequences of requiring him to register have been devastating and thus requiring him to register as a sex offender, under the circumstances of this case, should be deemed punishment.

Given the totality of the circumstances as set forth above, we conclude that the registration requirement under SORA, as applied to defendant, constitutes punishment.

B. DO THE REGISTRATION AND NOTIFICATION REQUIREMENTS OF SORA IMPOSE CRUEL OR UNUSUAL PUNISHMENT ON DEFENDANT?

Determining whether a punishment is cruel or unusual requires consideration of the gravity of the of-

fense, the harshness of the penalty, a comparison of the penalty to penalties for other crimes in this state, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation. *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996).

Here, the circumstances of the offense are not very grave. Defendant was 18 years old and in a consensual sexual relationship with another teen who was almost 15 years old. The other teen's parents knew of the relationship and condoned it. This other teen is the same person defendant married five years later. The gravity of the offense does not change regardless of the date on which the assignment to youthful trainee status occurred.

The penalty in this case, however, has been harsh. Defendant is being required to register as a sex offender for 10 years. He receives the social stigma of being labeled as a sex offender and the social stigma of being "convicted" of a crime even though he successfully completed his status as a youthful trainee and the court dismissed the proceedings. As a result of registering as a sex offender, defendant has been unable to find employment and, in fact, lost two jobs after it was discovered that his name is on the sex offender registry. He is depressed and, although he finally married NT, the opportunity to marry and pursue happiness was delayed because of his inability to find employment as a result of being labeled a convicted sex offender. Given the circumstances of this case, the offense that defendant committed was not very grave, but the penalty has been very harsh.

With regard to a comparison of the penalty to penalties for other crimes in this state, defendant would not have had to register as a sex offender had he been

assigned to youthful trainee status approximately one month later than he was. Defendant is required to register as a sex offender along with rapists and pedophiles. The PSOR does not provide a description of an offender's offense. Thus, individuals viewing the PSOR are unable to determine whether a person who is registered is a rapist, a pedophile, or just a person who engaged in consensual sexual activity with a teen.

With regard to a comparison of the penalty to penalties imposed for the same offense in other states, USA Today reported on July 24, 2007:

> More states are bucking the national crackdown on sex offenders by paring back punishment for teens who have consensual sex with underage partners.
>
> Governors in seven states have signed bills in the past two months that mean no prosecution for some teens or no requirement to register as a sex offender.
>
> States vary widely in how they prosecute consensual teen sex, which prosecutors refer to as "Romeo and Juliet" cases, but some remain tough on teens who are several years older than their partners. [USA Today, *States ease laws that punish teens for sex with minors* <http://www.usatoday.com/news/nation/2007-07-24-teen-sex-offenders_N.htm> (accessed May 13, 2009).]

In *Wallace v State*, 905 NE2d 371, 384 (Ind, 2009), the Indiana Supreme Court recently concluded that Indiana's sex registration law, as applied to the defendant in that case, was punitive. The court noted that "the Act makes information on all sex offenders available to the general public without restriction and without regard to whether the individual poses any particular future risk." *Id*. Consequently, "if the registration and disclosure are not tied to a finding that the safety of the public is threatened, there is an implication that the Act is excessive." *Id*. at 383. The court held

that "the non-punitive purpose of the Act, although of unquestioned importance, does not serve to render as non-punitive a statute that is so broad and sweeping." *Id*. at 384.

Because defendant's registration is not tied to a finding that the safety of the public is threatened, the registration requirement, as applied to defendant, is excessive. *Id*. at 383. Hence, the registration requirement, as applied to defendant, is punitive. *Id*. at 384. Moreover, even the Michigan Legislature noted that "[s]ome states reserve sex offender registration for those individuals who truly represent a danger to the public and have a high risk of reoffending." House Legislative Analysis, HB 4920, 5195, and 5240, November 12, 2003, at 6. Other states are recognizing the need to distinguish between people who truly represent a danger to the public and those who do not. The penalties imposed for the same Romeo and Juliet offense in some other states are less severe.

Also, it is abundantly clear that there is no goal of rehabilitation in this case. Defendant never posed a danger to the public or a danger of reoffending. Defendant is not a sexual predator, nor did the trial court deem him to be. Further, even if defendant needed rehabilitation, SORA's labeling him as a convicted sex offender works at an opposite purpose, preventing defendant from securing employment and otherwise moving forward with his life plans.

Consequently, after considering the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation, we conclude that requiring defendant to register as a sex offender for 10 years is cruel or unusual punishment. We vacate

the trial court's April 1, 2008, order and remand the case to the trial court to enter an order consistent with this decision.

Vacated and remanded. Jurisdiction is not retained.

In re LAGER ESTATE

Docket No. 276843. Submitted May 5, 2009, at Detroit. Decided November 3, 2009, at 9:10 a.m.

Ernest J. Lager designated his son, Eric Lager, as the primary beneficiary of his personal savings plan. He subsequently married Georgia Forbes-Lager and died intestate eight years later. Forbes-Lager, as personal representative of her husband's estate, contacted the plan administrator, which then paid the proceeds of the plan to her as the surviving spouse. Asserting that he was the primary beneficiary, Eric Lager petitioned the Genesee County Probate Court to determine the disposition of the proceeds. The court, Jennie E. Barkey, J., awarded him the proceeds, and Forbes-Lager sought delayed leave to appeal. The Court of Appeals denied leave to appeal in an unpublished order, entered October 19, 2007 (Docket No. 276843). In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 480 Mich 1133 (2008).

The Court of Appeals *held*:

1. The probate court had subject-matter jurisdiction over the estate and its assets, including the determination of what assets were not part of the estate. MCL 700.1302 gives the probate court exclusive legal and equitable jurisdiction over various matters related to decedents' estates, including questions about the validity of a will. MCL 700.1303 gives the probate court concurrent legal and equitable jurisdiction that includes jurisdiction to determine property rights or interests. Eric Lager's petition requested more than a ruling regarding the plan. It questioned the validity of Ernest Lager's marriage and requested probate of his estate, and after its ruling regarding the validity of the will, the probate court proceeded within its jurisdiction to determine the property rights in the estate's assets.

2. While the plan was subject to the provisions of the Employee Retirement Income Security Act (ERISA), which is a federal law that preempts state law causes of action related to an employee benefit plan, federal and state courts have concurrent jurisdiction over claims brought by a beneficiary to recover benefits due under a plan, to enforce rights under the terms of a plan, or to clarify rights to future benefits.

3. The probate court erred when it determined that Eric Lager was the proper beneficiary. ERISA permits participants in a pension plan to designate a beneficiary who is not the nonparticipating spouse only when the spouse agrees. Ernest Lager elected his son as his beneficiary before he married Forbes-Lager. Under 29 USC 1055(c)(2), an election of a beneficiary by an unmarried participant is ineffective following the participant's subsequent marriage if the new spouse does not consent to the election. Forbes-Lager did not consent to the election of Eric Lager as the plan beneficiary.

Reversed.

PENSIONS — PERSONAL SAVINGS PLANS — EMPLOYEE RETIREMENT INCOME SECURITY ACT — BENEFICIARIES — ELECTION OF BENEFICIARIES — SURVIVING SPOUSE'S CONSENT TO BENEFICIARY.

The election of a beneficiary by an unmarried participant in a pension plan is ineffective following the participant's subsequent marriage if the new spouse does not consent to the election (29 USC 1055[c][2]).

John C. Lukes, P.C. (by *John C. Lukes*), for Georgia Forbes-Lager.

Winegarden, Haley, Lindholm & Robertson, P.L.C. (by *L. David Lawson*), for Eric Lager.

Before: WILDER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM. Appellant, Georgia Forbes-Lager, personal representative of the estate of Ernest J. Lager, deceased, appeals as on leave granted an order awarding the proceeds of Ernest's personal savings plan (PSP) to Ernest's son, appellee Eric Lager. We reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

In 1992, Ernest designated Eric as the primary beneficiary of his PSP. At that time, Ernest was unmarried. He married Georgia in 1997. Ernest died intestate

in 2005. Georgia was appointed the personal representative of his estate. She contacted the administrator of the PSP, which paid the PSP proceeds to her as the surviving spouse. Claiming that he was the designated beneficiary, Eric petitioned the probate court to determine the disposition of the proceeds. The probate court awarded them to Eric.[1]

Georgia filed a delayed application for leave to appeal the probate court's order, which this Court denied. *In re Lager Estate*, unpublished order of the Court of Appeals, entered October 19, 2007 (Docket No. 276843). Thereafter, Georgia applied for leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration as on leave granted of the probate court's jurisdiction and Georgia's right to the proceeds under the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 1001 *et seq*. *In re Lager Estate*, 480 Mich 1133 (2008).

II. THE PROBATE COURT'S ORDERS

The probate court entered an order distributing the estate following a bench trial. The order provided, in relevant part:

> This matter having come before the Court for trial on the Petition and Amended Petition of Eric J. Lager for Determination of Spousal Status of Georgia A. Forbes, and for Removal of Georgia A. Forbes as Personal Representa-

[1] We do not have the benefit of the probate court file. Rather, an appeal was taken from the probate court to the circuit court, and the circuit court file was submitted on appeal. The circuit court file does not contain the probate court order dividing assets or a transcript of the bench trial that determined the validity of a copy of a will and other assets. Accordingly, the statement of facts was derived from the parties' briefs and the documents included with them.

> tive, and the Petition of Eric J. Lager for Probate and/or Appointment of Personal Representative, the Court having heard all the testimony, having reviewed all of the evidence and proofs submitted during the trial, and being otherwise fully advised in the premises;
>
> The Court finds:
>
> IT IS HEREBY ORDERED that the marriage between the Deceased, Ernest J. Lager, and Georgia Forbes is valid and legal and any claims of Georgia A. Forbes, as surviving spouse, are not barred or limited by MCL 700.2801(2).
>
> IT IS FURTHER ORDERED that the Court further finds that the Petitioner, Eric Lager, failed to rebut the legal presumption that his father intentionally destroyed his will, a copy of which was offered into evidence, and said copy is therefore not admitted.
>
> IT IS FURTHER ORDERED that Eric J. Lager is awarded the General Motors PSP plan established by the decedent as the designated beneficiary of that plan, and Georgia A. Forbes shall turn over to Eric J. Lager the assets or proceeds of the PSP plan, and any interest or earnings thereon.
>
> IT IS FURTHER ORDERED that Georgia A. Forbes is awarded the two Fifth Third Bank IRA accounts established by the decedent as the surviving spouse, the default beneficiary under the terms of those IRAs.

A claim of appeal from the decision was filed in the circuit court. The circuit court noted that there was a question regarding jurisdiction and remanded the case to the probate court for a determination regarding whether a final order had entered pursuant to MCR 2.602(A) or MCR 5.801(B) because a final order under the latter court rule would be appealed in this Court. The probate court concluded that the PSP was not included in the estate and, therefore, that a final order was entered "pursuant to MCR 2.602(A) and/or MCR 5.801(B)."

III. JURISDICTION

Georgia's first claim on appeal is that the probate court lacked jurisdiction over the PSP. We disagree. Questions of statutory construction and subject-matter jurisdiction present questions of law and are reviewed de novo. *White v Harrison-White*, 280 Mich App 383, 387; 760 NW2d 691 (2008).

"In general, subject-matter jurisdiction has been defined as a court's power to hear and determine a cause or matter." *In re Petition by Wayne Co Treasurer for Foreclosure of Certain Lands*, 265 Mich App 285, 291; 698 NW2d 879 (2005). Probate courts are courts of limited jurisdiction. Const 1963, art 6, § 15. The jurisdiction of the probate court is set forth by statute. *In re Wirsing*, 456 Mich 467, 472; 573 NW2d 51 (1998). MCL 700.1302 provides, in relevant part:

> The court has exclusive legal and equitable jurisdiction of all of the following:
>
> (a) A matter that relates to the settlement of a deceased individual's estate, whether testate or intestate, who was at the time of death domiciled in the county or was at the time of death domiciled out of state leaving an estate within the county to be administered, including, but not limited to, all of the following proceedings:
>
> (*i*) The internal affairs of the estate.
>
> (*ii*) Estate administration, settlement, and distribution.
>
> (*iii*) Declaration of rights that involve an estate, devisee, heir, or fiduciary.
>
> (*iv*) Construction of a will.
>
> (*v*) Determination of heirs.
>
> (*vi*) Determination of death of an accident or disaster victim . . . .

In addition to this exclusive legal and equitable jurisdiction, MCL 700.1303 provides for concurrent legal and equitable jurisdiction and states, in relevant part:

> (1) In addition to the jurisdiction conferred by [MCL 700.1302] and other laws, the court has concurrent legal and equitable jurisdiction to do all of the following in regard to an estate of a decedent, protected individual, ward, or trust:
>
> (a) Determine a property right or interest.
>
> (b) Authorize partition of property.

Review of the probate court's ruling reveals that the petition filed by Eric requested more than a ruling regarding the PSP. Rather, the petition questioned the validity of Ernest's marriage to Georgia and requested probate of the estate, with Eric purportedly submitting a copy of Ernest's will. After a bench trial, the probate court ruled that Eric had failed to rebut the presumption that the will was intentionally destroyed and then distributed assets of the estate. The question of the validity of the will presented an issue for resolution by the probate court. See MCL 700.1302(a); *Scripps v Wayne Probate Judge*, 131 Mich 265, 268; 90 NW 1061 (1902). After ruling regarding the validity of the will, the probate court proceeded to determine the property rights in the assets of the estate. This also presented an issue within the jurisdiction of the probate court. To require the probate court to examine each individual item and partition the consideration of some items to the circuit court would not be an efficient use of resources for the court as well as the litigants. The probate court had subject-matter jurisdiction over the estate and its assets, including determining the assets that were not part of the estate, in light of the nature of the petition filed with the probate court.[2]

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[2] Because we do not have the benefit of the probate court file, our conclusion regarding the subject matter pending before the probate court was determined in light of the probate court's ruling. The parties do not brief or acknowledge the other issues, such as the validity of the will and

We note also that the probate court had jurisdiction even though the PSP was subject to the provisions of ERISA. ERISA is a federal law intended to provide a uniform regulatory regime over employee benefit plans. *Aetna Health Inc v Davila*, 542 US 200, 208; 124 S Ct 2488; 159 L Ed 2d 312 (2004). ERISA is an exclusive remedy that preempts state law causes of action that relate to an employee benefit plan. *Id.* at 209. Consequently, federal courts generally have subject-matter jurisdiction over ERISA claims. *Yellow Freight Sys, Inc v Donnelly*, 494 US 820, 823 n 3; 110 S Ct 1566; 108 L Ed 2d 834 (1990), quoting 29 USC 1132(e)(1). However, the Legislature provided concurrent jurisdiction to state and federal courts for claims brought by a beneficiary to recover benefits due to him or her under the terms of the plan, to enforce the beneficiary's rights under the terms of the plan, or to clarify the beneficiary's rights to future benefits under the terms of the plan. *Id.*; 29 USC 1132(a)(1)(B). Because Eric sought to enforce rights as a designated beneficiary under the PSP, Michigan courts and federal courts had concurrent jurisdiction over his petition. Therefore, the probate court did not err under ERISA when it asserted jurisdiction.

IV. THE DISTRIBUTION

Georgia's second claim on appeal is that, under ERISA, Ernest needed her consent to uphold his election of Eric as the beneficiary of his PSP. Because Georgia never provided that consent, she argues that she is entitled to the PSP proceeds as a surviving spouse. We agree.

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the disposition of the other assets that were submitted to the probate court for resolution. Rather, the briefs examine the jurisdiction of the probate court in light of the PSP alone.

ERISA requires that pension plans include qualified joint and survivor annuities to nonparticipating surviving spouses of deceased vested plan participants. *Boggs v Boggs*, 520 US 833, 843; 117 S Ct 1754; 138 L Ed 2d 45 (1997), citing 29 USC 1055. The purpose of these annuities "is to ensure a stream of income to surviving spouses." *Id*. The economic security of surviving spouses is the paramount concern that cannot be undermined by any other state law, and if a state law and the provisions and objectives of ERISA clash, the state law cannot stand. *Id*. at 843-844. ERISA was modified "to permit participants to designate a beneficiary for the survivor's annuity, other than the nonparticipant spouse, only when the spouse agrees." *Id*. at 843. The act allows plan participants to waive the benefits to surviving spouses by electing a beneficiary or form of benefits. *Shields v Reader's Digest Ass'n, Inc*, 331 F3d 536, 542 (CA 6, 2003). To effectuate this waiver, however, the participant must obtain spousal consent according to specific statutory requirements. *Id.* at 542-543. 29 USC 1055(c) provides:

> (1) A plan meets the requirements of this section only if—
>
> (A) under the plan, each participant—
>
> (i) may elect at any time during the applicable election period to waive the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit (or both),
>
> (ii) if the participant elects a waiver under clause (i), may elect the qualified optional survivor annuity at any time during the applicable election period, and
>
> (iii) may revoke any such election at any time during the applicable election period, and
>
> (B) the plan meets the requirements of paragraphs (2), (3), and (4).

> (2) Each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect unless—
>
> (A) (i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public, or
>
> (B) it is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary of the Treasury may by regulations prescribe.
>
> Any consent by a spouse (or establishment that the consent of a spouse may not be obtained) under the preceding sentence shall be effective only with respect to such spouse.

The parties do not dispute that Ernest elected Eric as a beneficiary *before* the marriage or that Georgia did not consent to this election *following* the marriage. Thus, the key issue on appeal is whether an election by an unmarried participant is effective following the participant's subsequent marriage if the new spouse fails to consent to the election. The plain language of 29 USC 1055(c)(2) suggests that such an election is ineffective. Again, the last sentence of this section provides: "Any consent by a spouse (or establishment that the consent of a spouse may not be obtained) under the preceding sentence shall be effective only with respect to such spouse." 29 USC 1055(c)(2). This language contemplates the possibility of subsequent spouses and grants them the same rights with regard to consenting that were enjoyed at the time of the election.

This interpretation of the plain language of 29 USC 1055(c)(2) comports with the purpose of ERISA to protect surviving spouses. It also comports with authority in other jurisdictions. *Hurwitz v Sher*, 982 F2d 778, 782-783 (CA 2, 1992) (a son could not be a designated beneficiary absent the new spouse's consent according to the requirements in 29 USC 1055(c)); *Howard v Branham & Baker Coal Co*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued July 6, 1992 (Docket No. 91-5913) (the daughter could not be a designated beneficiary absent the surviving spouse's consent); *Arkansas Chapter, NECA-IBEW Retirement Fund v Chronister*, 337 F Supp 2d 1144, 1148 n 1 (ED Ark, 2004) (had the participant and the new spouse been married for one year according to the plan requirements, the former spouse likely could not have been a designated beneficiary absent the new spouse's consent); *Nellis v Boeing Co*, 15 Employee Benefits Cases (BNA) 1651 (D Kan, 1992) (the participant's children could not be designated beneficiaries absent the surviving spouse's consent).

In keeping with authority from other jurisdictions and the plain language and purpose of 29 USC 1055(c)(2), we conclude that an election by an unmarried participant is not effective following a subsequent marriage if the new spouse fails to consent to the election. In this case, Georgia did not provide consent to Ernest's election of Eric as beneficiary, as required by 29 USC 1055(c). Thus, the probate court erred when it determined that Eric was the proper beneficiary.

Because of our conclusions, this Court need not address Georgia's remaining arguments, which exceed the scope of the Supreme Court's remand order. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544-545; 705 NW2d 365 (2005).

Reversed.

PLUNKETT v DEPARTMENT OF TRANSPORTATION

Docket No. 284320. Submitted September 9, 2009, at Lansing. Decided November 3, 2009, at 9:15 a.m.

Jerome Plunkett, as the personal representative of the estate of his wife, Holly M. Plunkett, brought an action in the Ingham Circuit Court against the Department of Transportation, seeking wrongful-death damages after her single-car accident on a state highway. The department moved for summary disposition on the grounds of governmental immunity. The court, James R. Giddings, J., denied the motion, concluding that Plunkett's presuit notice sufficiently described the nature of the defect in the highway and that Plunkett had alleged a persistent defect that in combination with the rain falling at the time of the accident created an unsafe situation. The department appealed.

The Court of Appeals *held*:

1. To bring a claim under the highway exception to governmental immunity, an injured person must timely notify the governmental agency having jurisdiction over the highway of the occurrence of the injury, the injury sustained, the exact location and nature of the defect in the roadway, and the names of known witnesses. The principal purposes to be served by requiring notice are (1) to provide the governmental entity with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured. When notice is required of an average citizen for the benefit of a governmental agency, it need only be understandable and sufficient to bring the important facts to the governmental entity's attention. A liberal construction of the notice requirements is favored to avoid penalizing an inexpert layperson for some technical defect. A court should not hold a notice ineffective when it is in substantial compliance with the law. A court may consider the description of the nature of the defect as substantially complying with the statute when coupled with the specific description of the location, time, and nature of the injuries. Although Plunkett's notice did not specifically mention that the accident was allegedly caused by rutting of the road or an inadequate superelevation of the highway, it adequately described

the location and defect to the extent that it reasonably apprised the department of Plunkett's claims.

2. The trial court erred by denying the department's summary disposition motion. Under the highway exception to governmental immunity, the only permissible claims are those arising from a defect in the roadbed itself, and the exception does not extend to claims based on defective design or accumulations of ice and snow. With respect to accumulations of ice or snow, there must have been a combination of ice or snow and a defect that, in tandem, proximately caused the accident. In the absence of a persistent defect in the highway that rendered it unsafe for public travel at all times and that combined with the natural accumulation of ice, snow, or water, a plaintiff cannot prevail against an otherwise immune municipality. One prong of Plunkett's theory of recovery was premised on a claimed design defect that did not adequately allow water to drain off the roadbed. The second prong of his theory claimed that rutting defects in the physical structure of the roadbed surface, along with the pooled water, proximately caused the accident. The evidence, however, supported a conclusion that the rutting was not at all times a persistent defect of which the department should have had notice. Plunkett submitted nothing to show that his wife lost control of her vehicle for any reason other than hydroplaning.

Affirmed in part, reversed in part, and remanded for entry of summary disposition for the department.

1. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — NOTICE — DEFECTS IN HIGHWAYS.

To bring a claim under the highway exception to governmental immunity, an injured person must timely notify the governmental agency having jurisdiction over the roadway of the occurrence of the injury, the injury sustained, the exact location and nature of the defect, and the names of known witnesses; the notice need not be in a particular form, and it is sufficient if the notice is timely and contains the requisite information; a court may consider a plaintiff's description of the nature of the defect as substantially complying with the statute when coupled with the specific description of the location, time, and nature of the injuries (MCL 691.1404[1]).

2. NOTICE — GOVERNMENTAL ENTITIES — REQUIREMENTS — ADEQUACY.

When notice is required of an average citizen for the benefit of a governmental entity, it need only be understandable and sufficient to bring the important facts to the governmental entity's atten-

tion; a court should construe the notice requirements liberally to avoid penalizing an inexpert layperson for a technical defect; a court should not find a notice ineffective when it is in substantial compliance with the law; some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects.

3. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — DEFECTS IN HIGHWAYS — PROXIMATE CAUSE OF INJURY — ACCUMULATIONS OF ICE, SNOW, OR WATER.

A defect in a highway that simply causes the accumulation of ice, snow, or water is not sufficient to sustain an action by an injured plaintiff under the highway exception to governmental immunity; the plaintiff must show that the ice, snow, or water in tandem with a persistent defect in the highway that rendered it unsafe for public travel at all times proximately caused the injury (MCL 691.1402[1]).

Fieger, Fieger, Kenney, Johnson & Giroux, P.C. (by *Victor S. Valenti*), for plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *John P. Mack*, Assistant Attorney General, for defendant.

Before: SAAD, C.J., and WHITBECK and ZAHRA, JJ.

PER CURIAM. In this governmental immunity highway exception case, defendant, the Michigan Department of Transportation (MDOT), appeals as of right the trial court's order denying MDOT summary disposition under MCR 2.116(C)(7). This case arises out of a single-motor-vehicle accident in which plaintiff Jerome Plunkett's wife, decedent Holly Marie Plunkett,[1] died after losing control of her vehicle, causing her vehicle to leave the roadway and strike a tree. We affirm in part and reverse in part.

[1] Because Jerome Plunkett is bringing this claim on behalf of Holly Plunkett's estate, any reference to "Plunkett" will refer to Jerome Plunkett unless otherwise indicated.

I. BASIC FACTS AND PROCEDURAL HISTORY

On May 19, 2005, at approximately 8:30 p.m., Holly Plunkett was driving her minivan south on US-127 in Clare County, at or near Bailey Road in Frost Township. The posted speed limit was 70 miles an hour, and data allegedly taken from the vehicle's diagnostic module reflected that Holly Plunkett was traveling 77 miles an hour when she lost control of the vehicle, which then struck a tree on the west side of the highway. At the time and place of the accident, it was raining and the road surface was wet. The injuries Holly Plunkett sustained as a result of the accident caused her immediate death.

In September 2005, Plunkett filed his presuit notice of claim, which alleged that a defect existed on US-127 that led to Holly Plunkett's accident.[2] Shortly thereafter, Plunkett filed suit in the Court of Claims as personal representative of the estate of Holly Marie Plunkett, specifically invoking the highway exception to governmental immunity[3] in an effort to seek damages "as allowed by Michigan's Wrongful Death Statute, MCL 600.2922 . . . ." In his third amended complaint, Plunkett alleged that Holly Plunkett "suddenly and unexpectedly lost control of her vehicle due to the dangerous and defective conditions which existed on/at the actual physical structure of the roadbed surface of the highway at issue, causing Mrs. Plunkett's death." More specifically, Plunkett alleged that

> [a]s a direct and proximate result of [MDOT's] failure to maintain the highway at issue in reasonable repair and in a condition reasonably safe and fit for public/vehicular travel, defects in the actual physical of the roadbed [sic]

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[2] See MCL 691.1404.

[3] MCL 691.1402(1); MCL 691.1407(1).

> surface of said highway, designed for vehicular travel, allowed an unnatural accumulation of rainfall to pool/collect.

Plunkett alleged that Holly Plunkett's vehicle "hydroplaned on the defective and dangerous roadway surface, causing loss of control of said vehicle . . . ."

According to Plunkett, the portion of the highway at issue was initially designed and built correctly and "in a condition reasonably safe and fit for vehicular/public travel at all times," but it later fell into disrepair, "which caused the actual physical structure of the roadbed's surface to thereafter contain substantially dangerous and defective conditions . . . ." Plunkett alleged that the

> general purpose for the MDOT super-elevation and cross-slope/crown specifications on the actual physical structure of roadbed surface [sic] of the highway at issue, designed for public/vehicular travel, is to reduce or eliminate wet weather skidding accidents by maintaining zero water depth on the roadbed surface during a normal rainfall.

However, Plunkett alleged, "1999 and/or 2001 micro surfacing projects negligently altered the cross-slope/crown and/or super-elevation of the highway at issue from the proper cross-slope/crown and/or super-elevation of the 1990 construction" because a uniform thickness was not applied and the "cross-slope/crown and/or super-elevation" then became inadequate.

Plunkett alleged that, at the time of the accident, the "actual physical structure of the roadbed's surface . . . was . . . substantially hazardous and defective, not properly maintained, and/or not in reasonable repair and in a condition reasonably safe and fit for public/vehicular travel" because of "excessive wheel track rutting," "uneven gradient due to excessive wear," "excessive wear," "inadequate cross-slope/crown," and "inadequate super-elevation[.]" Plunkett alleged that these defects in the

physical structure of the roadbed surface proximately caused Holly Plunkett's vehicle to "become imbalanced." However, Plunkett also alleged that these defects in the physical structure of the roadbed surface "caused rainfall to unnaturally collect and pool/stand on the roadway's surface in excessive and dangerous amounts when it rained." According to Plunkett, the defects in the physical structure of the roadbed surface, "with the unnaturally pooled water and/or rainfall, proximately caused [Holly] Plunkett's accident." And he alleged that

> [a]t least 30 days prior to and at the time of the accident, the actual physical structure of the roadbed surface of the highway at issue, designed for public/vehicular travel, was substantially defective and hazardous, and not in reasonable repair and in a condition reasonably safe and fit for public/vehicular travel at all times during and after rainfall due to the aforementioned dangerous and defective conditions in the roadbed surface.

Plunkett further alleged that, at least 30 days before and at the time of the accident, MDOT "knew, or after the exercise of due diligence should have known," about the defective conditions, "which needed to be repaired."

In November 2007, MDOT filed its third motion for summary disposition under MCR 2.116(C)(7), arguing that Plunkett had failed to plead a cause of action in avoidance of governmental immunity, that Plunkett had failed to perfect his claim with proper presuit notice, and that the damages recoverable by Plunkett were restricted to those specifically allowed under MCL 691.1402(1). After hearing oral arguments on the motion, the trial court denied the motion, finding that Plunkett's presuit notice sufficiently described the nature of the defect; that Plunkett had properly pleaded in avoidance of governmental immunity by alleging that there was a persistent defect in the highway that, in

combination with the falling rain, created an unsafe situation; and that Plunkett was entitled to recover wrongful death act damages for loss of companionship and society. The trial court entered a formal written order in March 2008.

MDOT now appeals as of right the trial court's denial of its motion for summary disposition.[4]

II. MCL 691.1404 PRESUIT NOTICE

A. STANDARD OF REVIEW

MDOT argues that the trial court erred by denying MDOT summary disposition because Plunkett's claim, that an inadequate superelevation or rutting of the highway surface constituted the alleged "defect," is barred because MDOT was not given sufficient presuit notice of that specific condition as required by MCL 691.1404. According to MDOT, the notice did not contain a strictly accurate or correct identification of the alleged highway defect.

We review de novo a trial court's ruling on a motion for summary disposition.[5] Further, the proper interpretation of a statute is a question of law subject to our de novo review.[6]

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[4] See MCR 7.203(A)(1) (stating that this Court "has jurisdiction of an appeal of right filed by an aggrieved party from . . . [a] final judgment or final order of the circuit court, or court of claims"); MCR 7.202(6)(a)(v) (stating that in a civil case, a "final judgment" or "final order" means "an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116[C][7]"); *Costa v Community Emergency Med Services, Inc*, 475 Mich 403, 413; 716 NW2d 236 (2006).

[5] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[6] *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997).

B. PLUNKETT'S PRESUIT NOTICE

As stated previously, in September 2005, Plunkett filed his presuit notice of claim, which alleged that a defect existed on US-127 that led to Holly Plunkett's accident. The notice stated, in pertinent part:

> Please accept this letter as notice of intention to file a claim against the Michigan Department of Transportation on behalf of our clients in connection with an incident that occurred on May 19, 2005, at approximately 8:30 p.m. on Southbound US-127, at or near Bailey Road, Clare County, Michigan.
>
> The claim arose when Holly Marie Plunkett struck standing/pooled water on the roadway's surface while driving, which then caused her vehicle to hydroplane out of control and strike a tree on the west side of the roadway. The standing/pooled water on the roadway was caused by excessive and uneven wear, and/or lack of drainage due to uneven and unreasonable wear, and/or failure to maintain the roadway in a reasonably safe manner.

A police report regarding Holly Plunkett's accident was attached to the notice. The report stated that "[i]t was raining hard at the time, there was some standing water on the roadway where the vehicle tires travel . . . ." The report suggested that Holly Plunkett lost control of her vehicle "possibly from hydro-planing [sic] . . . ." A second police report described the location of the accident:

> The section of US-127 where the incident occurred has a long curve going from the southwest to the south. Just prior to where the vehicle left the roadway the road straightens out to the south. . . .
>
> * * *
>
> At the scene of the accident there was a guard rail on the east side of the roadway that started approx 40 yds prior to

the accident scene. The guard rail on the west side of the roadway started adjacent to the point of impact of the incident. There is a bridge that goes over a swamp just south of the scene.

C. APPLICABLE LEGAL PRINCIPLES

To bring a claim under the highway exception to governmental immunity, an injured person must timely notify the governmental agency having jurisdiction over the roadway of the occurrence of the injury, the injury sustained, "the exact location and nature of the defect," and the names of known witnesses.[7] The notice need not be provided in a particular form. It is sufficient if it is timely and contains the requisite information.[8]

The Michigan Supreme Court has established that "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect" and "must be enforced as written."[9] However, when notice is required of an average citizen for the benefit of a governmental entity, it need only be understandable and sufficient to bring the important facts to the governmental entity's attention.[10] Thus, a liberal construction of the notice requirements is favored to avoid penalizing an inexpert layman for some technical defect.[11] The principal purposes to be served by requiring notice are simply (1) to provide the governmental agency with an opportunity

[7] MCL 691.1404(1); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200, 203-204, 219; 731 NW2d 41 (2007).

[8] *Burise v City of Pontiac*, 282 Mich App 646, 654; 766 NW2d 311 (2009).

[9] *Rowland*, 477 Mich at 219.

[10] *Brown v City of Owosso*, 126 Mich 91, 94-95; 85 NW 256 (1901).

[11] *Meredith v City of Melvindale*, 381 Mich 572, 579; 165 NW2d 7 (1969).

to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured.[12]

" ' "[T]he requirement should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice . . . ." ' "[13] "[A] notice should not be held ineffective when in '*substantial compliance* with the law . . . .' "[14] A plaintiff's description of the nature of the defect may be deemed to substantially comply with the statute when "[c]oupled with the specific description of the location, time and nature of injuries . . . ."[15] " 'Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects.' "[16]

D. ANALYSIS

MDOT argues that MCL 691.1404(1) requires a "strictly accurate or correct description of the alleged defective condition." Therefore, MDOT contends, Plunkett was required to specifically mention that the accident was allegedly caused by rutting or an inadequate superelevation. MDOT relies on two unpub-

[12] *Hussey v Muskegon Hts*, 36 Mich App 264, 267-268; 193 NW2d 421 (1971); see *Lawson v City of Niles*, unpublished opinion per curiam of the Court of Appeals, issued January 8, 2009 (Docket No. 280797), p 2.

[13] *Kustasz v Detroit*, 28 Mich App 312, 315; 184 NW2d 328 (1970), quoting *Meredith*, 381 Mich at 579, quoting *Brown*, 126 Mich at 94-95.

[14] *Smith v City of Warren*, 11 Mich App 449, 455; 161 NW2d 412 (1968), quoting *Ridgeway v City of Escanaba*, 154 Mich 68, 73; 117 NW 550 (1908) (emphasis added).

[15] *Jones v Ypsilanti*, 26 Mich App 574, 584; 182 NW2d 795 (1970); see also *Barribeau v Detroit*, 147 Mich 119, 125; 110 NW 512 (1907) ("In determining the sufficiency of the notice . . . the whole notice and all of the facts stated therein may be used and be considered to determine whether it reasonably apprises the officer upon whom it is required to be served of the place and the cause of the alleged injury.").

[16] *Jones*, 26 Mich App at 584, quoting *Smith*, 11 Mich App at 455.

lished cases in support of its contention, *Botsford v Clinton Charter Twp*[17] and *Chambers v Wayne Co Airport Auth*.[18] However, in addition to having no precedential value,[19] those cases dealt with different statutory provisions, and we are not bound to extend their reasoning to the statute at issue in this case.[20]

Published caselaw applying MCL 691.1404(1) does not support MDOT's interpretation. Indeed, this Court has stated that "a notice of injury and defect will not be regarded as insufficient because of a failure to comply literally with all the stated criteria. Substantial compliance will suffice."[21] Therefore, all that is required to create a legally sufficient notice is that the plaintiff substantially comply with the notice requirement, and the description of the nature of the defect may be deemed to substantially comply with the statute when "[c]oupled with the specific description of the location, time and nature of injuries . . . ."[22]

Taken as a whole, Plunkett's notice reasonably apprised MDOT of the nature of the defect. Although it did not use the words "rutting" or "superelevation," it adequately described the location and nature of the defect to the extent that it "reasonably apprise[d]"[23] MDOT of Plunkett's claims. Plunkett's statement that the "standing/pooled water on the roadway was caused

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[17] *Botsford v Clinton Charter Twp*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2007 (Docket No. 272513).

[18] *Chambers v Wayne Co Airport Auth*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 277900).

[19] MCR 7.215(C)(1) ("An unpublished opinion is not precedentially binding under the rule of stare decisis.").

[20] See *Henry v Dow Chem Co*, 484 Mich 483, 500; 772 NW2d 301 (2009).

[21] *Hussey*, 36 Mich App at 269.

[22] *Jones*, 26 Mich App at 584; see also *Rule v Bay City*, 12 Mich App 503, 507-509; 163 NW2d 254 (1968).

[23] *Barribeau*, 147 Mich at 125.

by excessive and uneven wear, and/or lack of drainage due to uneven and unreasonable wear" along with the police report's description of location was sufficient to bring the defect to MDOT's attention.[24] Indeed, this Court has upheld even less detailed descriptions.[25]

Accordingly, we conclude that the trial court did not err by denying MDOT's motion for summary disposition when Plunkett's presuit notice substantially complied with the notice requirements and reasonably apprised MDOT of the nature of the defect.

III. HIGHWAY DEFECT EXCEPTION

A. STANDARD OF REVIEW

MDOT argues that the trial court erred by denying its third motion for summary disposition because there was no actionable highway defect in this case. MDOT argues that, according to the uncontested national standards for maintaining asphalt pavement, the ruts in the roadbed surface had not reached a sufficient depth to alert a reasonable highway authority that the condition, if not repaired, would unreasonably endanger public travel. Moreover, MDOT asserts, the presence of pooling water on the roadbed is not, by itself, an actionable defect, and the condition of the roadbed surface that allowed the water to remain on the surface did not itself cause the loss of control and injury. MDOT argues that it was not required to design and maintain its highway so

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[24] See *Brown*, 126 Mich at 94-95.

[25] See *Hussey*, 36 Mich App at 268 (concluding that the plaintiffs' "description of the defect as a 'defect in the sidewalk' in front of 2042 Peck Street is adequate"); *Jones*, 26 Mich App at 583-584 (finding substantial compliance when the notice described the defect as "defective sidewalk immediately east of 5 West Michigan Avenue which is located on the south side of Michigan Avenue").

that no water pools or accumulates on the surface. MDOT maintains that liability under the highway exception may not attach for such transient conditions as rain, snow, or ice—the condition must pose an unreasonable hazard to safe public travel "at all times."

MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law. To survive a (C)(7) motion raised on these grounds, the plaintiff must allege facts warranting the application of an exception to governmental immunity.[26] Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence.[27] The plaintiff's well-pleaded factual allegations must be accepted as true and construed in the plaintiff's favor, unless the movant contradicts such evidence with documentation.[28]

We review de novo the applicability of governmental immunity.[29] Determination of the applicability of the highway exception is a question of law subject to our de novo consideration on appeal.[30] Further, the proper interpretation of a statute is a question of law subject to our de novo review.[31]

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[26] *Kendricks v Rehfield*, 270 Mich App 679, 681; 716 NW2d 623 (2006); *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997).

[27] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[28] MCR 2.116(G)(5); *Maiden*, 461 Mich at 119; *Smith*, 223 Mich App at 616.

[29] *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004); *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

[30] *Robinson v City of Lansing*, 282 Mich App 610, 613; 765 NW2d 25 (2009).

[31] *Putkamer*, 454 Mich at 631.

B. APPLICABLE LEGAL PRINCIPLES

The governmental immunity act[32] provides "broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function[.]"[33] Here, there is no dispute that US-127 is a state trunkline highway within MDOT's jurisdiction as a state agency and that the repair and maintenance of such public highways is a governmental function.[34] However, the governmental immunity act sets forth several narrowly construed exceptions to immunity,[35] including liability for damages caused by an unsafe highway.[36]

The highway exception to governmental immunity provides, in pertinent part:

> [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.[37]

Interpreting this statute, the Michigan Supreme Court

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[32] MCL 691.1401 *et seq*.

[33] *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 595; 363 NW2d 641 (1984); see MCL 691.1407(1).

[34] See MCL 691.1401(c), (e), and (f); *In re Claim of Moross Against Hillsdale Co*, 242 Mich 277, 281; 218 NW 683 (1928); *Alpert v Ann Arbor*, 172 Mich App 223, 227; 431 NW2d 467 (1988).

[35] *Lash v Traverse City*, 479 Mich 180, 195 n 33; 735 NW2d 628 (2007); *Grimes v Dep't of Transportation*, 475 Mich 72, 78; 715 NW2d 275 (2006); *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003).

[36] MCL 691.1402.

[37] MCL 691.1402(1).

has stated that a governmental agency's immunity is waived for bodily injury or property damage

> if the road has become, through lack of repair or maintenance, not reasonably safe for public travel. . . . MCL 691.1402(1) establishes the duty to maintain the highway in "reasonable repair." The phrase "so that it is reasonably safe and convenient for public travel" simply refers to the duty to maintain and repair, and states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway "reasonably safe." Hence, the Legislature has not waived immunity if the repair is reasonable but the road is nonetheless still not reasonably safe because of some other reason.
>
> Viewing the [governmental immunity act] as a whole, it can also be seen that the converse of this statement is true: that is, the Legislature has not waived immunity where the maintenance is allegedly unreasonable but the road is still reasonably safe for public travel. . . . [A]n *imperfection* in the roadway will only rise to the level of a compensable "defect" when that imperfection is one which renders the highway not "reasonably safe and convenient for public travel" . . . .[38]

Further, to be liable for injuries or damages caused by defective highways, the governmental agency must have known, "or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place."[39]

In sum, the

> governmental agency does not have a separate duty to eliminate *all* conditions that make the road not reasonably

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[38] *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 167-168; 713 NW2d 717 (2006) (citations omitted); see also *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000).

[39] MCL 691.1403.

> safe; rather, an injury will only be compensable when the injury is caused by an unsafe condition, of which the agency had actual or constructive knowledge, which condition stems from a failure to keep the highway in reasonable repair.
>
> * * *
>
> "The purpose of the highway exception is not to place upon the state . . . an unrealistic duty to ensure that travel upon the highways will always be safe. Looking to the language of the statute, we discern that the true intent of the Legislature is to impose a duty to keep the physical portion of the traveled roadbed *in reasonable repair*."[40]

Notably, this Court and the Supreme Court have clarified that "the only permissible claims are those arising from a defect in the actual roadbed itself"[41] and that liability under the exception does not extend to claims based simply on defective design[42] or accumulations of ice and snow.[43]

With respect to design defects, the Supreme Court in *Hanson v Mecosta Co Rd Comm'rs* held that "the highway exception does not include a duty to design, or to correct defects arising from the original design or

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[40] *Wilson*, 474 Mich at 168-170, quoting *Scheurman v Dep't of Transportation*, 434 Mich 619, 631; 456 NW2d 66 (1990) (emphasis added by *Wilson*).

[41] *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 503; 638 NW2d 396 (2002), citing *Nawrocki*, 463 Mich at 161-162.

[42] *Hanson*, 465 Mich at 502.

[43] *Buckner Estate v City of Lansing*, 480 Mich 1243, 1244 (2008) (holding that the plaintiffs had not shown that the defendant violated its duty to maintain the sidewalk in reasonable repair "[b]ecause the accumulation, by itself, of ice and snow on a sidewalk, regardless of whether it accumulated through natural causes or otherwise, does not constitute a 'defect' in the sidewalk"); *Haliw v Sterling Hts*, 464 Mich 297, 308-309; 627 NW2d 581 (2001); *Stord v Dep't of Transportation*, 186 Mich App 693, 694; 465 NW2d 54 (1991).

construction of highways."[44] The Court explained, "Nowhere in the statutory language is there a duty to *install*, to *construct* or to correct what may be perceived as a dangerous or defective "*design*."[45]

> "[T]he focus of the highway exception is on *maintaining* what has already been built in a state of reasonable repair so as to be reasonably safe and fit for public vehicular travel." The plain language of the highway exception to governmental immunity provides that the road commission has a duty to repair and maintain, *not a duty to design or redesign*.[46]

Several cases have also addressed the accumulation of ice and snow on highways. In *Stord v Dep't of Transportation*,[47] this Court noted, "It has long been the law in this state . . . that a governmental agency's failure to remove the natural accumulation of ice and snow on a public highway does not signal negligence of that public authority." In *Haliw v Sterling Hts*,[48] the Supreme Court clarified that "a governmental agency's failure to remove ice or snow from a highway does not, by itself, constitute negligence. . . . [A] plaintiff must prove that there was an existing defect in the [highway] rendering it not reasonably safe for public travel." In other words, "there must exist the combination of the ice or snow and the defect that, in tandem, proximately causes the [accident]."[49] "In the absence of a persistent defect in the highway . . . rendering it unsafe for public

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[44] *Hanson*, 465 Mich at 502.

[45] *Id*. at 501 (emphasis in original).

[46] *Id*. at 503 (emphasis added; citation omitted).

[47] *Stord*, 186 Mich App at 694.

[48] *Haliw*, 464 Mich at 308; see also *Johnson v City of Pontiac*, 276 Mich 103, 105; 267 NW 795 (1936) (stating that a plaintiff cannot recover if an injury "was due *solely* to the presence of ice and snow") (emphasis added).

[49] *Haliw*, 464 Mich at 311.

travel at all times, and which combines with the natural accumulation of ice or snow to proximately cause injury, a plaintiff cannot prevail against an otherwise immune municipality."[50]

In *Haliw*, the Court, applying these principles, held that the plaintiff could not "demonstrate that it was the *combination* of ice *and* a defect in the sidewalk that caused her to slip and fall."[51] According to the Court, the plaintiff admitted "that she slipped on the ice that was present on the sidewalk; she did not trip over, or lose her balance in any way because of the claimed depression in the sidewalk."[52] Therefore, the "*sole proximate cause* of [the] plaintiff's slip and fall was the ice; there was no persistent defect in the sidewalk rendering it unsafe for public travel at all times that, in combination with the ice, caused the incident."[53] To illustrate this point, the *Haliw* Court provided this example:

> Under the first scenario, a six-foot deep hole exists in the middle of a sidewalk. Water naturally accumulates in the top of the hole and, because of the weather conditions, freezes so that, in effect, the hole no longer exists. While walking upon the sidewalk, an individual steps on the ice, slips, and falls, thereby incurring injury. Under this scenario, it can only be said that the sole proximate cause of the slip and fall was the presence of the natural accumulation of ice. A different outcome, however, would present under a scenario where the same six-foot hole in the sidewalk is present, but the ice forms several inches below the top of the hole. While walking upon the sidewalk, an individual steps on the edge of the hole, which causes him to momentarily lose his balance. While attempting to

[50] *Id*. at 312.

[51] *Id*. at 310 (emphasis in original).

[52] *Id*.

[53] *Id*. (emphasis in original).

> remain upright, this individual slips on the ice that had naturally accumulated in the hole. Under this scenario, it must be said that, in tandem, the defect and the natural accumulation of ice combined to proximately cause the slip and fall.[54]

C. ANALYSIS

Plunkett argues on appeal that his complaint specifically alleged lack of repair or maintenance, not defective design, for which he acknowledges that damages cannot be recovered under the highway exception. However, Plunkett's theory of liability below was in part based on the "cross-slope/crown and/or super-elevation" of the roadbed. And despite his contentions to the contrary, he continues on appeal to assert that the "cross-slope/crown and/or super-elevation" contributed to the accident.

Under the preceding caselaw, we conclude that Plunkett's claims regarding the "cross-slope/crown and/or super-elevation" of the roadbed are not claims of lack of repair or maintenance. Rather, this prong of Plunkett's theory was premised on a claimed design defect that allowed water to collect or, stated differently, did not adequately allow water to drain off the roadbed. But the water on the roadway was a design issue, controlled by design factors, including elevation, angle, and width and how much rainfall an hour the road is designed to handle. In *Stord*, the plaintiffs asserted that "the natural accumulation combined with the contour of the highway presented a question of fact regarding whether the accumulation was unnatural."[55] This Court, however, classified the plaintiffs' argument as one alleging defective design or

[54] *Id*. at 311 n 10.

[55] *Stord*, 186 Mich App at 695.

construction of the highway and ruled that the trial court properly granted summary disposition in favor of MDOT.[56] MDOT is immune from liability for claims related to the construction, design, or redesign of a highway, including making sure the highway has a specific geometry or cross-slope. Accordingly, the highway exception to governmental immunity is inapplicable to this alleged defect, and Plunkett's claim in this regard should have been dismissed.

In addition to the allegations regarding the "cross-slope/crown and/or super-elevation," however, Plunkett's theory of liability below had a second prong, in part based on "rutting" in the roadbed surface of US-127. More specifically, Plunkett claimed that the rutting defects in the physical structure of the roadbed surface, along "*with* the unnaturally pooled water and/or rainfall, proximately caused [Holly] Plunkett's accident."[57]

As stated earlier, under Michigan law "there must exist the combination of the ice or snow [or water] and the defect that, in tandem, proximately causes the [accident]."[58] In other words, "[i]n the absence of a persistent defect in the highway . . . rendering it unsafe for public travel at all times, and which combines with the natural accumulation of ice or snow [or water] to proximately cause injury, a plaintiff cannot prevail against an otherwise immune municipality."[59] A defect that simply causes the accumulation of ice or snow, or water as in this case, is not sufficient to sustain an

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[56] *Id*.; see also *Ulrich v Dep't of Transportation*, unpublished opinion per curiam of the Court of Appeals, issued April 14, 2005 (Docket No. 252525).

[57] Emphasis added.

[58] *Haliw*, 464 Mich at 311.

[59] *Id*. at 312.

action under the highway exception. Under *Haliw*, to maintain an action under the highway exception, the sole proximate cause of the injury cannot be simply slipping on the ice, snow, or water. The plaintiff must show that the injury was caused by the ice, snow, or water, *in tandem with the defect itself*, for example, tripping or losing one's balance on the edge of the defect and then slipping.[60]

Although *Haliw* is factually distinguishable because that case involved ice on a sidewalk, we agree with MDOT that the same fundamental principles underlying interpretation of the highway exception apply. Thus, applying *Haliw*, it is first significant to note that there is no dispute that it was raining and that the roadway was wet at the time of Holly Plunkett's accident. However, the presence of water on the roadway alone is not enough to maintain Plunkett's claim. Plunkett also needed to show that there was also an underlying "persistent defect" in the highway that rendered the road unsafe for public travel "at all times"[61] of which MDOT had notice and that combined with the water to proximately cause Holly Plunkett's injury. Plunkett alleged that the rutting on US-127 is such a defect.

However, Plunkett failed to plead or present evidence that the rutting was a "persistent defect" "at all times" of which MDOT had or should have had notice. For example, there were no facts pleaded or any evidence submitted to show that the rutting was so deep or wide that, regardless of the weather conditions, the road was unsafe for public travel. Expert testimony established that the rutting was not a significant enough condition

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[60] *Id*. at 311 n 10.

[61] *Id.* at 312; see also *MacLachlan v Capital Area Transportation Auth*, 474 Mich 1059 (2006).

to put MDOT on notice that the road required repair. MDOT's expert, Gilbert Baladi, Ph.D., P.E., testified that some cracking and rutting is endemic to asphalt pavement and that the rutting at issue was within the guidelines and standards of the American Association of State Highway Transportation Officials. According to Dr. Baladi, the maintenance threshold for rutting on highways is somewhere between 0.5 to 0.7 inches, but the rutting at the accident site was less than 0.5 inch. Dr. Baladi opined that the roadway was in good condition. Moreover, MDOT's expert, engineering consultant James Valenta, testified that the accident rate in the area where Holly Plunkett's accident occurred was "significantly less than the national average." This evidence supports a conclusion that the rutting was not at all times a persistent defect of which MDOT should have had notice. (Notably, Plunkett points out that several similar accidents occurred at the same location in the three months *after* Holly Plunkett's death; however, these *subsequent* accidents could not have provided MDOT any notice of any potential hazard *before* Holly Plunkett's death and are, thus, irrelevant.)

As MDOT has pointed out, Plunkett submitted nothing to show that Holly Plunkett lost control of her vehicle for any reason other than hydroplaning. Plunkett's own expert witnesses conceded that the rutting would not have caused the vehicle to lose control if the road had been dry at the time of the accident. Indeed, Plunkett's expert, William Woehrle, testified that there was "no evidence to suggest" that the Plunkett vehicle was "tripped by any portion of the physical surface of the travel lane of the highway." Consistently with Plunkett's pleadings, Woehrle simply testified that "the physical surface of the highway provided the conditions for water to accumulate in these ruts . . . ." Moreover, Plunkett's experts also acknowledged that even if the

highway had been wet, the vehicle would not have hydroplaned if the water level had been lower.

Plunkett also argues that, contrary to *Haliw*, the alleged defect need not exist "at all times" because there is no such requirement in the statutory language of MCL 691.1402(1). However, we are bound to follow the Michigan Supreme Court's interpretation of the statute.[62]

Because Plunkett did not allege that there was a persistent defect in the roadway rendering it unsafe for public travel at all times that, in tandem with the pooling water, caused the accident, we conclude that the trial court erred by denying MDOT's motion for summary disposition.

Because our resolution of this issue is dispositive, we decline to address Plunkett's remaining argument regarding his entitlement to recovery of wrongful death damages.

Affirmed in part, reversed in part, and remanded for entry of an order granting MDOT summary disposition and dismissing Plunkett's claims with prejudice. We do not retain jurisdiction.

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[62] *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000).

PEOPLE v DAVENPORT (AFTER REMAND)

Docket No. 271366. Submitted July 17, 2009, at Lansing. Decided November 3, 2009, at 9:20 a.m.

Gary E. Davenport was convicted following a bench trial in the Presque Isle Circuit Court of six counts of first-degree criminal sexual conduct. He appealed, claiming ineffective assistance by trial counsel, Janet Frederick-Wilson, who had failed to raise an objection at trial concerning the potential conflict of interest created when the attorney who had represented defendant at his preliminary examination, Richard Steiger, joined the Presque Isle County prosecutor's office before defendant's trial concluded. The Court of Appeals granted defendant's motion for a remand for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to create a factual record regarding the claim of ineffective assistance of counsel. After the hearing, the trial court, Scott L. Pavlich, J., ruled that Frederick-Wilson's performance fell below an objective standard of reasonableness, but that defendant failed to establish that Frederick-Wilson's error was outcome-determinative. Accordingly, the trial court denied defendant's motion for a new trial. Following the *Ginther* hearing, the Court of Appeals held that although the trial court correctly determined that defendant failed to show a reasonable probability that, absent Frederick-Wilson's error, the result of the trial would have been different, the trial court nevertheless committed plain error by failing to explore the potential conflict of interest and determine whether disqualification of the prosecutor's office was warranted. The Court of Appeals noted that, once defendant showed that a member of the prosecutor's office had represented defendant in the same or related case, a presumption arose that members of the prosecutor's office had conferred about the matter and, to rebut the presumption, the prosecution had to show that effective screening procedures were used to prevent improper communications within the prosecutor's office. The Court of Appeals therefore remanded the case to the trial court for an evidentiary hearing on the question. 280 Mich App 464 (2008). On remand, the trial court conducted an evidentiary hearing and concluded that the prosecution, through an assistant attorney general, had established that the

prosecutor's office had implemented measures to prevent improper communications and that it consistently followed through with these measures. The trial court determined that Steiger had exchanged no information with anyone within the prosecutor's office about any aspect of defendant's case.

After remand, the Court of Appeals *held*:

1. The trial court correctly ruled that the prosecution, through the assistant attorney general, established that it implemented and followed procedures that prevented improper communications with the prosecutor's office.

2. The trial court correctly concluded that defense counsel's failure to raise the issue regarding the potential conflict constitutes an objectively unreasonable error. However, defendant is not entitled to relief on this issue because he failed to show that he was prejudiced by defense counsel's error and the record does not show that defendant was prejudiced by Steiger's move to the prosecutor's office.

3. No evidence supports defendant's claim that his trial counsel rushed the case to trial. Defendant did not present evidence to overcome the strong presumption that his trial counsel employed sound trial strategy in recommending that defendant waive his right to a jury trial.

4. The trial court correctly held both that defendant's trial counsel's performance fell below an objective standard of reasonableness when she failed to interview several defense witnesses before trial and that defendant failed to establish that he was prejudiced by this conduct.

5. Any error that may have resulted from defense counsel's failure to suppress references to the reasons why defendant was terminated from a previous teaching job did not change the outcome of the trial.

6. Defense counsel's failure to call an expert witness to testify regarding whether defendant's penis has an abnormal shape did not fall below an objective standard of reasonableness.

7. The trial court correctly determined that defendant caused the victim serious psychological injury requiring professional treatment and scored offense variable 4, MCL 777.34(1)(a), at 10 points. The court need not find that the victim actually sought professional treatment. The victim's expression of fearfulness is enough to satisfy the statute. Defendant is not entitled to resentencing.

Affirmed.

SENTENCES — OFFENSE VARIABLE 4.

A sentencing court need not find that the victim actually sought professional treatment in order to score 10 points under offense variable 4 and may determine that the victim's expression of fearfulness is enough to satisfy the variable's requirement that the victim suffered serious psychological injury requiring professional treatment (MCL 777.34[1][a], [2]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Mark G. Sands*, Assistant Attorney General, for the people.

Kirsch & Satawa, P.C. (by *Mark A. Satawa*, *Stuart G. Friedman*, and *Lisa B. Kirsch Satawa*), for defendant.

AFTER REMAND

Before: SAAD, C.J., and MURPHY and DONOFRIO, JJ.

PER CURIAM.

I. TRIAL COURT PROCEEDINGS ON REMAND

This case is before us following a remand to the trial court for an evidentiary hearing on the question whether the prosecutor's office undertook adequate safeguards to shield the prosecuting attorney, Donald McLennan,[1] from communications about the case from Richard Steiger, an assistant prosecuting attorney who formerly represented defendant, Gary E. Davenport. Steiger acted as defense counsel for Davenport at his preliminary examination but, before trial, he accepted a job as the Presque Isle County assistant prosecutor. The prosecuting attorney's office employed only two attorneys, McLennan and Steiger, and McLennan prosecuted Davenport in the trial court.

[1] Donald McLennan is now a probate judge in Presque Isle County.

In our prior opinion, *People v Davenport*, 280 Mich App 464, 470-471; 760 NW2d 743 (2008), we addressed Davenport's claim that his trial counsel, Janet Frederick-Wilson, provided ineffective assistance[2] for failing to raise the issue of Steiger's move to the prosecutor's office:

> We affirm the trial court's ruling that defense counsel's failure to raise this matter constitutes an objectively unreasonable error. Clearly, a potential conflict of interest arose when Steiger joined the prosecutor's office after representing defendant at the preliminary examination. Defense counsel was obligated to protect her client from the potential prejudice inherent in these circumstances. Had she raised a timely objection, the trial court would have been obligated to make an inquiry and fashion an appropriate safeguard.
>
> We also agree with the trial court that defendant failed to show a reasonable probability that, absent defense counsel's error, the result of his trial would be different. However, because during the pendency of this case, defendant's former counsel joined the same two-attorney prosecutor's office that pursued the case against him, we hold that it was plain error for the trial court to fail to explore the matter and to make a ruling that the prosecutor's office employed appropriate safeguards to prevent Steiger from sharing information about defendant's case with McLennan. Indeed, when confronted by an apparent conflict of interest of this magnitude, it is incumbent upon the trial court to fully explore the matter to determine whether disqualification of the prosecutor's office is warranted and whether the failure to do so prejudiced defendant.

We further ruled that "once a defendant has shown that a member of the prosecutor's office counseled him or

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[2] As we stated in our prior opinion, " '[i]n order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different' and the result that did occur was fundamentally unfair or unreliable." *Davenport*, 280 Mich App at 468, quoting *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

represented him in the same or related matter, a presumption arises that members of the prosecutor's office have conferred about the matter." *Id.* at 473. Accordingly, we remanded this case to the trial court for an evidentiary hearing. We further opined:

> We emphasize that the prosecutor's office bears the burden of establishing that it implemented measures to prevent improper communications and that it consistently followed through with these measures. The trial court's inquiry must be thorough and in-depth, and take into consideration the prosecutor's failure to come forward with this matter voluntarily, and the office's ability to effectively quarantine the conflict of interest when the office employs only two attorneys. Unless the trial court finds sufficient evidence that the prosecutor's office consistently undertook adequate safeguards to shield McLennan from the taint of Steiger's conflict of interest, defendant's convictions must be reversed and a new trial ordered. [*Id*. at 475-476 (citation omitted).]

On remand, the trial court conducted a lengthy evidentiary hearing during which an assistant attorney general presented testimony from the staff members employed by the Presque Isle County prosecutor's office when Davenport's case was pending. We hold that the trial court correctly ruled that the prosecutor, through the assistant attorney general, established "that it implemented measures to prevent improper communications and that it consistently followed through with these measures." After reviewing the factors set forth in our prior opinion, the court ruled that, as a result of following the procedures employed by the office, Steiger exchanged no information with McLennan about any aspect of Davenport's case. Though the office maintained no written procedures about how to handle a potential conflict or the Davenport file in particular, it is abundantly clear that both attorneys and all staff

members were informed and understood that Steiger was to have no contact with the Davenport file and that he would not participate in any discussions, interviews, or meetings about the case. Members of the staff all testified that, to their knowledge, Steiger had no contact with the case file and was not present for, and did not participate in, any discussions about the case. Both Steiger and McLennan testified that, after an initial discussion about the potential conflict in the Davenport prosecution if Steiger joined the prosecutor's office, they exchanged no information about the case. Moreover, McLennan testified that his investigation and interviews were completed before Steiger joined the prosecutor's office.

The record further reflects that Steiger immediately disclosed his decision to join the prosecutor's office to Davenport and his wife and he repeatedly assured them that he would not reveal to McLennan anything about his representation of Davenport. Though Davenport's subsequent attorney, Frederick-Wilson, denied that she knew about the conflict, McLennan testified that all the attorneys knew about Steiger's move to the prosecutor's office. Davenport's wife also testified that she received numerous letters from people in the community expressing concern when Steiger became the assistant prosecutor. Under these circumstances, while the prosecutor should have notified the trial court about the potential conflict, it also appears that the defense was aware of the issue and chose not to raise it until after the trial. As in our prior opinion, we reiterate that the trial court correctly concluded "that defense counsel's failure to raise this matter constitutes an objectively unreasonable error." *Davenport*, *supra* at 470.

We also hold that Davenport is not entitled to relief on this issue because he failed to show that he was

prejudiced by defense counsel's error and, after the trial court explored the matter on remand, the record does not indicate that he was prejudiced by Steiger's move to the prosecutor's office. Again, the prosecution met its burden to show that the prosecutor's office took adequate steps to prevent improper communications and consistently followed through with those steps, and no evidence showed that there were any improper communications about the case.

II. DEFENDANT'S REMAINING CLAIMS

A. ASSISTANCE OF COUNSEL

Davenport claims that he was denied the effective assistance of counsel when Frederick-Wilson recommended that he waive a jury trial and when she rushed the case to trial.[3] Davenport maintains that Frederick-Wilson did so because she wanted to finish the trial, and keep her retainer, before she was suspended from the practice of law on June 1, 2006. However, at the *Ginther*[4] hearing, Frederick-Wilson denied that she attempted to fast-track the case and the trial court found no evidence that defense counsel asked for earlier trial dates or otherwise hurried the proceedings. We agree with the trial court that, Davenport's speculation aside, nothing in the record suggests that Frederick-Wilson rushed the case to trial. Further, with regard to his waiver of a jury trial, defendant has not overcome the strong presumption that his counsel employed sound trial strategy, *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). As Frederick-Wilson testified, she was concerned about a jury's emotional re-

[3] Our prior opinion erroneously stated that defendant was convicted by a jury. Defendant was actually convicted following a bench trial.

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

sponse to the allegations and the victim's potential testimony. No evidence shows that Frederick-Wilson's discussions with defendant about waiving a jury trial had anything to do with speed and it was reasonable for counsel to recommend a bench trial in light of the allegations against defendant about his sexual assaults on a child. On this claim, defendant has failed to establish that defense counsel's performance fell below an objective standard of reasonableness.

We agree with the trial court that defense counsel's performance fell below an objective standard of reasonableness when she failed to interview several defense witnesses before trial. However, while this is troubling, Davenport has not established that he was prejudiced by this conduct. As the trial court noted, had Frederick-Wilson interviewed them, none of the witnesses would have testified differently than they did at trial about any significant issue. Though two witnesses may have testified that, as children sometimes do, the victim had tried to get out of trouble by making up stories, nothing suggests that the victim fabricated his claims of molestation and, in light of the overwhelming evidence of Davenport's guilt, this minor credibility question would not have made a difference in the outcome.

Davenport claims that he was denied effective assistance of counsel because Frederick-Wilson failed to obtain medical or counseling records of the victim. However, those records were not produced at the *Ginther* hearing, so there is no way to determine whether they would have been relevant or would have affected the trial in any way. Accordingly, Davenport has failed to show that Frederick-Wilson's conduct prejudiced him. He also argues that defense counsel should have filed motions to suppress an investigator's testimony regarding Davenport's "grooming" of the victim. Davenport

fails to cite a legal basis to exclude the investigator's testimony, and it appears to have involved nothing more than the obvious fact that defendant showered the victim with expensive gifts. "There is no obligation for a defense attorney to object where such objection would be futile," *People v Odom*, 276 Mich App 407, 416; 740 NW2d 557 (2007), and Davenport has not shown any error by Frederick-Wilson in this regard. Davenport complains that counsel also should have attempted to suppress references to the reasons he was terminated from a previous teaching job. Were we to agree with the trial court's determination that defense counsel should have objected to this testimony as an improper reference to a prior bad act, it would not have changed the outcome of the trial. Indeed, the trial judge, sitting as the fact finder, eventually stated that he found the issue to be of no significance.

Davenport maintains that Frederick-Wilson's conduct was unreasonable because she failed to hire an expert to testify about the abnormal shape of his penis. Frederick-Wilson testified at the *Ginther* hearing that, before trial, Davenport's wife told her that Davenport's penis was slightly bent from an injury. However, at trial, Davenport's wife testified that Davenport's penis was so deformed that it actually curled into a tight circle. It was not clear error for the trial court to conclude that the wife's testimony came as a surprise at trial. Further, by stipulation of the parties, an expert was allowed to examine Davenport after his wife testified, and the expert testified that Davenport's penis might be curved, but it would not form a tight circle as described by Davenport's wife. In light of this evidence, and because the testimony of Davenport's wife was a surprise, defense counsel's actions did not fall below an objective

standard of reasonableness when she failed to call an expert to testify about this issue.[5]

B. SENTENCE

Defendant complains that the trial court improperly scored offense variable (OV) 4 at 10 points. OV 4, MCL 777.34(1)(a), states that 10 points should be scored if the victim suffers "[s]erious psychological injury requiring professional treatment . . . ." The court need not find that the victim actually sought professional treatment, MCL 777.34(2), and the victim's expression of fearfulness is enough to satisfy the statute, *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). The record reflects that, at sentencing, the prosecutor submitted a receipt for counseling services and he informed the court that, two days before sentencing, the victim "began another series of counselings" with Catholic Human Services. In light of this evidence, as well as Davenport's systematic, repeated abuse of this child over a period of years, the trial court correctly determined that Davenport caused the victim "[s]erious psychological injury requiring professional treatment . . . ." Accordingly, he is not entitled to resentencing.

Affirmed.

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[5] To the extent Davenport complains that he paid defense counsel $8,000 to obtain expert testimony, this may give rise to a contract dispute between Davenport and his counsel. However, the payment alone does not establish that an expert was necessary for his defense.

In re INVESTIGATIVE SUBPOENAS

Docket No. 284993. Submitted September 2, 2009, at Lansing. Decided November 19, 2009, at 9:05 a.m.

The Grand Traverse County Prosecuting Attorney petitioned the Grand Traverse Circuit Court for authorization to issue investigative subpoenas pursuant to MCL 767A.2(1) to investigate alleged violations of the Michigan Campaign Finance Act (MCFA), MCL 169.201 *et seq*., with regard to a February 7, 2007, election conducted by Acme Township. The court, Philip E. Rodgers, Jr., J., authorized the subpoenas. Two of the recipients of the subpoenas, Meijer, Inc., and Dickinson Wright Employees, refused to produce information sought by the subpoenas. The prosecutor filed a motion to compel compliance by those recipients (hereafter respondents). Respondents moved to quash the subpoenas and dismiss the proceedings, arguing that the MCFA invests the Secretary of State with the exclusive jurisdiction to investigate and enforce campaign finance law violations, that the prosecutor had no legal basis for seeking the subpoenas, and that the circuit court had no authority to issue or enforce the subpoenas. The court granted the motion to dismiss for lack of subject-matter jurisdiction. The prosecuting attorney appealed.

The Court of Appeals *held*:

1. The Legislature enacted both civil and criminal penalties for violation of MCFA requirements. The MCFA empowers the Secretary of State to investigate, enforce, and endeavor to prevent election campaign finance improprieties, and to assess civil fines. The Secretary of State's enforcement armamentarium consists of three procedural courses of action: informal methods such as conferences, conciliation, or persuasion; commencement of a hearing to address potential civil violations; and referral to the Attorney General for the enforcement of a criminal penalty. The Secretary of State may also enter into a conciliation agreement with the person involved, and the agreement, unless violated, is a complete bar to any further action with respect to matters covered in the agreement.

2. The Legislature, by enacting the MCFA, did not intend to divest county prosecutors of their duty to investigate and

prosecute election law crimes. The Legislature did not intend to delegate to the Secretary of State sole discretion over whether alleged MCFA violators should face criminal prosecution.

3. The Secretary of State's broad authority to remedy election law infractions does not encompass the prosecution of election-law-related crimes. The Secretary of State has the statutory obligation to investigate and report election law violations and the responsibility of enforcing campaign finance laws and may commence a hearing to determine whether a civil violation of the act has occurred and impose a civil fine. However, the MCFA contemplates the potential imposition of criminal liability for violators regardless of whether the Secretary of State has imposed a civil fine.

4. MCL 169.215 and 169.254 evince the Legislature's intent to create two distinct methods of enforcing the MCFA: civil procedures pursued by the Secretary of State and criminal prosecutions initiated by county prosecutors and the Attorney General.

5. Although the Secretary of State possesses the discretion to refer violators to the Attorney General for prosecution, the MCFA does not provide that the referral process constitutes the sole path to criminal prosecution or supplants a county prosecutor's traditional criminal law enforcement powers.

6. The Legislature, by enacting MCL 169.215, did not intend to delegate to civil authorities the exclusive jurisdiction to enforce criminal provisions concomitantly enacted to punish regulatory transgressors.

7. The Secretary of State possesses no legal authority to address criminal liability in a conciliation agreement like the one reached in this matter, therefore, a conciliation agreement may not bar the prosecutor from investigating felony charges.

Reversed and remanded.

1. ELECTIONS — MICHIGAN CAMPAIGN FINANCE ACT — CIVIL FINES — CRIMINAL PROSECUTIONS.

The Michigan Campaign Finance Act creates a framework for remedying and punishing campaign finance law violations and empowers the Secretary of State to investigate, enforce, and endeavor to prevent election campaign finance improprieties and to assess civil fines and enter into conciliation agreements; the act does not delegate to the Secretary of State the sole discretion whether violators should face criminal prosecution or supplant the traditional criminal law enforcement powers of county prosecuting attorneys or the Attorney General to prosecute crimes (MCL 169.201 *et seq.*).

2. ELECTIONS — MICHIGAN CAMPAIGN FINANCE ACT — SECRETARY OF STATE — CONCILIATION AGREEMENTS.

The Secretary of State may enter into a conciliation agreement with a person believed to have violated provisions of the Michigan Campaign Finance Act and, unless the agreement is violated, the agreement is a complete bar to any further action with respect to matters covered in the agreement; the Secretary of State is not authorized to address criminal liability in a conciliation agreement (MCL 169.215).

Alan R. Schneider, Prosecuting Attorney, for the Grand Traverse County Prosecuting Attorney.

Miller Johnson (by *James S. Brady* and *Jon R. Muth*) and *Honigman Miller Schwartz & Cohn, LLP* (by *John D. Pirich* and *Andrea L. Hansen*), for Meijer, Inc.

Barris, Sott, Denn & Driker, P.L.L.C. (by *Sharon M. Woods*), for Dickinson Wright Employees.

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

GLEICHER, J. In this action arising from petitioner Grand Traverse County Prosecuting Attorney's investigation of a potential violation of the Michigan Campaign Finance Act (MCFA), MCL 169.201 *et seq*., petitioner appeals as of right a circuit court order dismissing the case for lack of jurisdiction. We reverse and remand for further proceedings.

I. UNDERLYING FACTS AND PROCEEDINGS

On February 7, 2007, Acme Township conducted an election to determine whether to recall any township trustees. Approximately a year later, the prosecutor filed a petition in the circuit court seeking authorization to issue investigative subpoenas pursuant to MCL 767A.2(1), which states, "A prosecuting attorney may

petition the district court, the circuit court, or the recorder's court in writing for authorization to issue 1 or more subpoenas to investigate the commission of a felony as provided in this chapter." The petition averred that the prosecutor's investigation centered on an alleged violation of MCL 169.254, which prohibits corporations, their agents, and certain others from making election campaign contributions. The circuit court authorized the investigative subpoenas, finding "reasonable cause to believe a felony has been committed and those persons who are the subject of the petition may have knowledge regarding the felony."

Two subpoena recipients, respondents Meijer, Inc., and Dickinson Wright Employees, refused to produce information sought by the subpoenas. The prosecutor then filed in the circuit court a motion to compel respondents' compliance. Respondents moved to quash the subpoenas and to dismiss the proceeding for want of jurisdiction. According to respondents, because the MCFA invests the Secretary of State with the exclusive jurisdiction to investigate and enforce campaign finance law violations, the prosecutor had no legal basis for seeking the subpoenas and the circuit court did not have authority to issue or enforce the subpoenas. In a written opinion and order, the circuit court explained, as follows in relevant part, that it was granting respondents' motion to dismiss the case "for lack of subject matter jurisdiction":

> The MCFA is designed to ensure openness and honesty in our elections by mandating certain reporting requirements and by prohibiting corporations (including law firms operating as limited liability companies) or their lawyers or agents from making monetary contributions to influence elections. Thus, enforcement of the MCFA is unquestionably a state interest. The Legislature clearly intended to

> vest exclusive jurisdiction for enforcement of the MCFA in the Secretary of State and, upon her request, in the Attorney General.
>
> * * *
>
> [T]he Legislature . . . having vested exclusive jurisdiction in the Secretary of State to investigate and resolve campaign violations or to refer them to the Attorney General for criminal prosecution, the Prosecuting Attorney has no statutory jurisdiction to investigate or prosecute violations. By the same token, this Court did not have jurisdiction to issue the subpoenas at issue or rule on the pending motions. Ironically, the Secretary of State does not have authority to request investigative subpoenas. It seems she will rely on the cooperation of those she is investigating to produce documents, and at this point, full document production has not been made. It seems, then, unlikely that the Secretary of State can adequately and fairly investigate this case without the Attorney General's assistance. Prudence would suggest she enlist his aid. [Citations omitted.]

II. STANDARD OF REVIEW

"Whether a trial court has subject-matter jurisdiction is a question of law that this Court reviews de novo." *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 472; 628 NW2d 577 (2001). This Court also reviews de novo legal issues of statutory construction. *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 698; 736 NW2d 594 (2007).

III. ANALYSIS

"The MCFA is designed to ensure openness and honesty in our elections by mandating certain reporting requirements and by prohibiting corporations (including law firms operating as limited liability companies) or their lawyers or agents from making monetary

contributions to influence elections." *Fieger v Cox*, 274 Mich App 449, 451; 734 NW2d 602 (2007). To achieve this goal, the MCFA establishes rigorous rules applicable to certain election campaigns. The act mandates that candidates in applicable elections form candidate committees that include a designated treasurer and identify a financial institution as an official depository for campaign contributions. MCL 169.221(1) through (6). The committee treasurer must "keep detailed accounts, records, bills, and receipts," and bears the responsibility for report preparation and filing. MCL 169.222. The MCFA specifies that one requisite report, a committee's campaign statement, shall contain specific information about "the total amount of contributions received during" a reporting period, comprehensive detail about fund raising efforts, the identities of campaign contributors, and a list of all expenditures. MCL 169.226(1)(b). And MCL 169.254 regulates corporate contributions by generally prohibiting independent corporate expenditures other than those made to ballot question committees.

The Legislature also enacted both civil and criminal penalties for violations of MCFA requirements. For example, a person who fails to form a campaign committee or who commingles campaign committee funds "is subject to a civil fine of not more than $1,000.00." MCL 169.221(13). If a candidate, treasurer, or other designated person neglects to timely file mandatory campaign statements, "that candidate, treasurer, or other designated individual is guilty of a misdemeanor, punishable by a fine of not more than $1,000.00, or imprisonment for not more than 90 days, or both." MCL 169.233(8). "A person who knowingly violates" the MCFA prohibition against the use of campaign funds for purposes other than "qualified campaign expendi-

tures" "is guilty of a felony punishable" by a fine, imprisonment, or both. MCL 169.266(1) and (4).

The MCFA provision at the heart of this case is the act's broad preclusion of corporate contributions. Under MCL 169.254(1), with limited and here inapplicable exceptions, a corporation "shall not make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of a contribution pursuant to [MCL 169.204(3)(a)]." Pursuant to MCL 169.254(4):

> A person who knowingly violates this section is guilty of a felony punishable, if the person is an individual, by a fine of not more than $5,000.00 or imprisonment for not more than 3 years, or both, or, if the person is not an individual, by a fine of not more than $10,000.00.

The question presented here is whether a county prosecutor may enforce the MCFA's criminal penalty provisions where the Secretary of State already had initiated civil proceedings that resulted in a civil fine for the same infraction of MCL 169.254.

The Secretary of State serves as Michigan's "chief election officer" and possesses "supervisory control over local election officials in the performance of their duties . . . ." MCL 168.21. The MCFA commits to the Secretary of State numerous tasks related to the implementation, administration, and enforcement of Michigan's campaign finance laws. The Secretary of State bears responsibility for making available "appropriate forms, instructions, and manuals required" under the MCFA, developing a "filing, coding, and cross-indexing system for the filing of required reports and statements," preparing required "forms, instructions, and manuals," and promulgating rules to implement the MCFA. MCL 169.215(1)(a), (b), (d), (e). Under MCL 169.218(1), the Secretary of State must make

available "an electronic filing and internet disclosure system" permitting the electronic filing of committee statements or reports. When requests for declaratory rulings are adequately supported with statements of facts by the persons submitting the requests, the Secretary of State must issue declaratory rulings concerning the MCFA. MCL 169.215(2).

The MCFA additionally empowers the Secretary of State to investigate, enforce, and endeavor to prevent election campaign finance improprieties, and to assess civil fines. The pertinent portions of MCL 169.215 set forth the following:

> (9) The secretary of state shall investigate the allegations under the rules promulgated under this act. . . .
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> (10) If the secretary of state determines that there may be reason to believe that a violation of this act has occurred, the secretary of state shall endeavor to correct the violation or prevent a further violation by using informal methods such as a conference, conciliation, or persuasion, and may enter into a conciliation agreement with the person involved. Unless violated, a conciliation agreement is a complete bar to any further action with respect to matters covered in the conciliation agreement. If the secretary of state is unable to correct or prevent further violation by these informal methods, the secretary of state may refer the matter to the attorney general for the enforcement of a criminal penalty provided by this act or commence a hearing as provided in subsection (11).
>
> (11) The secretary of state may commence a hearing to determine whether a civil violation of this act has occurred. . . . If after a hearing the secretary of state determines that a violation of this act has occurred, the secretary of state may issue an order requiring the person to pay a civil fine equal to the amount of the improper contribution or expenditure plus not more than $1,000.00 for each violation.

These sections delineate the Secretary of State's civil enforcement armamentarium, which consists of three procedural courses of action: "informal methods such as a conference, conciliation, or persuasion," commencement of a hearing to address potential civil violations, and referral to the Attorney General "for the enforcement of a criminal penalty . . . ." MCL 169.215(10) and (11).

As an adjunct to the informal resolution options described in MCL 169.215(10), this subsection contemplates that the Secretary of State may "enter into a conciliation agreement with the person involved" and that "[u]nless violated, a conciliation agreement is a complete bar to any further action with respect to matters covered in the conciliation agreement." *Id*. The MCFA envisions that the Secretary of State will preferentially utilize administrative conciliation to resolve campaign-finance-related disputes, and that only if the Secretary of State's informal enforcement tools fail to "correct or prevent further violation" may the secretary "refer the matter to the attorney general for the enforcement of a criminal penalty provided by this act or commence a hearing as provided in subsection (11)." MCL 169.215(10). If the Secretary of State conducts a hearing, the MCFA permits the Secretary of State thereafter to assess "a civil fine equal to the amount of the improper contribution or expenditure plus not more than $1,000.00 for each violation." MCL 169.215(11).

The circuit court concluded that because MCL 169.215(10) specifies that the Secretary of State may refer "the enforcement of a criminal penalty" to the Attorney General, the prosecutor did not possess the authority to investigate potential MCFA violations. The prosecutor maintains that the circuit court inaccurately characterized the MCFA's "narrow" informal enforce-

ment procedure as an exclusive remedy for any MCFA violation. Meijer and Dickinson assert that although the MCFA lacks a specific provision assigning to the Attorney General the exclusive authority to enforce criminal violations of the act, the statutory language clearly conveys the Legislature's intent to divest local prosecutors of the power to prosecute campaign finance law crimes. Meijer and Dickinson further assert that because the Secretary of State entered into a conciliation agreement regarding the subject of the prosecutor's investigation, MCL 169.215(10) plainly bars any related criminal prosecution.[1]

"Well-established principles guide this Court's statutory construction efforts." *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002). We begin by examining the specific statutory language under consideration, bearing in mind that

> [w]hen faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. [*Id.* (citations and quotation marks omitted).]

In discerning legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006). We endeavor to avoid interpreting a statute in a manner

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[1] On May 13, 2008, the Secretary of State issued a press release announcing that Meijer "is paying the largest fine ever assessed under Michigan's Campaign Finance Act as part of agreements resolving violations stemming from expenditures made in two elections."

that renders any statutory language nugatory or surplusage, and we " 'construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature.' " *Id*., quoting *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159-160; 627 NW2d 247 (2001).

We reject the notion that by enacting the MCFA, the Legislature intended to divest county prosecutors of their duty to investigate and prosecute election law crimes. "The prosecutor is a constitutional officer whose duties are as provided by law." *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972). The Legislature generally described the prosecutor's legal duties in MCL 49.153, which provides, "The prosecuting attorneys shall, in their respective counties, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested." In a case construing the MCFA, this Court recognized that "prosecuting attorneys in Michigan possess broad discretion to investigate criminal wrongdoing, determine which applicable charges a defendant should face, and initiate and conduct criminal proceedings." *Fieger*, 274 Mich App at 466. Our careful consideration of the plain and unambiguous language of the MCFA refutes the proposition that the Legislature intended to delegate to the Secretary of State's sole discretion whether alleged MCFA violators should face criminal prosecution.

Indisputably, the Secretary of State possesses broad authority to remedy election law infractions. But the authority of the Secretary of State clearly does not encompass the prosecution of election-law-related crimes. In the Michigan Election Law, MCL 168.1 *et seq*., the Legislature invested the Secretary of

State with the obligation to *investigate* and *report* election law violations as follows:

> The secretary of state shall do all of the following:
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> * * *
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> (h) Investigate, or cause to be investigated by local authorities, the administration of election laws, and report violations of the election laws and regulations to the attorney general or prosecuting attorney, or both, for prosecution. [MCL 168.31(1)(h).]

The MCFA entrusts the Secretary of State with the responsibility of enforcing campaign finance laws by authorizing the Secretary of State to "correct" and "prevent" violations. MCL 169.215(10). But nothing in the MCFA supplies the Secretary of State with the power to prosecute *criminal* infractions. Rather, the MCFA expressly provides only that the Secretary of State may "commence a hearing to determine whether a *civil* violation of this act has occurred," and may impose a "*civil* fine . . . ." MCL 169.215(11) (emphasis added). "Civil infractions are not crimes and are not punishable by imprisonment or by 'penal fines'." *Saginaw Pub Libraries Bd of Comm'rs v Judges of the 70th Dist Court*, 118 Mich App 379, 387; 325 NW2d 777 (1982). And the MCFA specifically contemplates the potential imposition of criminal liability for violators irrespective of whether the Secretary of State has imposed a civil fine: "Unless otherwise specified in this act, a person who violates a provision of this act is subject to a civil fine of not more than $1,000.00 for each violation. *A civil fine is in addition to, but not limited by, a criminal penalty prescribed by this act*." MCL 169.215(14) (emphasis added).

The Secretary of State's broad powers to investigate, conciliate, and remediate election law infringement,

and to assess civil fines, simply does not establish in the Secretary of State exclusive jurisdiction with respect to the criminal provisions of the MCFA. We discern no language in MCL 169.215, or elsewhere in the MCFA, that plainly conveys to the Secretary of State a prosecutorial function, or any language that attenuates the traditional criminal enforcement powers of prosecutors. Nor do we detect any legislative intent that informal methods of resolving campaign finance disputes, including conciliation agreements and civil fines, should entirely substitute for the prosecution of persons who "knowingly" violate MCL 169.254.[2]

Meijer and Dickinson urge that because MCL 169.215 describes an enforcement mechanism that includes no mention of the county prosecutor, this omission signifies that the Secretary of State possesses "the exclusive jurisdiction to enforce the MCFA unless, within her discretion, she refers a matter to the Attorney General and, even then, only after the mandatory conciliation procedure is exhausted and proven unsuccessful." In respondents' estimation, the MCFA neither explicitly nor implicitly grants to any other person or entity "the authority to contemporaneously investigate potential violations or to enforce the MCFA." We readily acknowledge that the enforcement provisions of § 15 omit express reference to the prosecutor. But MCFA § 15 and § 54(4), which criminalizes some corporate campaign contributions, relate to precisely the same subject: avoiding corruption or the appearance of cor-

[2] The Attorney General has previously reached the same conclusion: "The Legislature has provided that county prosecuting attorneys shall, in their respective counties, prosecute all civil and criminal matters in which the state or county may be interested. MCL 49.153 . . . . Nothing contained in the MCFA diminishes the authority of county prosecutors to prosecute crimes committed in their respective counties." OAG, 1999-2000, No. 7040, pp 81, 82 (December 9, 1999).

ruption in election campaigns. Consequently, we interpret these provisions *in pari materia* and read them together as a whole. *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). "The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes." *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008). "If two statutes lend themselves to a construction that avoids conflict, that construction should control." *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 148; 762 NW2d 192 (2009).

We conclude that MCFA §§ 15 and 54 evince plain legislative intent to create two distinct methods of enforcing the MCFA: civil procedures pursued by the Secretary of State and criminal prosecutions initiated by county prosecutors or the Attorney General. By enacting § 54, the Legislature unambiguously intended that knowing violators of the corporate campaign finance law would face criminal prosecution. Without question, the Legislature recognized and understood that the prerogative of criminal prosecution resides only in the Attorney General and county prosecutors. We discern no language in § 15 suggesting that the Legislature intended to appoint the Secretary of State as the gatekeeper for all potential prosecutions under the MCFA, concomitantly divesting the state's traditional prosecutorial entities of their statutory and constitutional powers. Our construction of the statute fully comports with this Court's previous observation in *Forster v Delton School Dist*, 176 Mich App 582, 585; 440 NW2d 421 (1989), that under the MCFA, prosecutors maintain their statutory power to prosecute crime:

> The campaign financing act does not allow for enforcement by private individuals. MCL 169.215 . . . provides an express remedy to enforce the duties imposed under the campaign financing act. The campaign financing act also

> provides for criminal penalties for knowing violation of the act, and enforcement for such knowing violation may be prosecuted by the Attorney General or local prosecuting attorneys.

Moreover, the interpretation of the MCFA suggested by Meijer and Dickinson would require us to read into the MCFA a jurisdictional rule that finds no support in the plain language of the act. "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). The MCFA makes no reference to jurisdiction, and nothing in the act conveys any intent, much less a "clear intention," to vest in the Secretary of State exclusive jurisdiction to determine whether MCFA violators will face criminal prosecution. See *Burt Twp v Dep't of Natural Resources*, 459 Mich 659, 669; 593 NW2d 534 (1999) (explaining that the Legislature "need only use terms that convey its clear intention that the grant of jurisdiction given is, in fact, exclusive").

The civil enforcement scheme set forth in the MCFA simply does not call into question the legitimacy of a criminal prosecution under the act. Although the Secretary of State possesses the *discretion* to refer violators to the Attorney General for prosecution, nothing in the act reflects that the Legislature intended that this discretionary referral ability would supplant a county prosecutor's traditional criminal law enforcement powers. The MCFA contains no language implying that the referral process constitutes the sole path to criminal prosecution. And we cannot agree with Meijer and Dickinson that § 15 subjects the prosecutorial power to investigate crime and

initiate prosecution to the sole discretion of the Secretary of State.

Meijer and Dickinson further assert that "statutes vesting administrative agencies with exclusive jurisdiction for enforcement" preclude circuit court proceedings "for alleged violations of the very statutory scheme for which the agency is charged with enforcement." In support of this claim, Meijer and Dickinson invoke several decisions of this Court.[3] In all the cited cases, this Court held that an administrative agency possessed exclusive jurisdiction over the issues presented.[4] However, none of the cases invoked by Meijer and Dickinson involved a criminal prosecution. We reject the proposition that by creating administrative agencies or designating state officers as responsible for the enforcement of regulatory laws, the Legislature intended to take away from county prosecutors their statutory power to prosecute crimes committed in their respective counties. Alternatively stated, by enacting MCL 169.215 or other regulatory schemes, the Legislature did not intend to delegate to civil authorities the exclusive jurisdiction to enforce criminal provisions

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[3] The cases cited by Meijer and Dickinson consist of *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354; 733 NW2d 107 (2007) (involving the power of the Liquor Control Commission under the Michigan Liquor Control Code, MCL 436.1101 *et seq*.); *Huron Valley Schools v Secretary of State*, 266 Mich App 638; 702 NW2d 862 (2005) (in which the plaintiffs averred that the defendant had misinterpreted or violated the MCFA); *Papas v Gaming Control Bd*, 257 Mich App 647; 669 NW2d 326 (2003) (concerning casino licensing under the Michigan Gaming Control and Revenue Act, MCL 432.201 *et seq*.); and *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43; 620 NW2d 546 (2000) (where the plaintiff sought a declaratory judgment on the basis that the Attorney General and the Secretary of State had misconstrued or would misconstrue the MCFA).

[4] *L & L Wine & Liquor*, 274 Mich App at 357-358; *Huron Valley Schools*, 266 Mich App at 645-650; *Papas*, 257 Mich App at 649; and *Citizens for Common Sense in Gov't*, 243 Mich App at 47.

concomitantly enacted to punish regulatory transgressors.[5]

Meijer and Dickinson also aver that a conciliation agreement bars both further civil proceedings and criminal enforcement of the MCFA, even if initiated by the Attorney General. In support of this argument, Meijer and Dickinson cite the portion of MCL 169.215(10) stating, "Unless violated, a conciliation agreement is a complete bar to any further action with respect to matters covered in the conciliation agreement." Because the Secretary of State possesses no legal authority to address criminal liability in a conciliation agreement, this statutory language does not bar the prosecutor from investigating felony charges. Furthermore, our review of the conciliation agreement reflects that it covered only Meijer's civil liability for violating the MCFA and the assessment of civil fines; the agreement includes no mention that the Secretary of State considered or imposed criminal penalties.

By its plain terms, the MCFA creates a framework for remedying and punishing campaign finance law violations. The statutory language neither expressly creates nor inherently implies any restriction applicable to the prosecutor's power to investigate criminal violations provided for by the MCFA. Had the Legislature intended that civil enforcement by the Secretary of State

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[5] Pursuant to the Liquor Control Code, "[a] person who engages in the business of selling or keeping for sale alcoholic liquor in violation of this act" is liable "both civilly and criminally" for the act's violation. MCL 436.1917(1). Under the Michigan Gaming Control and Revenue Act, a person who conducts a gambling operation "where wagering is used or to be used without a license issued by the board" is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $100,000, or both, and shall be barred from receiving or maintaining a license . . . ." MCL 432.218(1)(a).

would preclude all related criminal prosecutions, it would not have incorporated in the MCFA an admonition that "[a] civil fine is in addition to, but not limited by, a criminal penalty prescribed by this act." MCL 169.215(14). Absent a clear and unambiguous expression that the Legislature intended to limit a prosecutor's authority, we divine in MCL 169.215 no intent to divest the circuit court of jurisdiction to entertain the criminal prosecution of campaign finance law violators.

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

BRONSON METHODIST HOSPITAL v
ALLSTATE INSURANCE COMPANY

Docket No. 286087. Submitted November 10, 2009, at Lansing. Decided November 24, 2009, at 9:00 a.m.

Bronson Methodist Hospital brought an action on February 6, 2008, in the Kalamazoo Circuit Court, J. Richardson Johnson, J., against Allstate Insurance Company, seeking to recover personal protection insurance benefits for medical care provided to Lemuel Brown for injuries sustained in an automobile accident, statutory interest, costs, and attorney fees. The accident occurred on December 29, 2006, and Brown, who was uninsured and driving a borrowed, uninsured vehicle, received treatment from plaintiff from December 30, 2006, through January 5, 2007. Plaintiff submitted an application to the Michigan Assigned Claims Facility (MACF) on December 14, 2007, and the claim was assigned to defendant on January 7, 2008. Plaintiff received notice of the assignment on January 15, 2008, and billed defendant directly, but defendant refused to pay. The court granted summary disposition in favor of defendant, determining that the one-year-back recovery limitation found in MCL 500.3145(1) prevented plaintiff from recovering for medical services performed more than one year before the action was filed. Plaintiff appealed.

The Court of Appeals *held*:

1. Plaintiff timely commenced this action. The statute of limitations in MCL 500.3145(1) does not preclude the action. Generally, under MCL 500.3145(1) plaintiff's action against defendant would be time-barred because Brown's treatment ended on January 5, 2007, thus barring commencement of an action after January 5, 2008. However, MCL 500.3174 provides that an action by a claimant under the assigned claims plan shall not be commenced more than 30 days after receipt of notice of the assignment or the last date on which the action could have been commenced against an insurer of identifiable coverage applicable to the claim, whichever is later. Here, February 15, 2008, was the thirtieth day after the receipt of notice of the assignment, which date was later than January 5, 2008, the last date on which the action could have been commenced against an insurer of identifiable coverage applicable to the claim. Therefore, plaintiff timely commenced the action on February 6, 2008.

2. MCL 500.3174 does not extend the one-year recovery limitation found in MCL 500.3145(1) because the language used by the Legislature in MCL 500.3174 unambiguously describes only an extension of the statute of limitations period. Application of the recovery limitation in MCL 500.3145(1) precludes plaintiff's claim. The one-year-back rule draws a strict line that must be followed even with unfair results. Plaintiff, which commenced this action on February 6, 2008, is precluded from recovering any benefits for treatment that occurred before February 6, 2007. Plaintiff last treated Brown on January 6, 2007.

Affirmed.

INSURANCE — NO-FAULT INSURANCE — PERSONAL PROTECTION BENEFITS — LIMITATION ON RECOVERY.

The language employed by the Legislature in MCL 500.3174 to extend the period of limitations contained in MCL 500.3145(1) for the commencement of an action to recover personal protection insurance benefits by a person claiming through the assigned claims facility does not apply to the one-year-back recovery limitation period contained in MCL 500.3145(1), and the recovery of benefits remains subject to the one-year-back limitation.

Miller Johnson (by *Robert J. Christians* and *Richard E. Hillary, II*) for plaintiff.

Potter, DeAgostino, O'Dea & Patterson (by *P. Kelly O'Dea*) for defendant.

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM. In this case brought under the Michigan no-fault insurance act,[1] plaintiff Bronson Methodist Hospital appeals as of right the May 30, 2008 trial court order granting defendant Allstate Insurance Company's motion for summary disposition under MCR 2.116(C)(7). We affirm.

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[1] MCL 500.3101 *et seq*.

I. BASIC FACTS AND PROCEDURAL HISTORY

On December 29, 2006, Lemuel Brown was injured in an automobile accident while driving a borrowed vehicle. Brown was transported from the scene of the accident to Bronson Methodist Hospital. Brown received medical treatment from December 30, 2006, through January 5, 2007. Brown's medical expenses totaled $37,465.01.

It was later determined that the borrowed vehicle was uninsured, and neither Brown nor any of his relatives with whom he resided carried automobile insurance. Therefore, on December 14, 2007, Bronson Methodist Hospital submitted an application to the Michigan Assigned Claims Facility (MACF) seeking to recover the medical expenses. The MACF assigned the claim to Allstate on January 7, 2008. Bronson Methodist Hospital received notice of the assignment on January 15, 2008. Bronson Methodist Hospital billed Allstate directly, but Allstate refused to pay the claim.

On February 6, 2008, Bronson Methodist Hospital commenced the current action seeking recovery for Brown's medical expenses under the no-fault insurance act and seeking statutory interest, costs, and attorney fees. Allstate moved for summary disposition on the ground that application of the recovery limitation provision (the one-year-back rule) in MCL 500.3145(1) barred Bronson Methodist Hospital's claim. Bronson Methodist Hospital responded that MCL 500.3174, the assigned claims plan notice and commencement section of the no-fault insurance act, extended the recovery limitation provision of MCL 500.3145(1) with respect to assigned claims.

The trial court determined that MCL 500.3174 applied only to the statute of limitations period of MCL 500.3145(1) and not to the recovery limitations period of

MCL 500.3145(1). In addition, the trial court held that the one-year-back rule should be strictly construed, because it limits recovery to damages that were incurred within one year of filing suit. The trial court then applied the one-year-back rule and determined that all Bronson Methodist Hospital's medical services were performed more than one year before the instant action was filed. Accordingly, the trial court granted Allstate summary disposition pursuant to MCR 2.116(C)(7).

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Bronson Methodist Hospital argues that the trial court erred by granting Allstate summary disposition under MCR 2.116(C)(7) because denying Bronson Methodist Hospital the ability to recover no-fault medical benefits after it fully complied with the time requirements of MCL 500.3174 would render the statute nugatory and meaningless.

We review de novo a trial court's decision on a motion for summary disposition.[2] Under MCR 2.116(C)(7), a party may move for summary disposition on the ground that a claim is barred by the statute of limitations. When considering a motion brought under MCR 2.116(C)(7), it is proper for this Court to review all the material submitted in support of, and in opposition to, the plaintiff's claim.[3] In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the

[2] *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003).

[3] *Patterson v Kleiman*, 447 Mich 429, 433; 526 NW2d 879 (1994).

plaintiff's favor.[4] In addition, the issues raised in this appeal involve questions of statutory interpretation. We review such issues de novo.[5]

B. PRINCIPLES OF STATUTORY INTERPRETATION

The issue here is primarily a question of statutory interpretation. The primary goal in statutory interpretation is to ascertain and give effect to the Legislature's intent.[6] " 'This Court should first look to the specific statutory language to determine the intent of the Legislature,' " which is " 'presumed to intend the meaning that the statute plainly expresses.' "[7] When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted.[8] Because the role of the judiciary is to interpret rather than write the law, courts lack authority to venture beyond a statute's unambiguous text.[9] Undefined statutory terms are generally given their plain and ordinary meanings.[10] Where words "have acquired a peculiar and appropriate meaning in the law," they should be construed according to that meaning.[11]

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[4] *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001).

[5] *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007).

[6] *Farmers Ins Exch v AAA of Michigan*, 256 Mich App 691, 695; 671 NW2d 89 (2003).

[7] *Universal Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003), quoting *Institute in Basic Life Principles, Inc v Watersmeet Twp (After Remand)*, 217 Mich App 7, 12; 551 NW2d 199 (1996).

[8] *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

[9] *Id.*

[10] *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004).

[11] *Feyz v Mercy Mem Hosp*, 475 Mich 663, 673; 719 NW2d 1 (2006).

C. APPLICABLE STATUTES

Personal protection insurance benefits under the no-fault insurance act are governed under MCL 500.3145(1), which provides, in pertinent part:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.

This Court has determined that this section contains a statute of limitations provision because it allows commencement of an action at any time within one year of the most recent "allowable expense," but also contains a recovery limitation provision because it limits recovery of personal protection insurance benefits to losses incurred within one year before the action commences.[12] The recovery limitation is termed the "one-year-back" rule and is to be strictly enforced as written.[13] Therefore, under its plain terms, MCL 500.3145(1) precludes an action to recover benefits for any portion of a loss incurred more than one year before the date on which the action was commenced.

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[12] *Bohlinger v Detroit Automobile Inter-Ins Exch*, 120 Mich App 269, 273; 327 NW2d 466 (1982).

[13] *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574, 586; 702 NW2d 539 (2005).

When an individual is uninsured, the MACF is an insurer of last priority.[14] "A person entitled to no-fault benefits may obtain them through an assigned claims plan 'if no personal protection insurance is applicable to the injury[.]' "[15] MCL 500.3174 provides:

> A person claiming through an assigned claims plan shall notify the facility of his claim within the time that would have been allowed for filing an action for personal protection insurance benefits if identifiable coverage applicable to the claim had been in effect. The facility shall promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned, or of the facility if the claim is assigned to it. An action by the claimant shall not be commenced more than 30 days after receipt of notice of the assignment or the last date on which the action could have been commenced against an insurer of identifiable coverage applicable to the claim, whichever is later.

Claims filed through the MACF remain subject to the one-year-back rule found in MCL 500.3145(1).[16]

D. ANALYSIS

1. MCL 500.3174 AND THE MCL 500.3145(1) STATUTE OF LIMITATIONS

Reading MCL 500.3174 and MCL 500.3145(1) together, we conclude that the statute of limitations found in MCL 500.3145(1) does not preclude Bronson Methodist Hospital's action. Bronson Methodist Hospital notified the MACF of its claim on December 14, 2007, within one year of the date of the accident. The MACF

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[14] MCL 500.3172; *Hunt v Citizens Ins Co*, 183 Mich App 660, 665; 455 NW2d 384 (1990).

[15] *Parks v Detroit Automobile Inter-Ins Exch*, 426 Mich 191, 210; 393 NW2d 833 (1986), quoting MCL 500.3172(1).

[16] *Henry Ford Health Sys v Titan Ins Co*, 275 Mich App 643, 646-647; 741 NW2d 393 (2007).

assigned the claim to Allstate on January 7, 2008, and Bronson Methodist Hospital received notification of the assignment on January 15, 2008. Bronson Methodist Hospital then commenced the current action on February 6, 2008.

Generally, under MCL 500.3145(1), Bronson Methodist Hospital's action against Allstate would be time-barred because Brown's treatment ended on January 5, 2007, thus barring commencement of an action after January 5, 2008. However, MCL 500.3174 provides that "[a]n action by the claimant shall not be commenced more than 30 days after receipt of notice of the assignment or the last date on which the action could have been commenced against an insurer of identifiable coverage applicable to the claim, whichever is later."[17] Here, the thirtieth day after the receipt of notice of the assignment was February 15, 2008, which date was later than January 5, 2008, "the last date on which the action could have been commenced against an insurer of identifiable coverage applicable to the claim[.]" Therefore, Bronson Methodist Hospital timely commenced this action on February 6, 2008.

2. MCL 500.3174 AND THE MCL 500.3145(1) RECOVERY LIMITATION

The issue then becomes, however, whether the recovery limitation, or one-year-back rule, found in MCL 500.3145(1), precludes Bronson Methodist Hospital's recovery or if MCL 500.3174 also extends the recovery limitation. This is an issue of first impression.

The relevant language found in MCL 500.3174, "*[a]n action* by the claimant *shall not be commenced* more than 30 days after receipt of notice of the assignment or the last date on which the action *could have been*

[17] MCL 500.3174.

commenced against an insurer of identifiable coverage applicable to the claim, whichever is later[,]"[18] uses the same words as found in MCL 500.3145(1):

> *An action* for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury *may not be commenced* later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, *the action may be commenced* at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred.[19]

Each emphasized phrase includes language limiting when *an action* can be *commenced*. Because the Legislature chose to use the same language in each provision, we conclude that the Legislature intended that the different sections be treated in the same manner to accomplish the same purpose.[20] "A phrase that is found in multiple sections throughout the no-fault act should be consistently construed."[21] More specifically, as explained previously, the Michigan Supreme Court has already interpreted the two phrases in MCL 500.3145(1) to constitute statutes of limitations,[22] and therefore, use of the same terms found in MCL 500.3174 should also be interpreted as relating to the statute of limitations.

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[18] Emphasis added.

[19] MCL 500.3145(1) (emphasis added).

[20] *Farmers Ins Exch v Farm Bureau Gen Ins Co*, 272 Mich App 106, 116; 724 NW2d 485 (2006).

[21] *Amy v MIC Gen Ins Corp*, 258 Mich App 94, 106; 670 NW2d 228 (2003), rev'd on other grounds *sub nom Stewart v Michigan*, 471 Mich 692 (2004).

[22] *Devillers*, *supra* at 574.

In addition, MCL 500.3174 does not contain any language extending the recovery limitation of MCL 500.3145(1). "When the Legislature enacts laws, it is presumed to know the rules of statutory construction and therefore its use or omission of language is generally presumed to be intentional."[23] Further, undefined words that have a peculiar and appropriate meaning in the law should be construed according to that meaning.[24]

The word "action" "in its usual legal sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law."[25] In construing the similar provisions in MCL 500.3145(1) as statutes of limitations, our Courts necessarily used the particular legal meaning of the word "action," because statutes of limitations are designed to encourage plaintiffs to diligently pursue their actions and protect defendants from defending stale claims.[26] Therefore, the omission of language in MCL 500.3174 extending the recovery limitation was intentional where the Legislature referred only to "actions." Thus, recovery of benefits remains subject to the one-year-back rule.

The Legislature is presumed to intend the meaning the statute expresses.[27] And the plain, unambiguous language of the statute should be enforced as written.[28] " ' "Only where the statutory language is ambiguous may a court properly go beyond the words of the statute

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[23] *Carson City Hosp v Dep't of Community Health*, 253 Mich App 444, 447-448; 656 NW2d 366 (2002).

[24] *Feyz*, *supra* at 673.

[25] Black's Law Dictionary (5th ed).

[26] See *Bates v Mercier*, 224 Mich App 122, 128; 568 NW2d 362 (1997).

[27] *Universal Underwriters Ins*, *supra* at 544.

[28] *McGhee v Helsel*, 262 Mich App 221, 224; 686 NW2d 6 (2004).

to ascertain legislative intent." ' "[29] An ambiguity does not exist simply because a court questions whether the Legislature intended the consequence of the language at issue.[30] An ambiguity exists only where the words of the statute can be viewed with more than one accepted meaning,[31] which is not the case herein. Any other interpretation by this Court would require impermissible judicial interpretation.

In sum, MCL 500.3174 does not extend the recovery limitation found in MCL 500.3145(1), because the language used by the Legislature in MCL 500.3174 unambiguously describes only an extension of the statute of limitations period.

The application of the recovery limitation therefore precludes Bronson Methodist Hospital's claim. The one-year-back rule draws a strict line, which must be followed even with unfair results.[32] Because Bronson Methodist Hospital commenced this action on February 6, 2008, it was precluded from recovering any benefits for treatment occurring before February 6, 2007. Bronson Methodist Hospital last treated Brown on January 5, 2007. Thus, Bronson Methodist Hospital is no longer entitled to recover any of the medical expenses it provided to Brown.

Affirmed.

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[29] *Id.*, quoting *Colucci v McMillin*, 256 Mich App 88, 94; 662 NW2d 87 (2003), quoting *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[30] *Id.*

[31] *Id.*

[32] *Henry Ford*, *supra* at 647.

CAMPBELL v DEPARTMENT OF HUMAN SERVICES

Docket No. 281592. Submitted July 8, 2009, at Lansing. Decided November 24, 2009, at 9:05 a.m.

Christonna Campbell, an employee of the Department of Human Services, brought an action in the Washtenaw Circuit Court, Timothy P. Connors, J., against the Department of Human Services, alleging that she was denied a promotion as a result of unlawful gender discrimination. The jury found that plaintiff had proved her discrimination claim and awarded her economic and noneconomic damages. The court entered a judgment and order consistent with the verdict and denied defendant's motions for judgment notwithstanding the verdict, remittitur, or a new trial. Defendant appealed.

The Court of Appeals *held*:

1. Acts occurring outside the limitations period, although not actionable, may, in appropriate cases, be used as background evidence to establish a pattern of discrimination to support a claim for an injury occurring within the limitations period. This evidence is subject to the rules of evidence and applicable governing law, and may be admitted under the sound discretion of the trial court. The trial court did not abuse its discretion by admitting evidence regarding employment acts occurring outside the limitations period as background evidence. The trial court properly denied defendant's motion for summary disposition, given the proper admission of the background evidence and the inference of discrimination it supported.

2. Plaintiff met her burden of proof regarding the fourth element necessary to establish a prima facie case of discrimination, i.e., whether the adverse employment action took place under circumstances giving rise to an inference of unlawful discrimination, with the admissible evidence regarding acts occurring outside the limitations period. The trial court did not err by denying defendant's motion for a directed verdict.

3. The evidence was sufficient to allow the jury to believe that defendant's proffered reasons for promoting a male to the position instead of plaintiff were pretextual. Plaintiff presented sufficient evidence to raise a triable issue concerning whether gender was a

motivating factor in defendant's decision not to promote plaintiff. The trial court properly denied defendant's motion for judgment notwithstanding the verdict.

4. The jury's award of economic damages was reasonably based on the evidence and was not excessive. The motions for remittitur or a new trial were properly denied.

5. Victims of discrimination may recover for the humiliation, embarrassment, disappointment and other forms of mental anguish resulting from the discrimination and medical testimony substantiating the claim is not required. Plaintiff's testimony regarding her own subjective feelings was sufficient to support the award of noneconomic damages.

Affirmed.

MURRAY, J., concurring in part and dissenting in part, agreed with the majority regarding the admission of evidence regarding acts occurring outside the limitations period as background evidence to support a timely discrimination claim. However, Judge MURRAY stated that the evidence plaintiff presented was insufficient as a matter of law to show that she was discriminated against on the basis of her gender when she was not promoted to the position she desired. Plaintiff failed to prove that she was similarly situated to any of the males that received any of the prior positions that plaintiff sought and, even though there was enough evidence to show that plaintiff was similarly situated to the male that received the promotion at issue in this case, there is no evidence of pretext in defendant's choice of that male over plaintiff. The judgment of the trial court should be reversed and the case should be remanded to the trial court for entry of an order granting a directed verdict for defendant.

CIVIL RIGHTS — EMPLOYMENT DISCRIMINATION — EVIDENCE — ACTS OCCURRING OUTSIDE LIMITATIONS PERIOD.

Acts occurring outside the limitations period, although not actionable, may, in appropriate cases, be used as background evidence to establish a pattern of discrimination to support a claim for discrimination occurring within the limitations period; such evidence is subject to the rules of evidence and applicable governing law and may be admitted under the sound discretion of the trial court.

Barnes Monroe Barnes, P.C. (by *Joan M. Barnes*), for plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Ann M. Sherman*, Assistant Attorney General, for defendant.

Before: METER, P.J., and MURRAY and BECKERING, JJ.

METER, P.J. In this gender-discrimination case, defendant appeals as of right from a judgment for plaintiff entered after a jury trial. We affirm. Of particular note is our holding that although acts of discrimination occurring outside an applicable limitations period are not actionable, evidence of them may, in appropriate cases, be used as "background evidence" to establish a pattern of discrimination and to support a proper claim.

I. PERTINENT FACTS

Plaintiff alleged in her lawsuit that defendant, her employer, discriminated against her on the basis of her gender, contrary to MCL 37.2202(1)(a), a provision of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*.[1] Plaintiff had been employed with defendant since 1985, working in various positions with adjudicated youths. The basis of plaintiff's claim was defendant's decision to promote Michael Johnson, instead of her, to the center director position at Arbor Heights (Arbor), a youth facility, in October 2002.

The parties did not dispute that plaintiff's claim was governed by a three-year period of limitations. See MCL 600.5805(10). Defendant moved for summary disposition, noting that plaintiff's discrimination claim was subject to the analysis outlined in *McDonnell Douglas Corp v Green*, 411 US 792, 802-804; 93 S Ct 1817; 36 L

[1] Plaintiff set forth two counts in her complaint—gender discrimination and retaliation—but the retaliation count was dismissed and is not at issue on appeal.

Ed 2d 668 (1973), which has been adopted in Michigan. See *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001). Defendant claimed that plaintiff had failed to present evidence of acts within the three-year limitations period amounting to discrimination. Defendant further claimed that it offered an alternative, nondiscriminatory reason for promoting Johnson instead of plaintiff to the position in question.

A key issue in defendant's motion was whether acts that occurred outside the limitations period could be considered in order to support a claim based on an act that occurred within that period. Defendant asserted that acts outside the limitations period could not be considered on the basis of our Supreme Court's decision in *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 283-285; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005), in which the Court held that a plaintiff could not bring a viable CRA lawsuit for employment actions that occurred outside the limitations period. *Garg* overruled *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986), which recognized a "continuing-violations" exception to the statute of limitations. *Garg*, 472 Mich at 280, 284. Defendant contended that only events that occurred after January 28, 2002,[2] properly could be considered in this case. Plaintiff maintained that *Garg* does not mandate the exclusion from evidence of acts outside the limitations period in order to show a pattern of discrimination, as long as the claim itself is based on an act within that period.

The trial court rejected defendant's interpretation of *Garg* by relying on the reasoning in *Ramanathan v*

[2] This date took into consideration that the statutory period was tolled during the pendency of a federal suit filed by plaintiff that was later dismissed. Plaintiff does not dispute the accuracy of defendant's calculation.

Wayne State Univ Bd of Governors, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 266238) *(Ramanathan I)*, rev'd in part on other grounds by *Ramanathan v Wayne State Univ Bd of Governors*, 480 Mich 1090 (2008) *(Ramanathan II)*. It stated that it had discretion to consider acts that occurred outside the limitations period as background evidence in order to establish a pattern of discrimination. The court applied the *McDonnell Douglas* framework, found that plaintiff had presented sufficient evidence to establish a prima facie case, and concluded that a genuine issue of material fact existed regarding whether unlawful discrimination was a motivating factor in defendant's failure to promote plaintiff. The court concluded that, although defendant satisfied its burden of providing a legitimate, nondiscriminatory reason for its failure to promote plaintiff, the substantively admissible evidence, which included acts outside the limitations period, was sufficient to support a rational inference of discrimination. The trial court therefore denied defendant's motion for summary disposition of plaintiff's gender discrimination claim, and a two-day jury trial took place.

The jury found that plaintiff had proved her discrimination case and awarded her $328,000 in economic damages and $50,000 in noneconomic damages.

II. EVIDENCE OF ACTS OUTSIDE THE LIMITATIONS PERIOD

Defendant argues that evidence of acts occurring outside the three-year limitations period should have been excluded from trial.

Defendant raises this issue in the context of the trial court's denial of its motion for summary disposition under MCR 2.116(C)(10). This Court reviews de novo a trial court's decision regarding a motion for summary

disposition. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). Summary disposition of all or part of a claim may be granted under MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (citation and quotation marks omitted). The moving party must specifically identify the matters that allegedly have no disputed factual issues, and the nonmoving party must support its position that a disputed factual issue does exist by using affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(4); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006).

We review a trial court's admission of evidence for an abuse of discretion. *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007). However, we review de novo preliminary questions of law pertinent to the admission of evidence. *Dep't of Transportation v Frankenlust Lutheran Congregation*, 269 Mich App 570, 575; 711 NW2d 453 (2006).

In *Sumner*, the Court adopted the "continuing-violations" exception to the statute of limitations, which required the plaintiff to first demonstrate the existence of a violation within the limitations period, and then "demonstrate either that his or her employer has engaged in a 'policy of discrimination' or has engaged in 'a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern . . . .' " *Garg*, 472 Mich at 280, quoting *Sumner*, 427 Mich at 528. The *Garg* Court held that this doctrine was at odds with the applicable statute of limitations,

MCL 600.5805, and, thus, had no future applicability in Michigan. *Garg*, 472 Mich at 281-282. Therefore, under *Garg*, a plaintiff cannot recover for any injuries that occurred outside the three-year limitations period applicable to CRA claims. *Id*. at 282. This rule is not in dispute in this case. Rather, the parties dispute whether evidence of acts or events outside the limitations period can nonetheless be used as background evidence to establish a pattern of discrimination in order to prove a timely claim.

The Court in *Garg* did not squarely address whether acts or events outside the limitations period can be used as background evidence to establish a pattern of discrimination in order to prove a timely claim. It is true that the Court in *Garg* seemed to exclude from evidence in that case acts occurring outside the limitations period. See *id*. at 278. This was pointed out by Justice CAVANAGH, writing in dissent. *Id*. at 303 (CAVANAGH, J., dissenting). However, the Court also emphasized that *allowing recovery* for injuries outside the limitations period would improperly contravene the intent of the Legislature. *Id*. at 282. There is a difference, of course, between *allowing recovery* for an injury outside the limitations period and simply allowing such an injury to be used as background evidence to establish a claim associated with an injury occurring within the limitations period. Significantly, the Court in *Garg* had originally included a footnote stating that acts outside the limitations period could *not* be used as background evidence of discrimination, but this footnote was deleted in an amendment to the opinion.

This Court, in its unpublished decision *Ramanathan I*, which the trial court in this case followed, stated:

> Despite the language in *Garg*, referencing limitations on the admissibility of evidence in that case, we cannot read

> the amended opinion so broadly as to exclude per se all background evidence of alleged discriminatory or retaliatory acts occurring outside the limitations period. Absent clear guidance in this regard from the Supreme Court, we conclude that this evidence is subject to the rules of evidence and other applicable governing law, and its admissibility is within the discretion of the trial court. [*Ramanathan I*, unpub op at 4.]

The *Ramanathan I* panel stated that a "per se rule [of exclusion] cannot be inferred from *Garg* given the Supreme Court's amendment of the opinion to delete footnote 14, which expressly sanctioned such blanket exclusion of evidence in claims under the CRE." *Id*., unpub op at 3. On appeal, the Supreme Court reversed this Court's *Ramanathan I* decision in part and remanded the case to the circuit court without commenting on this Court's handling of the "background evidence" issue, a point that Justice MARKMAN noted in his dissenting statement. *Ramanathan II*, 480 Mich at 1097 (MARKMAN, J., dissenting). Justice MARKMAN stated:

> Defendant also asserts that, even if plaintiff's claims are allowed to proceed to trial, plaintiff may not present evidence of events that occurred outside the statute of limitations period under *Garg*. Unfortunately, the majority simply ignores this issue. The significance of this Court's action in *Garg* in granting plaintiff's motion for reconsideration and striking the original footnote 14 is squarely implicated in this case if it must proceed to trial, as required by the majority. I agree with the Court of Appeals that "the implications of *Garg* are unclear with respect to the admission of evidence." This Court should not require this trial to proceed where the scope of admissible evidence is unclear and where this issue has squarely been presented to this Court. It makes no sense for this trial to proceed before its ground rules can be determined. [*Id*.]

Given the absence of a bright-line rule set forth in *Garg*, given the deletion of the footnote, and given the Supreme Court's failure to address the "background evidence" issue in *Ramanathan II*, we decline to read *Garg* as holding that injuries occurring outside the limitations period may never be used as evidence to support a claim for an injury occurring within the limitations period. We instead choose to adopt the reasoning in *Ramanathan I* and hold that acts occurring outside the limitations period, although not actionable, may, in appropriate cases, be used as background evidence to establish a pattern of discrimination. This evidence is subject to the rules of evidence and applicable governing law, and may be admitted under the sound discretion of the trial court. We note that our decision to adopt this rule of law does not resurrect the continuing-violations doctrine. Unlike under the continuing-violations doctrine, a plaintiff cannot *recover* for any injury suffered as a result of a prior act occurring outside the limitations period. However, we find no reason why the use of such acts as background evidence should not be subject to Michigan's evidentiary rules and the trial court's discretion to admit it.[3]

We conclude that the trial court did not err by finding that it was not prohibited as a matter of law from considering employment acts occurring outside the limitations period as background evidence. The evidence was admissible as background evidence, and in light of its clear probative value, we conclude that the trial court did not abuse its discretion by admitting it. Given the proper admission of the evidence and given

[3] We note that federal courts allow time-barred acts as background evidence relating to timely acts. See, e.g., *Rathbun v Autozone, Inc*, 361 F3d 62, 76 (CA 1, 2004).

the inference of discrimination it supported, the trial court properly denied defendant's motion for summary disposition.

III. ADDITIONAL ISSUES

A. THE FOURTH ELEMENT OF THE PRIMA FACIE CASE

Defendant also contends that its motion for a directed verdict should have been granted because plaintiff failed to establish the fourth element necessary to establish a prima facie case of discrimination, i.e., whether the adverse employment action took place under circumstances giving rise to an inference of unlawful discrimination. See *Hazle*, 464 Mich at 463.

This Court reviews de novo a trial court's decision on a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003).

> In reviewing the trial court's ruling, this Court examines the evidence presented and all legitimate inferences arising therefrom in the light most favorable to the nonmoving party. A directed verdict is appropriate only when no material factual question exists upon which reasonable minds could differ. If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury. The appellate court recognizes the jury's and the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony. [*Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 201-202; 755 NW2d 686 (2008) (citations and quotation marks omitted).]

In *Hazle*, 464 Mich at 463, the Court stated:

> Under *McDonnell Douglas*, a plaintiff must first offer a "prima facie case" of discrimination. Here, plaintiff was required to present evidence that (1) she belongs to a

> protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination.

Defendant contends that plaintiff did not adequately establish the fourth element of this analysis. We disagree. Given the admissibility of acts outside the limitations period as background evidence of discrimination, we find that the record demonstrates that plaintiff met her burden of establishing this element. Viewing the evidence in the light most favorable to plaintiff, a rational trier of fact could reasonably infer, from the multiple times that plaintiff was not chosen for a position for which she was qualified and that was filled by a male, and in some cases by a male less qualified than plaintiff, that gender was a motivating factor in defendant's decision not to promote plaintiff to the Arbor position. Further, we find unpersuasive defendant's argument that another female employee was selected and promoted as a center director elsewhere. The fact that some women held high-level positions does not mean that a reasonable inference of discrimination could not be made in this particular case. The trial court did not err by denying the motion for a directed verdict.

B. EVIDENCE OF A PRETEXT

Defendant next argues that "[p]laintiff did not prove that [d]efendant's legitimate, nondiscriminatory reasons for hiring Michael Johnson as the Arbor Heights director were pretextual." Defendant contends that for this reason, the trial court should have granted defendant's motion for judgment notwithstanding the verdict (JNOV).

We review de novo a trial court's decision regarding a motion for JNOV. *Sniecinski*, 469 Mich at 131. "This Court must view the evidence and all legitimate inferences in the light most favorable to the nonmoving party . . . to determine whether a question of fact existed." *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 517-518; 742 NW2d 140 (2007). "If reasonable jurors could honestly have reached different conclusions, then the jury verdict must stand." *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005) (citations and quotation marks omitted).

Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *Hazle*, 464 Mich at 464-465. The plaintiff, for his or her claim to survive following such an articulation by the employer, must then demonstrate that the articulated reason was merely a pretext for unlawful discrimination. *Id*. at 465-466.

> A plaintiff can establish that a defendant's articulated legitimate, nondiscriminatory reasons are pretexts (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. [*Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998).]

It is insufficient for a plaintiff to "simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Hazle*, 464 Mich at 476 (citations and quotation marks omitted).

The evidence presented in this case was sufficient to allow the jury to believe that defendant's proffered reasons for promoting Johnson instead of plaintiff—objective scoring criteria and a written recommendation—were pretextual. Defendant claimed Johnson had the highest interviewing score, but failed to introduce the actual scores as corroborating evidence, despite their availability. This was of particular importance because interview performance apparently was the key factor in the promotion decision. Further, plaintiff's written qualifications were more than sufficient and she had been trained in the type of interviewing employed. In light of these facts, along with the evidence on the record that supported an inference of discrimination based on defendant's pattern of promoting men who were less qualified than plaintiff, plaintiff created a triable issue regarding whether defendant's stated reason for promoting Johnson was a mere pretext for gender discrimination. See *Town v Michigan Bell Tel Co*, 455 Mich 688, 698; 568 NW2d 64 (1997) (evidence to discredit a defendant's proffered reason together with the plaintiff's prima facie case may be sufficient to support a finding of discrimination).

Although defendant presented statistical evidence suggesting workplace gender equality, that evidence covered the entirety of defendant's employees, and not just those at the bureau where plaintiff claimed she had suffered gender discrimination. It may have been true that overall gender equality existed statistically, while there was inequality in the bureau in question. Moreover, the mere facts that there was a woman on the interview panel and that a woman approved the promotion decision do not mean that plaintiff was not discriminated against on the basis of gender. In fact, the approval process only ensured that the civil-service rules were followed regarding the selection process and

did not involve the detailed substance of interviews. Candidates' scores were also not compared during the approval process. Considering all the evidentiary support, we find that plaintiff presented sufficient evidence to raise a triable issue concerning whether gender was a motivating factor in defendant's decision not to promote plaintiff. Accordingly, the trial court properly denied the motion for JNOV.[4]

C. REMITTITUR OR A NEW TRIAL

Defendant next argues that the trial court should have granted its motion for remittitur or a new trial because plaintiff did not support with evidence the economic damages that the jury awarded, and the verdict was excessive and against the great weight of the evidence.

We review for an abuse of discretion a trial court's decision concerning a motion for a new trial. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 682; 630 NW2d 356 (2001). We also review for an abuse of discretion a trial court's decision regarding remittitur. *Palenkas v Beaumont Hosp*, 432 Mich 527, 533; 443 NW2d 354 (1989).

> In determining whether remittitur is appropriate, a trial court must decide whether the jury award was supported by the evidence. *Diamond v Witherspoon*, 265 Mich App 673, 693; 696 NW2d 770 (2005). This determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented. *Palenkas* [432 Mich at 532]. The power of remittitur should be

[4] In its appellate brief, defendant conflates a number of the issues in this case. For clarity, we note that we also conclude that there was sufficient evidence of discrimination presented before trial to allow plaintiff's claim to proceed and we therefore reject defendant's argument that the trial court should have granted its motion for summary disposition.

> exercised with restraint. *Hines v Grand Trunk W R Co*, 151 Mich App 585, 595; 391 NW2d 750 (1985). If the award for economic damages falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, the jury award should not be disturbed. *Palenkas*, *supra* at 532-533. [*Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008).]

The damages award fell within the range supported by the evidence and within what reasonable minds would consider just compensation, and therefore the award will not be disturbed. Plaintiff testified that it was her understanding that the position in question would provide compensation based on its classification at "level 17," and evidence indeed indicated that employees were compensated according to classification level and years of state service. Plaintiff, in calculating the damages she sought, used the pay rate of a "level 17" employee with similar tenure who was promoted around the time she was denied the position at Arbor.

Although it is questionable whether plaintiff would have retained a position classified at "level 17" after Arbor closed sometime in 2007, other opportunities did exist and she was qualified for them. It would be reasonable for a jury to conclude that plaintiff would have obtained a similar position. A jury could thus decide to award her corresponding compensation. We conclude that the jury's award of $328,000 in economic damages was reasonably based on the evidence and was not excessive, and, therefore, it will not be disturbed. *Id*. Remittitur or a new trial is unwarranted.

Defendant further argues that a portion of the jury's award is for future damages and therefore must be reduced to its present-day value in accordance with MCL 600.6306. Although it is possible, considering the record, including plaintiff's trial testimony, that a por-

tion of her award was for future damages, the verdict form only had one line on which the jury entered its amount of economic damages. Significantly, defendant approved this verdict form. Plaintiff testified that she calculated her total economic damages at $320,218, her counsel stated that she was asking for $368,265, and the jury awarded her $328,000. It is not possible to determine with any accuracy what portion, if any, of the award was for future damages. Accordingly, we conclude that no portion of the jury's award should be reduced to its present-day value.

D. HEARSAY

Lastly, defendant argues that the trial court abused its discretion by "admitting through [p]laintiff's testimony medical documents from [p]laintiff's treating physician that supported [p]laintiff's non-economic damages" because "the documents are hearsay" and "the result materially affected [d]efendant's rights." As noted earlier, we review a trial court's admission of evidence for an abuse of discretion. *In re Archer*, 277 Mich App at 77.

Hearsay is an out-of-court statement (including a written assertion) offered for the truth of the matter asserted. MRE 801(a) and (c). Hearsay is not admissible unless a specific exception applies. MRE 802.

Here, the trial court admitted two doctor's notes and a prescription. The first note was admitted for the limited purpose of notice, not for the truth of the matter asserted, and was therefore not hearsay. The second note was used to demonstrate that plaintiff was diagnosed as having stress, anxiety, and depression that disabled her from working. The prescription was used to demonstrate that plaintiff had been prescribed the antidepressant Paxil, as she had testified.

Even assuming, without deciding, that the second note and the prescription were hearsay and thus improperly admitted, we find no basis for reversal. "In civil cases, evidentiary error is considered harmless unless declining to grant a new trial, set aside a verdict, or vacate, modify, or otherwise disturb a judgment or order appears to the court inconsistent with substantial justice." *Guerrero v Smith*, 280 Mich App 647, 655; 761 NW2d 723 (2008) (citations and quotation marks omitted).

Contrary to defendant's contention that plaintiff had to present objective evidence of her emotional damages, plaintiff's testimony regarding her own subjective feelings was sufficient to support an award of noneconomic damages. Victims of discrimination may recover for the "humiliation, embarrassment, disappointment and other forms of mental anguish" resulting from the discrimination, and medical testimony substantiating the claim is not required. *Brunson v E & L Transport Co*, 177 Mich App 95, 106-107; 441 NW2d 48 (1989). Plaintiff testified regarding the stress, anxiety, and depression that she experienced because of defendant's discriminatory conduct. Thus, the content of the second note was merely cumulative of her testimony. In addition, the prescription simply indicated that plaintiff was prescribed the drug Paxil, without stating any condition explaining why the drug was prescribed and without providing any additional information. Moreover, plaintiff herself testified that she had been prescribed the drug. Under the circumstances, no error requiring reversal occurred.[5]

Affirmed.

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[5] We thus reject defendant's argument that a new trial or remittitur is appropriate because of the admission of the documents.

BECKERING, J., concurred.

MURRAY, J. (*concurring in part and dissenting in part*). I concur in the majority opinion's holding that nothing within *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005), or the three-year statute of limitations, MCL 600.5805(10), precludes plaintiff from bringing forward background evidence of allegedly discriminatory conduct directed towards her that occurred more than three years prior to the filing of the complaint, so long as it is otherwise admissible under the Michigan Rules of Evidence. The United States Supreme Court has held such "time-barred" evidence to be admissible as background evidence to a timely discrimination claim, *Nat'l R Passenger Corp v Morgan*, 536 US 101, 113; 122 S Ct 2061; 153 L Ed 2d 106 (2002) ("Nor does the statute [Title VII] bar an employee from using the prior acts as background evidence in support of a timely claim."), and even though the Michigan Supreme Court has not issued a final opinion precluding such background evidence, it almost did, *Garg*, *supra* at 263 n 14, but then seemed to change its mind, see *Garg* as amended, *supra* at 1205, striking the original footnote 14 and renumbering the remaining footnotes, and see *Ramanathan v Wayne State Univ Bd of Governors*, 480 Mich 1090, 1097 (2008) (MARKMAN, J., dissenting).

However, the majority errs in its conclusion that the trial court properly denied defendant's motion for a directed verdict. The testimony produced by plaintiff during her case-in-chief, which included only that of plaintiff and Michael Johnson, the male employee who received the only actionable promotion at issue, was insufficient as a matter of law to prove that plaintiff was subject to unlawful sex discrimination in her fail-

ure to be promoted to the Arbor Heights center director position in 2002. Accordingly, I dissent from that portion of the majority's opinion.

The elements required to prove a case of sex discrimination under a "disparate treatment" theory are well-settled.[1] In order to prove her sex discrimination case, plaintiff was required to show that she was a member of a class protected by the Civil Rights Act, MCL 37.2101, and that she was treated differently than a member of a different class for the same or similar conduct. *Lytle v Malady* (*On Rehearing*), 458 Mich 153, 181; 579 NW2d 906 (1998) (opinion by WEAVER, J.); *Merillat v Michigan State Univ*, 207 Mich App 240, 247; 523 NW2d 802 (1994). Because there is no dispute that plaintiff was a member of a protected class, to create an inference of disparate treatment plaintiff had to prove that she was similarly situated to Johnson, which required proving that " 'all of the relevant aspects' of [her] employment situation were 'nearly identical' to those of [Johnson's] employment situation." *Town v Michigan Bell Tel Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997) (opinion by BRICKLEY, J.), quoting *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994); see, also, *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 370; 597 NW2d 250 (1999). If plaintiff proves that she was similarly situated to Johnson, a rebuttable presumption of discrimination arises. However, the presumption is not conclusive of unlawful discrimination and, in fact, *dissipates* once defendant articulates a legitimate non-discriminatory reason for not promoting plaintiff. See *Hazle v Ford Motor Co*, 464 Mich 456, 462-465; 628 NW2d 515 (2001); *Lytle*, *supra* at 172-174 (opinion by WEAVER, J.). Once the presumption has been rebutted,

[1] Plaintiff must utilize this burden-shifting criteria because she did not produce any direct evidence of discrimination.

plaintiff must come forward with evidence to show not only that defendant's reasons for not promoting plaintiff were false, but also that the motivating factor in the decision was plaintiff's sex. *Hazle*, *supra* at 474-475. The court can neither second-guess defendant's decision nor focus on whether that decision was " 'wise, shrewd, prudent, or competent.' " *Id*. at 464 n 7, quoting *Town*, *supra* at 704. The only question is whether unlawful " 'discriminatory animus' " motivated defendant's decision. *Hazle*, *supra* at 464 n 7, quoting *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 257; 101 S Ct 1089; 67 L Ed 2d 207 (1981).

In this case, plaintiff's entire case-in-chief revolved around evidence that she was a qualified and prosperous employee who was more qualified than Johnson for this promotion. Plaintiff's case was based upon two related theories. First, plaintiff testified about how well she served in different capacities during her employment with the state,[2] and how Johnson had allegedly received some discipline during his service with the state. Second, plaintiff testified in very general terms about different positions—some of which she applied for and some of which she didn't—that she felt qualified for over the years but that went to a male employee. Neither of these proofs was sufficient to submit this case to a jury.

Taking the theories in reverse order, what was substantially missing from plaintiff's background proofs was any suggestion that she was similarly situated to anyone that received any prior position. In fact, there was no evidence at all about the qualifications of any male (excluding Johnson) who received positions that

[2] During plaintiff's case-in-chief, defendant offered to stipulate that plaintiff was a good employee throughout her employment with the state, so this issue was never in dispute.

plaintiff thought she should have received (even if she didn't apply for them), and thus the jury had no evidence to make any comparison with respect to the relative qualifications of those males and whether they were similarly situated to plaintiff. Thus, the conclusory evidence of prior positions held by males that plaintiff thought she should have received did not constitute evidence of sex discrimination, or a predisposition by defendant to discriminate against plaintiff because of her gender when she did not receive the Arbor Heights promotion.

There certainly was enough evidence to show that plaintiff was similarly situated to Johnson. However, there was no evidence of pretext in defendant's choice of Johnson over plaintiff. For one, plaintiff's belief that she was more qualified than Johnson does not constitute evidence of unlawful sex discrimination, for " 'a plaintiff's own opinions about her work performance or qualifications do not sufficiently cast doubt on the legitimacy of her employer's proffered reasons for its employment actions.' " *Millbrook v IBP*, *Inc*, 280 F3d 1169, 1181 (CA 7, 2002), quoting *Ost v West Suburban Travelers Limousine, Inc*, 88 F3d 435 (CA 7, 1996). And, although in some limited cases evidence that a plaintiff was better qualified can be proof of pretext, *Ash v Tyson Foods*, *Inc*, 546 US 454, 457; 126 S Ct 1195; 163 L Ed 2d 1053 (2006), courts have been instructed not to sit as " 'super personnel department[s]' " by second-guessing otherwise legitimate decisions. *Millbrook*, *supra* at 1181, quoting *Simms v Oklahoma ex rel Dep't of Mental Health*, 165 F3d 1321, 1330 (CA 10, 1999). See, also, *Burdine*, *supra* at 259. To keep from acting in this manner, courts have uniformly held that to be considered evidence of pretext the evidence must show that the qualification " 'differences are so favorable to the plaintiff that there can be no dispute among reasonable

persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue.' " *Millbrook*, *supra* at 1179, quoting *Deines v Texas Dep't of Protective and Regulatory Services*, 164 F3d 277, 279 (CA 5, 1999). Accord *Ash*, *supra* at 457-458, and cases cited therein.

As noted, the evidence offered by plaintiff did not show that her qualifications were such that she was clearly the better-qualified candidate, and therefore she did not present sufficient evidence of pretext. Both she and Johnson had a comparable level of education and years of experience in the relevant fields. Both had held positions above their normal pay grade. And, although plaintiff had the recommendation of the individual who was being replaced as center director, that alone does not make plaintiff the clearly better-qualified candidate. Or, stated differently, it does not create any inference of discriminatory treatment by defendant in this employment decision. All that plaintiff's evidence allowed the jury to do was determine whether defendant promoted the better-qualified candidate, and that is not what the Civil Rights Act was meant to do. *Ash*, *supra*; *Burdine*, *supra*; *Millbrook*, *supra*.[3] As the Supreme Court held in *Burdine*:

> The views of the Court of Appeals can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference.

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[3] Indeed, in denying defendant's motion for a directed verdict, the trial court ruled that plaintiff's testimony that she felt she was promised the center director position because she was more qualified than Johnson, and that Johnson thought plaintiff would get the position, created an issue of fact for the jury. But all this evidence did was create an issue with respect to whether defendant made the best decision, rather than whether it made a discriminatory one.

> Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination. *Loeb v. Textron, Inc.*, [600 F2d 1003, 1012 n 6 (CA 1, 1979)]; see *Lieberman v. Gant*, 630 F.2d 60, 65 (CA 2 1980). [*Burdine*, *supra* at 259.]

I would reverse the judgment and remand for entry of an order granting defendant's motion for a directed verdict.

In re WILLIAMS

Docket No. 289260. Submitted June 2, 2009, at Lansing. Decided November 24, 2009, at 9:10 a.m.

The Department of Human Services petitioned the Berrien Circuit Court, Family Division, for orders granting the petitioner temporary and permanent custody of Makyla Williams, the minor daughter of respondents, Michael Williams, Sr., and Lashawnda Masjay Wright, and terminating the respondents' parental rights. Following proceedings conducted by a referee, the court, Thomas E. Nelson, J., entered an order terminating the respondents' parental rights and granting custody of the child to the petitioner. The respondents appealed.

The Court of Appeals *held*:

1. Clear and convincing evidence supported the determination to terminate the parental rights of the respondent mother on the bases of her longstanding drug addiction, her persistent inability to complete a drug treatment program, and her lack of housing and employment. The evidence showed that the mother's problems will not be rectified within a reasonable time considering the child's age. The part of the order terminating the respondent mother's parental rights must be affirmed.

2. The respondent father, for the first four months of the proceedings, did not qualify as a "respondent" who, if indigent, had the right to court-appointed counsel, because the petitions contained no allegations of wrongdoing against him. It was not until the petitioner filed the supplemental petition that it identified an act or omission that converted the father's status from that of a nonoffending parent into that of a "respondent." A permanency planning hearing was then conducted without informing the respondent father of his right to appointed counsel. The father then requested court-appointed counsel at the termination hearing, however, the referee erred in determining at the hearing that the father did not qualify for appointed counsel. The referee erred in imputing to the father income earned by his mother and father, with whom he lived, who have no legal responsibility to contribute to the respondent father's legal expenses. A court may not prohibit a respondent from exercising the right to appointed counsel on the

basis of a calculation that imputes income from sources unavailable to the respondent. The referee erred in rejecting the respondent father's request for appointed counsel at the termination hearing under the circumstances of this case. It was not harmless error to fail to inform the respondent father at the permanency planning hearing about his right to counsel or to refuse to appoint counsel at the termination hearing. These plain errors affected the fundamental fairness of the proceedings and the father's substantial rights. The part of the order terminating the respondent father's parental rights must be reversed and the case must be remanded for further proceedings.

Affirmed in part, reversed in part, and remanded.

GLEICHER, J., concurring, agreed with the result reached by the majority but wrote separately to express her belief that the respondent father's right to appointed counsel attached at the outset of the proceedings rather than when the petitioner filed the supplemental petition identifying him as a respondent. Fundamental due process principles required that the referee offer the respondent father court-appointed counsel in accordance with MCR 3.915(B)(1) when the respondent father was first deprived of the custody of his child. The deprivation of counsel was highly prejudicial to the respondent father in this case. Child protective proceedings that divest a nonoffending parent of his or her child's custody implicate the due process liberty interest in caring for the child, regardless of whether the petitioner has formally identified the parent as a respondent. The process due when a court deprives a nonoffending parent of his or her child's custody should be determined by balancing three factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards; third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. An application of these factors in this case compels the conclusion that the referee should have offered the respondent father appointed counsel at the adjudication trial and at every hearing conducted thereafter. The error was not harmless.

1. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — RIGHT TO COUNSEL.

The United States Constitution guarantees a right to counsel in parental rights termination cases; the constitutional concepts of due process and equal protection grant respondents in termination proceedings the right to counsel; the constitutional right of due

process confers on indigent parents the right to appointed counsel at hearings that may involve the termination of their parental rights.

2. PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — INDIGENTS — RIGHT TO APPOINTED COUNSEL — IMPUTED INCOME.

A court may not deny appointed counsel to a respondent in child protective proceedings by imputing to the respondent income earned by people who bear no legal responsibility to contribute to the respondent's legal expenses; mere cohabitants, even if parents of an adult respondent, possess no obligation to pay a respondent's attorney fees; a court may not prohibit a respondent from exercising the right to appointed counsel on the basis of a calculation that imputes income from sources unavailable to the respondent (MCL 712A.17c[4] and [5]; MCR 3.915[B][1]).

Norm R. Perry for Lashawnda Masjay Wright and Michael Williams, Sr.

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

PER CURIAM. Respondents appeal as of right a circuit court order terminating their parental rights. We affirm regarding Lashawnda M. Wright, respondent mother, reverse with respect to Michael Williams, Sr., respondent father, and remand for further proceedings concerning respondent father. We have decided this case without oral argument pursuant to MCR 7.214(E).

I. FACTUAL AND PROCEDURAL HISTORY

Respondents are the parents of Makyla Williams, who was born on December 7, 2007.[1] At the time of Makyla's birth, respondent mother resided in Odyssey House, a residential substance abuse treatment center

[1] Respondents are also the parents of Michael Williams, Jr., born January 18, 2007. The circuit court terminated respondents' parental rights to Michael in October 2008, and this Court affirmed. *In re Williams*, unpublished opinion per curiam of the Court of Appeals, issued April 28, 2009 (Docket Nos. 288260, 288304).

in Flint. Respondent mother withdrew from Odyssey House on February 1, 2008, before completing her treatment. She returned to Berrien County with two-month-old Makyla, and enrolled in an intensive outpatient treatment program at the Community Healing Center. For approximately six weeks, respondent mother complied with the requirements imposed by the intensive outpatient program.

In March 2008, Children's Protective Services (CPS) received information that respondent mother had prematurely ceased her outpatient substance abuse treatment and renewed her habitual use of crack cocaine and marijuana. On March 13, 2008, petitioner, Department of Human Services (DHS), filed a petition seeking temporary custody of Makyla. The petition contained no substantive allegations about respondent father.[2] A circuit court referee authorized the petition and ordered Makyla placed in foster care. The parties have not provided this Court with the transcript of the March 13, 2008, preliminary hearing, and it is uncertain whether respondent father attended. The circuit court record reflects that respondent mother appeared and requested appointed counsel, and that the court appointed counsel for her.

Petitioner filed an amended petition on March 24, 2008, containing greater detail regarding respondent mother's substance abuse history. The amended petition recited that respondent father "is the legal father of Makyla," but contained no allegations that respon-

[2] The petition's sole reference to respondent father averred:

> An attempt was made to conduct a home visit on 3/12/08. The Petitioner spoke with Cecil Davis, Lashanda's [sic] grandfather who stated that Lashanda [sic] and the baby had just left with Michael Williams. The Petitioner left a card with Mr. Davis and requested he have Lashanda [sic] call.

dent father had neglected or abused Makyla or lacked the capacity to care for her.

On May 7, 2008, a circuit court referee conducted a bench adjudication trial. Respondent mother did not attend the trial, but was represented by counsel. The referee preliminarily observed with respect to respondent father, "Mr. Williams, you are here without counsel. It's my understanding that you're going to represent yourself?" Respondent father replied affirmatively, and the following colloquy ensued:

> *The Referee*: Okay. And you understand that you have the right to do that?
>
> *Respondent Father*: Yes.
>
> *The Referee*: And you also understand that the same rules and regulations apply whether you have counsel or not? So you still have to comply with the same laws and rules. You understand that, sir?
>
> *Respondent Father*: Yes.
>
> *The Referee*: All right. And we'll go ahead and proceed because notice is proper.

The prosecutor called respondent father as her first witness. Respondent father testified that he lived with his mother, received social security disability income for a disease that he described as "a spot on my lung," and earned additional income doing "odds and ends." Respondent father agreed that respondent mother had a "very unstable" lifestyle and lacked housing and a source of income. In response to questions posed by the referee, respondent father explained that he spent time with Makyla every day, fed her, and changed her diapers. Respondent father volunteered that he had given respondent mother money to prevent her from "end[ing] up in the streets."

A supervisor and therapist at the Community Healing Center testified that respondent mother continued to abuse crack cocaine, marijuana, and alcohol, and failed to successfully complete the intensive outpatient treatment program. Amanda Forrester, Makyla's foster care worker, recounted that in March 2008 respondent mother had admitted regularly using cocaine and marijuana, and Forrester stated that services had been offered to respondent mother. Neither respondent presented any evidence.

The prosecutor requested that the court find "that there's a preponderance of evidence that the mother has neglected the child and the child's at risk in her care, and that the father's not in a position to be able to provide for the child on his own." Respondent father argued:

> Your honor, I haven't—my condition and whatever is wrong with me, there's a lot of people a lot sicker than me that have custody of their children like this. And I take care of little June, I take care of little Mike, and I take care of her too. I stay up, I watch her, change their diapers, feed them three or four, five o'clock in the morning. . . .
>
> And my physical problem does not prevent me from not taking—from not taking care of them. I take care of them. I feed them. I buy them [P]ampers. I buy whatever they need, milk and everything. I support them.

The referee determined that Makyla came within the court's jurisdiction, finding that "transferring this child back to the home of either parent would be inappropriate and would potentially cause more harm than any good that can come of it." After the referee announced his ruling, respondent father objected, "I don't see why I can't have temporary custody of them because I don't smoke drugs, I do not do drugs. I'm at home with them."

The referee proceeded to conduct a dispositional hearing. Forrester recommended that Makyla remain in

placement with respondent father's sister, and responded as follows to questions posed by the prosecutor:

> *Q*. And this is Mr. Williams Senior's sister?
>
> *A*. Yes.
>
> *Q*. That gives him pretty good access to his child?
>
> *A*. Yes. It does. Michael Senior's mother provides daycare for the child during the time and she lives in the same home as Michael, Senior. So he does have that—liberal access to the child.
>
> *Q*. And in terms of Mr. Williams, he's a pretty nice guy?
>
> *A*. Yes. He is.
>
> *Q*. He's been very consistent in caring for his children and being involved?
>
> *A*. Yes.
>
> *Q*. He wants to be involved with his children's lives?
>
> *A*. Yes.
>
> *Q*. And he actually visits and spends as much time as possible with them. Is that correct?
>
> *A*. As far as I know. Yes.

Forrester then described that "about a year ago" she received a "form" from respondent father's physician "basically stating that Mr. Williams needs help with shopping, laundry, meal preparation, some basic chores." At the bottom of the form, Forrester had inquired of the physician, "Does this patient's medical condition keep him from being able to parent/raise a 4-month old child until he is an adult?" The physician wrote, "Yes," and underlined it. Forrester advised that respondent father willingly signed two additional medical releases, but despite her efforts the physician had yet to supply her with additional information. Forrester asserted that she wanted the physician to elaborate and admitted that she saw no reason why respondent father

could not provide care "with the assistance of his family members[.]" According to Forrester, petitioner had neither offered nor provided any services to respondent father, apart from a parenting class that respondent father successfully completed in the course of the child protective proceeding regarding Michael, Jr. Forrester recommended only that respondent father maintain contact with Makyla. Regarding respondent mother, Forrester recommended substance abuse treatment followed by individual counseling, a parenting class, and weekly parenting time.

The prosecutor sought clarification of Forrester's recommendations by inquiring, "So you're not—your goal isn't to keep the children from Mr. Williams?" Forrester responded, "No. It's not." The referee addressed respondent father and highlighted that "the prosecutor and the Department of Human Services, everybody thinks that you're a pretty good dad." The referee then advised respondent father that "we want to get a handle on" any health restrictions, and that he should stop "enabling" respondent mother by giving her money. Respondent father agreed to cooperate with petitioner. The circuit court's order of May 9, 2008, afforded respondent father "liberal and frequent" parenting time "supervised by the Department of Human Services and/or its designee."

On July 30, 2008, the referee conducted a dispositional review hearing. The prosecutor noted that a termination petition had been requested "in the companion file" involving Michael, Jr.[3] The lawyer-guardian ad litem reviewed that respondent mother had missed "a signifi-

[3] The record provided to this Court does not include of copy of the petition regarding Michael, Jr., and we are unable to determine whether the initial petition in Michael's case sought termination of respondent father's parental rights.

cant number of drug screens," and "needs a lot of services" that she had failed to initiate. Neither the prosecutor nor the lawyer-guardian ad litem voiced any concerns about respondent father. The referee then noted that respondent father had "pulmonary sarcosis [sarcoidosis]." In response to the referee's questions, respondent father explained that he took medication and received treatment for this condition, which had remained "the same" since its original diagnosis in 1987 or 1989. The referee then spoke at length with respondent mother, and warned her that if she continued to use drugs she would lose her children. The referee opined:

> It is not appropriate to return the child to the home at this point because I'm not sure what issues the child would face based on the substance abuse.
>
> Dad's got some medical problems himself, which gives [sic] him some problems as far as becoming the custodial parent. But doesn't mean they don't need a father. You're going to continue to be the father, Mr. Williams, right?
>
> *Respondent Father*: Yes, sir.

None of the hearing participants further elaborated any concerns regarding respondent father's lung disease. But the order entered after the hearing noted concerning "likely harm to the child if the child was returned to his or her parent(s)," "Father has medical issues which prevent him from taking control of the child."

On October 6, 2008, the referee authorized petitioner to file a supplemental petition seeking permanent custody of Makyla. With regard to respondent father, the supplemental petition alleged as follows:

> Mr. Williams cannot parent one child, let alone two small children, by himself, due to health issues. He may have a kind heart but he is susceptible to the lure of his relationship with LaShawnda and has not demonstrated that he has the strength to resist what she wants even

> when that is not what is best for his children or for LaShawnda. He gave her money ostensibly to prevent her from stealing or engaging in prostitution to get money for drugs. He allowed her to live in his car in his driveway instead of using that as an opportunity to go into a program by asking the worker for help. His greatest mistake was in providing Ms. Wright a means to leave her residential treatment program before she had completed it successfully and received all of the benefit that she needed to prepare herself for the next step in her recovery. There is no reason to believe he would be strong enough to resist her in the future.

On October 22, 2008, the circuit court referee conducted a permanency planning hearing regarding Makyla. The prosecutor initiated the following colloquy:

> *The Prosecutor*: Did you first want to review with Mr. Williams, even though I know he knows this, his right to have an attorney before we proceed?
>
> *The Referee*: Mr. Williams, I take it you have not hired counsel?
>
> *Respondent Father*: No. Not at the moment, your Honor.
>
> *The Referee*: Okay. And you understand that you have a right to hire counsel if you wish?
>
> *Respondent Father*: Yes.
>
> *The Referee*: And you're willing to proceed without counsel today?
>
> *Respondent Father*: Yes.
>
> *The Referee*: Okay.

Foster care worker Kanita Roseburgh testified that petitioner had pursued reasonable efforts to reunify Makyla with her parents. Roseburgh related that respondent mother had entered a residential drug treatment program, and respondent father "lives with his parents and does have a medical condition, which

prohibits him from caring for his child." According to Roseburgh, both respondents had failed to complete offered services or otherwise substantially comply with the terms and conditions of their case service plans.[4] Respondent mother testified by telephone, describing her current substance abuse treatment efforts and her commitment to remaining substance free. Respondent father offered the following statement on his own behalf:

> *Respondent Father*: They terminated my rights to my son and now they're trying to terminate my rights for my daughter. And I did everything this court asked of me to do. And I take care of them kids. I buy them stuff, whatever they need. I take their stuff right up—whatever they need I take right off the top before I do anything. And they're terminating my rights because I'm looking for LaShawnda to get better. And that's not right for them to terminate my rights for my son or my daughter.
>
> *The Referee*: Is that . . .
>
> *Respondent Father*: And I'm not—
>
> *The Referee*: —your statement, Mr. Williams?
>
> *Respondent Father*: Yeah. I'm not going to let this go neither because the prosecuting attorney—I mean, they was wrong. They didn't—they asking if I have never had no home. I never had no place to have my home because I always took care of other folk kids a long term relationship.
>
> *The Referee*: You understand, Mr. Williams, that this hearing today isn't going to terminate anything?
>
> *Respondent Father*: Right. Yes.
>
> *The Referee*: We're not going to—we're not going to do that today.

---

[4] As discussed later in this opinion, no evidence exists that respondent father failed to comply with a case service plan or failed to complete offered services.

Respondent Father: Right.

The Referee: We're only going to determine what we're going to do between now and the 12th of November.

Respondent Father: Yes, your Honor.

The Referee: Okay. And you understand the 12th of November, that's the hearing that –

Respondent Father: Yeah.

The Referee: —will decide whether or not anybody's rights are going to be terminated.

Respondent Father: Yes, your Honor.

The referee announced that although he continued to support his prior authorization of the supplemental permanent custody petition, "at this point I'm not changing the [reunification] plan until I hear the testimony and the evidence on the termination."

The termination hearing occurred on November 12, 2008, and respondent father almost immediately requested counsel. The following discussion ensued:

The Referee: Mr. Williams, any comment you wish to make?

Respondent Father: I want to know if I can ask the court for a court appointed lawyer on this.

The Referee: A court appointed lawyer?

Respondent Father: Yes.

The Referee: I don't believe you're entitled to a court appointed lawyer in this case.

Well, wait a minute. You are a respondent.

Lawyer-Guardian Ad Litem: I don't believe he's been screened, your Honor. We . . . we've told him in the other case and he's never had an attorney at any hearing. He's constantly reminded to be screened if he wants court appointed attorneys. He would have been told at every one of these hearings.

The Referee: I thought we—yeah. We discussed that I thought back in October.

But the question is, is he entitled to a court appointed lawyer?

Lawyer-Guardian Ad Litem: We won't know that until he's screened.

Respondent Father: I got screened for—I did one for Michael Junior.

The Referee: Did you get a court appointed lawyer?

Respondent Father: I guess for this pretrial.

The Referee: What about the termination hearing?

Respondent Father: That's what I meant.

The Referee: Pardon?

Respondent Father: Yes.

The Referee: Does 2008—

Prosecutor: Your Honor—

The Referee: —0020 indicate that there was a court appointed lawyer for Mr. Williams?

Prosecutor: Your Honor, I'm just looking back at 2007-0020 and the notes that I have from [prosecutor] Ms. Penninger at each of the hearings, I don't know about the orders, but the note I have from the prelim back in 2007 was over income, waived an attorney for today. I have nothing in here otherwise, other than waives attorney in a few different spots.

I think . . . at the termination hearing I have a note that Mr. Williams waived attorney. And that was a prior case.

In this file, your Honor, I have the same notes in here of the prelim it looks like, that he waived attorney. I have nothing about a court appointed attorney being in here anywhere.

The Referee: Well, one of the—

Lawyer-Guardian Ad Litem: He is the legal father.

The Referee: —statements in the petition is that Mr. Williams doesn't have any income.

Lawyer-Guardian Ad Litem: Well, but he does. He's testified in previous hearings not only does he get disability payments, but he does odd jobs on the side. Because that was one of the allegations, was that he was giving money and enabling Ms. Wright. But whether or not that puts him over income, I don't know what those standards are. He'd have to be screened.

Prosecutor: Your Honor, this case has been going on for almost nine months, the prior case was going on for over a year. I think that he's been adequately advised every hearing that he needs—what he would need to do. I haven't been present for those hearings. It's not my file. But I would assume from the notes and from what [Lawyer-Guardian ad Litem] Ms. Long has indicated that he has had ample opportunity to obtain counsel. And he's already been through a termination hearing so he knew what he was going into facing today.

Lawyer-Guardian Ad Litem: That doesn't change the fact that he's a legal father, he's a respondent, and he should at least be screened, which he can do over the phone.

Respondent Mother's Attorney: And on behalf of our office, your Honor, if he was screened on previous case, that doesn't necessarily mean that that would transfer over to this one. He would need to be rescreened on this one. And as Ms. Long indicated, that could be done over the phone in just a few minutes if we wanted to [sic] off the record to facilitate that.

The Referee: Well, again, I definitely think so because he is a respondent-father. And while I agree that, you know, it's a little late in the day, he still has a right to do it.

So we will go off the record.

Prosecutor: I think we should call mom back, tell her—

The Referee: Yeah. I think what we're going to do, Ms. Wright, we're going to disconnect the phone in a few

minutes for Mr. Williams to contact legal services to screened [sic] whether or not he's eligible for a court appointed lawyer.

* * *

And then what we'll do is we'll call you back, probably in about 20 minutes to 25 minutes.

* * *

Or sooner, depends on how long the screening takes. It shouldn't take much longer than that though.

* * *

The Referee: Okay. We're back on the record in file 2008-0027-NA-N. We took a recess to determine whether or not Mr. Williams would be eligible for court appointed counsel.

Ms. Hadanek, what was [sic] the results of that?

Respondent Mother's Attorney: Your Honor, Mr. Williams was put through to our office by telephone. He was screened. Because he's been living with his parents since 2003 we included all household include [sic]. And he was over income at 133 percent.

The Referee: So he would not be eligible for court appointed lawyer?

Respondent Mother's Attorney: That's correct, your Honor.

The Referee: All right.

Mr. Williams, determination from the screening process is that you would not be entitled to court appointed lawyer. You would still be entitled if you wished to hire a lawyer, you could have done that. But you had ample opportunity in this case to do so. The record is replete with all kinds of indications to you that you had a right to do that. You waived that right. So now on the day of trial we're not

> going to—we're not going to adjourn it to do so. So you're going to be representing yourself.
>
> All right. So we will go ahead and proceed.

Malinda Bush, respondent mother's drug rehabilitation counselor, testified that respondent mother had been "in and out of treatment, engaging then disengaging, engaging then disengaging," since 2004. Bush opined that although respondent mother was doing well in her current residential treatment setting, she could not safely parent a child outside the inpatient environment.

Forrester testified that she had worked on Makyla's case until July 2008, and that she reviewed the services that petitioner had offered to both respondents since Michael, Jr., was placed in foster care in October 2007. Forrester described that respondent mother had made no progress regarding her emotional stability, neglected to participate in parenting classes, lacked housing and employment, and failed to meaningfully participate in substance abuse treatment. Forrester related that respondent father had participated in parenting and psychological assessments, completed a parenting class in January 2008, and regularly attended his parenting times. She explained that respondent father's medical condition "[i]nitially wasn't much of a concern" because she lacked information regarding the condition. Forrester continued, "However, when I received some more information from his doctor then it did become a concern." Forrester conceded that she based her conclusion regarding respondent father's health on the "form" respondent father's doctor had completed in 2007, which she previously submitted to the court.[5]

[5] Our careful review of the record reveals that Forrester never actually received any "more information" from respondent father's physician than the one-page form, whose contents she described at the adjudication trial.

Forrester offered that although respondent father "cares about his children," he neglected to provide medical documentation "stating that he's able to raise them," and "he's also not able to show that he has housing. So he's not able to provide for them financially." According to Forrester, "[t]hose are still concerns today." Forrester acknowledged that she had no recent information with respect to whether respondent father continued to "enable" respondent mother.

Roseburgh, the foster care specialist who assumed Forrester's duties in August 2008, testified concerning respondent father that she had requested only "adequate documentation from his doctor regarding his health," which he failed to provide. She conceded that respondent father's parents provided for his household needs. Roseburgh opined that respondent father could not safely care for Makyla "because we don't have adequate documentation from [his doctor] that says that it's okay for him to do that. So that's the big issue at this point." Roseburgh echoed Forrester's concerns that respondent father lacked "independent housing," and agreed that his income would not suffice "to help him in raising a child." With regard to respondent mother, Roseburgh expressed the same concerns as had Forrester, opining that respondent mother had made no progress in any areas of concern and lacked a relationship with Makyla.

Respondent mother testified that she continued to achieve significant gains in her therapeutic setting, and felt strongly that she could remain abstinent from alcohol and drugs and safely parent Makyla after her release from residential treatment. Respondent father testified in narrative fashion, objecting to the loss of his parental rights. He insisted that he routinely washed, fed, and dressed his children, and felt capable of taking care of them.

The referee began his bench opinion with the following summary:

> This case really does present a dilemma to me, to be honest with you. There are many, many reasons that it almost seems like a no brainer to terminate the rights of the parents. And then on the other side it seems to me that dad has been, you know, doing what he needs to be doing as far [as] he's concerned. I agree that sometimes I don't think he quite understands some of the difficulties. But that's not his fault. He didn't ask to have that pulmonary scardosis [sic], or however you pronounce it.

The referee found termination of respondent mother's parental rights to Makyla warranted pursuant to MCL 712A.19b(3)(c)(*i*)[the conditions leading to the adjudication continue to exist with no reasonable likelihood of rectification within a reasonable time given the child's age], (c)(*ii*) [the parent received recommendations to rectify other conditions and had a reasonable opportunity to do so, but failed to rectify the other conditions], (g) [irrespective of intent, the parent fails to provide proper care and custody and no reasonable likelihood exists that she might do so within a reasonable time given the child's age], and (i) [the parent had rights to a sibling of the child terminated due to serious and chronic neglect or physical or sexual abuse, and prior rehabilitation efforts have failed]. The referee invoked only subsection (g) as a ground for terminating respondent father's parental rights. The referee lastly found that termination of respondents' parental rights would serve Makyla's best interests because she apparently would have a permanent placement with a paternal aunt, an arrangement that would afford respondent father and respondent mother, if she remained sober, ongoing access to Makyla.

The circuit court adopted the referee's findings and conclusions in an order entered on November 13, 2008.

Both respondents timely sought appointed appellate counsel. The circuit court appointed the same appellate lawyer for both respondents, who now appeal as of right.

II. ISSUES PRESENTED AND ANALYSIS

A. STANDARD OF REVIEW

We review for clear error a circuit court's decision to terminate parental rights. MCR 3.977(J). The clear error standard controls our review of "both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A decision qualifies as clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Clear error signifies a decision that strikes us as more than just maybe or probably wrong. *In re Trejo*, 462 Mich at 356. Whether a child protective proceeding complied with a respondent's right to due process presents a question of constitutional law that we review de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009).

The proof supporting a court's termination decision must qualify at least as clear and convincing. *Santosky v Kramer*, 455 US 745, 768-770; 102 S Ct 1388; 71 L Ed 2d 599 (1982). The clear and convincing evidence standard is "the most demanding standard applied in civil cases[.]" *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Our Supreme Court has described clear and convincing evidence as proof that

> produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*Id*. (quotation marks and citations omitted; alteration in original).]

B. RESPONDENT MOTHER

Respondent mother contends that insufficient evidence supported the termination of her parental rights on any statutory ground. We find that clear and convincing evidence warrants termination of respondent mother's parental rights on the basis of MCL 712A.19b(3)(c)(*i*) and (g). The conditions that led to Makyla's adjudication as a temporary court ward involved respondent mother's longstanding drug addiction, persistent inability to complete a drug treatment program, and lack of housing and employment. Although respondent mother embarked on a commendable effort to treat her addiction several months before the termination hearing, the totality of the evidence amply supports that she had not accomplished any meaningful change in the conditions existing by the time of the adjudication.

Furthermore, we detect no reasonable likelihood that respondent mother's lengthy struggle with drug addiction and her lack of employment and housing "will be rectified within a reasonable time considering the child's age." MCL 712A.19b(3)(c)(*i*). Although respondent mother appeared to be doing well in her residential program at the time of the termination hearing, our review of the testimony reveals that she would require a lengthy period of assessment, counseling, and supervision before reunification with her child could be considered. No reasonable expectation exists that re-

spondent mother could provide proper care or custody for Makyla before the child's second birthday. The circuit court correctly determined that the two years Makyla already had spent in foster care, her entire life, constituted too long a period to await the mere possibility of a radical change in respondent mother's life. The evidence detailed above also clearly and convincingly supports the circuit court's reliance on MCL 712A.19b(3)(g) as an alternate ground for terminating her parental rights.

The record does not substantiate the existence of any additional conditions causing the child to come within the court's jurisdiction, as required to terminate parental rights pursuant to MCL 712A.19b(3)(c)(*ii*). But because the evidence amply supports termination under two alternate statutory subsections, the court's invocation of subsection (c)(*ii*) qualifies as harmless error. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

C. RESPONDENT FATHER

Respondent father's appointed appellate counsel challenges only the sufficiency of the evidence supporting termination of his parental rights. Appellate counsel failed to raise any issue regarding his client's lack of counsel during the termination hearing, or at any point after petitioner manifested its intent to terminate respondent father's parental rights.

Only rarely will this Court consider and decide an issue not raised by the parties. Here, however, we are confronted with a circuit court order permanently severing respondent father's fundamental right to the care and custody of his child, entered after proceedings conducted without the assistance of counsel. Because we cannot ignore a process that casts serious doubt on

the integrity of the proceedings and would risk substantial injustice if allowed to stand unexamined, we turn to a detailed consideration of respondent father's right to counsel and related issues. *LME v ARS*, 261 Mich App 273, 287; 680 NW2d 902 (2004). Furthermore, "appellate courts will consider claims of constitutional error for the first time on appeal when the alleged error could have been decisive of the outcome." *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). An unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

The underpinnings of a respondent's right to counsel in parental rights termination proceedings are statutory and constitutional. In MCL 712A.17c(4), our Legislature has mandated that in child protective proceedings,

> the court *shall* advise the respondent at the respondent's first court appearance of *all* of the following:
>
> (a) The right to an attorney at each stage of the proceeding.
>
> (b) The right to a court-appointed attorney if the respondent is financially unable to employ an attorney.
>
> (c) If the respondent is not represented by an attorney, the right to request and receive a court-appointed attorney at a later proceeding. [Emphasis added.]

The Legislature also specifically addressed a respondent's indigence in a separate subsection of the same statute: "If it appears to the court in a proceeding under section 2(b) or (c) of this chapter that the respondent wants an attorney and is financially unable to retain an

attorney, the court *shall* appoint an attorney to represent the respondent." MCL 712A.17c(5) (emphasis added).

In MCR 3.915(B)(1), our Supreme Court delineated the procedures that must be employed in child protective proceedings to implement the statutory right to appointed counsel. The court rule provides:

> (a) At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that
>
> (i) the respondent has the right to a court appointed attorney if the respondent is financially unable to retain and attorney, and,
>
> (ii) if the respondent is not represented by an attorney, the respondent may request a court-appointed attorney at any later hearing.
>
> (b) The court shall appoint an attorney to represent the respondent at any hearing conducted pursuant to these rules if
>
> (i) the respondent requests appointment of an attorney, and
>
> (ii) it appears to the court, following an examination of the record, through written financial statements, or otherwise, that the respondent is financially unable to retain an attorney.

This Court has explicitly recognized that the United States Constitution guarantees a right to counsel in parental rights termination cases. In *In re Powers*, 244 Mich App at 121, this Court explained: "The constitutional concepts of due process and equal protection also grant respondents in termination proceedings the right to counsel." This Court has also explicitly recognized that the constitutional right of due process confers on indigent parents the right to appointed counsel at

hearings that may involve the termination of their parental rights. *In re Cobb*, 130 Mich App 598, 600; 344 NW2d 12 (1983).

We now consider when these legislative and judicial mandates designed to safeguard an indigent respondent's right to appointed counsel attached to respondent father. Both MCL 712A.17c(4) and MCR 3.915(B)(1)(b) specifically extend the right of appointed counsel only to indigent "respondent[s]" in child protective proceedings. The initial petition contained no allegations of wrongdoing against respondent father, and expressed no concerns about his ability to parent Makyla. Consequently, at the preliminary hearing, the adjudication, and the dispositional hearing, respondent father did not qualify as a "respondent."[6] Although the foster care workers voiced some concerns involving respondent father's medical condition, at no point until petitioner filed the supplemental petition did it directly identify an act or omission that converted respondent father's status from that of a nonoffending parent into that of a respondent. Under the applicable statute and court rule, respondent father thus enjoyed no right to appointed counsel during the first four months of the proceedings. However, when the circuit court authorized the supplemental petition on October 6, 2008, it was required to advise respondent father of his right to appointed counsel.

At the termination hearing, respondent father unequivocally requested the appointment of counsel. The

[6] The court rules define the term "respondent" as "the parent, guardian, legal custodian, or nonparent adult who is alleged to have committed an offense against a child." MCR 3.903(C)(10). The term "offense against a child" is defined as "an act or omission by a parent, guardian, nonparent adult, or legal custodian asserted as grounds for bringing the child within the jurisdiction of the court pursuant to the Juvenile Code." MCR 3.903(C)(7).

record reflects that the referee utilized a screening process to determine that respondent father did not qualify for appointed counsel. The screening procedure imputed to respondent father all the income of his household, including that earned by his parents. We reject the idea that a court may deny a respondent appointed counsel by imputing to the respondent income earned by people who bear no legal responsibility to contribute to the respondent's legal expenses. Mere cohabitants, even if parents of an adult respondent, possess no obligation to pay the respondent's attorney fees, and a court may not prohibit a respondent from exercising the right to appointed counsel on the basis of a calculation that imputes income from sources unavailable to the respondent. Because respondent father's parents had no legal obligation to pay for an attorney for their adult son, their assets simply had no relevance to a determination of respondent father's indigence.[7] Furthermore, petitioner contended at the termination hearing that respondent father's lack of "independent housing" and his insufficient income supplied grounds for terminating his rights. We find it fundamentally unfair to deny appointed counsel because a respondent does not qualify as indigent, while at the same time invoking the respondent's indigence as a ground for terminating parental rights. And we note that the circuit court apparently had no difficulty in appointing counsel for respondent father's appeal. Under the circumstances presented here, the referee erred by rejecting respondent father's request for appointed counsel at the termination hearing because the court improperly imputed to respondent income earned by others.

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[7] MCR 6.005(B) sets forth the factors that must guide a court's determination of a criminal defendant's indigency. Those factors do not mention income earned by others.

An erroneous deprivation of appointed counsel for child protective proceedings can be subject to a harmless error analysis. *In re Hall*, 188 Mich App 217, 222-223; 469 NW2d 56 (1991). But we do not view as harmless in this case the referee's failure to inform respondent father at the permanency planning hearing about his right to counsel, or the referee's refusal to appoint counsel at the termination hearing.[8] Because these plain errors affected the fundamental fairness of the proceedings, we conclude that the absence of counsel does not qualify as harmless. *Carines*, 460 Mich at 763-764, 774 (here the erroneous deprivation of counsel seriously affected the fairness and integrity of the judicial proceedings).

III. SUMMARY

The circuit court correctly terminated respondent mother's parental rights for the reasons described in this opinion. However, at the permanency planning hearing, the referee plainly erred by failing to advise respondent father of his right to appointed counsel, and compounded this error by refusing to appoint counsel at the termination hearing. These plain errors affected respondent father's substantial rights. The continuous and ongoing nature of the referee's errors concerning respondent father's right to appointed counsel affected "the fairness, integrity, or public reputation" of these proceedings. *Id*. at 774. Accordingly, we reverse the part of the order terminating respondent father's parental rights and remand for further proceedings consistent with this opinion.

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[8] The referee conducted these two hearings after petitioner filed the permanent custody petition identifying respondent father as a respondent, thus triggering his right to appointed counsel under MCR 3.915(B)(1).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

GLEICHER, J. (*concurring*). I concur with the result reached by the majority. I write separately to express my view that respondent father's right to appointed counsel attached at the outset of the proceedings, rather than when petitioner filed the supplemental permanent custody petition identifying him as a respondent. I believe that when the circuit court deprived respondent father of the custody of his child, fundamental due process principles required that the circuit court offer respondent father appointed counsel in accordance with MCR 3.915(B)(1). I also write separately to elaborate on the reasons why I view the deprivation of counsel as highly prejudicial error in this case.

At the adjudication trial, petitioner recommended against respondent father's having custody of Makyla and the referee unquestioningly accepted this recommendation. Despite respondent father's persistent requests for custody and his undisputed fitness, the referee inexplicably ordered Maklya's placement with petitioner. Petitioner's expressed opposition to respondent father's custody of his child and the referee's determination at the adjudication that "transferring this child back to the home of either parent would be inappropriate and would potentially cause more harm that any good that can come of it," functionally altered respondent father's status from that of a nonoffending parent to that of a respondent. When petitioner and the referee articulated that Makyla would be at risk in respondent father's custody, he qualified as a de facto respondent notwithstanding the absence of any formal allegations against him.

The importance of a parent's "essential" and "precious" right to raise his or her child is well-established in our jurisprudence. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). Because "[t]his right is not easily relinquished," "to satisfy constitutional due process standards, the state must provide the parents with fundamentally fair procedures." *Id*. at 257 (quotation marks and citation omitted). As our Supreme Court acknowledged in *Hunter*, "where the parental interest is most in jeopardy, due process concerns are most heightened." *Id*. at 269.

Fundamental due process principles required that petitioner and the referee consider respondent father a respondent, and inform him at the adjudication trial of his right to appointed counsel. This is so because petitioner sought to deprive respondent father of his fundamental right to custody of Makyla for an unspecified period, and the referee agreed to this proposal. "There is no question that parents have a due process liberty interest in caring for their children . . . ." *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001). Child protective proceedings that divest a nonoffending parent of his or her child's custody implicate that liberty interest, regardless of whether the petitioner has *formally* identified the parent as a respondent.

In my view, the process due when a court deprives a nonoffending parent of his or her child's custody should be determined by balancing the three factors described in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and admin-

> istrative burdens that the additional or substitute procedural requirement would entail.

These factors recognize that due process " 'is flexible and calls for such procedural protections as the particular situation demands.' " *Id*. at 334, quoting *Morrissey v Brewer*, 408 US 471, 481; 92 S Ct 2593; 33 L Ed 2d 484 (1972).

Here, application of the *Eldridge* factors compels the conclusion that the referee should have offered respondent father appointed counsel at the adjudication trial and at every hearing conducted thereafter. First, the private interest of a parent in the care, custody, and control of his or her children is one of the oldest fundamental liberty interests recognized by the United States Supreme Court. *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v Massachusetts*, 321 US 158, 166; 64 S Ct 438; 88 L Ed 645 (1944). Because respondent father possessed a substantial and constitutionally protected interest in maintaining custody of Makyla, the first *Eldridge* factor weighs heavily in favor of his right to appointed counsel.

The second *Eldridge* factor considers the risks of error inherent in a proceeding. Here, the risk of erroneously depriving respondent father of his custodial right qualified as substantial. Without assistance from counsel, respondent father lacked the ability to fully comprehend that although he had not been formally named as a respondent, his fundamental right to custody hung in the balance during each and every hearing conducted in this case. Thus, a substantial risk existed that respondent father would suffer an erroneous dep-

rivation of his custody of Makyla, despite that no evidence proved his unfitness. Appointed counsel would have identified the complete absence of allegations of respondent father's unfitness, and would have reminded the court that because Makyla spent her days in respondent father's home, the evidence strongly supported that she would remain safe in his custody.

Counsel additionally could have argued that if petitioner intended to use respondent father's sarcoidosis as a ground for terminating his rights, it first had to fully investigate the actual extent of his disability, and then offer services addressing any pertinent physical limitations.[1] Counsel would have emphasized that the foster care workers who testified in support of depriving respondent father of custody premised their opinions solely on a one-page form containing minimal diagnostic information, and that the workers had not actually spoken to the physician or determined that he possessed an understanding of the issues presented in a child welfare case. Counsel would have pursued additional medical information, pointed out that respondent father resided in a stable home with parents who assisted him when necessary, and would have vigorously challenged petitioner's claim that the sarcoidosis disqualified respondent father from raising his child. Lacking counsel's assistance, respondent father had no opportunity to advocate that under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., his sarcoidosis served to *enhance* petitioner's obligation to initiate meaningful reunification efforts.

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[1] Undoubtedly, counsel additionally would have highlighted that the burden of proof obligates *petitioner* to establish respondent father's unfitness, physical or otherwise, by clear and convincing evidence. MCR 3.977(A)(3); MCL 712A.19b(3). The caseworker's testimony in this case suggests that petitioner improperly shifted to respondent father the burden of substantiating his physical fitness.

The third *Eldridge* factor involves the state's interests. Admittedly, appointment of counsel would impose on the state a financial burden. But this burden became inevitable once petitioner formally announced its intent to terminate respondent father's parental rights. Affording counsel during the months that petitioner deliberately sought to deprive respondent father of Makyla's custody likely would have spared the expense of repeating these proceedings, and would have contributed to a more reliable outcome. After balancing the *Eldridge* factors, I conclude that due process required that the circuit court afford respondent father the right to appointed counsel when it first ordered that Makyla reside outside his custody.

In *Lassiter v Dep't of Social Services of Durham Co, North Carolina*, 452 US 18, 31; 101 S Ct 2153; 68 L Ed 2d 640 (1981), the United States Supreme Court described the following hypothetical situation in which appointment of counsel would be required in a child protective proceeding:

> If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.

In my view, this is such a case. Irrespective that the applicable state statute and court rule did not mandate the appointment of counsel for respondent father before petitioner formally identified him as a respondent, I believe that basic notions of procedural due process triggered that right when the court denied his requests for custody of his child.

Furthermore, I believe that additional and compelling reasons support a determination that the deprivation of respondent father's right to counsel at the permanency planning and termination hearings cannot qualify as harmless error. The initial petition filed in this case did not mention respondent father's pulmonary disease or any concern about his physical ability to parent Makyla. At the dispositional hearing, foster care worker Amanda Forrester admitted that she needed additional information from respondent father's physician concerning the physician's conclusion that respondent father's condition would prevent him from raising a child. When asked, "[Y]ou don't see any reason why he can't provide care with . . . the assistance of his family members as it's going on," Forrester replied, "No." At the dispositional review hearing, the referee took note that respondent father received ongoing treatment for sarcoidosis, and identified reunification as the permanency plan. Not until petitioner filed the supplemental petition did it first assert that respondent father's medical condition prohibited him from caring for his child. And at the termination hearing, the evidence marshaled in support of terminating respondent father's rights concentrated almost exclusively on his alleged physical limitations.

Had the referee appointed counsel for respondent father, counsel certainly would have raised several legal arguments on respondent father's behalf that likely would have significantly affected the proceedings. First, counsel would have recognized from the outset of the proceedings that respondent father's pulmonary sarcoidosis potentially qualified him for services under the ADA. The ADA requires the petitioner "to make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services." *In re Terry*, 240 Mich

App 14, 25; 610 NW2d 563 (2000). "[I]f the FIA [Family Independence Agency] fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family." *Id*. at 26. Petitioner undisputedly failed to make any reasonable accommodations for respondent father, notwithstanding that it utilized his sarcoidosis as the primary basis for terminating his parental rights. Counsel also would have recognized that because the circuit court had not conducted an adjudication of the allegations against respondent-father, petitioner was limited to presenting legally admissible evidence in support of terminating his parental rights. *In re CR*, 250 Mich App 185, 205-206; 646 NW2d 506 (2002).

Finally, little evidence in the record supported a conclusion that respondent father lacked the capacity to parent Makyla because of his physical limitations. The form filled out by respondent father's physician described only that he needed assistance with meal preparation, shopping, laundry, and housework. These limitations, standing alone and in the absence of any evidence of unfitness, do not amount to clear and convincing grounds on which to terminate a parent's fundamental constitutional right to custody of a child. Furthermore, the physician's hearsay opinion that respondent father's medical condition would "keep him from being able to parent/raise a 4-month old child until he is an adult," without more, does not constitute legally admissible, clear and convincing evidence of unfitness. Had counsel appeared on respondent father's behalf, the inherent weaknesses of the one-page medical form, and its lack of clear evidentiary support for termination, would have been stressed. Counsel also could have presented evidence on behalf of respondent father, emphasized his ongoing commitment to caring

for and financially supporting his daughter, and argued that no evidence supported that he ever had failed to provide proper care or custody for the child. Given the weak evidence supporting termination and the strength of contrary arguments that an attorney could have presented, the outcome of the proceedings likely would have differed in the presence of counsel.

HASTINGS MUTUAL INSURANCE COMPANY v SAFETY KING, INC

Docket Nos. 286392 and 286601. Submitted November 9, 2009, at Detroit. Decided November 24, 2009, at 9:15 a.m.

Hastings Mutual Insurance Company brought an action in the Oakland Circuit Court against Safety King, Inc., and Deborah and Michael Mastrogiovanni, individually, and Deborah Mastrogiovanni, as next friend of Michael Mastrogiovanni, a minor, seeking a declaratory judgment regarding its duty to defend and indemnify Safety King, its insured under a commercial general liability policy, with respect to underlying claims brought by the Mastrogiovanni defendants against Safety King for damages allegedly resulting from Safety King's use of a sanitizing agent, the pesticide triclosan, during air duct cleaning services performed in the Mastrogiovanni defendants' home. Safety King brought a counterclaim against Hastings, requesting declaratory relief and asserting claims of breach of contract, fraudulent inducement, negligent misrepresentation, and innocent misrepresentation. Hastings moved for summary disposition on the basis of, in part, the pollution exclusion provisions of the insurance contract. The trial court, Rae Lee Chabot, J., granted summary disposition in favor of Hastings with regard to its action for a declaratory judgment and Safety King's counterclaim, determining that the alleged damages were caused by a pollutant as defined by the terms of the policy and that the pollution exclusion applied. Safety King and the Mastrogiovanni defendants appealed, and their appeals were consolidated.

The Court of Appeals *held*:

1. The definition of a "pollutant" in the policy does not include a "pesticide." Instead, the defining characteristic of a "pollutant" under the policy is that it is an "irritant" or "contaminant." Illustrative examples of potential types of irritants or contaminants given in the policy include "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The policy does not define the terms "irritant" and "contaminant," but the terms are not ambiguous. There is only one reasonable interpretation for each term when they are considered in accordance with their commonly used meanings and in the particular context of being in a pollution

exclusion clause in an insurance contract. A "pollutant" is any solid, liquid, gaseous, or thermal substance that, because of its nature and under the particular circumstances, is generally expected to cause injurious or harmful effects to people, property, or the environment, i.e., an irritant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. A "pollutant" is also any solid, liquid, gaseous, or thermal substance that, because of its nature and under the particular circumstances, is not generally supposed to be where it is located and causes injurious or harmful effects to people, property, or the environment, i.e., a contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.

2. Hastings did not establish that triclosan is a pollutant. There is a genuine issue of material fact whether triclosan is a pollutant under the terms of the policy. Hastings, at a minimum, had a duty to defend Safety King against the claims in the underlying action because they arguably came within the policy coverage. The order granting summary disposition with regard to the declaratory judgment action and the counterclaim must be reversed and the case must be remanded for further proceedings.

Reversed and remanded.

INSURANCE — POLLUTION EXCLUSIONS — WORDS AND PHRASES — POLLUTANTS.

A "pollutant," for purposes of a pollution exclusion clause in a commercial general liability insurance policy that defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste" and that does not define an "irritant" or "contaminant," is any solid, liquid, gaseous, or thermal substance that, because of its nature and under the particular circumstances, is generally expected to cause injurious or harmful effects to people, property, or the environment, or is not generally supposed to be where it is located and causes injurious or harmful effects to people, property, or the environment.

Kallas & Henk PC (by *Constantine N. Kallas* and *Michele L. Riker-Semon*) for Hastings Mutual Insurance Company.

Mantese and Rossman, P.C. (by *Gerard V. Mantese* and *Ian M. Williamson*), for Safety King, Inc.

Paluda Smolek, P.C. (by *Andrew J. Paluda* and *Jeffrey A. Smolek*), for the Mastrogiovanni defendants.

Before: STEPHENS, P.J., and CAVANAGH and OWENS, JJ.

CAVANAGH, J. Defendant Safety King, Inc. (Safety King), and defendants Deborah and Michael Mastrogiovanni, individually, and Deborah Mastrogiovanni, as next friend of Michael Mastrogiovanni, a minor (the Mastrogiovanni defendants), appeal as of right an order granting summary disposition in favor of plaintiff Hastings Mutual Insurance Company (Hastings) in this insurance dispute. We reverse.

Safety King was insured under a commercial general liability policy issued by Hastings when the Mastrogiovanni defendants sued Safety King for damages allegedly resulting from Safety King's use of a sanitizing agent during air duct cleaning services performed in their home. Hastings initially defended Safety King under a reservation of rights, but then filed this action for a declaratory judgment. Hastings alleged that, because of the policy's pollution exclusion provision, it owed no duty to defend and indemnify Safety King with respect to the Mastrogiovanni defendants' claims. In response to the declaratory judgment action, Safety King brought a counterclaim against Hastings requesting declaratory relief and asserting claims of breach of contract, fraudulent inducement, negligent misrepresentation, and innocent misrepresentation.

Hastings filed motions for summary disposition under MCR 2.116(C)(10) with regard to both actions. Hastings argued that the Mastrogiovanni defendants' claims arose from Safety King's application of a sanitizing agent to their ductwork. The active ingredient of the sanitizing agent used is triclosan, a pesticide. Hastings argued that because pesticides qualify as "pollutants" under pollution exclusion provisions, coverage under the policy was precluded and Hastings was en-

titled to summary disposition of its declaratory judgment action. Further, Hastings argued, because neither fraud nor misrepresentations were involved in the issuance of the insurance policy, it was also entitled to summary dismissal of Safety King's counterclaim.

Safety King and the Mastrogiovanni defendants opposed Hastings' motion for summary disposition of the declaratory judgment action, arguing that a "pollutant" was not involved in the underlying lawsuit but, if a pollutant were involved, it was not used in the manner proscribed by the policy and, further, an exception to the pollution exclusion clause applied under the facts of this case. Safety King also opposed Hastings' motion for summary dismissal of its counterclaim, arguing that it was premised on Hastings' failure to provide comparable insurance coverage as requested and promised. Thus, defendants argued, Hastings was not entitled to summary dismissal of either action.

Following oral arguments, the trial court agreed with Hastings and granted the motions. In a clarifying order, the trial court quoted the policy's definition of "pollutant" and held:

> There can be no dispute that the damages alleged in the underlying action are alleged to have been caused by a pollutant as defined by the terms of the policy. Thus, coverage is excluded by the terms of the policy, and Plaintiff's motion for summary disposition is properly granted.

Both Safety King and the Mastrogiovanni defendants appealed and the appeals were consolidated pursuant to an unpublished order of the Court of Appeals, entered July 30, 2008 (Docket Nos. 286392, 286601).

On appeal, Safety King and the Mastrogiovanni defendants argue that a "pollutant" did not cause the damages claimed by the Mastrogiovanni defendants in the underlying lawsuit; thus, Hastings had a duty to

defend and indemnify Safety King in that matter and the trial court's holding to the contrary was erroneous. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30-31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. We also review de novo issues of contract interpretation. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

"Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage." *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997). The issue in this case involves the second step of the inquiry: whether the pollution exclusion clause applied to negate coverage otherwise provided with regard to the damage claims made by the Mastrogiovanni defendants against Safety King. For the exclusion to apply, a "pollutant" must be involved. The insurance policy defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

The same contract construction principles apply to insurance policies as to any other type of contract because it is an agreement between the parties. *Rory*,

supra at 461; *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). Thus an insurance policy must be read as a whole to determine and effectuate the parties' intent. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 332; 632 NW2d 525 (2001). The terms of the contract are accorded their plain and ordinary meaning. *Rory*, *supra* at 464. If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law. *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). Clear and specific exclusionary provisions must be given effect, but are strictly construed against the insurer and in favor of the insured. *Churchman*, *supra* at 567.

The record evidence shows that Safety King was in the business of providing air duct cleaning services and provided such services to the Mastrogiovanni defendants. During the course of performing those services, Safety King applied a sanitizing agent, Aeris-Guard Advanced Duct and Surface Treatment, to the Mastrogiovanni defendants' ductwork. The active ingredient in Aeris-Guard Advanced Duct and Surface Treatment is triclosan, which is an antimicrobial pesticide. In support of its motions for summary disposition, Hastings argued, as it does here, that our Supreme Court, in *Protective Nat'l Ins Co of Omaha v Woodhaven*, 438 Mich 154; 476 NW2d 374 (1991), "determined that pesticides qualify as a pollutant under the pollution exclusion provisions." Without any other discussion or explanation regarding why triclosan should be considered a "pollutant," Hastings claims that "[t]here is no question that the duct sanitizing by Safety King falls under the pollution exclusion." Apparently, because triclosan is considered a "pesticide," Hastings' position

is that it is then also unquestionably a "pollutant" under the terms of its insurance policy.

Safety King and the Mastrogiovanni defendants argue, however, that triclosan is not a substance to which the pollution exclusion clause applies because it is not a "pollutant." They argue that triclosan is a ubiquitous antimicrobial agent found in a variety of cosmetic and personal hygiene products. Triclosan targets bacteria and dental plaque and is used in various products including, for example, soaps, skin cleaning agents, deodorants, shaving gel, toothpaste, mouthwash, dental cement, surgical sutures, cosmetics, and air duct treatments. They argue that, because triclosan is commonly used in products that are applied directly to human skin and, in many cases, within the mouth, Safety King's use of a triclosan-containing product did not implicate the pollution exclusion. It simply is not a "pollutant."

The trial court without analysis, and after merely quoting the definition of "pollution" contained in the policy, agreed with Hastings, holding: "There can be no dispute that the damages alleged in the underlying action are alleged to have been caused by a pollutant as defined by the terms of the policy." We cannot agree that the issue is that basic or the answer that obvious. The definition of "pollutant" does not include "pesticide." Instead, the defining characteristic of a "pollutant" under this policy is that it is an "irritant" or "contaminant." Illustrative examples of potential types of irritants and contaminants are set forth as including "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste" without further qualification or limitation.[1]

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[1] All "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste" are not necessarily irritants and contaminants; accordingly, they are characterized here as "potential types of irritants and contaminants." For example, vinegar is comprised of acetic acid and table salt is sodium

The terms "irritant" and "contaminant," however, are not defined by the policy. We turn to their dictionary definitions to ascertain the plain and ordinary meaning of these terms as they would appear to a reader of the contract. See *Rory*, *supra* at 464; *Coates v Bastian Bros, Inc*, 276 Mich App 498, 504; 741 NW2d 539 (2007). An "irritant" is defined as "tending to cause irritation," and "a biological, chemical, or physical agent that stimulates a characteristic function or elicits a response, esp. an inflammatory response." *Random House Webster's College Dictionary* (1997). Thus, the definition of "irritant" connotes a substance that, because of its nature and under the particular circumstances, is generally expected to cause a response. A "contaminant" is defined as "something that contaminates." *Id*. And, "contaminate" means "to make impure or unsuitable by contact or mixture with something unclean, bad, etc.," and "something that contaminates or carries contamination." *Id*. Thus, the definition of "contaminant" connotes a substance that, because of its nature and under the particular circumstances, is not generally supposed to be where it is located and causes undesirable effects.

But contractual terms must be construed in context and in accordance with their commonly used meanings. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Here, the terms "irritant" and "contaminant" are used to define "pollution" in a pollution exclusion clause, a provision in an insurance policy that limits the scope of liability coverage for damage claims. Considered in this context, an "irritant" is a substance that, because of its nature and under the particular circumstances, is generally expected to cause

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chloride but they are not necessarily "pollutants." Similarly, water and oxygen are not necessarily "pollutants."

injurious or harmful effects to people, property, or the environment. And, considered in context, a "contaminant" is a substance that, because of its nature and under the particular circumstances, is not generally supposed to be where it is located and causes injurious or harmful effects to people, property, or the environment.

In this case, Hastings has failed to establish that Safety King's use of a "pollutant" gave rise to the damage claims asserted by the Mastrogiovanni defendants. Specifically, Hastings did not prove that triclosan is an irritant or contaminant. Rather, the evidence set forth by Safety King showed that triclosan was supposed to be where it was located, i.e., in ductwork, and that it is *not* generally expected to cause injurious or harmful effects to people. Accordingly, Hastings' motion for summary disposition of its declaratory judgment action should have been denied.

Hastings' reliance on the holding of *Protective Nat'l* to support its apparent claim that all pesticides are "pollutants" is misplaced. In that declaratory judgment action, the defendant city of Woodhaven had sprayed a chemical pesticide as part of its service to control insects and pests and a third party brought an action for damages allegedly sustained as a result of being exposed to the pesticide. *Protective Nat'l*, *supra* at 156. The defendant's insurer claimed that the insurance policy's pollution exclusion clause was applicable, relieving it of its duty to defend or indemnify the city. *Id*. at 157. But whether the pesticide used was, in fact, a "pollutant" to which the pollution exclusion clause applied was not at issue or contested. The evidence of record in that case, as noted by the majority opinion, clearly proved that the specific pesticide at issue was an "irritant, contaminant or pollutant." *Id*. at 163-166. However, in our case, the

record evidence did not prove that the specific pesticide at issue, triclosan, is an irritant or contaminant. And we reject Hastings' contention that all pesticides are necessarily "pollutants" under their policy terms. Many homemade pesticides, for example, which use dishwashing detergent or pureed garlic as their active ingredient would not typically be considered "pollutants."

We recognize that many jurisdictions have considered the definition of "pollutant" in the same or very similar pollution exclusion clauses and found it ambiguous, particularly because of the use of the undefined terms "irritant" and "contaminant." Some courts have noted that these terms are vague, in that they are susceptible to more than one meaning, and broad, in that they are virtually boundless because no substance in the world would not irritate or damage some person or property.[2] Some courts have questioned whether the terms refer to (1) substances that ordinarily irritate or contaminate, (2) substances that have, in fact, irritated or contaminated under the particular circumstances regardless of their tendency to do so, or (3) both. Examples are often cited to illustrate the confusion. Fluoride would be considered a "contaminant" if it was dumped in large quantities into a stream without proper approvals, but it would not be a "contaminant" if a municipality properly added it to drinking water to promote oral health. *Auto-Owners Ins Co v Ferwerda Enterprises, Inc*, 283 Mich App 243, 260 n 1; 771 NW2d 434 (2009) (dissenting opinion by O'CONNELL, P.J.),

[2] See, e.g., *Nautilus Ins Co v Jabar*, 188 F3d 27, 30-31 (CA 1, 1999); *Regional Bank of Colorado, NA v St Paul Fire & Marine Ins Co*, 35 F3d 494, 498 (CA 10, 1994); *Sargent Constr Co, Inc v State Auto Ins Co*, 23 F3d 1324, 1327 (CA 8, 1994); *Regent Ins Co v Holmes*, 835 F Supp 579, 581-582 (D Kan, 1993); see, also, *Auto-Owners Ins Co v Ferwerda Enterprises, Inc*, 283 Mich App 243, 258-260 n 1; 771 NW2d 434 (2009) (dissenting opinion by O'CONNELL, P.J.), rev'd 485 Mich 905 (2009).

rev'd 485 Mich 905 (2009). Chlorine added as a disinfectant in a public pool would not usually be considered a "contaminant," but chlorine added in the same concentration in someone's drinking water would be a "contaminant." *Id*. Similarly, chlorine used as a disinfectant in a public pool would not ordinarily be considered an irritant, although it could cause an allergic reaction in some people. *Nautilus Ins Co v Jabar*, 188 F3d 27, 30-31 (CA 1, 1999). But contract terms should not be considered in isolation and contracts are to be interpreted to avoid absurd or unreasonable conditions and results. See *Knox v Knox*, 337 Mich 109, 120; 59 NW2d 108 (1953), quoting 12 Am Jur, p 848; *Port Huron Area School Dist v Port Huron Ed Ass'n*, 120 Mich App 112, 116; 327 NW2d 413 (1982).

We conclude that the contract terms at issue here are not ambiguous. There is only one reasonable interpretation of each term when they are considered in accordance with their commonly used meanings and in the particular context of being in a pollution exclusion clause in an insurance policy. See *Henderson*, *supra* at 354. A "pollutant" is "any solid, liquid, gaseous or thermal" substance that, because of its nature and under the particular circumstances, is generally expected to cause injurious or harmful effects to people, property, or the environment, i.e., an irritant, "including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." A "pollutant" is also "any solid, liquid, gaseous or thermal" substance that, because of its nature and under the particular circumstances, is not generally supposed to be where it is located and causes injurious or harmful effects to people, property, or the environment, i.e., a contaminant, "including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." In this case, Hastings did not establish that triclosan is a pollutant.

Our interpretation of this pollution exclusion clause is also cognizant of, and consistent with, the longstanding principle that

> [i]n construing [contractual provisions] due regard must be had to the purpose sought to be accomplished by the parties as indicated by the language used, read in the light of the attendant facts and circumstances. Such intent when ascertained must, if possible, be given effect and must prevail as against the literal meaning of expressions used in the agreement. [*W O Barnes Co, Inc v Folsinski*, 337 Mich 370, 376-377; 60 NW2d 302 (1953).]

The purpose of insurance is to insure. *Shumake v Travelers Ins Co*, 147 Mich App 600, 608; 383 NW2d 259 (1985). "Commercial general liability policies are designed to protect the insured against losses to third parties arising out of the operation of the insured's business." 9A Couch on Insurance, 3d, § 129:2, p 129-7. Safety King is in the air duct cleaning business and has been for many years. It not only admits using deodorizing and sanitizing agents as a part of the duct cleaning services it provides, it vigorously advertises that service as a primary marketing incentive. Thus, Hastings knew or should have known about this normal business practice of using deodorizing and sanitizing agents and would have clearly, specifically, and definitively excluded liability coverage for such practice if that was its intention. Likewise, because it was Safety King's normal business practice to use deodorizing and sanitizing agents, it would have reasonably expected coverage for damage claims arising out of the use of deodorizing and sanitizing agents.

Accordingly, Hastings' motion for summary disposition with regard to its declaratory judgment action should have been denied and the trial court's decision to the contrary is reversed. There is, at least, a genuine

issue of material fact regarding whether triclosan is a pollutant under the terms of the policy. Therefore, Hastings, at minimum, had a duty to defend Safety King against the Mastrogiovanni defendants' claims because they arguably came within the policy coverage. See *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 137-138; 610 NW2d 272 (2000). In light of our holding, we need not consider the other issues, which were not reached by the trial court, regarding the pollution exclusion clause or the application of the heating equipment exception raised by Safety King and the Mastrogiovanni defendants.

Next, Safety King argues that the trial court erroneously granted Hastings' motion for summary dismissal of Safety King's counterclaim. We agree. The trial court did not set forth any justification for its decision to dismiss the counterclaim and we are unable to discern whether the trial court actually even considered the matter. Therefore, the decision to dismiss Safety King's counterclaim is reversed and the matter is remanded to the trial court for further proceedings.

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

FREED v SALAS

Docket No. 283317. Submitted June 9, 2009, at Detroit. Decided December 1, 2009, at 9:00 a.m.

Karl Freed, as the personal representative of the estate of Bretton J. Freed, deceased, brought an action in the Wayne Circuit Court, Michael J. Callahan, J., against Kimberly J. Salas, Healthlink Medical Transportation Services, Inc., Waste Management of Michigan, Inc., and William Whitty, seeking damages arising from the injury and death of the decedent as the result of a motor vehicle accident that occurred when the decedent was a passenger in a Healthlink ambulance driven by Salas that failed to stop at a stop sign and was hit by a Waste Management garbage truck driven by Whitty. Following an agreement between the plaintiff and Healthlink in which Salas admitted negligence, Salas was dismissed with prejudice. The disputed issues at trial appear to have been whether the garbage truck was being operated in excess of the speed limit or a reasonable speed, the percentage of fault to assign to the defendants, and whether the decedent (already a spastic quadriplegic as a result of injuries sustained in an automobile accident about 17 years earlier) could feel pain or have knowledge of his injuries or impending death. Before the jury was instructed, an order was entered dismissing Whitty from the action with prejudice. The jury found both Healthlink and Waste Management negligent, assigned fault at 55 percent and 45 percent, respectively, and awarded damages totaling $14 million, $6,529,353.70 of which was against Waste Management. Waste Management appealed following the denial of its motions for a new trial, remittitur, or judgment notwithstanding the verdict (JNOV).

The Court of Appeals *held*:

1. Waste Management waived any claim that the dismissal of Whitty automatically resulted in its dismissal by failing to raise that issue at the appropriate time. Regardless, plaintiff's claim against Waste Management under the owner's liability act, MCL 257.401, survived the dismissal. Even when dismissal of a vicariously liable defendant is appropriate based on agency principles, it will not preclude a plaintiff's claim or recovery against that defendant based on the vehicle owner's liability statute where

such a claim has been pleaded. The trial court did not err by denying Waste Management's motion for JNOV.

2. Waste Management failed to object to the request not to disclose to the jury the "high-low" agreement between plaintiff and Healthlink, which provided that Salas would be dismissed with prejudice, Healthlink would be liable for all of Salas's actions, and that Healthlink would admit that its negligence was a proximate cause of the decedent's death in exchange for between $900,000 and $1,000,000. The trial court did not err by denying Waste Management's motion for a new trial that was based on the trial court's failure to disclose the agreement to the jury. Had the trial court performed a balancing test to weigh the interest of fairness served by disclosure of the true alignment of the parties to the jury against the countervailing interests in encouraging settlements and avoiding prejudice to the parties by revealing settlements, it still would not have required disclosure of the agreement. The agreement also was not a "*Mary Carter*" agreement, see *Booth v Mary Carter Paint Co*, 202 So 2d 8 (Fla App, 1967).

3. The plaintiff did provide evidence regarding the decedent's conscious pain and suffering from which the jury could conclude that the decedent had a fear of impending doom or death and conscious pain and suffering. The trial court did not err by denying Waste Management's motion for JNOV.

4. The trial court did not err by allowing an expert retained by plaintiff, Dr. Werner Spitz, to testify that the decedent "could have" had certain experiences, such as having a sense of fear or death.

5. The trial court's paraphrasing of certain statutes when giving M Civ JI 12.01, although awkward, was accurate and a more artful reading of the instruction would not have affected the outcome of the case.

6. The trial court did not abuse its discretion under the facts of this case by failing to give the sudden emergency instruction set forth in M Civ JI 12.02.

7. The awards for conscious pain and suffering and lost companionship were not excessive. The trial court did not abuse its discretion by denying Waste Management's motion for remittitur.

8. The trial court did not abuse its discretion by permitting accident reconstruction experts to give their opinions regarding fault and ordinary negligence. If error did occur, it did not taint the entire trial.

9. The trial court did not abuse its discretion by failing to take judicial notice of the speed limit in the area where the accident

occurred. The speed limit was not undisputed or capable of accurate and ready determination.

Affirmed.

TALBOT, J., concurring in part and dissenting in part, concurred in the result only with regard to the determinations that the dismissal of Whitty did not preclude a finding of Waste Management's liability under the owner's liability statute, MCL 257.401, that the high/low agreement was not a "*Mary Carter*" agreement, that the trial court's wording of M Civ JI 12.01 was not erroneous, and that the trial court correctly refused to take judicial notice of the speed limit. Judge TALBOT dissented on the remaining issues and stated that because of the obvious errors in the conduct of the trial, and with particular emphasis on the impropriety of the expert testimony elicited, he would reverse the judgment and remand for a new trial regarding Waste Management's liability and damages. The trial court improperly permitted the accident reconstruction experts to opine on the ultimate issues of Waste Management's negligence and proportion of fault and erred in failing to instruct the jury regarding the sudden emergency doctrine. The trial court erred by allowing Dr. Spitz to testify beyond his identified area of expertise and the doctor's testimony was impermissibly speculative and without an adequate basis. The doctor's testimony exceeded the limitations that the trial court had placed on his testimony. Waste Management did object to the combination of an award of damages for pain and suffering and loss of society on the jury verdict form. The propriety or reasonableness of those awards cannot be determined because they were combined, therefore, the sufficiency of the evidence to support those awards must be questioned.

1. MOTOR VEHICLES — OWNERS LIABILITY — ACTIONS — PARTIES — AGENCY.

Even when the dismissal of a vicariously liable defendant is appropriate based on agency principles, it will not preclude a plaintiff's claim or recovery against that defendant based on the motor vehicle's owner's liability statute where such a claim has been pleaded (MCL 257.401).

2. NEGLIGENCE — JURY INSTRUCTIONS — SUDDEN EMERGENCY DOCTRINE — EXCUSED VIOLATIONS OF STATUTE.

The sudden emergency instruction set forth in M Civ JI 12.02 is intended to allow a jury to excuse the violation of a statute from which negligence may be inferred; the sudden emergency doctrine provides a basis for a defendant to be excused of a statutory violation in regards to the events that occur after the defendant

discovers the emergency; the instruction is not to be given in all negligence cases or as to all claims of negligence and is not intended to excuse negligence as such; the instruction may only be given with regard to statutory violations referenced in M Civ JI 12.01.

3. DAMAGES — VERDICTS — EXCESSIVE DAMAGES.

The factors that should be considered by a reviewing court in determining whether a verdict is excessive are: whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and whether the amount actually awarded is comparable with awards in similar cases both within the state and in other jurisdictions.

4. WITNESSES — EXPERT WITNESSES — OPINION TESTIMONY — OPINION ON ULTIMATE ISSUES.

Expert testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be determined by the trier of fact such as fault and ordinary negligence (MRE 704).

5. EVIDENCE — JUDICIAL NOTICE.

A fact must be one not subject to reasonable dispute, in that it is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, before a trial court may take judicial notice of the fact; taking judicial notice is discretionary (MRE 201[b], [c]).

Fieger, Fieger, Kenney, Johnson & Giroux, P.C. (by *Victor S. Valenti*), for Karl Freed.

Tanoury, Nauts, McKinney & Garbarino, P.L.L.C. (by *Linda M. Garbarino*), for Kimberly J. Salas and Healthlink Medical Transportation Services, Inc.

John P. Jacobs, P.C. (by *John P. Jacobs*), for Waste Management of Michigan, Inc.

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

SHAPIRO, J. In this vehicle negligence and wrongful death action, defendant Waste Management of Michigan, Inc., appeals as of right a judgment awarding plaintiff Karl Freed, as personal representative of the estate of Bretton J. Freed, deceased, $6,529,353.70 from Waste Management. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This action arose from the death of 35-year-old Bretton Freed. Freed, already a spastic quadriplegic from an accident in April 1987, when he was 18 years old, was being transported from Oakwood Annapolis Hospital, where he had been treated for pneumonia or urosepsis, back to his fulltime care facility, Special Tree Rehabilitation, in an ambulance owned by defendant Healthlink Medical Transportation Services, Inc., and driven by defendant Kimberly Salas. Although the ambulance was not operating in an emergency capacity and had no lights or sirens activated, Salas ran a stop sign and the ambulance was struck broadside in a "T-bone" collision by one of defendant Waste Management's garbage trucks weighing about 70,000 pounds. The garbage truck was driven by defendant William Whitty. Approximately four hours later, Freed died at University of Michigan Hospital from injuries sustained in the accident.

On the second day of trial, before opening statements, plaintiff requested dismissal without prejudice of the two drivers, Salas and Whitty, as "named individual defendant[s] leaving their corporate employers in, . . . with the understanding that, that, obviously in no way waives a[n] agency/princip[al] relationship" and that "both employers would be vicariously liable, if in fact negligence is found by the jury." Healthlink's counsel stipulated regarding dismissal with prejudice as to Salas, but counsel for Whitty and his employer, Waste

Management, objected to dismissal of Whitty, unless it was with prejudice. Accordingly, trial commenced with Healthlink, Waste Management, and Whitty as defendants; Salas was dismissed.

Healthlink's counsel then disclosed "to the Court and all counsel of record" that Salas and Healthlink had entered into a "high-low" agreement and presented an unsigned copy to show its terms. The agreement provided that Salas would be dismissed and Healthlink would continue to be liable for her actions; that Salas would admit negligence and that her negligence was a proximate cause of Freed's death; that plaintiff would receive no less than $900,000 but no more than $1,000,000 from Healthlink; and that Healthlink was remaining in the case to argue the nature and extent of damages. Plaintiff's counsel noted that Healthlink's insurance policy had a coverage limit of $1,000,000, that there was no excess coverage, and that the case had been evaluated at $900,000 with regard to Healthlink and Salas. Plaintiff's counsel moved that the existence of the agreement not be revealed to the jury and Healthlink's counsel concurred. No position on the request was offered by counsel for Waste Management and Whitty.

At trial, the disputed issues appear to have been whether the garbage truck was being operated in excess of the speed limit or a reasonable speed, what percentage of fault to assign to the respective defendants, and whether Freed could feel pain or have knowledge of his injuries or impending death.

Before closing arguments, plaintiff's counsel again raised the issue of dismissing Whitty, but not Waste Management, stating:

> [I]n my complaint I alleged, not only that Waste Management was responsible for Mr. Whitty's driving under the doctrine of respondeat superior, but also I specifically

> pled the owner's liability statute and during the course of discovery, Waste Management, of course, agreed and admitted that Mr. Whitty was driving in the course and scope of his employment with the expressed permission of Waste Management to drive a garbage truck.
>
> So, unless there is some reason that they are now changing their position at trial, which I don't think they can, we could move to dismiss Mr. Whitty as a defendant . . . .

Counsel for Whitty and Waste Management indicated he had no objection "provided that it is with prejudice." Plaintiff's counsel stated that a dismissal with prejudice was acceptable "[a]s long as I have, I would like an admission from Waste Management that they are not asserting anything at all to the express—." At this point, however, the trial court cut plaintiff's counsel off and stated, "You don't need it," and told the bailiff, "You can bring in the jury." Thereafter, an order was entered dismissing Whitty with prejudice.

The jury ultimately found both Healthlink and Waste Management negligent, assigned fault at 55 percent and 45 percent, respectively, and awarded a total of $14 million to plaintiff resulting in an award of $6,529,353.70[1] against Waste Management. Waste Management then filed a multitude of postverdict and postjudgment motions seeking a new trial and a judgment notwithstanding the verdict (JNOV) on the basis of the same grounds now argued on appeal, all of which were denied.

II. ANALYSIS

A. RES JUDICATA

Waste Management first argues that the trial court erred by denying its motion for JNOV because plaintiff's dismissal of Whitty with prejudice should have

[1] This amount includes additional amounts for costs and interest.

resulted in the dismissal with prejudice of Waste Management on the basis of res judicata principles. We disagree.

First, we conclude that Waste Management waived this issue. At the time that the parties discussed Whitty's dismissal, Waste Management never suggested that Whitty's dismissal automatically resulted in its dismissal. Waste Management also never objected to the jury instructions that stated that the jury was to decide Waste Management's negligence; in fact, it specifically indicated satisfaction with the jury verdict form. If Waste Management believed that dismissal of Whitty resulted in Waste Management also being dismissed as a matter of law, it should have objected at the time of Whitty's dismissal, before the jury returned a verdict. In *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 294-295; 731 NW2d 29 (2007), on which Waste Management relies, immediately after the trial court granted summary disposition to the physician, the hospital moved for summary disposition alleging that its dismissal was required as a result of the physician's dismissal. *Id.* at 286. Having failed to do likewise, Waste Management waived this argument. See *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997) (stipulation to jury verdict form waived argument because "[e]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence").

Moreover, even at the hearing regarding the order dismissing Whitty, plaintiff's counsel stated that "[w]e're concerned about an argument by [defendant] on appeal that the dismissal of Whitty, i.e., the agent, relieves the principal, i.e. Waste Management, from any responsibility. Now we have it under ownership liability as well but that's what our concern is." Waste Manage-

ment again stood mute. If it believed that Whitty's dismissal precluded the claim against Waste Management, it should have so moved immediately after the trial court signed the order. It did not, however. Instead, it attempted to harbor this issue as a kind of appellate parachute; something this Court has long found impermissible. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002). Accordingly, Waste Management has waived this issue.

However, because this issue involves a question of law and the necessary facts have been presented, we will address the merits of Waste Management's argument. See *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007).

Plaintiff argued that Waste Management was liable for any negligence by Whitty "based on the doctrine of Respondeat Superior as well as the Owner's Liability Act[,] § MCL 257.401." MCL 257.401(1) provides:

> This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family.

Plaintiff argues that this statute provides that recovery may be had against the owner of the vehicle regardless of whether the driver of the vehicle has been dismissed.

Initially, the liability of owners was based on respondeat superior. In *Geib v Slater*, 320 Mich 316; 31 NW2d 65 (1948), the plaintiff's decedent was struck by an automobile owned by the defendant. The plaintiff predicated his right to recover "solely on the statute which imposes liability upon the owner of a motor vehicle for negligence of persons operating it with his consent." *Id.* at 318. The *Geib* Court concluded that the defendant was "guilty of no tortious act" but that "his liability arises only by operation of law. . . . [H]is statutory liability is based upon the doctrine of *respondeat superior*." *Id.* at 321 (italics in original). It noted that "a valid release of either the master or servant from liability for tort operates to release the other" such that the settlement and release from the driver served to release the owner of the vehicle. *Id.*

Not long after, however, our Supreme Court overruled this conclusion. In *Moore v Palmer*, 350 Mich 363; 86 NW2d 585 (1957), our Supreme Court reexamined the owner's liability statute. It noted that in cases "where the owner of the automobile was also the employer of its driver, some confusion has developed as to whether the Court should apply the terms of [the] owner liability statute or the older common-law doctrine of master and servant." *Id.* at 375. It noted the *Geib* decision had indicated that the owner's liability was based on the doctrine of respondeat superior. *Id.* at 389. However, it concluded that liability under the owner's liability act "is not limited by the common-law tests applicable to the master-servant relationship" and expressly overruled the language in *Geib* that held that the owner's liability act was based on respondeat superior. *Id.* at 393-394.

Waste Management relies upon *Theophelis v Lansing Gen Hosp*, 430 Mich 473; 424 NW2d 478 (1988), a

medical malpractice case where our Supreme Court was asked to determine whether an amendment to the statute requiring contribution among tortfeasors "abrogated the common-law rule that settlement with, and release of, an agent operates to discharge the principal from vicarious liability for the agent's acts." *Id.* at 476. Although *Theophelis* cited *Geib* for common-law principles of agency, it did not indicate that it was overruling *Moore*. That is, its reference to *Geib* did not somehow reinvigorate the notion that owner liability was something other than a statutory creature and not based on common-law agency or respondeat superior. Indeed, "[t]he owner's liability under the statute is nonderivative" and "[t]he purpose of this statute is to place the risk of damage or injury on the person who has the ultimate control of the motor vehicle as well as the person in immediate control." *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998). See also *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 80; 697 NW2d 558 (2005) (concluding that liability under the owner's liability statute is not vicarious in nature); *North v Kolomyjec*, 199 Mich App 724, 725-726; 502 NW2d 765 (1993) (the owner's liability act "created a new cause of action against a motor vehicle owner" and "the statute was designed to extend and complement the common law").

Waste Management also relies on the statement in *Kaiser v Allen*, 480 Mich 31; 746 NW2d 92 (2008), that liability between the owner and driver is vicarious and indivisible. *Id.* at 36, 38, 39. However, the issue in *Kaiser* concerned joint and several liability, not res judicata. In *Kaiser*, the plaintiff sued both the driver and the owner. *Id.* at 33-34. The plaintiff settled with the owner for $300,000 and the owner was dismissed from the lawsuit. *Id.* at 34. At trial, the jury concluded that "the total amount of damages suffered" by the

estate was $100,000. *Id.* The driver then requested that the $100,000 be set off against the $300,000 already paid by the owner. *Id.* Our Supreme Court concluded that the setoff was appropriate because "the jury verdict awarding damages to plaintiff explicitly states that the award is for 'the total amount of damages' suffered by the plaintiff" and that if the plaintiff were permitted to recover $100,000 from the driver and keep the $300,000 from the owner, the plaintiff would have impermissibly recovered "four times more than the jury determined plaintiff should be awarded . . . ." *Id.* at 39-40.

Thus, when the Supreme Court stated that fault was "indivisible" in *Kaiser*, it was doing so in the context of quantifying damages in order to make certain that the plaintiff only received one full award, as provided by law. The intent of *Kaiser* was to prevent a double recovery by requiring a setoff even though statutory changes had eliminated common-law joint and several liability. *Kaiser* requires that if a plaintiff settles with and dismisses a driver, the owner be given a setoff for that settlement, not that the owner is entitled to a complete dismissal. Indeed, Kaiser makes no reference at all to res judicata.

Waste Management's reliance on medical malpractice cases fails to consider the differences between the relationships that result in hospital liability versus vehicle owner's liability. Hospital liability is built on common-law agency principles. See *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 12; 651 NW2d 356 (2002). However, Michigan caselaw is clear that such agency principles do not control vehicle owner's liability. See *Roberts v Posey*, 386 Mich 656, 664; 194 NW2d 310 (1972) ("The owner's liability statute is too important a foundation stone in the field of automobile-negligence

law to be circumscribed by judicially declared limitations borrowed from the law of agency."). Indeed, the entire basis for the creation of the statute was that common-law concepts of bailment, agency, and respondeat superior were inadequate. *Frazier v Rumisek*, 358 Mich 455, 457; 100 NW2d 442 (1960), citing *Moore*, *supra*. Given that the underlying relationship that results in liability of a hospital is agency, and agency law is inapplicable to the owner's liability statute, we conclude that the holdings of *Al-Shimmari*, which are clearly based on an agency relationship, are not applicable in the vehicle owner's liability context.

We recognize that in this case Whitty was an employee of Waste Management, creating an additional relationship besides that of owner/driver. However, because we have concluded that plaintiff's owner's liability claim survived Whitty's dismissal, thereby providing a valid basis for upholding the jury's award, we need not address whether dismissal was required because of Whitty and Waste Management's agency relationship. In doing so, we hold that even when dismissal of a vicariously liable defendant is appropriate based on agency principles, it will not preclude a plaintiff's claim or recovery against that defendant based on the vehicle owner's-liability statute where such a claim has been pleaded. Accordingly, the trial court did not err by denying Waste Management's motion for JNOV.

B. HIGH-LOW AGREEMENT

Waste Management next argues that the trial court erred by denying its motion for a new trial that alleged that the trial court erred by failing to disclose the high-low agreement between plaintiff and Healthlink to the jury. We disagree.

The high-low agreement in this case provided that Salas would be dismissed with prejudice, that Healthlink would be liable for all of Salas's actions, and that Healthlink would admit negligence and that its negligence was a proximate cause of Freed's death. In exchange, plaintiff would receive no less than $900,000 and no more than $1,000,000, with the jury award determining the amount received ($900,000 or less would result in payment of $900,000; $1,000,000 or more would result in payment of $1,000,000; an amount between $900,000 and $1,000,000 would result in payment of the jury verdict). A verdict against Healthlink was not to be entered as a judgment; instead a release and settlement agreement would "be the only mechanism of resolution of the litigation," with both parties waving all rights to appeal.

As previously noted, the agreement was disclosed to both the trial court and counsel on the second day of trial, before opening statements. Plaintiff's counsel moved that "there be no mention of the hi/low agreement in this case" and requested an order limiting and precluding mention of the agreement. He added, "There is no agreement between plaintiff and these defendants to prevent them from asserting any defense that they want against us, against Mr. Whitty and/or Waste Management." Healthlink's counsel stipulated with respect to the request. Waste Management's counsel neither agreed nor objected, but remained silent.

After trial, when Waste Management filed its motion for a new trial on the ground that the jury was not informed of the high-low agreement, the trial court held that it was not required to inform the jury of a high-low agreement where no party asked that it do so during the entire trial. Waste Management argued that the trial court had a duty to disclose it sua sponte because it was a matter of public policy and judicial integrity, and that a request in a post trial motion was sufficiently timely.

Waste Management also argued that there was litigation cooperation. The trial court concluded:

> The Court of Appeals and whoever reads this record should know that I had nothing to do with the agreement that was entered into. Nobody asked me to disclose it. I would never have sua sponte decided to disclose it. And as far as I'm concerned, Waste Management waived any argument that [defense counsel] is now making. That's the last word.

As noted by the trial court, Waste Management never objected to plaintiff and Healthlink's request that the agreement not be disclosed to the jury. "A party may not waive objection to an issue and then argue on appeal that the resultant action was error." *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 168; 761 NW2d 764 (2008). Additionally, even assuming, as Waste Management's appellate counsel suggests, that Waste Management's trial counsel was caught off guard by the disclosure of the agreement on the second day of trial, at no time during the 16 days of trial[2] did Waste Management's trial counsel ever attempt to argue that disclosure of the agreement should have been granted, or that it even wanted the agreement disclosed. We conclude that Waste Management had more than sufficient time during trial to consider the agreement and raise the issue of disclosure to the jury at a time when the trial court still had the opportunity to do so. Thus, Waste Management's failure to object before the jury was given the case, whether by plan or negligence, cannot constitute reversible error. *Phinney*, *supra* at 537.

As before, however, because this issue involves a question of law and the relevant facts are contained in the record, we have chosen to address the merits of Waste Management's argument. *Laurel Woods Apartments*, *supra*.

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[2] Trial began on April 25 and ended on May 10.

1. *MARY CARTER* AGREEMENTS

First, we disagree with Waste Management that the agreement at issue is a *Mary Carter* agreement. A *Mary Carter*[3] agreement is defined as

> [a] settlement device used in multiparty litigation. Under the typical Mary Carter agreement the plaintiff releases his cause of action against a joint tortfeasor in return for the settling joint tortfeasor's continued participation in the trial. *The plaintiff also promises to pay the settling tortfeasor a portion of the recovery received from the nonsettling tortfeasor.* The settling tortfeasor thus represents himself to be a defendant whose financial interest is adverse to the plaintiff, while in fact he has a vested financial interest in the success of the plaintiff's cause of action against the nonsettling defendant. [Black's Law Dictionary (5th ed) (emphasis added).]

Under this definition, the agreement does not constitute a *Mary Carter* agreement because plaintiff did not promise to pay Healthlink a portion of the recovery received from Waste Management.

In *Smith v Childs*, 198 Mich App 94; 497 NW2d 538 (1993), this Court stated that

> [t]he distinguishing characteristics of a *Mary Carter* agreement are that it (1) not act as a release, so the agreeing defendant remains in the case, (2) is structured in a way that it caps the agreeing defendant's potential liability and gives that defendant an incentive to assist the plaintiff's case against the other defendants, and (3) is kept secret from the other parties and the trier of fact, causing all to misunderstand the agreeing defendant's motives. [*Id.* at 97-98.]

The agreement in this case only satisfies the first element, because Healthlink was not released, but was left in the

[3] *Booth v Mary Carter Paint Co*, 202 So 2d 8 (Fla App, 1967).

case to argue fault and damages. Although the agreement capped Healthlink's liability, it did not give Healthlink an incentive to "assist the plaintiff's case against the other defendants . . . ." Although Healthlink did agree with plaintiff about Waste Management's negligence and fault, this was not a position created by the agreement, but was the result of the natural alignment of the parties under the facts of this case. Regardless of the high-low agreement, Healthlink had an undeniable interest in Waste Management also being found at fault because the higher the degree of fault found by the jury as to Waste Management, the lower the amount of fault assignable to Healthlink.

Waste Management relies, in part, on a cost-sharing agreement related to accident reconstructionist Weldon Greiger's testimony. According to a letter sent May 7, 2007, from Healthlink's counsel to plaintiff's counsel, plaintiff's counsel's firm "agreed to pay for the fees and expenses related to Greiger's preparation for trial since April 25, 2007 and Mr. Greiger's trial appearance" for Healthlink's case-in-chief. This is not evidence of improper collusion, however. Greiger was an independent expert originally hired by Healthlink and plaintiff determined that Greiger's testimony was helpful to its case. Rather than risk Healthlink not calling Greiger because his testimony matched that of plaintiff's expert, plaintiff elected to share in the payment of Greiger's fee. This agreement is no different than those situations where co-defendants or co-plaintiffs cost-share fees of experts on certain issues where they have a unity of interest on that issue. Here, Healthlink and plaintiff had a unity of interest in proving Waste Management was at fault. This interest existed independently of the high-low agreement and was obvious throughout the trial. Thus, we are not

persuaded that the cost-sharing agreement related to Greiger is evidence of collusion.[4]

Finally, the third factor is not met because the agreement was not kept secret from the other parties and the alignment of the parties was self-evident throughout the case and was consistent with the alignment, if any, that the high-low agreement created. Throughout the trial, Healthlink's interests remained clear to the parties, the court and the jury, i.e., Healthlink sought to reduce the gross amount of damages awarded and to reduce its percentage of fault, which given that plaintiff had no fault, inherently meant that Healthlink would seek to increase Waste Management's percentage of fault.

Thus, whether using the Black's Law Dictionary definition or this Court's own standard, the agreement is not a *Mary Carter* agreement. This conclusion is not dispositive of the issue, however, because the agreements in *Hashem* were also "not prototypical *Mary Carter* agreements." *Hashem*, *supra* at 83.

2. THE AGREEMENTS IN *HASHEM*

The agreements in *Hashem* were three high-low agreements executed between the plaintiff and each of three of the defendants. *Id.* at 81-82. One provided for a minimum award of $25,000 and a maximum award of $50,000; one provided for a minimum of $90,000 and a maximum of $100,000 (the insurance policy limit for that defendant); and the third provided that the plaintiff would receive that defendant's insurance policy limit as both the high and low amount. *Id.* Counsel for

[4] Waste Management suggests other examples of what it claims was collusion during voir dire and closing argument. A review of the record reveals that these suggestions are merely speculative and that the events were of little significance to the trial or its outcome.

the two remaining defendants had "questioned the propriety of the continued participation of the settling codefendants without disclosure of the agreements to the jury" but the trial court declined, finding the agreements irrelevant. *Id.* at 82. The nonsettling defendants then argued on appeal that the failure to inform the jury of those agreements denied them a fair trial. *Id.* This Court noted that the agreements did not fall precisely into the definition of a *Mary Carter* agreement because they were not kept secret from the trial court and the nonsettling defendants and they contained no releases. *Id.* at 83.

> Nonetheless, as argued by defendants, an agreement that deprives a settling defendant of any significant financial interest in the amount recovered against any nonsettling defendant distorts the adversarial process and potentially undermines both the right to a fair trial and the integrity of the judicial system. . . .
>
> [T]he primary danger of such an agreement is that the settling defendant will fail to operate as an adversary. . . . [This danger] may also be present, although in a subtler form, when a defendant has reached a "high-low" agreement, yet remains involved in the litigation. With respect to these latter agreements, the distortion of the adversarial process is arguably less pronounced because, given the range of awards provided for in a "high-low" agreement, the settling defendants retain an interest in ensuring that the total amount of damages is as small as possible. Nonetheless, the integrity of the judicial system is placed into question when a jury charged with the responsibility to determine the liability and damages of the parties is denied the knowledge that there is, in fact, an agreement regarding damages between a number of the parties. Consequently, wise judicial policy must favor disclosure of such agreements to the jury. [*Id.* at 83-85 (citation omitted).]

The agreement in this case is similar to those involved in *Hashem*. The agreements in both cases were dis-

closed to all parties and the trial court, but not the jury; did not contain a release, leaving the settling parties to continue to participate in the litigation; and contained minimum and maximum amounts, where the maximum was generally the defendant's insurance policy limit. Thus, *Hashem* appears applicable to the present case.

The *Hashem* Court concluded that "the interest of fairness served by disclosure of the true alignment of the parties to the jury must be weighed against the countervailing interests in encouraging settlements and avoiding prejudice to the parties." *Id.* at 86. It noted that the variation of agreements in this area was "virtually limitless" so that "parties must rely on the sound discretion of the trial court to ensure that, whatever the circumstances of a particular case, the integrity of the adversarial process is preserved." *Id.* Accordingly, we must determine whether the trial court abused its discretion by failing to disclose the agreement to the jury.

We note that none of the parties requested that the jury be informed of the agreement. In fact, the only motion in front of the trial court was a specific request that the jury not be informed of the agreement. Thus, it is difficult to see an abuse of discretion.

Waste Management argues that the trial court had an obligation to disclose sua sponte the agreement. We find nothing in the language of *Hashem* that mandates disclosure of all high-low agreements. Moreover, even if we assume that the trial court has some type of obligation to act sua sponte, the trial court's obligation is not to disclose the agreement, but "the duty and the discretion to fashion procedures that ensure fairness to all the litigants in these situations." *Id.* at 86. The purpose of the disclosure of the agreement would be to ensure the integrity of the judicial system. *Id.* at 84-85.

In this case, we find that there is no evidence that nondisclosure of the agreement undermined the integrity of the judicial process. As noted previously, Healthlink's position at trial remained unchanged by the agreement. It had a vested interest in reducing plaintiff's total damages and in allocating fault to Waste Management, and all its actions during trial clearly reflected this position. Thus, the jury and the parties were all aware of the true alignment of the parties.

Additionally, although the nature of the *Hashem* agreements and the agreement in this case is similar, the amount still at stake was substantially different. In *Hashem*, the three high-low agreements provided for a total difference of $35,000 between the low and high figures, averaging slightly more than $10,000 for each settling defendant. *Id.* at 81-82. Further, in *Hashem*, one of the three settling defendants had no change in liability regardless of the outcome of the trial, because the high and low amounts were the identical insurance policy limit. *Id.* In the present case, the difference between the low and high figures was $100,000—almost 10 times the average amount at issue in *Hashem*. To the degree that Waste Management suggests that $100,000 is an insufficient sum to create an incentive, we note that Waste Management elected to go to trial rather than raise its settlement offer to plaintiff from its offer of $375,000 to plaintiff's demand of $500,000—a difference of $125,000. Since Waste Management deemed $125,000 sufficient incentive to go to trial, it is difficult to understand its present claim that $100,000 was not a sufficient stake for Healthlink to have been considered adverse to plaintiff.

Finally, *Hashem* makes clear that disclosure of a high-low agreement must be balanced against the legal traditions of encouraging settlements and avoiding

prejudice by revealing settlements to juries. *Id.* at 86. Indeed, encouraging settlement and the potential prejudice caused to parties when such agreements are disclosed to juries is the foundation of MRE 408, which excludes evidence of "accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim . . . ." This was discussed at length in *Brewer v Payless Stations, Inc*, 412 Mich 673; 316 NW2d 702 (1982), which generally barred informing jurors of settlements. See, also, *Precopio v Detroit*, 415 Mich 457, 473; 330 NW2d 802 (1982) ("public policy . . . encourages settlements, a policy which underlies the exclusion of offers to settle or to compromise from consideration by the factfinder on the issue of liability").

In *Brewer*, the Supreme Court noted that disclosure of such agreements is a "two-edged sword" and that either or both parties may prefer that a jury not be informed of it. *Brewer*, *supra* at 678. Our Supreme Court unanimously wrote that informing juries of settlements

> cuts both ways. . . . For example, the mere fact of settlement by a codefendant could suggest liability on the part of a blameless non-settling defendant. The amount of the settlement, if large, might tend to suggest a higher value of the claim. If small, the jury might tend to "make it up" by a higher verdict as to the non-settling tortfeasor. . . .
>
> On the other hand, a small settlement could disadvantage a plaintiff if the jury perceived that amount as bearing on the total value of the claim. The jury also might consider its duty to be diminished by settlement or consider the amount involved to be adequate regardless of the non-settling defendant's liability. [*Id.*]

It is in this context that we consider Waste Management's failure to timely request that the high-low agreement be disclosed. It seems likely that Waste

Management did not request disclosure as a matter of trial tactics, because revealing the agreement could have been prejudicial to Waste Management's position. Because Waste Management had been unwilling to settle for $500,000, it had no desire for the jury to hear that Healthlink was going to pay plaintiff a minimum of $900,000, thus suggesting to the jury that the damages in the case were far greater than Waste Management claimed.

In any event, because the jury was aware of the true alignment of the parties and Healthlink had a substantial interest in the outcome of the trial, we conclude that, even if the trial court had performed the balancing test, it would not have required disclosure of the agreement. Accordingly, the trial court did not abuse its discretion by failing to disclose the agreement to the jury or by denying a new trial on such grounds.

C. EVIDENCE OF PAIN AND FEAR

Waste Management argues that plaintiff did not provide evidence of conscious pain and suffering and that the trial court's ruling that permitted plaintiff's expert witness Dr. Werner Spitz to testify that Freed "could have" experienced a fear of death should have resulted in JNOV or a new trial because it violated the preponderance of the evidence standard. We disagree with both propositions.

We review de novo a trial court's decision to deny a motion for JNOV. *Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004). The evidence is reviewed and all legitimate inferences are taken in the light most favorable to the nonmoving party. *Id.* "Only when the evidence viewed in this light fails to establish a claim as a matter of law is the moving party entitled to judgment

notwithstanding the verdict (JNOV)." *Id.* (quotation marks and citation omitted).

It was uncontested that Freed's injuries were severe, including the internal injuries that ultimately caused his death, a leg fractured at about 90 degrees, and multiple, less significant injuries. It is not disputed that these are injuries that in a conscious person would obviously cause pain and suffering. Freed's physical medicine and rehabilitation physician of several years, Dr. Edward Dabrowski, testified that, despite his quadriplegia, Freed "had sensation" and could see, hear, and feel pain. He testified that in his opinion Freed would have felt pain from the injuries he suffered in this accident. More generally, he testified about Freed's capacity to experience sensations and emotions. He testified that Freed would grimace in response to pain, smack his lips in response to the presence of his mother, move his eyes, recognize individuals, experience pleasure in interactions both with people and with his environment, and that Freed enjoyed therapeutic recreational activities such as watching baseball, which he "loved," and going to the park. He also testified that Freed could respond with volitional movement to an order to squeeze the doctor's hand.

Eyewitness testimony about Freed's pain and state of mind after the accident came from Kelly Barker, a physician assistant who treated Freed for four years before the accident and who came to the accident scene shortly after the crash. She testified about both her observations post-accident as well as to her evaluation of Freed's sensorium in general. Like Dabrowski, Barker testified that Freed would respond to pain by grimacing, respond to his parents, smile or giggle if happy, respond to changes in his environment, had full facial expressions, and could respond to simple commands such as squeezing a hand.

Barker testified that she received a call about the accident and arrived at the scene after Freed had been placed on a stretcher. She testified that Freed appeared frantic and traumatized, with his eyes wide-open, and that this appearance was not how he normally appeared. She described him as maintaining full eye contact with her at the scene and looking scared. She testified that she responded to him with his facial expressions and that he was not unconscious. She testified that she conducted a physical examination and found that Freed had a 90-degree fracture to one leg, was bleeding from multiple cuts, and displayed bruising that demonstrated internal bleeding. She testified that she traveled in the ambulance with Freed to the local hospital and remained with him the entire time he was in the emergency department, and that during that time he remained conscious and his facial expressions were frantic and scared.[5] She further testified that after about 45 minutes, Freed was transferred from that emergency room by ambulance to University of Michigan Hospital and that she remained with him during the ambulance ride and for some time at University of Michigan Hospital. She testified that during this period as well, Freed remained conscious throughout and that his facial expressions continued to show fear. She testified that before Freed went to the CT scanner—at which point she left the hospital—she spoke to him and that his eyes were open and he was listening to her.

The defendants did not claim that Freed's injuries would not have been painful or that the experience would not have been extremely frightening to a person

[5] Given his preexisting injuries, Freed could not utter words describing his experience. However, "[t]he existence of a decedent's conscious pain and suffering may be inferred from other evidence that does not explicitly establish the fact." *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 180; 475 NW2d 854 (1991).

with an operative sensorium. Rather, both Healthlink and Waste Management argued that Freed was incapable of feeling pain or fear in light of cognitive and sensory limits created by his preexisting injuries. They offered the testimony of a retained neurologist who reviewed Freed's records and offered this opinion and stated that, given that conclusion, Barker's eyewitness observations were not meaningful. By contrast, as just discussed, plaintiff submitted evidence from Dabrowski and Barker that Freed was, in fact, capable of experiencing pain and fear despite his preexisting injuries and that his facial expressions were easy to read.

Plaintiff also offered the testimony of a retained expert, Dr. Werner Spitz, whose review of the records and the testimony of Dabrowski and Barker led to his opinion that Freed could sense and feel pain. Spitz also testified that Freed's capacity to experience pleasure was demonstrative of an ability to feel displeasure and fear. He also testified that Freed's symptoms after the crash indicated that he was not getting adequate oxygen due to his internal bleeding and that lack of oxygen instinctively causes fear.

Taking this evidence in the light most favorable to plaintiff, the collective testimony of Dabrowski, Barker and Spitz meant that Freed had the ability and capacity to feel pain, and that his facial expressions evidenced pain and fear. Although the jury was presented with a differing view on these issues by defendants' expert, it is the role of the jury to determine which witnesses it found credible and what weight to give the various evidence. *Taylor v Mobley*, 279 Mich App 309, 314; 760 NW2d 234 (2008). Because there was sufficient evidence from which the jury could conclude that Freed had a fear of impending doom or death and conscious pain and suffering, we find no error in the trial court's denial of Waste Management's motion for a JNOV.

Waste Management argues that the trial court erred by allowing Spitz to testify about what Freed "could have" experienced. We are not, however, persuaded that this is error. As noted, defendants argued that Freed lacked the capacity to interact with his environment and, therefore, could not have had a fear of death. Spitz's testimony was intended to counter that view. His testimony was that Freed "could have" had such a fear, meaning Freed had the capacity to have such a state of mind or experience.[6] Although Spitz's testimony by itself would not have been enough to prove actual pain and suffering and without Barker's eyewitness testimony would have been merely speculative, it did not stand alone. Rather, it complemented Barker's statements regarding her observations of, and interactions with, Freed after the accident. Thus, allowing testimony from Spitz that Freed "could have" had certain experiences was not error.

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[6] The dissent selects several statements from Spitz's testimony that it asserts went beyond the issue of Freed's capacity to experience pain and fear. However, this mischaracterizes the statements. Several of the quoted statements were that Freed "could have," i.e., Freed had the capacity to experience pain and fear. Several others went to the fact that loss of blood causes brain hypoxia (reduced oxygen), which causes a sensation of fear and impending doom regardless of an individual's intellectual status. The other statements were medical opinions based upon observations of Freed at the accident scene by a physician assistant familiar with Freed. The dissent does not explain why it concludes that such observations are not sufficiently reliable for a medical expert to rely on them. Medical experts routinely rely on the observations of physician assistants and nurses. Indeed, the dissent itself does not take issue with admission of the testimony of the physician assistant witness. Of course, the jury was free to disregard that testimony and, if it did, to disregard the opinions of Dr. Spitz based upon it. Finally, although the dissent concludes that Dr. Spitz's testimony constituted "improper and repetitive references" to damages, it appears untroubled by the defense expert's repeated assertions that the decedent "was not in pain at the time after the injury and he didn't know how serious his injuries were."

D. JURY INSTRUCTIONS

Waste Management alleges that the trial court improperly paraphrased state statutes when giving M Civ JI 12.01 and erred by failing to give a sudden emergency instruction. We disagree.

Claims of instructional error are reviewed de novo, *Kenkel v Stanley Works*, 256 Mich App 548, 555-556; 665 NW2d 490 (2003), but the determination whether an instruction is accurate and applicable is reviewed for an abuse of discretion. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). "Jury instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002) (citations and quotation marks omitted). Reversal based on instructional error is only warranted where "failure to vacate the jury verdict would be inconsistent with substantial justice." *Cox*, *supra* at 8 (citation and quotation marks omitted).

1. NEGLIGENCE INSTRUCTIONS

Counsel for all parties and the trial court had a several page colloquy regarding the giving of M Civ JI 12.01. They reviewed what possible statutory violations would be referenced and as to which defendants. Plaintiff requested that the jury be given M Civ JI 12.01 as to Waste Management and that part or all of five statutes be paraphrased in this instruction, namely, MCL 257.626 (reckless driving), MCL 257.626b (careless driving), MCL 257.627 (driver shall operate at a careful and prudent speed, keep a proper lookout and shall not operate at a speed that will not allow for a stop within the assured clear distance ahead) and MCL 257.628 and

257.629 (exceeding posted speed limit). Waste Management objected to all of plaintiff's requests. The trial court held that there was no evidence to support an instruction on the statute dealing with reckless driving, but held that the jury should be given M Civ JI 12.01 as to careless driving, proper lookout, excess speed for conditions, and exceeding posted speed limit.

Waste Management and plaintiff both requested that M Civ JI 12.01 be given as to Healthlink with regard to possible violations of multiple statutes. Healthlink objected on the grounds that such instructions were not necessary because it had already admitted negligence. The trial court overruled the objection and gave the instructions as requested.

Waste Management has not argued on appeal that the trial court erred by agreeing to include any of the cited statutes in M Civ JI 12.01. Rather, Waste Management argues only that the trial court did not accurately paraphrase the relevant statutes and that the trial court's inaccuracies were so extensive that the outcome of the trial was affected.

Because Waste Management has not supplied this Court with a copy of the instructions that it requested and there does not appear to be a copy of any such requested instructions in the record, we presume that Waste Management concurred with the form used by the trial court in its M Civ JI 12.01 instruction as to Healthlink, which was essentially identical in form to the M Civ JI 12.01 instruction given as to Waste Management. The only difference in the instructions with regard to the two defendants is that the trial court advised the jury of several possible statutory violations by Healthlink that it did not include as to Waste Management, specifically, failure to stop in the assured clear distance, failure to stop at a stop sign and failure

to yield. This difference in substance appears to have been proper given the facts of the case and theories of the parties.

The trial court referenced differing statutes for the two defendants when instructing the jury under M Civ JI 12.01. The instructions read:

> We have state statutes that provide concerning the negligent driving of a garbage truck in a careless and negligent manner, concerning negligent failure to keep a proper lookout, concerning negligent driving of the garbage truck in excess of the posted speed limit and too fast for existing weather and road conditions.
>
> We have state statutes that further provide concerning negligent driving of an ambulance in a careless and negligent manner, negligent failure to stop in an insured [sic] clear distance, negligent failure to keep a proper lookout, negligent driving of an ambulance at a speed contrary to weather and road conditions, negligent failure to obey stop signs, to obey signs such as a stop sign, negligent failure to yield to a vehicle who had the right of way.
>
> * * *
>
> If you find that the Defendants violated any of these statutes before or at the time of the occurrence, you may infer that that Defendant was negligent. You must then decide whether such negligence was a proximate cause of this occurrence.

Looking at the form of the paraphrasing of the instructions, we find no error as to Waste Management. MCL 257.626b provides that "[a] person who operates a vehicle upon a highway . . . or other place open to the general public . . . in a careless or negligent manner likely to endanger any person or property, but without wantonness or recklessness, is responsible for a civil infraction." The portion of MCL 257.627(1) unrelated to assured clear distance provided at the relevant time:

"A person driving a vehicle on a highway shall drive that vehicle at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition then existing." Finally, MCL 257.628(8) provided at the relevant time that "[a] person who fails to observe an authorized speed or traffic control sign, signal, or device is responsible for a civil infraction." See also MCL 257.629(6).

The paraphrases "negligent driving of a garbage truck in a careless and negligent manner" and "negligent driving of the garbage truck in excess of the posted speed limit and too fast for existing weather and road conditions" do convey the nature of those statutes. Although the instructions might have been more clear if the trial court had included the words "is prohibited" so that the instructions read that Michigan has statutes "which provide that negligent driving of a garbage truck in a careless and negligent manner [is prohibited] . . . [and n]egligent driving of the garbage truck in excess of the posted speed limit and too fast for existing weather conditions [is also prohibited]," ultimately, the paraphrasing cannot be said to have been so poor that a jury could not conclude what was being asked of it. Also, Waste Management was satisfied with this paraphrasing when it came to Healthlink. Although the trial court's paraphrasing was awkward, it remained accurate and we do not see how a more artful reading of the instruction would have affected the outcome of the case.

2. SUDDEN EMERGENCY INSTRUCTION

The sudden emergency instruction is set forth at M Civ JI 12.02. M Civ JI 12.02 is captioned "Excused Violation of Statute" and, if given, is to be read immediately after the reading of M Civ JI 12.01, which, as just noted, sets forth claims that the defendant violated a

state statute from which negligence may be inferred. Waste Management seems to suggest that M Civ JI 12.02 must be given in all vehicle negligence cases and that it provides an excuse for negligence altogether. However, the plain language of M Civ JI 12.01 and 12.02 make clear that M Civ JI 12.02 is not to be given in all negligence cases or as to all claims of negligence and that it is not intended to excuse negligence as such. Rather, it is intended to allow a jury to excuse the violation of a statute from which negligence may be inferred and may only be given as regards any statutory violations referenced in M Civ JI 12.01.

M Civ JI 12.02 provides:

> However, if you find that *[defendant/plaintiff]* used ordinary care and was still unable to avoid the violation because of [State here the excuse claimed.], then *[his/her]* violation is excused.
>
> If you find that *[defendant/plaintiff]* violated this statute and that the violation was not excused, then you must decide whether such violation was a proximate cause of the occurrence.

As noted, as to Waste Management, the trial court read M Civ JI 12.01 and inserted paraphrases regarding state statutes barring driving in excess of the speed limit, driving too fast for existing weather and road conditions, careless driving, and failing to keep a proper lookout.

"The sudden-emergency doctrine applies when a collision is shown to have occurred as the result of a sudden emergency not of the defendants' own making." *White v Taylor Distributing Co*, *Inc*, 482 Mich 136, 139-140; 753 NW2d 591 (2008) (quotation marks and citation omitted). A case exemplifying the application of M Civ JI 12.02 is *Vsetula v Whitmyer*, 187 Mich App 675, 677-678; 468 NW2d 53 (1991). In that case, the jury was instructed on the defendant's alleged violation of MCL 257.652, the

statute requiring a driver to stop and yield before entering a highway from a driveway. The defendant testified that she did brake, but that her car hit a patch of ice on the driveway that sent her car sliding onto the highway despite the fact that she had timely applied her brakes. This Court held that the trial court erred by directing a verdict on the issue of negligence in favor of the plaintiff and opined that the jury should have been given the sudden emergency instruction. In that case, there was no claim that the defendant was speeding before her attempt to brake; in fact, the uncontested testimony was that she had been traveling at only two to three miles per hour.

Waste Management was not entitled to a sudden emergency instruction with regard to its alleged excessive speed because the garbage truck's exceeding the speed limit or going too fast for conditions preceded, rather than was caused by, the ambulance's running the stop sign. The same is true of the Waste Management's driver's duty to keep a proper lookout.

Waste Management properly argued to the jury that even if its driver was speeding, or not keeping a reasonable lookout, these violations did not amount to a proximate cause of the accident because the ambulance darted out when there was no time to stop regardless of what speed Whitty was going. The jury was directed to consider this argument because it was instructed under M Civ JI 12.01 that, even if it found that Waste Management had violated a statute and was therefore negligent, it still "must decide whether such violation was a proximate cause of the occurrence."[7]

[7] We note, however, that Waste Management's proximate cause argument was weak given that Waste Management did not present any expert testimony to rebut the three accident reconstructionists who testified that Whitty was speeding and that the accident would not have occurred had he been traveling within the speed limit.

The sudden emergency doctrine provides a basis for a defendant to be excused of a statutory violation in regards to the events that occur after the defendant discovers the emergency. Here, plaintiff did not argue that Whitty failed to properly respond once he observed the ambulance in his path and plaintiff's experts did not criticize Whitty's reactions upon seeing the ambulance. Rather, plaintiff claimed that Whitty's speed before discovery of the emergency is what prevented him from being able to stop when he applied his brakes.

Waste Management asserts that anytime the trial court gives an M Civ JI 12.01 instruction on failure to stop within the assured clear distance ahead that the relevant defendant is entitled to a sudden emergency instruction. However, the record is clear that the trial court instructed the jury on assured clear distance only as to Healthlink and not as to Waste Management. Because no instruction was given that the jury could find Waste Management negligent merely because of a failure to stop within the assured clear distance ahead, the trial court properly declined to give a sudden emergency instruction as to Waste Management.[8] We find no abuse of discretion.

E. CONSCIOUS PAIN AND SUFFERING/REMITTITUR

Waste Management argues that the trial court erred by denying its motion for remittitur because the jury's excessive award of $4 million for four hours of claimed, but unproven, conscious pain and suffering and $10

[8] The dissent suggests that not giving this instruction constituted an "assumption that Waste Management's driver was speeding." This is incorrect. The jury remained completely free to find that Waste Management's driver was not speeding before the emergency arose and to find for Waste Management on that basis. The decision not to give the sudden emergency instruction merely reflected the fact that plaintiff had not alleged any negligence by Whitty *after* the emergency arose. An instruction providing that postemergency negligence may be excused has no place where there is no allegation of postemergency negligence.

million for lost companionship were vastly beyond the proofs as reasonably construed. We disagree.

We review for an abuse of discretion a trial court's denial of a motion for remittitur. *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 305; 616 NW2d 175 (2000). Remittitur is provided for under MCR 2.611(E)(1), which provides:

> If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

Under this language, remittitur is justified when a jury verdict is excessive. *Palenkas v Beaumont Hosp*, 432 Mich 527, 531-532; 443 NW2d 354 (1989). However, "[b]ecause the amount required to compensate a party for pain and suffering is imprecise" and "that calculation typically belongs to the jury," reviewing courts must ensure "that a verdict is not 'excessive' without concomitantly usurping the jury's authority to determine the amount necessary to compensate an injured party." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 763-764; 685 NW2d 391 (2004). Thus, "appellate review of jury verdicts must be based on *objective* factors and firmly grounded in the record." *Id.* at 764 (emphasis in original). Our Supreme Court has indicated that the factors that should be considered by this Court are: (1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; (2) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and (3) whether the amount actually awarded is comparable with awards in similar cases both within the state and in other jurisdictions. *Id.*

Waste Management argues that the jury's award was improperly based on passion and sympathy because it responded to plaintiff's counsel's request that the estate be awarded $1 million for each hour Freed suffered.[9]

> An appellate court reviewing a trial court's grant or denial of remittitur must afford due deference to the trial judge since the latter has presided over the whole trial, has personally observed the evidence and witnesses, and has had the unique opportunity to evaluate the jury's reaction to the witnesses and proofs. Accordingly, the trial judge, having experienced the drama of the trial, is in the best position to determine whether the jury's verdict was motivated by such impermissible considerations as passion, bias, or anger. Deference to the trial judge simply reflects the recognition that the trial judge has observed live testimony while the appellate court merely reviews a printed record. [*Palenkas*, *supra* at 534.]

Because the trial court did not find any basis to determine that the jury was somehow inflamed or biased, and Waste Management points to nothing other than that single statement for its argument, Waste Management has failed to show the first element.[10]

We address the second and third factors together because they are related. Waste Management presents

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[9] The dissent suggests that the combining of all past noneconomic damages in a single question on the verdict form was reversible error. In fact, that construction is used in all the personal injury standard verdict forms that address noneconomic damages. In addition, the trial court properly instructed the jury that it could award noneconomic damages only for "the pain and suffering undergone by Bretton Freed while he was conscious during the time between his injury and death" and for the loss of society and companionship suffered by his family as a result of his death. Finally, while Waste Management objected to the verdict form at trial, it has not argued on appeal that the trial court erred by overruling that objection.

[10] We also note that Waste Management did not object when plaintiff's counsel made this damages request in closing argument.

what it claims are analogous cases with much lower awards. However, plaintiff provided similarly analogous cases that tend to support the amount of the award. As noted by our Supreme Court, "no two cases precisely resemble one another" and "no two persons sustain the same injury or experience the same suffering." *Precopio*, *supra* at 471. Recognizing those issues, it held that "[a]n appellate court should not attempt to reconcile widely varied past awards for analogous injuries which in the abbreviated appellate discussion of them seem somewhat similar." *Id.* (citation and quotation marks omitted). Moreover, a dollar amount can never truly be placed on an individual's pain and suffering. *Phillips v Deihm*, 213 Mich App 389, 405; 541 NW2d 566 (1995).

In presenting comparable awards, Waste Management argues that "when a young man of similar age who was fully able bodied was killed, a Bench Judgment resulted in a $1.5 Million award." This argument implies that because an able-bodied young man did not receive an award as large as the one in this case, a quadriplegic certainly should not. Not only does this argument imply that able-bodied people's lives are worth more, it fails to recognize that Freed's fear and suffering may have been increased because he was aware of the accident and his injuries but had no ability whatsoever to attempt to protect himself, communicate, or advocate on his own behalf during those four hours. Thus, while Waste Management argues that this inability to communicate should have resulted in a lower award, it is reasonable to conclude that Freed's limitations may have only increased his fear. If the jury so concluded, it had the right to award damages for the suffering caused by that fear. Further, Waste Management's comparison fails to consider how much more fearful Freed would have been of being in an accident after already having been rendered a quadriplegic in a

previous motor vehicle accident. Because Waste Management has failed to adequately communicate how its "analogous" cases take into account the factual differences in the injuries and the victims, we find no error.

Finally, our conclusion that the award in this case is not excessive precludes Waste Management's due process argument. Accordingly, the trial court did not abuse its discretion by denying Waste Management's motion for remittitur.[11]

F. EXPERT TESTIMONY

Waste Management argues that prejudice resulted because the accident reconstructionists improperly testified in such a way so as to fix fault or identify who was negligent. We disagree.

Waste Management relies primarily on *O'Dowd v Linehan*, 385 Mich 491; 189 NW2d 333 (1971). We first note that *O'Dowd* was decided before the adoption of MRE 704, which states that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Moreover, *O'Dowd* was one of the early cases dealing with accident reconstruction testimony and, as shown by the concurrence by Justice WILLIAMS, there was concern about the reliability and method of the expert in that case. The crucial issue in *O'Dowd* was which of two cars was in the wrong lane when the collision occurred, *id.* at 510, and the expert's attempt to describe the positions of the cars and his determination which driver had been in the wrong lane was what the Court viewed to be an attempt

[11] We note that although the dissent takes issue with the verdict form, see n 9 of this opinion, the dissent does not conclude that the trial court abused its discretion by declining to reduce the total amount of past noneconomic damages awarded.

to "fix the blame" for the accident. *Id.* at 513. Such testimony as to accident causation has become routine since the adoption of MRE 704 and we do not believe that *O'Dowd* should be read to bar an accident reconstructionist from testifying about what and whose actions caused the accident.[12] See *Ruddock v Lodise*, 413 Mich 499; 320 NW2d 663 (1982) (expert testimony that the trial court improperly concluded, relying on *O'Dowd*, should have been excluded because it embraced the ultimate issue to be decided by the jury was permissible under MRE 704 where the testimony could aid the jury in determining whether the defendant failed to maintain the road in a reasonably safe condition); see also *Portelli v I R Constr Products Co, Inc*, 218 Mich App 591, 602; 554 NW2d 591 (1996) ("Plaintiff's expert found fault . . . ."). Accordingly, the trial court did not abuse its discretion by permitting the accident reconstructionists to opine as to fault.

The same is true as to opinion testimony regarding ordinary negligence in light of MRE 704. Waste Management relies on *Koenig v South Haven*, 221 Mich App 711; 562 NW2d 509 (1997), rev'd on other grounds 460 Mich 667 (1999). However, that non-vehicle case involved an expert testifying that he believed a defendant's actions constituted gross negligence, not ordinary negligence. In the instant case, the only reference by any expert regarding negligence came in a single statement by Healthlink's expert, who testified that traveling at an excessive speed is negligent and that Whitty was driving negligently because he was speeding. Plaintiff's expert testified that a reasonably pru-

[12] Indeed, the Court in *O'Dowd* noted that "there was nothing so exceptional in the record *of this case* as to require an expert opinion on the ultimate issue for the jury." *Id.* at 513 (emphasis added). The limiting language implies that in other cases, such testimony may very well be appropriate.

dent driver would not drive a garbage truck 51 miles per hour in a 35 miles per hour zone. We do not believe that these statements fall outside the scope of MRE 704 and, even if they did, we would find no prejudice. The statement that speeding is unreasonable or negligent is so undeniably true that the jury did not need the expert's testimony to reach that conclusion; it would have reached the same conclusion anyway. This is distinct from the testimony in *Koenig* that dealt with a much more complex question dealing with the statutory definition of gross negligence. See *Rouch v Enquirer & News of Battle Creek*, 184 Mich App 19; 457 NW2d 74 (1990), vacated and remanded on other grounds 440 Mich 238 (1992) (holding that an expert witness's testimony that the defendant was negligent was properly admitted because the expert did not purport to define the term negligence and gave the testimony "in the form of an opinion after having first given a factual foundation for the ultimate issue to be decided"). We conclude that the fault testimony was permissible and, to the degree there was any error in the admission of these two statements, it cannot be said to have tainted the entire trial.[13]

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[13] The dissent's concern regarding this issue is misplaced for several reasons. First, the dissent writes as if MRE 704 had never been adopted. That rule provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Second, the dissent's discussion of the caselaw is highly attenuated. The dissent cites *Franzel v Kerr Mfg Co*, 234 Mich App 600, 621; 600 NW2d 66 (1999); *Carson Fisher, Potts & Hyman v Hyman*, 220 Mich App 116, 122; 559 NW2d 54 (1996); *People v Drossart*, 99 Mich App 66, 79-80; 297 NW2d 863 (1980); and *Koenig*, *supra* at 726. *None* of these cases involved testimony by an accident reconstructionist. The first involved testimony by a psychologist to the effect that the plaintiff was a credible witness, which is plainly not an issue for which expert testimony may be offered whether it goes to the ultimate question or not. *Franzel*, *supra* at

G. JUDICIAL NOTICE

In its final claim on appeal, Waste Management argues that the trial court erred because it failed to take judicial notice of the speed limit in the area of the accident. We disagree.

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622. The second involved a trial court's improper appointment of a special master in a bench trial to make findings of facts and law and prepare a judgment for the court in violation of the Michigan Constitution. *Hyman*, *supra* at 124. The third was a criminal case in which this Court rejected the limitations for which the dissent cites it and found that expert testimony on the ultimate issue of the defendant's sanity was proper because the question involved "a special field of activity" and that "[t]he objection that such testimony is an improper legal conclusion, invading the provinces of the judge and jury is without merit." *Drossart*, *supra* at 80, 82. The Court, *id.* at 81, quoted *Williams v State*, 265 Ind 190, 199; 352 NW2d 733 (1976), for the principle that an expert witness "does not state a *fact* but gives an *opinion* in order to aid the jury or trier of fact" (emphasis in original) and "[t]he argument that such an opinion usurps the function of the jury is simply not valid . . . for the simple reason that the jury is free to reject the opinion and accept some other view" (quotation marks and citations omitted). In the final case cited by the dissent, the Court found that under MRE 704, "counsel can ask the expert who caused the accident, or who ran the red light, without fear of objection." *Koenig*, *supra* at 726 (quotation marks and citation omitted).

Third, the dissent offers quotations from the testimony regarding causation of the accident and asserts that they constituted reversible error despite the fact that the defense did not object to the questions or answers quoted. There was also no objection to the quoted question regarding loss of the right of way. The dissent even cites as error the admission of a question and answer to which there was an objection, despite the fact that the trial court sustained the objection and excluded the testimony. In reality, the only two questions to which there was an overruled objection was one asking whether a driver has a duty to watch for other traffic and one asking if it was negligent to exceed the speed limit. Neither of these questions violated MRE 704. Moreover, given that the defense did not dispute that drivers should watch out for other traffic, the question did not even address an issue in dispute. The same is true of the question whether speeding is negligent. The defense never asserted that the garbage truck driver could have been speeding and still not been negligent; it argued only that he was not speeding. The questions may have been superfluous, but allowing them was not remotely reversible error.

Pursuant to MRE 201(b), for a trial court to take judicial notice of a fact, it "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Taking judicial notice is discretionary. MRE 201(c). Thus, we review the trial court's refusal to take judicial notice for an abuse of discretion.

The parties agree that the relevant traffic control order indicates that the speed limit for the area where the accident occurred is 45 miles an hour. However, on its face, the traffic control order indicates that "[t]his order becomes effective when signs giving notice of same have been erected." This means that until 45 miles an hour signs were posted, the speed limit was not 45 miles an hour. All of the evidence indicated that the last sign before the area of the accident read 35 miles an hour. Given that the signage and the traffic control order did not agree as to the speed limit for the area, the fact could not reasonably be said to have been undisputed or capable of accurate and ready determination. Accordingly, the trial court did not abuse its discretion by refusing to take judicial notice of the speed limit.

Affirmed.

FITZGERALD, P.J., concurred.

TALBOT, J. (*concurring in part and dissenting in part*). I concur, in result only, with the majority opinion regarding the determinations that (a) dismissal of Waste Management's driver from the litigation does not preclude a finding of Waste Management's liability under the owner's liability statute, MCL 257.401, (b) the high/low agreement does not comprise a "*Mary*

Carter"[1] agreement, (c) the trial court's wording of the jury instructions pursuant to M Civ JI 12.01 was not erroneous, and (d) the trial court correctly refused to take judicial notice of the speed limit at the situs of the accident. However, I find it necessary to dissent on the remaining issues because of procedural concerns regarding the conduct of the trial.

I. FACTUAL SUMMARY

This appeal involves a motor vehicle accident that occurred on November 2, 2004, involving a garbage truck owned by defendant Waste Management of Michigan, Inc., and an ambulance owned by defendant Healthlink Medical Transportation Services, Inc., which resulted in the death of the ambulance passenger, Bretton Freed. Significantly, long before this accident occurred, Freed was rendered a spastic quadriplegic as the result of a previous motor vehicle accident that occurred in 1987. In the early stages of trial, the driver of the Waste Management truck, William Whitty, was dismissed with prejudice. The order of dismissal for Whitty acknowledged that he was an employee of Waste Management and, at the time of the accident, was operating the garbage truck within the course and scope of his employment. Plaintiff argued that Healthlink was liable because of the failure of their driver to obey a stop sign and that Waste Management was negligent because of their driver's exceeding the posted speed limit.

At the conclusion of the jury trial in this case, plaintiff received an award of $14 million. The jury apportioned fault as being 45 percent attributable to

[1] *Booth v Mary Carter Paint Co*, 202 So 2d 8 (Fla App, 1967); but see *Dosdourian v Carsten*, 624 So 2d 241, 246 (Fla, 1993) ((outlawing) the use of *Mary Carter* agreements).

Waste Management and 55 percent attributable to Healthlink. Healthlink acknowledged negligence resulting from the driver of the ambulance, Kimberly Salas, having run a stop sign.[2] Healthlink also entered into a high/low agreement with plaintiff, limiting its financial liability to no less than $900,000 and no more than $1 million.[3]

II. ANALYSIS—NEGLIGENCE/LIABILITY

In my opinion, this case should be reversed and remanded for a new trial because of errors that occurred and affected both the determination of negligence and the damages award for conscious pain and suffering. Specifically, with regard to the issue of Waste Management's negligence and liability, the trial court improperly permitted the accident reconstruction experts to opine on the ultimate issues of Waste Management's negligence and proportion of fault and failed to permit an instruction on the sudden emergency doctrine.

A. ACCIDENT RECONSTRUCTION EXPERTS

Three accident reconstruction experts were called to testify: Richard Toner, Weldon Greiger, and Ronald Robins.[4] The majority of the testimony elicited from these individuals focused on their method and means of determining the speed of the garbage truck at the time of impact. All three experts opined that the garbage truck was traveling in excess of the posted 35 miles an

[2] Salas pleaded guilty of negligent homicide and was the only driver cited by the police at the accident scene.

[3] The high/low agreement coincided with Healthlink's insurance coverage.

[4] Plaintiff named Richard Toner and Ronald Robins as expert witnesses. Defendant Healthlink originally named Weldon Greiger as an expert witness.

hour speed limit.[5] The problem arises with the trial court's latitude in the questioning of these witnesses, over Waste Management's repeated objections, to opine that Waste Management's driver was negligent and to suggest an apportionment of fault.

Several examples of the improper testimony demonstrate the extent and repetition of this error. When Toner was testifying, he was asked:

> *Q.* Do you have an opinion as to whether a reasonably prudent or careful truck driver under the very same circumstances of this accident would be going down that road at 51–at minimum 51 miles an hour?
>
> * * *
>
> *A.* I don't think that was proper for him to do at all. I think that was unreasonable.

Toner was also asked:

> *Q.* Now, when a road — when a person is going northbound like the truck driver, like Mr. Whitty. And there is traffic in front of him, can you tell the Jury if you have an opinion as to whether he has a duty to, "Keep a property [sic] look out"?
>
> *A.* Absolutely, every driver does.
>
> * * *
>
> *Q.* Why didn't he stop in time?
>
> *A.* He was going too fast.
>
> *Q.* In this case, Mr. Toner, do you have an opinion as to how many causes of this accident there were?
>
> *A.* Yes.
>
> *Q.* What are they?

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[5] Greiger estimated Whitty's speed to be 55 miles an hour; Toner estimated Whitty's speed at 51 miles an hour; Robins estimated Whitty's speed to be in the range of 55 miles an hour.

A. Two.

Q. Specifically who and what?

A. Ms. Salas ran the stop sign and the refuge [sic] truck was going too fast. The combination of both of them caused the accident.

Relevant testimony by Greiger included the following:

Q. So in . . . in conclusion, was the speed of the garbage truck, any less or more important that then [sic] factor of the ambulance going through the stop sign?

A. Well, percentage of fault really is the purview of the Jury but if I was asked — if I'm asked the question, they really have to share equal responsibility.

* * *

Q. You mentioned, Mr. Greiger, that as part of — plain and simple, Mr. Whitty was speeding, wasn't he?

A. Yes.

Q. And you believe he was negligently [sic] when he was speeding, exceeding the speed limit?

A. Yes.

Q. Don't you?

A. Yes.

* * *

Q. Mr. Geiger [sic], in addition to the fact that Mr. Whitty in [sic] Waste Management was speeding, you told the Jury, as a result of that speeding, he lost the right of way, didn't you?

A. That's the law.

* * *

Q. [T]o what you believe, as you told this Jury about both the ambulance, Ms. Salas and Mr. Whitty and Waste Management being causes of the accident, tell the Jury if you would, please, why you think they're both at fault?

> *A.* Well, obviously you need to yield with the stop sign. Had — had the ambulance stopped at the stop sign, there wouldn't have been an accident. Had Mr. Whitty not been speeding, there would not [sic] been an accident.

It is recognized that an expert's opinion regarding the law is of no aid to the jury and could result in confusion. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 621-622; 600 NW2d 66 (1999). The function of an expert witness is to supply expert testimony, which includes opinion evidence, subject to the development of a proper foundation. Opinion evidence may embrace ultimate issues of fact, such as, in this instance, the speed of the garbage truck before impact. "However, the opinion of an expert may not extend to the creation of new legal definitions and standards and to legal conclusions." *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 122; 559 NW2d 54 (1996). In addition, "an expert witness is not permitted to tell the jury how to decide the case." *Id.* at 122-123. "A 'witness is prohibited from opining on the issue of a party's negligence or nonnegligence, capacity or noncapacity to execute a will or deed, simple versus gross negligence, the criminal responsibility of an accused, or [the accused's] guilt or innocence'." *Id.* at 123, quoting *People v Drossart*, 99 Mich App 66, 79-80; 297 NW2d 863 (1980). Consequently,

> it is error to permit a witness to give the witness' own opinion or interpretation of the facts because doing so would invade the province of the jury. An expert witness also may not give testimony regarding a question of law, because it is the exclusive responsibility of the trial court to find and interpret the law. [*Carson, supra* at 123 (citations omitted).]

In other words,

> where a jury is as capable as anyone else of reaching a conclusion on certain facts, it is error to permit a witness to give his own opinion or interpretation of the facts because

> it invades the province of the jury. [*Koenig v South Haven*, 221 Mich App 711, 726; 562 NW2d 509 (1997), rev'd on other grounds 460 Mich 667 (1999), quoting *Drossart*, *supra* at 80.]

By permitting the experts to opine definitively regarding Waste Management's negligence and the apportionment of fault, the trial court effectively removed from the jury the decision on the ultimate issue of negligence. The scope of expert testimony should have been restricted to whether Waste Management's driver was speeding. Further compounding the error regarding the admissibility of this testimony is the omission on the verdict form of a provision for the jury to indicate whether Waste Management's driver violated a specific statute or common-law standard of care.[6] The jury's indication that Waste Management was negligent seems a mere formality given the trial court's treatment of the truck driver's negligence as a foregone conclusion rather than a question of fact to be determined by the jury. I acknowledge that the majority of testimony, which could be deemed persuasive, indicated Waste Management's driver was exceeding the applicable speed limit. However, because Waste Management's driver and his passenger estimated that he was driving between 35 miles an hour and 40 miles an hour,[7] whether the driver was speeding and violated a statutory regulation or a common-law standard of care comprised a factual issue that was solely within the purview of the jury.

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[6] I acknowledge that this discrepancy is rendered irrelevant given Waste Management's failure to object to this aspect or portion of the verdict form. *Chastain v Gen Motors Corp (On Remand)*, 254 Mich App 576, 591-592; 657 NW2d 804 (2002). See, also, *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 696; 630 NW2d 356 (2001); *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

[7] Whitty testified that he had slowed down and was proceeding at a speed less than 35 miles an hour when he approached the intersection.

Clearly, credibility and factual issues existed regarding the garbage truck's speed at the time of the accident. I do not question that sufficient evidence was presented, through expert testimony, to support a determination that Waste Management's driver was speeding at the time of the accident. However, by permitting the experts to opine that Waste Management's driver was negligent and to suggest an apportionment of fault, the trial court effectively removed the determination of negligence from the jury and it is impossible to ascertain the impact of these opinions on the ultimate verdict.

B. SUDDEN EMERGENCY DOCTRINE

Another issue of concern pertaining to the determination of Waste Management's negligence or liability is the trial court's failure to give the requested jury instruction on the sudden emergency doctrine. The trial court reasoned that Waste Management was not entitled to the instruction because it, at least in part, created the hazard. I believe the majority misconstrues Waste Management's argument on this issue.

The majority suggests that Waste Management contends that the instruction is required to be given to the jury in conjunction with the instruction on proximate cause. However, Waste Management asserts that the trial court's refusal to give the instruction was error because it served as a predetermination that its driver was speeding. I agree with Waste Management that the failure to give the instruction effectively resulted in the trial court ruling on Waste Management's negligence rather than the jury making a determination on this issue.

The majority contends the trial court did not abuse its discretion by refusing to give the instruction because the sudden emergency doctrine only excuses a statutory violation "in regards to the events that occur after the

defendant discovers the emergency," and in this instance, it was the speed of Waste Management's garbage truck before the emergent condition of the ambulance running the stop sign that precluded the ability to stop or avoid the accident. However, like the trial court, this presupposes that the garbage truck driver was speeding, which should have been a question of fact reserved solely for resolution by the jury. The jury should have first made a determination regarding whether Waste Management's driver was speeding and then, on the basis of that factual determination, should have decided whether the sudden emergency doctrine was applicable. While, in all likelihood, the jury would determine that the doctrine was not applicable, it was improper for the trial court to preclude giving the instruction on the basis of the court's assumption that Waste Management's driver was speeding, further usurping the role of the jury.

III. ANALYSIS—DAMAGES

While the errors pertaining to liability and negligence are sufficient, standing alone, to require a new trial, I also believe that error occurred involving the propriety of testimony by Dr. Werner Spitz regarding the decedent's fear of death or impending sense of doom. In addition, issues exist regarding the format or construction of a portion of the jury verdict form, which calls into question the award for conscious pain and suffering and the propriety of the trial court's ruling on remittitur, necessitating that the award be vacated.

A. WERNER SPITZ

The testimony elicited from Spitz was comprised of two interrelated components involving the decedent's actual physical capacity to sense pain and the dece-

dent's experience of fear as a compensable aspect of suffering. "A jury may award reasonable compensation for the pain and suffering undergone by the decedent while conscious during the intervening time between the injury and death." *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 180; 475 NW2d 854 (1991). "The existence of a decedent's conscious pain and suffering may be inferred from other evidence that does not explicitly establish the fact." *Id.*

There was no actual dispute that the decedent was conscious for the approximately four hours following the time of the accident until he was transferred to University of Michigan Hospital, where he expired. Issues arise pertaining to Spitz and others indicating that the decedent was aware or cognizant, after the accident, and maintained some level of understanding of his condition and impending death. There was conflicting testimony regarding the decedent's ability to experience pain because of his preexisting medical condition and longstanding diagnosis as a spastic quadriplegic.

Waste Management raised concerns regarding the testimony anticipated to be elicited from Spitz, based on his deposition testimony, regarding the decedent's experience of a "fear of death," initially seeking the testimony to be excluded or, in the alternative, that a *Daubert*[8] hearing be conducted. The trial court denied the request for a *Daubert* hearing and, instead, defendants' concerns were addressed before Spitz testified at trial, outside the presence of the jury. At this hearing, the trial court determined that it would permit Spitz to opine on the decedent's fear of death, but that it would limit such testimony to the possibility that he "could have feared impending doom."

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[8] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

The initial error by the trial court involves the overall breadth and scope of the testimony it permitted from Dr. Spitz. This witness was listed as an expert in forensic pathology and, initially, it appears he was to testify that the decedent died as a result of the injuries incurred in this accident. However, at some point, Dr. Spitz's role was inexplicably expanded and he was permitted, as a forensic pathologist, to testify regarding the decedent's ability to feel or experience pain following the accident. While I would contend it was improper to permit a forensic pathologist to provide "expert" testimony so far afield from his actual area of expertise, unfathomably the trial court went even further and allowed the scope of his testimony to be further expanded, permitting Spitz to render an opinion on the decedent's fear of impending doom as, asserted by plaintiff's counsel, "part and parcel of conscious pain and suffering."

I believe that the rulings by the trial court, which allowed Spitz to testify beyond his identified area of expertise, constituted serious error on a multitude of levels. Foremost, I cannot comprehend how Spitz was permitted to testify or opine as an expert on matters pertaining to the decedent's conscious pain and suffering when Spitz was only qualified or identified as an expert in forensic pathology. Further, the basis for the testimony elicited from Spitz was purely speculative and should have been excluded in accordance with MRE 403. *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995). To a limited extent, the opinion expressed by Spitz regarding decedent's fear was based on testimony by a physician's assistant, Kelly Long,[9] who had been involved for an ongoing time period in the decedent's care at the rehabilitation center where he

[9] Also referred to as Kelly Long Barker.

lived. Upon hearing of the accident, Long went to the accident scene and remained with the decedent through his transfer to University of Michigan Hospital. Long asserted, on the basis of her familiarity with the decedent, that his facial expressions indicated that he was traumatized and fearful following the accident. As has been repeatedly recognized, "[t]he facts and data on which an expert relies in formulating an opinion must be reliable." *Anton v State Farm Mut Automobile Ins Co*, 238 Mich App 673, 677; 607 NW2d 123 (1999). In this instance, the opinions expressed by Spitz were not based on reliable facts and data, but were merely premised on another individual's perception and opinion. As such, for the trial court to permit Spitz to testify regarding the decedent's fear of death and impending doom was impermissibly speculative and without adequate basis.

Compounding these errors was the failure of the trial court to require the questions directed to Spitz, and his resultant responses, to conform to the purported limitations placed on his testimony. Despite numerous and ongoing objections by Waste Management's counsel, the trial court permitted Spitz to testify that he believed the decedent experienced pain, suffering, and a fear of death or an impending sense of doom. The trial court indicated it would limit testimony by Spitz to whether decedent "could have feared impending doom." I agree with Waste Management's argument on appeal that the trial court repeatedly permitted Spitz to exceed this purported limitation. Examples of improper testimony by Spitz include, but are not necessarily limited to, the following:

> I think there's clear evidence that he was observed in a condition that was different from the usual condition that he was in. And that was based on the fact that he was in a state of great fear.

* * *

The fear of impending doom is an instinct.

* * *

All—any and all the injuries that he sustained were associated with pain and on top of that, the incident as a whole, even without manifestations of—direct manifestations of trauma by way of abrasion, laceration, fracture or whatever. The incident as a whole caused fear of dying in this individual.

* * *

He could see. He could hear. And this whole event was associated, as may be expected with a lot of commotion. And a lot of physical changes in an individual who is very susceptible . . . . So that is what caused the fear of impending doom.

* * *

We know he is losing blood and we know he is fearful.

* * *

He's losing blood rapidly. He is not having enough oxygen to breath [sic] and he's probably fearful as well.

* * *

That would cause him pain. It would cause him—he—can see. He can—he can observe the fact that there is blood shed. That makes him fearful, too. Or that could make him fearful too.

* * *

[I]n association with the physical pain he could have had a fear of dying, the fear of impending doom.

Ultimately, the determination of the existence and extent of the decedent's pain and suffering for this four-hour period following the accident was a determination

for the jury because conflicting testimony existed regarding the decedent's ability to perceive or experience pain and his level of cognizance. The decedent's physician reported that, historically, the decedent evidenced some movement and sensation in response to pinprick tests in his lower extremities. Waste Management presented testimony by a physician regarding the improbability of sensation, or the experience of pain, based on the decedent's preexisting diagnosis and evidence that the decedent was not administered any pain medication either at the accident site or when later hospitalized. While issues of fact and credibility determinations existed for the jury regarding the decedent's ability to experience pain, the trial court erred in permitting Spitz to repeatedly exceed the purported limits imposed on his testimony by indicating that the decedent's fear of dying or sense of impending doom was an established fact rather than a mere possibility. Because it is impossible to discern the impact or influence on the jury of such improper and repetitive references in its contemplation of damages, I would vacate the award for pain and suffering and remand this issue to the trial court for a new trial.

B. REMITTITUR

I believe the trial court also erred in its determination that sufficient evidence existed to support the damage award for conscious pain and suffering in its denial of Waste Management's request for remittitur. Waste Management sought remittitur or judgment notwithstanding the verdict (JNOV) on two separate occasions (October 12, 2007, and December 7, 2007) premised primarily on the insufficiency of the evidence to sustain such a verdict and comparisons to significantly lower verdicts awarded in other cases, which were factually similar to the circumstances pertaining to this decedent. At the hearing on the first motion, the trial court ruled:

> [T]he issue before me in this series of motions is whether the jury had sufficient evidence to decide the question of conscious pain and suffering. And I find that they did. They did have sufficient evidence and so the motion for JNOV, for a new trial and for remittitur based on the plaintiff's inability, Brett Freed's inability to have conscious pain and suffering is denied.

Following argument on the second motion, the trial court ruled, in relevant part:

> On the issue of remittitur, I find that the lawyers had ample time [sic] craft and approve the form of the verdict. I find further that there was sufficient evidence to support loss of society and companionship. I find lastly there was sufficient evidence to support conscious pain and suffering. Therefore, the motion for remittitur is denied.

Contrary to the trial court's implication that Waste Management waived this issue, Waste Management did object to the combination of an award of damages for pain and suffering and loss of society on the jury verdict form. Following the motion for remittitur, the trial court merely indicated that there was sufficient evidence to support the award.

This Court is required to accord due deference to a trial court's decision on remittutur and should only disturb the ruling if an abuse of discretion is shown. *Palenkas v Beaumont Hosp*, 432 Mich 527, 533-534; 443 NW2d 354 (1989). MCR 2.611(E)(1) provides:

> If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

Our Supreme Court has identified a number of factors to be considered in evaluating a damages award, stating:

> [T]rial courts, in addition to evaluating whether a jury award is supported by the proofs, have conducted a myriad of other inquiries in determining whether remittitur would be proper in a particular case: 1) whether the verdict "shocks the judicial conscience"; 2) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; 3) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; 4) whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions. [*Palenkas*, *supra* at 532.]

The *Palenkas* Court determined that the only "*expressly* authorized" consideration "is whether the jury award is supported by the evidence," *id.* (emphasis in original), citing MCR 2.611(E)(1), and expressly rejected the " 'shock the conscience' " inquiry as an "inappropriate consideration" because of its subjectivity, *id.* Instead, the Court indicated that inquiries pertaining to remittitur should focus and "be limited to *objective* considerations relating to the actual conduct of the trial or to the evidence adduced." *Id.* (emphasis in original).

Contrary to the trial court's ruling, because it is impossible to ascertain precisely how much of the award was attributable to pain and suffering versus the loss of society and companionship as a result of the consolidation of these items on the jury verdict form, the propriety or reasonableness of the award cannot be determined. In this instance, the jury awarded $9 million in total damages for conscious pain and suffering and the loss of society and companionship from the date of the accident through to the date of trial (specifi-

cally for the period of November 2, 2004, through May 9, 2007).[10] Of this amount, $4 million of the damages awarded were designated for the date of the accident and Freed's death on November 2, 2004, through the end of the 2004 calendar year. Specifically, the relevant portion of the jury verdict form, which was objected to by Waste Management, provides the following:

> **Question No. 6:** What is the total amount of the Plaintiff's damages to the present date for conscious pain and suffering, and loss of society and companionship?
>
> Answer: $9,000,000.00
>
> | | |
> |---|---|
> | 11/2/04 – 12/34/04 | $4,000,000.00 |
> | 2005 | $2,000,000.00 |
> | 2006 | $2,000,000.00 |
> | 1/31/07 – 5/9/07 | $1,000,000.00 |

The verdict form listed as one item, without separation or distinction, damages for both conscious pain and suffering and the loss of society and companionship across four different time periods (November 2, 2004, through December 31, 2004; 2005; 2006; January 31, 2007, through May 9, 2007).[11] Clearly, as a matter of logic, conscious pain and suffering damages can only be awarded for the four-hour time period between the accident and the decedent's demise. However, because of the manner in which this question is constructed on the verdict form, it is impossible to ascertain what amounts or apportionment, if any, were made for con-

[10] An additional $5 million was awarded for future damages pertaining to loss of society and companionship (from May 10, 2007, through November 2, 2011).

[11] I would note that the time period designated in 2007 in this category inexplicably begins at January 31, 2007, rather than January 1, 2007.

scious pain and suffering versus loss of society and companionship while the decedent was alive during this four-hour period. Construction of the verdict form and the failure to delineate between the actual date of the accident from subsequent time frames, as well as between conscious pain and suffering and loss of society and companionship, necessarily raises additional questions regarding whether the jury may have incorrectly awarded pain and suffering damages for time periods after the decedent's demise. As a result, I find it impossible to uphold the trial court's determination regarding the sufficiency of the evidence to support this portion of the damages award because it cannot be ascertained with any certainty or precision what amount comprised the actual award for conscious pain and suffering. In part, for this same reason, I question the award for loss of society and companionship, but as a result of the failure of counsel to adequately develop a record sufficient for appeal, I am unable to address the remainder of the damages award.

IV. CONCLUSION

Because of the obvious errors in the conduct of the trial in this matter, and with particular emphasis on the impropriety of the expert testimony elicited, I would reverse the judgment and remand for a new trial regarding Waste Management's liability and damages.

BIALICK v MEGAN MARY, INC

Docket No. 286571. Submitted November 3, 2009, at Detroit. Decided December 1, 2009, at 9:05 a.m.

Helen Bialick brought a premises liability action in the Oakland Circuit Court against Megan Mary, Inc., seeking damages for injuries sustained when she slipped and fell on the floor of the building at defendant's gas station. The court, Denise Langford Morris, J., granted summary disposition in favor of defendant on the basis that the wet condition of the floor was an open and obvious danger. Plaintiff appealed.

The Court of Appeals *held*:

1. A premises possessor owes an invitee such as plaintiff a duty to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the premises, but owes no duty to protect an invitee from dangers that are open and obvious unless special aspects exist, such as a condition that is effectively unavoidable or imposes an unreasonably high risk of severe harm. A condition is open and obvious if an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. The test is objective and the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger. Courts must focus on the objective nature of the condition of the premises, not the subjective degree of care used by the plaintiff.

2. Summary disposition is inappropriate if genuine issues of material fact exist regarding the condition of the premises and whether the hazard was open and obvious. A genuine issue of material fact exists in this case with respect to whether the wet condition of the floor was open and obvious and whether an average user with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection. The order granting summary disposition must be reversed and the case must be remanded for further proceedings.

Reversed and remanded.

Gary Krochmal for plaintiff.

Cory & Associates (by *Patrick W. Bennett*) for defendant.

Before: SHAPIRO, P.J. and JANSEN and BECKERING, JJ.

PER CURIAM. In this premises liability action, plaintiff, Helen Bialick, appeals as of right an order granting the motion of defendant, Megan Mary, Inc., for summary disposition under MCR 2.116(C)(10). We reverse and remand.

I

In the afternoon of January 4, 2006, plaintiff drove her car to defendant's gas station on her way home from work in order to refuel. Plaintiff had never before been to the gas station. Plaintiff testified at her deposition that it was "drizzling" outside at the time of the incident. She entered the gas station building in order to prepay for gas and took several steps past the threshold of the door. She had turned left and was heading toward the cashier counter when she slipped and fell, twisting and fracturing her right ankle. Plaintiff contends that she was looking down at the floor while walking but did not see anything, such as dirt, mud, water, or spilled pop, that would have alerted her to be careful. After the fall, plaintiff's hands were wet or moist with water, although she was not sitting in water. Plaintiff described the floor in the building as a light-colored tile with ridges on it. Although plaintiff walked over a "grating area" just inside the entrance, she testified that there were no mats or caution signs posted.

Defendant's owner, George Denha, testified at his deposition that after the grating area just inside the entrance, a long mat covered the tile floor all the way to

the cashier counter. He recalled that it was raining off and on during the two hours he was at the gas station before the incident. He indicated that "there was no water," but that the floor had become wet from customers walking into the building with water on the bottom of their shoes as a result of the rain. Denha testified that while he does not recall whether anyone had mopped before plaintiff's fall, the usual custom was to mop dry any water or dirt that appeared around the mat throughout the day and place a "caution, wet floor" sign out when it rained. Denha gave inconsistent testimony with respect to whether he witnessed the fall, saying at one point at his deposition that he first saw plaintiff when she walked into the gas station building and told him she had slipped outside, and at another point admitting that, in accordance with his answers to interrogatories, he had witnessed plaintiff slipping. In his answers to interrogatories, Denha stated that he saw plaintiff lying on the floor just inside the main entranceway. He also testified inconsistently with his answers to interrogatories with respect to whether there was a warning sign on the floor in the area where the incident occurred.

Plaintiff filed suit and, following discovery, defendant moved for summary disposition, which the trial court granted on the basis of the open and obvious danger doctrine.[1]

II

Plaintiff argues on appeal that the trial court erred in determining that the wet condition of defendant's floor was open and obvious. We agree.

[1] Although the parties debate the meaning of the trial court's wording in its opinion and order, the court found that "wet tiles on a misty day are open and obvious," and that special aspects did not exist.

This Court reviews a trial court's decision on a motion for summary disposition made under MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). "Summary disposition is appropriate only if there are no genuine issues of material fact, and 'the moving party is entitled to judgment as a matter of law.' " *Bragan v Symanzik*, 263 Mich App 324, 327-328; 687 NW2d 881 (2004) (citation omitted).

A negligence claim requires that a plaintiff prove the following four elements: (1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty, (3) causation, and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The duty a premises possessor owes to those who enter the premises is determined by the status of the visitor. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Michigan recognizes three traditional categories of visitors: trespasser, licensee, and invitee. *Id.* It is undisputed that plaintiff was an invitee while on defendant's premises. A premises possessor owes an invitee a duty "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the [premises]." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, a premises possessor owes no duty to protect an invitee from dangers that are "open and obvious" unless special aspects exist, such as a condition that is effectively unavoidable or imposes an unreasonably high risk of severe harm. *Id*. at 517-519.

A condition is open and obvious if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). The test is objective; thus, "the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger . . . ." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). When deciding a summary disposition motion based on the open and obvious danger doctrine, "it is important for courts . . . to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo*, *supra* at 523-524. If genuine issues of material fact exist regarding the condition of the premises and whether the hazard was open and obvious, summary disposition is inappropriate. See *Bragan*, *supra*.

In this case, viewing the evidence in the light most favorable to plaintiff, we find that a genuine issue of material fact exists with respect to whether the wet condition of defendant's floor was open and obvious. Plaintiff was several steps inside the building when she slipped and fell on the wet tile floor. Denha admitted that although there was no standing water, the floor was wet. Plaintiff observed no caution signs posted on the premises regarding a wet or slippery floor. Further, while Denha testified that there was a long mat on the floor all the way to the cashier counter, plaintiff testified that there were no mats. Plaintiff was specifically looking down at the floor while walking, and she did not see water or any other hazard on the floor before she fell.[2] Other than plaintiff and Denha, there were appar-

[2] We reject defendant's argument that plaintiff's observations may not be considered in assessing whether the hazard was open and obvious.

ently no other witnesses to the fall or the condition of the floor where plaintiff fell. Given the evidence presented, a genuine issue of material fact exists as to whether an average user with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection. See *Novotney*, *supra*. We reject defendant's argument that plaintiff should have been aware of a potentially hazardous condition inside the building based solely on the "drizzly" or "misty" weather outside, because our focus must be on the objective nature of the condition of the premises at issue. See *Lugo*, *supra* at 523-524. Plaintiff presented an issue of fact for the jury to consider, and the trial court's granting of defendant's motion was in error.

Plaintiff also argues on appeal that the trial court's "special aspects" analysis was irrelevant; however, given our holding above, we need not address plaintiff's second issue.

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

Defendant argues that taking into account plaintiff's observations changes the test from an objective one to a subjective one. This is incorrect. While the question whether a condition is open and obvious is ultimately objective, the observations of the plaintiff are entitled to as much consideration by the court as would be the observations of any other witness. The observations made by plaintiff are relevant to the court's determination whether there was a hazard, the nature of the hazard, and whether that hazard was observable on casual observation by an average user.

GMAC LLC v DEPARTMENT OF TREASURY

NUVELL CREDIT COMPANY LLC v DEPARTMENT OF TREASURY

Docket Nos. 289261, 289262, 289263, and 289266. Submitted June 2, 2009, at Lansing. Decided December 3, 2009, at 9:05 a.m.

GMAC LLC and Nuvell Credit Company LLC, which provide financing for consumer purchases of motor vehicles sold by automotive dealerships in Michigan, brought actions in the Court of Claims against the Department of Treasury, seeking a refund under the bad debt deduction contained in § 4i of the General Sales Tax Act, MCL 205.54i, in accordance with the interpretation of that provision by the Court of Appeals in *DaimlerChrysler Services North America LLC v Dep't of Treasury*, 271 Mich App 625 (2006). Defendant had denied plaintiffs' refund claims that were filed on September 21, 2007, and December 20, 2007. The Court of Claims, James R. Giddings, J., consolidated the cases and granted summary disposition for the defendant, holding that application of the amendment to MCL 205.54i that was approved and filed on October 1, 2007, given immediate effect, and expressly given retroactive application, and which corrected any misinterpretation of the term "taxpayer" that may have been caused by the *DaimlerChrysler* decision, required a finding that the plaintiffs are not entitled to a refund of the sales tax that had been remitted to the defendant by the automotive dealerships. The plaintiffs appealed. The appeals were consolidated.

The Court of Appeals *held*:

1. The enacting section of 2007 PA 105, which amended MCL 205.54i, shows that the Legislature determined that the *DaimlerChrysler* decision was contrary to the Legislature's intent with regard to MCL 205.54i and that the statute was amended to correct the conclusion reached in the *DaimlerChrysler* decision. The Legislature made clear that the bad debt deduction was available only to those individuals who remitted the tax and was not available to entities like the plaintiffs who did not remit the tax.

2. The plaintiffs did not have a vested right in the continuation of tax law. The plaintiffs' due process rights were not violated as a result of the application of the amended version of MCL 205.54i to their claims.

Affirmed.

Honigman Miller Schwartz and Cohn LLP (by *Alan M. Valade*, *June Summers Haas*, and *John D. Pirich*) for plaintiffs.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Bruce C. Johnson*, *Heather M.S. Durian*, *Shenique A. Moss*, *Michael S. Newell*, and *Drew M. Taylor*, Assistant Attorneys General, for defendant.

Amici Curiae:

Robert S. LaBrant for the Michigan Chamber of Commerce.

Clark Hill PLC (by *David D. Grande-Cassell*) for the Michigan Manufacturers' Association.

Willingham & Coté PC (by *Raymond J. Foresman, Jr.*) for the Michigan Automobile Dealers' Association.

Abbott Nicholson PC (by *Robert Y. Weller, II*) for the Detroit Automotive Dealers' Association.

McClelland & Anderson LLP (by *Gregory L. McClelland*) for the Michigan Association of Realtors.

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM. Plaintiffs appeal as of right the order granting summary disposition in favor of defendant. In this tax dispute, plaintiffs contend that a refund should be awarded pursuant to the bad debt deduction, MCL 205.54i, as interpreted by this Court in *DaimlerChrysler Services North America LLC v Dep't of Treasury*, 271 Mich App 625; 723 NW2d 569 (2006), despite the recent amendment to the statute clarifying the availability of the deduction. The Court of Claims held that the legislative

amendment was clear and unambiguous and, therefore, plaintiffs were not entitled to the deduction. We affirm.

In *DaimlerChrysler*, *supra* at 627, the plaintiff financed consumer purchases of motor vehicles from participating dealerships. If the plaintiff agreed to finance the transaction, the consumer executed a retail installment sales contract with the dealership, and the dealer retained a security interest in the vehicle. The plaintiff and the dealership agreed that the plaintiff would pay the dealers all the amounts due under the contract, including the sales tax on the purchase price of the vehicle. In exchange, the dealers assigned all rights, titles, and interests in the motor vehicle purchase agreements to the plaintiff. However, the dealers remitted the sales tax to the defendant. The plaintiff was assigned the right to repossess the vehicles when consumers defaulted on the contracts. However, the plaintiff was unable to recover the balance due on some of the contracts. Consequently, the plaintiff determined that it had overstated its gross receipts as a result of uncollectible bad debt and sought a refund or deduction on the alleged overpayment. *Id*. at 627-628. The hearing referee and the Court of Claims denied the plaintiff's requested relief, concluding that the plaintiff, as the financing provider, did not constitute a taxpayer for purposes of MCL 205.54i, and that an assignee did not achieve the status of a person subject to the act and is not allowed a sales tax deduction under the act for bad debt. *Id*. at 628-630.

The Court of Appeals held that the plaintiff was a taxpayer under the statute, holding:

> We conclude that, consistent with MCL 492.102(6), [the] plaintiff was a sales finance company "financing installment sale contracts" between the dealers and the purchasers who defaulted on their loans. As noted above, the

> pre-2004 GSTA [General Sales Tax Act] defined "taxpayer" as "a person subject to a tax under this act." MCL 205.51(1)(m). A "person" was defined as "an individual, firm, partnership, joint venture . . . *or any other group or combination acting as a unit* . . . . MCL 205.51(1)(a) (emphasis added.) The statute, by its plain language, contemplated a broad array of taxpayers. It also expressly declared that "any other group or combination" of persons may have been "acting as a unit," and, therefore, could have been considered as a single taxpayer.
>
> Defendant concedes and we agree that the dealers, as retailers, fell under the statute—otherwise defendant would be owed no tax in the first place—even though the statute's definition of "person" contained no reference to "retailers" or "motor vehicle dealers." Given the fact that motor vehicle sales frequently require financing, and that plaintiff here was the financing company, we conclude that the dealers and plaintiff were "acting as a unit," i.e., as a single, taxable entity, for the purpose of the retail sales of automobiles. Any other reading would render the language referring to a "combination" of persons "acting as a unit" nugatory.
>
> * * *
>
> [W]e conclude that plaintiff was a sales finance company that, along with its affiliated dealers, intended to act as one unit to make sales of motor vehicles; that plaintiff was engaged in business in Michigan; and, for those reasons, was a taxpayer under the GSTA. Further, we determine that plaintiff's bad debt was related to sales at retail because the sales themselves were "transactions by which transfer" of tangible property occurred. Plaintiff is entitled to recover from defendant sales tax overpayments under the bad-debt provision in effect at the time its claim accrued. [*Id*. at 635-636, 640.]

The Supreme Court denied the defendant's application for leave to appeal, 477 Mich 1043 (2007), and also denied a motion for reconsideration, 478 Mich 932 (2007).

In this case, plaintiffs, GMAC LLC and Nuvell Credit Company LLC, also provide financing for consumer

purchases of motor vehicles sold by automotive dealerships in Michigan. Specifically, plaintiffs alleged that they provided financing to facilitate consumer purchases of automobiles from dealerships, which included Michigan sales tax. However, it was concluded that plaintiffs overstated their gross receipts as a result of bad debts. Because of the *DaimlerChrysler* decision, plaintiffs filed sales tax refund claims on September 21, 2007, and December 20, 2007. However, MCL 205.54i was amended to place limitations on the person that may be characterized as a "taxpayer" for purposes of the bad debt provision. 2007 PA 105. The amendment to MCL 205.54i also contains the following enacting provision:

> Enacting section 1. This amendatory act is curative and shall be retroactively applied, expressing the original intent of the [L]egislature that a deduction for a bad debt for a taxpayer under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, is available exclusively to those persons with the legal liability to remit the tax on the specific sale at retail for which the bad debt deduction is recognized for federal income tax purposes, and correcting any misinterpretation of the meaning of the term "taxpayer" that may have been caused by the Michigan [C]ourt of [A]ppeals decision in Daimler Chrysler [sic] Services North America LLC v Department of Treasury, No. 264323 [271 Mich App 625; 723 NW2d 569 (2006)]. However, this amendatory act is not intended to affect a refund required by a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired if the refund is payable without interest and after September 30, 2009 and before November 1, 2009.

The amendment to MCL 205.54i was approved and filed on October 1, 2007, given immediate effect, and expressly provided for retroactive application.

Unable to obtain a refund from defendant, plaintiffs filed complaints in the Court of Claims that requested

tax refunds, relying on the *DaimlerChrysler* decision interpreting the bad debt deduction. The cases were consolidated, and following cross-motions for summary disposition, the Court of Claims denied plaintiffs' motion and granted defendant's motion for summary disposition, holding, in relevant part:

> Defendant asserts that the plain meaning of this statutory language retroactively reverses the ruling in *DaimlerChrysler*, *supra*, except as to taxpayers who had final judgments for a refund when [2007] PA 105 was enacted with immediate effect on October 1, 2007. The Court agrees.
>
> Plaintiffs espouse, however, a different view that appears to ignore the amendment's express mandate for its retroactive application. Noting that [2007] PA 105 expressly mentions only two dates in 2009 and is absolutely silent as to a deadline date for winning a final order for a refund, Plaintiffs contend that they must have until October 31, 2009 to pursue a final judgment. That interpretation must be rejected. Plaintiffs' reading of the act entails the patently erroneous idea, contradicted by the amendment itself, that the Legislature did not intend 2007 PA 105 to be applied retroactively to correct the misinterpretation of § 4i made by the *DaimlerChrysler* [C]ourt.
>
> It follows that Plaintiffs can have no cause of action under the bad-debt provisions of § 4i. Whatever possibility of such a suit they had immediately consequent to the ruling in *DaimlerChrysler* was extinguished on October 1, 2007 with the enactment of [2007] PA 105. Plaintiffs' motion must therefore be denied to the extent that it relies on a mistaken interpretation of the amendatory provisions in the act.
>
> The Court determines that the provisions of the GSTA pertinent to this case are clear and unambiguous. . . .
>
> In the alternative, Plaintiffs also argue that the retroactivity provision of [2007] PA 105, even if actually intended to take effect immediately when enacted on October 1, 2007, is unconstitutional because the amended § 4i of the

> GSTA offends several constitutional provisions, including but not limited to the Due Process Clause, the Equal Protection Clause, the Special Act Clause, and the Title-Object Clause. The Court must disagree and reject all of Plaintiffs' constitutional challenges for the reasons stated and on the authorities cited in Defendant's briefs.
>
> * * *
>
> The challenge to § 4i as a violation of the various constitutional provisions, whether as written or as applied in this instance, must fail on the basis of Defendant's analysis. Accordingly, the Court can find nothing in that statute that renders it constitutionally infirm. In sum, Plaintiffs have not established that the challenged statute is unconstitutional either as written or as applied by Defendant in denying sales tax refunds in these matters.
>
> The Court determines that Plaintiffs have failed to plead an actionable claim for a tax refund because § 4i of the GSTA, as recently amended by 2007 PA 105, cannot reasonably be read to permit the cause of action Plaintiffs mount here. Nor is the same legislation unconstitutional in any of the ways alleged by Plaintiffs. Plaintiffs are not due a tax refund. Rather, Defendant's denial of these tax refunds under § 4i is well within the parameters of the GSTA and is therefore lawful. In sum, Plaintiffs have failed to state a claim on which relief can be granted. Plaintiffs' motion for summary disposition under MCR 2.116(C)(10) must therefore be denied and Defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) must be granted.

Plaintiffs appeal as of right from the Court of Claims decision.

First, plaintiffs submit that the Court of Claims erred in its construction of the enacting section where the plain and unambiguous language of the enacting section of 2007 PA 105 provides for a refund of the sales tax. We disagree.

The trial court's decision regarding a motion for summary disposition is reviewed de novo. *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345, 354; 771 NW2d 411 (2009). Questions involving statutory interpretation and the constitutionality of a statute present questions of law subject to review de novo. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). The language of the statute expresses the legislative intent. *Dep't of Transportation v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008). The rules of statutory construction provide that a clear and unambiguous statute is not subject to judicial construction or interpretation. *Id*. Stated otherwise, when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case. *Id*. We may not speculate regarding the intent of the Legislature beyond the words expressed in the statute. *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007). Once the intention of the Legislature is discovered, this intent prevails regardless of any conflicting rule of statutory construction. See *People v Russo*, 439 Mich 584, 595; 487 NW2d 698 (1992); *Thompson v Thompson*, 261 Mich App 353, 361 n 2; 683 NW2d 250 (2004). "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). The omission of a provision should be construed as intentional. "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). The Legislature is presumed to act with knowledge of

judicial statutory interpretations. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991). When statutory provisions are construed by the court and the Legislature reenacts the statute, it is assumed that the Legislature acquiesced to the judicial interpretation. *Smith v Detroit*, 388 Mich 637, 650-651; 202 NW2d 300 (1972). Similarly, when a judicial decision is released and the Legislature acts to change the language of the statute, it is strong evidence of the disapproval of the judicial interpretation. See *id*. at 651. "Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible." *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

Plaintiffs' contention, that the Legislature intended to preserve refunds for any entity previously entitled pursuant to the *DaimlerChrysler* decision, is contrary to the plain language of the statute and ignores the language preceding the sentence in dispute. As previously stated, the enacting section provides:

> Enacting section 1. This amendatory act is curative and shall be retroactively applied, expressing the original intent of the [L]egislature that a deduction for a bad debt for a taxpayer under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, is available exclusively to those persons with the legal liability to remit the tax on the specific sale at retail for which the bad debt deduction is recognized for federal income tax purposes, and correcting any misinterpretation of the meaning of the term "taxpayer" that may have been caused by the Michigan [C]ourt of [A]ppeals decision in Daimler Chrysler [sic] Services North America LLC v Department of Treasury, No. 264323 [271 Mich App 625; 723 NW2d 569 (2006)]. However, this amendatory act is not intended to affect a refund required by a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have

> expired if the refund is payable without interest and after September 30, 2009 and before November 1, 2009.

Review of the first sentence of the enacting section reveals that the Legislature held that the *Daimler-Chrysler* decision was contrary to legislative intent and the statute was amended to correct the conclusion reached by that decision. In order to correct the judicial interpretation, the Legislature provided that the statute was curative, "shall be retroactively applied," and expressed its intent that the bad debt deduction was available only to those individuals who remitted the tax. The rules of statutory construction provide that once the intention of the Legislature is discovered, the intent prevails regardless of any conflicting rule of statutory construction. *Thompson*, *supra*. In this case, the Legislature's intent is plainly expressed, the enacting section contains the statement that amendment was required to express their original intent regarding the construction of the term "taxpayer" and to correct the misinterpretation that allowed the bad debt deduction to an entity other than the remitter of the tax.

Plaintiffs contend that the second sentence, which allows for a refund, creates an exception to the general rule. However, the application of the language as urged by plaintiffs would obviate the intent plainly expressed by the Legislature as well as contradict the legislative provisions that the statute was curative in nature and to be given immediate retroactive effect. *Baker*, *supra*. Moreover, "[a]n exemption will not be inferred from language of a statute if the words admit of any other reasonable construction." *In re D'Amico Estate*, 435 Mich 551, 567; 460 NW2d 198 (1990) (GRIFFIN, J., dissenting). Tax exemptions are disfavored, and the burden of proving an entitlement to an exemption is on the party claiming the right to the exemption. *Elias*

Bros Restaurants, Inc v Treasury Dep't, 452 Mich 144, 150; 549 NW2d 837 (1996). Tax exemptions are in derogation of the principle that all shall bear a proportionate share of the tax burden, and therefore, a tax exemption shall be strictly construed. *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc v Sylvan Twp*, 416 Mich 340, 348; 330 NW2d 682 (1982). The rules of construction with regard to taxation provide:

> "An intention on the part of the legislature to grant an exemption from the taxing power of the State will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a specific privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant." [*Detroit v Detroit Commercial College*, 322 Mich 142, 148-149; 33 NW2d 737 (1948), quoting 2 Cooley, Taxation (4th ed), § 672, p 1403.]

The language limiting the refund to those from a court of competent jurisdiction for which all appeals have been exhausted or have expired if the refund is payable without interest and after September 30, 2009, and before November 1, 2009, provides the Legislature with the opportunity to budget for expenditures that it never intended.[1] The plain language does not provide for a window of opportunity for similarly situated financing companies to hurriedly obtain a refund that was never intended.[2]

Plaintiffs next allege that retroactive application of the amended version of MCL 205.54i violates due pro-

[1] We do not express any opinion with regard to the statutory language to the extent it provides for a refund paid without interest and within a specific time.

[2] We note that plaintiffs raise an argument with regard to the applicability of the term "final order," whether the enacting language at issue was designed to apply only to the plaintiff in *DaimlerChrysler*, and whether the *DaimlerChrysler* plaintiff could meet the criteria of the enacting language. Additionally, plaintiffs raise an argument regarding the use of the past tense in the enacting language. We also reject these arguments. The intent of the Legislature was plainly expressed; the statute was never intended to apply to taxpayers who did not remit the tax. Once the intent of the Legislature is discovered, it controls regardless of the application of other rules of statutory construction. *Russo*, *supra*; *Thompson*, *supra*. Moreover, application of a tax exemption is at issue. An exemption must be strictly construed and cannot be permitted by inference or implication. *Detroit Commercial College*, *supra*. Although plaintiffs did not assert that the amendment to MCL 205.54i constitutes a violation of Const 1963, art 4, § 29 (the Legislature shall not pass a local act or special act where a general act can be made applicable), the issue was submitted in supplemental briefing. However, plaintiffs do not provide record evidence of the applicability of the *DaimlerChrysler* decision to smaller financing companies and other parties who have sought the bad debt deduction. "Courts may not speculate regarding the probable intent of the Legislature beyond the language expressed in a statute." *W A Foote Mem Hosp v City of Jackson*, 262 Mich App 333, 336; 686 NW2d 9 (2004). Additionally, the facts and circumstances surrounding the application of the amendment to the *DaimlerChrysler* plaintiff, any final order, any refund, and the date of such refund is not before us, and we will not speculate regarding its effect on the case before this panel.

cess because plaintiffs had accrued vested rights. We disagree. The determination regarding whether a statute applies retroactively is governed by the intent of the Legislature. *Aztec Air Service, Inc v Dep't of Treasury*, 253 Mich App 227, 233; 654 NW2d 925 (2002). The general rule is that an amended statute is given prospective application unless the Legislature expressly or impliedly identifies its intention to give the statute retrospective effect. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 474; 628 NW2d 577 (2001). However, constitutional due process principles act to prevent retrospective laws from divesting property rights or vested rights. *Detroit v Walker*, 445 Mich 682, 698; 520 NW2d 135 (1994). A vested right is "an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice." *Id*. at 699 (citations omitted). Stated otherwise,

> "a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another." [*Cusick v Feldpausch*, 259 Mich 349, 352; 243 NW 226 (1932), quoting 2 Cooley, Constitutional Limitations (8th ed), p 749.]

To determine whether a right is vested, policy considerations are controlling rather than inflexible definitions, and the courts must consider whether the holder possesses a title interest in the asserted right. *Walker*, *supra*. "As a matter of policy, it is imperative that taxpayers do not hide behind the facade of vested rights in an attempt to evade their financial responsibilities." *Walker*, *supra* at 702. A taxpayer does not have a vested

right in a tax statute or in the continuance of any tax law. *Id*. at 703 (citations omitted).

Here, plaintiffs contend that vested rights exist with regard to the continuation of tax law. However, a vested right cannot be premised on an expectation that general laws will continue and certainly cannot be premised on the continuation of tax law. *Id*. In light of the fact that plaintiffs did not have a vested right, the contention that due process rights were violated is simply without merit.

Next, plaintiffs assert that the seven-year retroactive application of the amended MCL 205.54i constitutes a due process violation and the requirement that retroactive legislation be limited to a modest period of retroactivity. We disagree. In *United States v Carlton*, 512 US 26, 28-29; 114 S Ct 2018; 129 L Ed 2d 22 (1994), the facts showed that Willametta K. Day died on September 29, 1985. The executor of her estate purchased stock shares on December 10, 1986. Two days after the purchase, the executor sold the stock shares at a loss to reduce the estate tax by $2,501,161. The parties stipulated that the executor engaged in the stock transactions to take advantage of a tax deduction that had been adopted in October 1986. Consequently, the Internal Revenue Service (IRS) announced that it would make the deduction available only to estates of decedents who owned the securities at issue before death. On December 22, 1987, Congress enacted an amendment to 26 USC 2057 that eliminated the refund sought by the executor of Day's estate. The IRS disallowed the deduction claimed by the executor, who then filed suit, alleging that the retroactive application of the 1987 amendment violated the Due Process Clause of the Fifth Amendment. The Supreme Court rejected the constitutional challenge, holding:

It seems clear that Congress did not contemplate such broad applicability of the deduction when it originally adopted § 2057. That provision was intended to create an "incentive for stockholders to sell their companies to their employees who helped them build the company rather than liquidate, sell to outsiders or have the corporation redeem their shares on behalf of existing shareholders." When Congress initially enacted § 2057, it estimated a revenue loss from the deduction of approximately $300 million over a 5-year period. In became evident shortly after passage of the 1986 Act, however, that the expected revenue loss under § 2057 could be as much as $7 billion—over 20 times greater than anticipated—because the deduction was not limited to situations in which the decedent owned the securities immediately before death. . . .

We conclude that the 1987 amendment's retroactive application meets the requirements of due process. First, Congress' purpose in enacting the amendment was neither illegitimate nor arbitrary. Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss. There is no plausible contention that Congress acted with an improper motive[.] . . .

Second, Congress acted promptly and established only a modest period of retroactivity. . . .

[The executor] argues that the 1987 amendment violates due process because he specifically and detrimentally relied on the preamendment version of § 2057 in engaging in the MCI stock transactions in December 1986. Although [the executor's] reliance is uncontested—and the reading of the original statute on which he relied appears to have been correct—his reliance alone is insufficient to establish a constitutional violation. Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code. . . . Moreover, the detrimental reliance principle is not limited to retroactive legislation. An entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process. [*Id*. at 31-34 (citations omitted).]

We conclude that plaintiffs' reliance on the *Carlton* decision is misplaced. Plaintiffs are not challenging the retroactive amendment to MCL 205.54i; rather, plaintiffs are challenging the Legislature's disapproval and corrective action with regard to the *DaimlerChrysler* decision. Indeed, in their brief on appeal, plaintiffs acknowledge that the prior version of MCL 205.54i was not the impetus for this lawsuit, but rather, "[plaintiffs] filed their sales tax refund claims based on the Court of Appeals' 2006 decision in *DaimlerChrysler*[.]" However, it is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation. *Walen*, *supra*; *Smith*, *supra*.

Lastly, plaintiffs contend that the trial court erred by failing to grant summary disposition in their favor pursuant to MCR 2.116(C)(10), because defendant failed to submit documentary evidence in opposition and there was no genuine issue of material fact. We disagree. This case presented a challenge to statutory language, a question of law. *Hunter*, *supra*. The duty to interpret and apply the law belongs to the courts, not the parties' witnesses. *Hottmann v Hottmann*, 226 Mich App 171, 179-180; 572 NW2d 259 (1997).

Affirmed.

HELMS v LeMIEUX

Docket No. 286397. Submitted October 6, 2009, at Detroit. Decided December 8, 2009, at 9:00 a.m.

Christine Helms brought an action in the Genesee Circuit Court against Robert J. LeMieux, individually, and as successor trustee of the Francis J. LeMieux and Ruth LeMieux revocable living trust dated July 16, 1999 (hereafter defendant), and Standard Life Insurance Company of Indiana, seeking a declaratory judgment regarding the rights to the proceeds of an annuity policy that Francis and Ruth secured from Standard. Defendant filed a counterclaim against Standard, alleging breach of contract and negligence. The August 9, 2002, application for the annuity identified Ruth as the "Joint Annuitant Owner," with the words "Joint" and "Owner" being handwritten on the application. The application identified Francis as the "Joint Owner," with the word "Joint" being handwritten. Further, the provision identifying Francis also included the phrase "if different from annuitant," which was contained in parentheses and printed under "Joint Owner." Francis and Ruth's revocable living trust dated July 16, 1999, was listed as the beneficiary. When the annuity policy was issued on September 17, 2002, it identified Ruth as the "Annuitant" and Francis as the "Joint Annuitant." In October 2002, Francis and Ruth changed the primary beneficiary of their annuity from the living trust to plaintiff, their granddaughter. Ruth died on May 20, 2006. Sometime thereafter, plaintiff and Francis each requested a lump sum payment of the annuity proceeds. Francis died on January 7, 2007, while Standard was still attempting to determine whom to pay. Defendant, plaintiff's father, who is also the beneficiary of the living trust and the sole heir and beneficiary, as well as the personal representative, of Francis's estate, sought to claim the proceeds of the annuity. Therefore, plaintiff sought declaratory relief. The trial court, Judith A. Fullerton, J., granted summary disposition in favor of plaintiff and Standard, ruling that Francis's rights as a policy owner of the annuity were extinguished upon Ruth's death, at which time plaintiff's rights to the annuity's proceeds vested. Defendant appealed.

The Court of Appeals *held*:

1. The application and the policy must be read together as one contract because the policy explicitly states that the application and the policy comprise the entire annuity contract.

2. The provisions in the application must be considered as prevailing over the conflicting provisions of the policy as a result of applying the general rules, first, that where in an instrument there are two conflicting clauses or provisions, the first shall be received as controlling and the latter one rejected, and, second, that where handwriting is contained in a contract it will prevail over printed language.

3. Ruth was the joint annuitant owner of the policy and Francis was the joint owner, as stated in the application. Therefore, plaintiff, as the beneficiary, was entitled to payment upon Ruth's death. The policy clearly provides that Standard agrees to pay the proceeds to the annuitant except, that after the annuitant's death, any payments due will be paid to the beneficiary.

4. Defendant has no cognizable claims against Standard for breach of contract or negligence.

Affirmed.

1. CONTRACTS — MULTIPLE CONTRACTUAL INSTRUMENTS.

Where one written instrument references another instrument for additional contract terms, the two instruments should be read together.

2. CONTRACTS — CONFLICTING CLAUSES.

Where there are two conflicting clauses or provisions in an instrument, generally, the first shall be received as controlling and the latter one rejected.

3. CONTRACTS — HANDWRITTEN LANGUAGE — PRINTED LANGUAGE.

Handwritten language contained in a contract prevails over the printed language of the contract.

Sheldon Siegel for Christine Helms.

Charles A. Grossmann for Robert J. LeMieux.

Simon, Galasso & Frantz, PLC (by *Henry Stancato* and *Frank R. Simon*), and *Cohen & Malad, LLP* (by *David J. Cutshaw*, *Arend J. Abel*, and *Kelley J. Johnson*), for Standard Life Insurance Company of Indiana.

Before: K. F. KELLY, P.J., and JANSEN and FITZGERALD, JJ.

PER CURIAM. In this contract action, defendant Robert J. LeMieux, individually, and as successor trustee of the Francis J. LeMieux and Ruth LeMieux revocable living trust dated July 16, 1999, appeals as of right the trial court's order granting summary disposition for plaintiff, Christine Helms, and defendant Standard Life Insurance Company of Indiana. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This dispute concerns an annuity policy entered into by Francis and Ruth LeMieux, husband and wife. On August 9, 2002, Francis and Ruth, then 94 and 79 years old respectively, jointly applied for an annuity with the Standard Life Insurance Company of Indiana (Standard) in the amount of $100,000. The annuity application identifies Ruth as the "Joint Annuitant Owner." The words "Joint" and "Owner" are handwritten on the application. The application identifies Francis as the "Joint Owner," with the word "Joint" being handwritten above the printedword "Owner." Further, the provision identifying Francis also includes the phrase "If different from Annuitant," which is contained in parentheses and is printed under "Joint Owner." This application designates Francis and Ruth's revocable living trust dated July 16, 1999, as the beneficiary. Both Francis and Ruth signed the application.

Standard approved the application and issued the annuity on September 17, 2002. The policy identified Ruth as the "Annuitant" and Francis as the "Joint Annuitant" contrary to what was contained in the joint application. In October 2002, Francis and Ruth changed the primary beneficiary of their annuity from the trust

to their granddaughter, plaintiff Christine Helms. Plaintiff was not aware that she had been made the beneficiary of the annuity.

On May 20, 2006, Ruth died. In July of that year, Standard sent Francis a letter requesting information regarding Ruth's death in order to process the claim. A heading on the letter identified plaintiff as the beneficiary of the annuity. However, the body of the letter indicated that Francis was the beneficiary, stating, "As the beneficiary of Ruth M. LeMieux's annuity contract, we need the following information to process the claim . . . ." Plaintiff never received a copy of this letter.

In response, Francis submitted an annuity claim form to Standard, dated July 26, 2006, requesting a lump sum payment of the annuity proceeds. Standard responded to Francis by letter, indicating that it could not continue the contract in Francis's name unless it had plaintiff's consent. The letter indicated that a copy had also been sent to plaintiff, but plaintiff never received a copy of this correspondence.

Defendant LeMieux, plaintiff's father, who is also the beneficiary of the revocable living trust, then sent plaintiff a form for her to sign that would permit the annuity to continue in Francis's name. As a result, plaintiff became aware that she was the beneficiary of the annuity and she did not sign the form as her father requested. Instead, in December 2006, plaintiff submitted an annuity claim form to Standard requesting a lump sum payment of the annuity.

On January 7, 2007, Francis died. On January 11, 2007, unaware that Francis had passed away, Standard mailed both Francis and plaintiff a letter informing them that they had filed competing claims and providing them notice that it would be filing an interpleader action in the near future unless some agreement was

reached between the parties. Defendant LeMieux and plaintiff, however, were not able to come to an agreement regarding who is entitled to receive the principal amount of the annuity. Defendant believed that he, as sole heir and beneficiary, as well as personal representative, of Francis's estate, was entitled to the proceeds of the annuity.

Consequently, plaintiff filed this lawsuit against Robert LeMieux, individually, and as successor trustee of the revocable living trust (hereafter defendant) and Standard, seeking declaratory relief.[1] Defendant answered the complaint and also cross-claimed against Standard, alleging that Standard breached the annuity contract and that Standard acted negligently.

Both Standard and plaintiff moved for summary disposition under MCR 2.116(C)(8) and (10). Defendant also moved for summary disposition. The trial court granted judgment in favor of plaintiff and Standard. The trial court reasoned:

> [T]his annuity was originally purchased in [2002] and then [Francis and Ruth] changed the beneficiary . . . to Christine Helms. She became the primary beneficiary [as of October 8, 2002].
>
> The Court notes, in this matter, this was a joint annuitant situation as indicated here and no decision was made to change that in writing, as required, after the designation of Christine Helms on 10/8/02. Ruth died 5/2[0]/06 and after that nothing else can be changed because it was a joint situation. And the Court believes at that time, . . . the proceeds of this annuity vested in Christine Helms as the designee of the two who created this particular situation.[2]

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[1] Plaintiff included Standard as a party only because it is a stakeholder in the annuity contract.

[2] We note that the trial court did not make an explicit decision on Standard's liability for its alleged negligence. Rather, the court's order

Defendant moved for reconsideration, but his motion was denied. This appeal followed.

II. STANDARDS OF REVIEW

We review a trial court's determination on a motion for summary disposition de novo. *Huntington Woods v Detroit*, 279 Mich App 603, 614; 761 NW2d 127 (2008). The trial court in this matter failed to specify the subrule under which it granted summary disposition. Accordingly, we will consider the trial court's decision as based on MCR 2.116(C)(10) because it appears to have considered information outside the pleadings. *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). In conducting our review of the trial court's determination under MCR 2.116(C)(10), we must consider all the documentary evidence in the light most favorable to the nonmoving party. *Huntington Woods*, *supra* at 614. A motion brought under this subrule is properly granted if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Montgomery v Fidelity & Guaranty Life Ins Co*, 269 Mich App 126, 128; 713 NW2d 801 (2005). Further, to the extent that this Court must interpret the meaning of the annuity contract, our review is also de novo. *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004).

III. DECLARATORY RELIEF

Defendant argues that the trial court erred when it ruled that Francis's rights as a policy owner of the

simply states that it is granting summary disposition in plaintiff's favor and that defendant Robert LeMieux is liable for any and all costs awarded to "any party" in this matter.

annuity were extinguished upon Ruth's death, at which time plaintiff's rights to the annuity's proceeds vested. According to defendant, as an "owner" and "annuitant" under the contract, Francis had full dominion and authority over the annuity. We disagree.

Resolution of defendant's argument requires this Court to interpret the meaning of the annuity contract. Our goal in doing so is to discern and enforce the parties' intent using the clear language of the contract. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005); *Robert A Hansen Family Trust v FGH Industries, LLC*, 279 Mich App 468, 476; 760 NW2d 526 (2008). When a contract's language is plain and unambiguous, its terms must be applied as written and construction of the contract is not permitted. *Rory*, *supra* at 468-469; *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 638-639; 734 NW2d 217 (2007). We read contracts as a whole and give contractual terms their common and ordinary meaning. *Genesee Foods Services, Inc v Meadowbrook, Inc*, 279 Mich App 649, 656; 760 NW2d 259 (2008). Further, "[w]here one writing references another instrument for additional contract terms, the two writings should be read together." *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998). If, however, the "provisions of a contract irreconcilably conflict, the contractual language is ambiguous, and the ambiguous contractual language presents a question of fact to be decided by a jury." *Laurel Woods Apartments*, *supra* at 638. But the fact that the parties may advance conflicting interpretations does not in itself render a contract ambiguous. *Genesee Foods Services, Inc*, *supra* at 655.

Here, Francis and Ruth jointly entered into an annuity contract. The policy explicitly states that the application and "this policy" comprise the entire annu-

ity contract. Thus, we must read these two writings together as one contract. *Forge*, *supra* at 207. The application, signed by both Francis and Ruth, identifies Ruth as the "Joint Annuitant Owner." The words "Joint" and "Owner" are handwritten above and below, respectively, the printed term "Annuitant." The application also identifies Francis as the "Joint Owner" and the word "Joint" is handwritten above the printed word "Owner." Conversely, the policy, issued about a month later and not signed by either Francis or Ruth, identifies Ruth as the "Annuitant" and Francis as the "Joint Annuitant." The general rule is that "where in an instrument there are 2 conflicting clauses or provisions, the first shall be received as controlling and the latter one rejected." *Klever v Klever*, 333 Mich 179, 189; 52 NW2d 653 (1952). Further, when handwriting is contained in a contract, it will prevail over printed language. *Mansfield Machine Works v Village of Lowell Common Council*, 62 Mich 546, 553-554; 29 NW 105 (1886); *Berk v Gordon Johnson Co*, 232 F Supp 682, 687 (ED Mich, 1964).[3]

These rules require us to consider the provisions in the application as prevailing over the conflicting provisions in the policy. The policy was created on a later date than the application and, thus, the application must be considered as controlling. *Klever*, *supra* at 189. The rule with respect to handwriting also mandates that we interpret the application's provisions as prevailing over the policy's provisions. The application con-

[3] We note that the rule of construction requiring that a contract entered into later in time will supersede, and rescind, any inconsistencies in an earlier contract, *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 346-347; 561 NW2d 138 (1997), is inapplicable to this matter. Here, the application standing alone does not constitute a contract and is more properly treated as a document containing additional contractual provisions, as incorporated by the policy.

tains handwriting specifically identifying the parties' respective roles, whereas the policy contains no handwriting and is not even signed by Francis and Ruth. Accordingly, we conclude that Ruth was the joint annuitant owner of the policy and that Francis was the joint owner, as stated in the application.

Having reached this conclusion, it is plain that plaintiff, as the beneficiary of the annuity, was entitled to payment upon Ruth's death. The first page of the policy unequivocally states, "Standard . . . agrees to pay the proceeds of this contract . . . to the Annuitant except, that after the Annuitant's death, any payments due will be paid to the Beneficiary." Defendant, however, argues that as an "owner" of the policy, Francis was entitled to the annuity's proceeds until his death. According to defendant, the "death benefit" became payable to the beneficiary only after Francis's death, or "the death of the payee" consistent with the settlement options provision of the contract. This argument lacks merit. Francis is not identified as a "payee" anywhere in the contract and for this Court to apply this provision to the present matter would be contrary to the parties' intent as clearly stated on the policy's first page.

After our reading of the annuity contract in the light most favorable to defendant, it is plain to us that Ruth was the annuitant, Francis was a joint owner, and that plaintiff's interest in the annuity proceeds vested when the annuitant, Ruth, passed away. In light of our conclusion, defendant's argument that the trial court erroneously relied on certain Michigan Supreme Court cases[4] is irrelevant. Even assuming that the trial court erroneously relied on these cases in reaching its conclusion, we will not reverse the trial court's order because

[4] Defendant alleges that the trial court relied on *Dogariu v Dogariu*, 306 Mich 392; 11 NW2d 1 (1943), *Prudential Ins Co v Irvine*, 338 Mich 18;

it reached the correct result. See *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007). The trial court did not err by granting summary disposition for plaintiff.

IV. ADDITIONAL CLAIMS

Defendant next argues that Standard is liable to defendant under theories of negligence and contract, because it breached its duty to Francis.[5] We disagree. Defendant has not posited an independent legal duty separate from those duties arising out of the contractual relationship. Nor has defendant alleged physical damage to persons or property separate from Francis's loss of the money. Thus, defendant has no cognizable claim for negligence. *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 84-85; 559 NW2d 647 (1997). Further, defendant's contention that Standard breached the contract is also unavailing. As we have already concluded, Standard was not obligated to pay Francis the annuity's proceeds upon Ruth's death. Accordingly, defendant's contract claim also fails.

Affirmed.

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61 NW2d 14 (1953), and *Harris v Metro Life Ins Co*, 330 Mich 24; 46 NW2d 448 (1951). The trial court, however, did not mention any of these opinions in its ruling.

[5] As already noted, it does not appear from our review of the lower court record that the trial court made a ruling with respect to these claims. However, "where the lower court record provides the necessary facts, appellate consideration of an issue raised before, but not decided by, the trial court is not precluded." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005). The record here contains the necessary facts and, therefore, we exercise our discretion to consider defendant's claims.

In re RUDELL ESTATE
In re RUDELL TRUST

Docket Nos. 287330 and 287332. Submitted November 3, 2009, at Detroit. Decided December 10, 2009, at 9:00 a.m.

Carla Bufe, as personal representative of the estate of Jane E. Rudell, deceased, and as trustee of the Jane E. Rudell Trust, petitioned the Oakland County Probate Court for an order quieting title to a certain parcel of real property in the trust. Respondent, William A. Rudell, the decedent's son, claimed the property as a result of a quitclaim deed executed before the decedent's death through which she purportedly transferred the property to the respondent for the consideration of $400,000. Respondent admitted that he never paid the $400,000 and claimed that he had received the property as a gift from the decedent. Petitioner, the decedent's daughter, claimed that the deed's recital of valuable consideration was evidence that the intent was to sell the property to respondent. The court, Barry M. Grant, J., considered both actions together and granted summary disposition in favor of petitioner and ordered the property reconveyed to the trust, basing its decision on the failure of consideration. Respondent appealed separately the order with regard to the estate and the trust, and the appeals were consolidated.

The Court of Appeals *held*:

1. The general rule that a complete or substantial failure of consideration may justify the rescission of a written instrument is not strictly applicable in the context of property transfers between a parent and a child. Where there are no outstanding claims against the property by creditors of the estate, a deed from a parent to a child that expresses a valuable consideration is valid, although no valuable consideration is passed. Because there was no evidence of outstanding claims in this case, respondent's failure to pay the recited consideration was not alone sufficient to justify the cancellation or rescission of the deed.

2. The probate court erred in concluding that the absence of a signed gift tax return by the decedent was conclusive evidence that the property was not given as a gift. The court erred in ruling that respondent was required to present written confirmation of the gift.

3. The rule in Michigan is that a recital of valuable consideration in a deed is not conclusive proof that the property was actually sold for value. The consideration recited in a deed is not conclusive, and may afterwards be inquired into. The recital of valuable consideration was prima facie evidence, not conclusive proof, that the decedent intended to sell the property to respondent for value. A material issue of fact existed regarding whether the decedent intended to give the property to respondent as a gift. Summary disposition was improperly granted.

4. Once a deed has been reduced to writing and the conveyance has been made, the statute of frauds, MCL 566.106, does not foreclose a subsequent inquiry into the consideration recited in the original deed. Any attempt by respondent to rebut or contradict the deed's recital of valuable consideration by way of oral evidence would not violate the statute of frauds. The probate court erred in ruling that the statute of frauds barred respondent from proving that the decedent acted with the requisite donative intent in this case.

5. Parol evidence was admissible to prove that the decedent did not actually intend to sell the property for value, despite the otherwise plain and unambiguous language of the deed reciting a valuable consideration of $400,000. While the consideration expressed in a written instrument is prima facie to be taken as the actual consideration, parol evidence is admissible to show that the true consideration was different from that expressed. The order granting summary disposition must be reversed and the case must be remanded for further proceedings during which, assuming that it is otherwise admissible, respondent may introduce parol evidence to show that the true consideration was different from that expressed in the deed.

Reversed and remanded.

1. DEEDS — CONSIDERATION — PARENT AND CHILD.

The general rule that a complete or substantial failure of consideration may justify the rescission of a written instrument is not strictly applicable in the context of property transfers between a parent and a child; a deed from a parent to a child that expresses valuable consideration is valid although no actual consideration passed, where there are no outstanding claims against the property by creditors of the parent's estate.

2. DEEDS — GIFTS —GIFT TAX RETURNS.

Although the filing of a gift tax return may tend to show that a gift has been made, the absence of such a return is not conclusive evidence that a conveyance by a deed was a sale rather than a gift; the presence of a gift tax return is not conclusive evidence that a gift was made.

3. DEEDS — GIFTS — CONSIDERATION — PAROL EVIDENCE.

A recital of valuable consideration in a deed is not conclusive proof that the property was actually sold for value but rather is prima facie evidence of a sale; the consideration recited in a deed is not conclusive and can be inquired into afterwards for the purpose of establishing that the conveyance was actually made as a gift; parol evidence may be used for such purposes.

4. STATUTE OF FRAUDS — DEEDS — CONSIDERATION — PAROL EVIDENCE.

The statute of frauds does not foreclose a subsequent inquiry into the consideration recited in a deed once a deed has been reduced to writing and the conveyance has been made; an attempt to rebut or contradict a deed's recital of valuable consideration with parol evidence does not violate the statute of frauds (MCL 566.106).

The Giles Law Firm (by *Thomas V. Giles* and *Molly Giles*) and *Jaffe, Raitt, Heuer & Weiss, P.C.* (by *Brian G. Shannon* and *Elizabeth Luckenbach Brown*), for petitioner.

Lauren M. Underwood, P.C. (by *Lauren M. Underwood*, *Priscilla V. Hirt*, and *Kristin A. Edwards*), for respondent.

Before: SHAPIRO, P.J. and JANSEN and BECKERING, JJ.

JANSEN, J. In these consolidated appeals, respondent William A. Rudell appeals by right the probate court's order quieting title to a certain parcel of real property in the Jane E. Rudell Trust (the trust).[1] For the reasons set forth in this opinion, we reverse and remand for further proceedings.

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[1] Lest there be any confusion on this matter, we wish to make clear that the probate court had jurisdiction to hear and resolve the present quiet-title dispute. The probate court has concurrent legal and equitable jurisdiction to determine property rights and interests with respect to an estate of a decedent, a protected individual, a ward, or a trust. MCL 700.1303(1)(a).

I. BASIC FACTS AND PROCEDURAL HISTORY

Jane E. Rudell (the decedent) died testate on July 2, 2003. The decedent was survived by her daughter Carla Bufe, her son William A. Rudell, and two children of her deceased daughter Lucinda Maunder. The decedent's will was admitted to probate in October 2003. The will listed the trust as the sole residual beneficiary of the decedent's estate. Petitioner Carla Bufe is both the personal representative of the decedent's estate and a trustee of the trust.

During her lifetime, the decedent owned a certain parcel of residential real property located at 1170 Chesterfield in Birmingham, Michigan (the property). In 1982, the decedent properly transferred ownership of the property to the trust. According to the complaint filed in this matter, the decedent began to exhibit symptoms of dementia and had become mentally incapacitated by 1999. Between 1999 and the time of the decedent's death in 2003, respondent William A. Rudell cared for the decedent and managed her financial and personal affairs. According to petitioner, the decedent's memory had greatly deteriorated by this time. For example, petitioner alleged that the decedent had forgotten how to sign her name on a check and had begun referring to respondent as her "husband," even though he was actually her son. Petitioner asserted that the decedent "required 24-hour supervision due to her feeble and infirm condition . . . ." It is beyond serious factual dispute that respondent provided such 24-hour supervision during the final years of the decedent's life.

A quitclaim deed was executed on February 6, 2000, purporting to transfer the property from the trust to "Jane E. Rudell, a single woman" for the consideration of ten dollars. The quitclaim deed was signed by the decedent as a "Trustee" of the trust. The deed was

witnessed and signed by Harold J. Meloche and Susan Joyce Everhart. A second quitclaim deed was also executed on February 6, 2000. This second deed purportedly transferred the property from the decedent to respondent for the consideration of "$400,000 paid by the [respondent]." The second deed was signed by the decedent in her individual capacity. Like the first deed, the second deed was also witnessed and signed by Harold J. Meloche and Susan Joyce Everhart. Everhart, who was a notary public, notarized both deeds.

Neither the first deed nor the second deed was recorded during the decedent's lifetime. Respondent recorded the deeds on July 2, 2003, the very day of the decedent's death. A real estate transfer tax of $440 was paid on the second deed. Following the decedent's death, respondent claimed exclusive fee simple ownership of the property.

Petitioner, as personal representative of the estate and as trustee of the trust, sued in October 2003, alleging, among other things, that the property had never been properly transferred to respondent. In count II of the amended complaint, petitioner alleged that respondent had never paid the decedent the consideration of $400,000 due under the second deed. Petitioner further alleged that "on the dates set forth in the purported deeds, [the decedent] was not of sound mind nor of sufficient competence to execute such conveyances," that the decedent "never intended to vest [respondent] with sole and exclusive fee simple ownership of her residence, thereby disinheriting the other surviving members of her family," that "[t]he deeds, themselves, and the circumstances surrounding their execution, lack circumstantial guarantees of trustworthiness required to evidence [the decedent]'s purported intent to transfer her residence outright to [respon-

dent] as the sole and exclusive owner of the property," and that respondent had procured the deeds through "fraud, overreaching, undue influence and/or coercion . . . ." Petitioner asserted that the deeds were "invalid and of no legal force or effect," and that title to the property should therefore be returned to and quieted in the trust or the estate.[2]

During discovery, in response to petitioner's requests for admission, respondent admitted that he had "never paid Jane E. Rudell $400,000.00 in exchange for all her rights, title and interest in the Property" and that he had "never paid Jane E. Rudell or any Trustee of the Jane E. Rudell Trust $400,000.00 for any . . . rights, title and interest in the Property." However, respondent denied petitioner's suggestion that the decedent had been "incapable of managing her own financial affairs" at the time the deeds were executed. In response to petitioner's first set of interrogatories, respondent asserted that he had received the property as a "gift" from the decedent on February 6, 2000.

On June 15, 2005, petitioner moved for summary disposition of count I of the complaint pursuant to MCR 2.116(C)(10). Petitioner contested respondent's assertion that the property had been given as a gift. Petitioner argued that such an assertion was unsupported by the record because there was no evidence that the decedent had acted with donative intent. Moreover, petitioner argued that respondent had never paid the decedent the $400,000 due under the second deed. Accordingly, petitioner asserted that the deed was invalid for failure of consideration.

Petitioner submitted medical records indicating that, as of 1999, the decedent was "suffering from multi-

[2] Count I of petitioner's amended complaint sought an accounting and requested money damages from respondent.

infarct dementia," was "mild[ly] confused," was suffering from "episodes of confusion [and] memory loss," and had occasional "difficulty expressing herself." Petitioner also argued that it was highly unlikely that the decedent had given her principal residence to respondent as a gift because such a large gift, as compared to the decedent's relatively few other assets, "would have dispossessed Mrs. Rudell of 80% of her assets, rendering her virtually indigent." Petitioner pointed to the terms of the decedent's trust, which expressed an intent that the decedent's surviving children Carla Bufe and William A. Rudell would share equally in her assets upon her death.[3] Petitioner argued that because the property was far and away the decedent's single largest asset, a gratuitous transfer of the property to respondent would have defeated this intent.

Petitioner noted that respondent had paid a real estate transfer tax of $440 at the time the second deed was recorded. According to petitioner, this tax payment established that the property was sold to respondent for value rather than given to him as a gift. Petitioner also argued that the second deed's recital of valuable consideration in the amount of $400,000 was unmistakable evidence that the decedent had intended to sell the property to respondent rather than give it to him as a gift. Petitioner contended that respondent could not demonstrate that the decedent had orally waived the $400,000 price because evidence of any such oral waiver would violate the statute of frauds.

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[3] Specifically, the trust document provided for an initial distribution of 10 percent of the assets to the two children of the decedent's deceased daughter, Lucinda Maunder. The document went on to provide that, following this initial 10-percent distribution, "[t]he balance of the trust estate . . . shall be divided into two (2) equal shares," with one payable to Carla Bufe and the other payable to William A. Rudell.

Respondent opposed petitioner's motion. He noted that he had been the decedent's caretaker for the final years of her life and asserted that the decedent had given him the property as a gift. Respondent argued that the decedent was not mentally infirm at the time the deeds were executed in February 2000, and contended that she had been fully aware that she was transferring the property to him as a gift. According to respondent, it was petitioner's "burden to come forward with *something* that would indicate [that the decedent] didn't want [respondent] to have the [property], and she hasn't met that burden." In response to petitioner's motion, respondent submitted his own affidavit, as well as the affidavits of Harold J. Meloche and Susan Joyce Everhart.

Respondent averred in his affidavit that "Mom wanted to put the [property] in my name because I promised to take care of her until the day she died, and that she would never go into a nursing home." According to respondent, petitioner insisted that the decedent should be placed in a nursing home, and this "scared" the decedent. Respondent averred that petitioner's insistence on placing the decedent in a nursing home caused the decedent to change her mind about the terms of her trust; respondent contended that the decedent no longer "want[ed] [petitioner] to have anything" but "did not trust [her attorney] to write [the trust] up this way." However, according to respondent, the decedent "knew that if the house was in my name, I would get it and [petitioner] would not. She knew she could put the house in my name and she would not have to change her trust." Respondent maintained that the decedent had given him the property as a gift and that the decedent had been coherent and lucid at the time the deeds were executed in February 2000. According to respondent, "Mom knew that I was not paying her

$400,000, she did not want any money from me. She wanted me to have the house as a gift."

Harold J. Meloche averred that he had known the decedent since 1980 and had been present in the decedent's home on multiple occasions. Meloche asserted that he was physically present at the time the deeds were executed on February 6, 2000, and that he personally observed the decedent sign her name on both deeds. Meloche further asserted that he had been present on several previous occasions when the decedent had discussed her desire to give the property to respondent. Meloche averred that "[o]n February 6, 2000, [the decedent] was happy, engaged in conversation, knew me and conversed easily with me," and that the decedent "looked the deeds over carefully before signing." Meloche believed that the decedent "knew exactly what she was doing when she signed the deeds, she was taking the property out of her trust and giving it to [respondent]." Meloche averred that the decedent "signed the deeds voluntarily and of her own free will, [respondent] did not put any pressure on her at all," and confirmed that he had never seen respondent "force his mother to do anything." Meloche stated that he had "every reason to believe that [the decedent] understood the transaction."

Similarly, Susan Joyce Everhart[4] averred that she had known the decedent "for well over 20 years," that she was present at the time the deeds were executed on February 6, 2000, that she personally observed the decedent sign both deeds, and that she had "notarized both deeds" in her capacity as a notary public. Everhart averred that "[t]here [wa]s no question" in her mind

[4] Although respondent described Everhart in his deposition only as a "friend," petitioner contends that Everhart was actually respondent's girlfriend.

that the decedent "wanted to transfer the [property] to [respondent]." Everhart asserted that the decedent had told her of her desire to transfer the property to respondent not only on February 6, 2000, but also "at other times prior to February 6, 2000." According to Everhart, the decedent was lucid and coherent on February 6, 2000, and "read the deeds before she signed them." Everhart opined that the decedent "knew exactly what she was doing when she signed the deeds," and averred that "no one put any pressure on [the decedent] to sign [the deeds]." According to Everhart, respondent "made it clear that [the decedent] did not have to do this unless she wanted to, and she was clear that this is what she wanted . . . ."

Accountant James Reinert, who had previously done work for both respondent and the decedent, testified at his deposition that he had become aware sometime before 2002 that respondent owed $400,000 to the decedent. Reinert subsequently prepared a gift tax return on behalf of the decedent indicating that she had forgiven this $400,000 debt as a gift to respondent. Reinert admitted that respondent himself—and not the decedent—had provided all the information necessary to prepare the gift tax return. However, Reinert testified that he had no reason to believe that the information provided by respondent was not accurate or truthful. Although Reinert was deposed in May 2007, it is not clear whether the probate court considered his deposition testimony when ruling on the motion for summary disposition.

Respondent has presented the gift tax return, dated July 23, 2002, to this Court on appeal. However, it does not appear that the gift tax return was submitted to the probate court. The gift tax return states that the decedent gave respondent a gift of $400,000 on Febru-

ary 6, 2000, and describes the purpose of the gift as "Forgiveness of Personal Debt." As correctly noted by petitioner, the gift tax return is unsigned and it is unclear whether it was ever filed with the Internal Revenue Service.

On August 1, 2008, without holding oral argument, the probate court issued an opinion and order concerning petitioner's motion for summary disposition of count II of the complaint. The probate court's opinion and order stated in relevant part:

> The [petitioner] submitted to the [respondent] Requests for Admission. The [petitioner] requested that the [respondent] admit that he never paid the Decedent or any Trustee of the Decedent's Trust $400,000.00 in exchange for all of [the] rights, title and interest in the real property in question. The [respondent] admitted that even though the deed states that the real property was conveyed in consideration for $400,000.00, the [respondent] never in fact paid the Decedent nor paid any of her Trustees of her Trust $400,000.00 for the real property in question, instead the [respondent] stated that the transfer of the property was a gift.
>
> The Court in *Sharrar v Wayne Savings Ass'n*, 246 Mich 225 (1929), ruled that "substantial failure of consideration justifies re[s]cission." The [petitioner] argues, pursuant to *Sharrar* that given the [respondent]'s admitted failure to pay the consideration amount of $400,000.00, the transfer of the real property to the [respondent] should be rescinded. The [respondent] argues that the amount of consideration is immaterial, but is adequate in this case.
>
> The [petitioner] argues that the Court in *Osius v Dingell*, 375 Mich 605 (1965) set out the criteria for a valid gift. The Court stated: "[T]he three elements necessary to constitute a valid gift are these: (1) that the donor must possess the intent to pass gratuitiously [sic] title to the donee; (2) that actual or constructive delivery be made; and (3) that the donee accept the gift." The [petitioner] argues that there can be no gift present in the case at hand when

> the deed that was recorded states that it is in consideration of $400,000.00. The [respondent] argues that a valid gift is present . . . . The [respondent] has not presented any evidence to support this claim (i.e., a written notice of the gift or a gift tax return that was filed).
>
> Because the [respondent] has nothing in writing supporting his claim for a gift, the gift could only be considered oral. Because of such, the [petitioner] next argues that the transfer of the residence to the [respondent] violates the Statute of Frauds. Pursuant to *Brooks v Gillow*, 352 Mich 189 (1958), "under . . . Michigan's Statute of Frauds, MCL 566.106, an interest in real estate cannot be [the] subject of an oral gift."
>
> The [respondent] continuously argues that the Decedent was competent when the deeds were signed and has presented affidavits supporting this claim. Even if the Decedent was competent when the deeds and or alleged gift was given, the [respondent] still has not presented any evidence to refute the facts that pursuant to *Sharrar* no consideration was given in exchange for the residence, pursuant to *Osisus* [sic], there is no evidence of a gift present, and pursuant to *Brooks*, there is no writing as required in the Statute of Frauds.

The probate court accordingly granted petitioner's motion for summary disposition with respect to count II of the complaint, ordering that the property "be reconveyed back to the Jane E. Rudell Trust . . . ."

II. STANDARDS OF REVIEW

We review de novo the grant or denial of a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We also review de novo the ultimate disposition reached in a quiet-title action, which is equitable in nature. *Canjar v Cole*, 283 Mich App 723, 727; 770 NW2d 449 (2009). A deed is a contract, *Negaunee Iron Co v Iron Cliffs Co*, 134 Mich 264, 279; 96 NW 468 (1903), and the proper

interpretation of the language in a deed is therefore reviewed de novo on appeal, *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). All other questions of law, including issues of statutory interpretation, are reviewed de novo as well. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006); *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

III. ANALYSIS

Respondent argues on appeal that the probate court erred by granting petitioner's motion for summary disposition of count II of the complaint. We agree.

A. FAILURE OF CONSIDERATION

Relying on *Sharrar v Wayne Savings Ass'n*, 246 Mich 225; 224 NW 379 (1929), the probate court ruled that because respondent had never paid the decedent the amount of $400,000, as recited in the second deed, the second deed was subject to rescission for failure of consideration. It is undisputed that respondent did not pay the decedent the recited consideration of $400,000. In general, a complete or substantial failure of consideration may justify the rescission of a written instrument. *Id*. at 229; see also *Moran v Beson*, 225 Mich 144, 146; 195 NW 688 (1923), and *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 13-14; 708 NW2d 778 (2005). However, this general rule is not strictly applicable in the context of property transfers between a parent and a child. At least when there are no outstanding claims against the property by creditors of the estate, "a deed from [a parent] to [a child], which expresses a valuable consideration, is valid, though no actual consideration passed . . . ." *Hoskey v Hoskey*, 7 Mich App 122, 126; 151 NW2d 227 (1967); see also

Warren v Tobey, 32 Mich 45 (1875). In the instant case, the parties have presented no evidence of any outstanding claims against the property by creditors of the decedent's estate. Therefore, in light of the foregoing authority, we must conclude that respondent's failure to pay the recited consideration of $400,000 was not alone sufficient to justify the cancellation or rescission of the second deed. *Hoskey*, 7 Mich App at 126-127; see also 19A Michigan Civ Jur, Parent & Child, § 92, p 179.

B. DONATIVE INTENT

Citing *Osius v Dingell*, 375 Mich 605; 134 NW2d 657 (1965), the probate court also ruled that there was no evidence of donative intent on the part of the decedent in this case. "It may be stated generally that the three elements necessary to constitute a valid gift are these: (1) that the donor must possess the intent to pass gratuitously title to the donee; (2) that actual or constructive delivery be made; and (3) that the donee accept the gift." *Id*. at 611; see also *Davidson v Bugbee*, 227 Mich App 264, 268; 575 NW2d 574 (1997). Whether a party has acted with donative intent presents a question of fact. *Osius*, 375 Mich at 611. When there is no evidence of donative intent, courts will find that no gift has been made. See *id*. at 611-612.

It appears that the probate court found an absence of donative intent for *two different* reasons. First, the probate court observed that respondent had "not presented any evidence" to support his claim that the property was conveyed as a gift. Specifically, the court pointed out that respondent had not submitted "a written notice of the gift or a gift tax return that was filed." We fully acknowledge that respondent had not submitted a signed gift tax return at the time of the probate court's ruling on the motion for summary

disposition. When reviewing a decision on a motion for summary disposition, this Court will not consider evidence that had not been submitted to the lower court at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). "This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Accordingly, we must decline to consider any evidence presented by respondent that was not available to the probate court at the time of its ruling. At any rate, however, we note that even if the gift tax return had been presented to the probate court, it is unsigned and it is not clear whether it was ever filed with the Internal Revenue Service. Accordingly, the return would have been of little value to the court in rendering its decision.

But contrary to the probate court's ruling, the absence of a signed gift tax return was not conclusive evidence that the property was not given to respondent as a gift. It is well settled that although the filing of a gift tax return may tend to show that a gift has been made, the absence of such a return is not conclusive evidence that a conveyance was a sale rather than a gift. See, e.g., *Layman v Layman*, 292 Ark 539, 541; 731 SW2d 771 (1987); *In re Marriage of Agazim*, 147 Ill App 3d 646, 651; 498 NE2d 742 (1986). Similarly, the presence of a filed gift tax return is not conclusive evidence that a gift was made. See, e.g., *Chase v Blackstone Distributing Co*, 110 RI 537, 547; 294 A2d 392 (1972); *Whiteley v United States*, 214 F Supp 489, 495 (WD Wash, 1963). Nor would it ordinarily be conclusive that there was no other written document indicating the decedent's intent to gratuitously pass title to respondent. "[T]he donor's intention to make a gift need not be expressed in any particular form," 38 Am Jur 2d,

Gifts, § 19, p 718, and donative intent may typically be proven through oral testimony, see *In re Morse's Estate*, 170 Mich 114, 121-122; 135 NW 1057 (1912); *In re Zaharion Estate*, 95 Mich App 70, 71; 290 NW2d 84 (1980), vacated on other grounds 412 Mich 852 (1981). Quite simply, the probate court erred as a matter of law by ruling that respondent was required to present written confirmation of the gift.

Second, the probate court concluded that because the deed recited a valuable consideration of $400,000, the conveyance of the property was a sale rather than a gift. It is true that the payment of valuable consideration is "the chief distinction between a sale and a gift," 38 Am Jur 2d, Gifts, § 2, p 703, and that the recitation of valuable consideration in a deed provides at least some "evidence that a sale was intended," *Scott v Scott*, 86 Ark App 120, 128; 161 SW3d 307 (2004). But the rule in Michigan is that a recital of valuable consideration in a deed is not conclusive proof that the property was actually sold for value. *Gardner v Gardner*, 106 Mich 18, 21; 63 NW 988 (1895); see also *Shotwell v Harrison*, 22 Mich 410, 420 (1871), and *Osten-Sacken v Steiner*, 356 Mich 468, 475; 97 NW2d 37 (1959). Indeed, Justice CHRISTIANCY explained that under certain circumstances, the recital of consideration in a deed is "mere hearsay," *Shotwell*, 22 Mich at 420, and our Supreme Court has observed that a deed's recital of consideration is only prima facie evidence "of the slightest kind," *Mowrey v Vandling*, 9 Mich 39, 41 (1860). Stated another way, "[t]he consideration recited in a deed is not conclusive, but can afterwards be inquired into." *Gardner*, 106 Mich at 21. On the basis of this authority, we hold that the second deed's recital of valuable consideration in the amount of $400,000 was not conclusive proof that the decedent intended to sell the property to respondent for value. The recital of consid-

eration in the amount of $400,000 was no more than prima facie evidence of a sale, and could "afterwards be inquired into" for the purpose of establishing that the conveyance was actually made as a gift. *Id*.

We conclude that there remained a genuine issue of material fact with respect to whether the decedent intended to give the property to respondent as a gift. Petitioner was not entitled to judgment as a matter of law on this issue. The second deed's recital of valuable consideration in the amount of $400,000 was merely prima facie evidence. *Mowrey*, 9 Mich at 41. Accordingly, respondent was entitled to introduce other competent evidence tending to rebut it, including evidence that the decedent intended to give him the property as a gift. See *Gardner*, 106 Mich at 21.

C. STATUTE OF FRAUDS

The probate court also ruled that the statute of frauds barred respondent from proving that the decedent acted with the requisite donative intent in this case. Michigan's general real-estate statute of frauds, MCL 566.106, provides:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, *or by a deed or conveyance in writing*, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing. [Emphasis added.]

The statute of frauds "was designed to prevent disputes as to what the oral contract, sought to be enforced, was." *Bagaeff v Prokopik*, 212 Mich 265, 269; 180 NW 427 (1920); see also *Kelsey v McDonald*, 76 Mich 188, 191-192; 42 NW 1103 (1889).

Contrary to the ruling of the probate court, the holding of *Brooks v Gillow*, 352 Mich 189; 89 NW2d 457 (1958), is not strictly applicable in the case at bar. In *Brooks*, our Supreme Court held that the statute of frauds prohibits an oral gift of an interest in real estate, and that a writing is therefore required to make such a gift. *Id*. at 198. However, there *was* a writing in the instant case. It is axiomatic that a "deed" is a sufficient writing to satisfy the statute of frauds. MCL 566.106; see also *Kitchen v Kitchen*, 465 Mich 654, 658; 641 NW2d 245 (2002).

It has been said that to satisfy the statute of frauds, the writing or memorandum "must be certain and definite" with respect to all essential terms of the transaction. *Cooper v Pierson*, 212 Mich 657, 660; 180 NW 351 (1920).[5] But the validity of this statement is doubtful, because the statute of frauds contains very few true requirements. *Goslin v Goslin*, 369 Mich 372, 376; 120 NW2d 242 (1963); *Zurcher v Herveat*, 238 Mich App 267, 278-279; 605 NW2d 329 (1999). At any rate, our Supreme Court has specifically observed that once a deed has been reduced to writing and the conveyance has been made, the statute of frauds does not foreclose a subsequent inquiry into the consideration recited in the original deed. *Gardner*, 106 Mich at 21. Consequently, we conclude that any attempt by respondent to

[5] Indeed, it has been said that the statute of frauds requires an instrument conveying an interest in land to be certain and definite with regard to all essential terms of the transaction, *including consideration*. See, e.g., *Cooper*, 212 Mich at 660; *McFadden v Imus*, 192 Mich App 629, 633; 481 NW2d 812 (1992); *Marina Bay Condos, Inc v Schlegel*, 167 Mich App 602, 606; 423 NW2d 284 (1988). But this is clearly incorrect. In Michigan, a deed or written conveyance of land need not recite any price or consideration to comply with the statute of frauds. MCL 566.109; *Benedek v Mechanical Products, Inc*, 314 Mich 494, 511-512; 22 NW2d 901 (1946); *In re Skotzke Estate*, 216 Mich App 247, 250; 548 NW2d 695 (1996).

rebut or contradict the second deed's recital of valuable consideration by way of oral evidence would not violate the statute of frauds. *Id*.

D. PAROL EVIDENCE AND SECRET INTENT

A closely related but legally distinct question in this case is whether extrinsic or parol evidence was admissible to prove that the decedent did not actually intend to sell the property for value, despite the otherwise plain and unambiguous language of the deed reciting a valuable consideration of $400,000. We conclude that parol evidence was admissible for this purpose.

It is certainly true that the plain language of a deed is the best evidence of the parties' intent. See *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 370-371; 699 NW2d 272 (2005); *Wild v Wild*, 266 Mich 570, 576-577; 254 NW 208 (1934). Respondent argues that the decedent never actually intended to charge him $400,000 for the property, but only included the recital of consideration in the deed for unspecified "tax purposes." In other words, respondent essentially argues that although the recital of a valuable consideration was included in the plain language of the deed, that recital was not reflective of the parties' secret intent that the property would be conveyed as a gift. "As with any instrument, a deed must be read as a whole in order to ascertain the grantor's intent." *Huntington Woods v Detroit*, 279 Mich App 603, 621; 761 NW2d 127 (2008). The general rule is that "[t]he controlling intent is that which is expressed in the instrument, rather than any belief or secret intention of the party or parties which may have existed at the time of execution." 23 Am Jur 2d, Deeds, § 212, p 215. As this Court has recognized, "[i]ntentions are manifested by words and actions, and not a secret intent." *First Pub Corp v*

Parfet, 246 Mich App 182, 189; 631 NW2d 785 (2001), vacated in part and affirmed on other grounds 468 Mich 101 (2003).

In light of this authority, it might appear at first blush that respondent should not be permitted to introduce extrinsic or parol evidence to prove that the decedent conveyed the property with donative intent. Such extrinsic evidence would certainly tend to contradict the plain language of the deed, which unambiguously stated that the property was being sold for value. The general rule is that when a quitclaim deed is reduced to writing and executed with the proper formalities, "[i]t is presumed to contain the agreement made by the parties at the time" and "is so conclusively presumed to embody the whole contract that parol evidence is inadmissible to contradict it or add to its terms." *Wild*, 266 Mich at 576-577; see also *Tepsich v Howe Constr Co*, 373 Mich 404, 407; 129 NW2d 398 (1964).

However, it has long been established that this general rule does not apply to the recital of consideration in a deed. As explained earlier, the rule in Michigan is that a deed's recital of valuable consideration is not conclusive regarding whether the property was actually sold for value. *Gardner*, 106 Mich at 21; see also *Shotwell*, 22 Mich at 420. "The consideration recited in a deed is not conclusive, but can afterwards be inquired into." *Gardner*, 106 Mich at 21; see also *Cutler v Spens*, 191 Mich 603, 618; 158 NW 224 (1916). And with respect to the issue of parol evidence, our Supreme Court has specifically held that "[w]hile the consideration expressed in a written instrument is *prima facie* to be taken as the actual consideration, the rule is well settled by abundant authority that parol evidence is admissible to show that the true consideration was . . . different from that expressed." *Stotts v Stotts*, 198 Mich 605, 617; 165 NW 761 (1917).

In essence, respondent wished to present parol evidence to prove that although the deed recited a valuable consideration of $400,000, the conveyance was actually made without consideration, or alternatively, in consideration of the love and affection existing between him and his mother.[6] In accordance with the rule of *Stotts*, we conclude that respondent should not have been precluded from doing so. On remand, assuming that it is otherwise admissible, respondent shall be entitled to introduce parol evidence "to show that the true consideration was . . . different from that expressed" in the second deed. *Id*.

IV. CONCLUSION

We conclude that the probate court erred by granting petitioner's motion for summary disposition with respect to count II of the complaint. Petitioner was not entitled to judgment as a matter of law on this issue. We accordingly reverse and remand for further proceedings. A question of fact remained concerning whether the decedent possessed the requisite donative intent to make a gift at the time the second quitclaim deed was executed. The probate court will be required to hear the testimony and weigh the evidence in order to determine whether the decedent actually intended to give the property to respondent as a gift. See *Osius*, 375 Mich at 611-612.

We note that the probate court did not reach petitioner's arguments concerning respondent's alleged fraud, overreaching, undue influence, and coercion. We express no opinion with respect to these matters, and decline to consider them further because they were not

[6] A conveyance of real property "for and in consideration of love and affection" is considered a gift. See *Ridinger v Ryskamp*, 369 Mich 15, 16; 118 NW2d 689 (1962).

decided below. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005); *People v Hall*, 158 Mich App 194, 199; 404 NW2d 219 (1987). The probate court will be required to consider these issues on remand and to take further evidence as necessary.

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

GENNA v JACKSON

Docket No. 285746. Submitted November 9, 2009, at Detroit. Decided December 15, 2009, at 9:00 a.m.

Mario and Kimberly Genna, and Mario Genna, as next friend of Layla and Sebastian Genna, minors, brought an action in the Oakland Circuit Court against Beverley Jackson and others, seeking damages resulting from the infestation of their condominium with mold following the rupture of a water heater in the adjoining condominium owned by Jackson (hereafter defendant) while defendant was on vacation. The court, Rudy J. Nichols, J., entered a judgment in favor of plaintiffs consistent with the jury's verdict and denied defendant's motions for a directed verdict and judgment notwithstanding the verdict (JNOV). Defendant appealed.

The Court of Appeals *held*:

1. The evidence established that there were extremely high levels of mold and that mold can cause the types of symptoms suffered by Layla and Sebastian. Defendant did not submit scientific evidence that the mold in her condominium could not have caused plaintiffs' injuries. Expert testimony was not required under the circumstances in order for the jury to conclude that defendant more likely than not is responsible for plaintiffs' injuries. There was ample circumstantial evidence that would facilitate reasonable inferences of causation, not mere speculation. The trial court did not err by refusing to grant defendant's motions for a directed verdict and JNOV.

2. Defendant initiated much of the testimony regarding defendant's offer to pay for mold remediation and, therefore, there is no merit to defendant's claim that Mario Genna was erroneously allowed to testify regarding the settlement negotiations.

3. A proper foundation was laid to allow Mario Genna to refresh his memory while testifying by referring to a typewritten list of the damaged contents of his condominium and their value. Plaintiff showed that Mario's present memory was inadequate, that the list could refresh his present memory, and that reference to the list did refresh his present memory.

4. The trial court properly allowed Mario Genna to testify regarding the value of the contents of his condominium. Expert testimony was not required to establish the value of those commonplace items.

Affirmed.

1. NEGLIGENCE — EVIDENCE — PROOF OF CAUSATION.

A plaintiff alleging simple negligence must demonstrate that the defendant owed the plaintiff a duty of care, the defendant breached that duty, the plaintiff was injured, and the defendant's breach caused the plaintiff's injuries; proving causation requires proof of both cause in fact and proximate cause; cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct and may be established by circumstantial evidence, but such proof must facilitate reasonable inferences of causation, not mere speculation; the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.

2. EVIDENCE — WITNESSES — REFRESHING RECOLLECTION.

A witness may be allowed to refresh his or her recollection with a writing if the proponent has shown that the witness's present memory is inadequate, the writing could refresh the witness's present memory, and reference to the writing actually does refresh the witness's present memory.

Siciliano Mychalowych VanDusen and Feul, PLC (by *Timothy R. Van Dusen* and *Lindsay Kennedy James*), for Mario and Kimberly Genna.

Blake, Kirchner, Symonds, Larson, Kennedy & Smith, P.C. (by *Kevin T. Kennedy*, *Rebecca S. Austin*, *Andrew F. Smith*, and *Christopher W. Bowman*), for Beverley Jackson.

Before: STEPHENS, P.J. and CAVANAGH and OWENS, JJ.

OWENS, J. In this case involving mold, defendant Beverley Jackson, hereafter defendant, appeals as of right the trial court's denial of defendant's postjudg-

ment motions for judgment notwithstanding the verdict (JNOV) and for a new trial. We affirm.

I. FACTS

Plaintiffs Mario and Kimberly Genna, and their two young children, Layla and Sebastian, lived at the Maplewoode Condominium complex in Royal Oak, Michigan. Defendant lived next door. Plaintiffs' and defendant's units shared a foundation, walls, an attic, and a plumbing stack.

In December 2004, defendant left her condominium to go visit her brother in Florida and did not return until May 22, 2005. While she was gone, defendant's hot water heater ruptured. When defendant returned home, her condominium was infested with mold. There were patches of mold of all different colors all over the walls and ceilings in her kitchen, family room, and dining area. The hot water tank was spewing water a few feet from the shared foundation wall and there were several inches of standing water on the floor and surface mold throughout the entire basement.

Beginning in February 2005, Layla and Sebastian began to experience flu-like symptoms including diarrhea, vomiting, congestion, and nosebleeds. Over the next few months, their health conditions worsened. They frequently had to be taken to the doctor and the emergency room. Antibiotics and breathing treatments, among others, did not improve their conditions. By May, Layla's fingernails and lips were turning blue and she was gasping for air. Sebastian's health was also worse and he continued to have a cough, a fever, and low oxygen levels. Neither child responded to aggressive treatment. Finally, on May 18, 2005, only a few days before defendant returned and discovered the mold, Kimberly and the children moved out of the condo-

minium and into Kimberly's parent's house. Following their removal from the condominium, Sebastian and Layla's health began to slowly improve.

Mold experts concluded that the interior of defendant's condominium was so grossly contaminated that the inside needed to be demolished. Plaintiffs' microbial expert at trial concluded that two of the molds identified in both plaintiffs' and defendant's condominiums were penicillium and aspergillus, which are molds that are known to produce toxins that can affect human health and pose safety issues. He further concluded that the levels of these two molds were unusually high, to the extent that both plaintiffs' and defendant's condominiums would not be healthy environments in which to live.

Plaintiffs filed a complaint against defendant and others. Following a jury trial, plaintiffs were awarded $303,260 in damages against defendant. After the entry of the judgment, defendant filed motions for JNOV and for a new trial, arguing that plaintiffs failed to present any expert testimony regarding mold being the cause of their personal injuries. The trial court denied defendant's motions. Defendant now appeals as of right.

II. MOTIONS FOR A DIRECTED VERDICT AND JNOV

Defendant asserts that the trial court erred by denying defendant's motions for a directed verdict and for JNOV. We disagree.

We review de novo a trial court's decision on a motion for a directed verdict. *Roberts v Saffell*, 280 Mich App 397, 401; 760 NW2d 715 (2008). We must view the evidence in the light most favorable to the nonmoving party. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 201-202; 755 NW2d 686 (2008). "A directed

verdict is appropriate only when no factual question exists upon which reasonable minds could differ." *Roberts*, 280 Mich App at 401.

The trial court's decision on a motion for JNOV is reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). When reviewing the denial of a motion for JNOV, the appellate court views the evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party to determine if a party was entitled to judgment as a matter of law. *Id.* The motion should be granted only when there is insufficient evidence presented to create a triable issue for the jury. *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 18-19; 684 NW2d 391 (2004). When reasonable jurors could honestly reach different conclusions regarding the evidence, the jury verdict must stand. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

Plaintiffs claim that defendant's negligence caused their illnesses and mental and emotional anguish. Accordingly, as in any case alleging simple negligence under Michigan law, plaintiffs must demonstrate: "(1) that defendant owed them a duty of care, (2) that defendant breached that duty, (3) that plaintiffs were injured, and (4) that defendant's breach caused plaintiffs' injuries." *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005).

Proving causation requires proof of both cause in fact and proximate cause. *Case v Consumers Power Co*, 463 Mich 1, 6 n 6; 615 NW2d 17 (2000). "Cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct." *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001). Cause in fact may be established by circumstan-

tial evidence, but such proof "must facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). A plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Id.* at 164-165. A mere possibility of such causation is not sufficient; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict in favor of the defendant. *Id.* at 165. Normally, the existence of cause in fact is a question for the jury to decide, but if there is no issue of material fact, the question may be decided by the court. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003).

Defendant urges this Court to adopt the requirement that, in order to prove causation in a toxic tort case, a plaintiff must show both that the alleged toxin is capable of causing injuries like those suffered by the plaintiff in human beings subjected to the same exposure as the plaintiff, and that the toxin was the cause of the plaintiff's injury. They urge this Court to find that direct expert testimony is required to establish the causal link, not inferences. We decline to adopt this requirement. There is no published Michigan caselaw on this subject.

In her brief, defendant urged this Court to follow the United States District Court for the Western District of Michigan's decision in *Gass v Marriott Hotel Services, Inc*, 501 F Supp 2d 1011 (WD Mich, 2007). However, since defendant submitted her brief, that decision was overturned by *Gass v Marriott Hotel Services, Inc*, 558 F3d 419 (CA 6, 2009). The district court opinion concluded that under Michigan law, the plaintiffs were required to

introduce an essential element of admissible expert testimony in order to prove causation. *Gass*, 501 F Supp 2d at 1026. The United States Court of Appeals for the Sixth Circuit rejected that conclusion, and stated:

> Defendants argue that this Court's decision in *Kalamazoo River Study Group v. Rockwell International Corp*, 171 F.3d 1065 (6th Cir. 1999), requires Plaintiffs to introduce an "essential element" of "admissible expert testimony" in order to prove causation. That case, however, cannot be read so broadly. *Kalamazoo River* was an environmental contamination case, involving 38 miles of shoreline which was polluted by the chemical polychorinated biphenyl ("PCB"). *Id.* at 1066. . . .
>
> In holding that the defendant could not be held liable for the PCB contamination along the shoreline, the court noted that the plaintiff presented no reliable expert testimony which refuted evidence showing that PCB from the 1989 leak never reached the nearby waterway. *Id.* at 1072-73. Accordingly, the court held that, "[t]he analytical gap between the evidence presented [by the plaintiff] and the inferences to be drawn . . . is too wide. Under such circumstances, a jury should not be asked to speculate on the issue of causation." *Id.* at 1073 (quoting *Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1360-61 (6th Cir. 1992)).
>
> Contrary to Defendants' assertions, the principle governing *Kalamazoo River* is not applicable to Plaintiffs' claims. . . . In other words, while the *Kalamazoo River* defendant proved an absence of causation by introducing objectively verifiable scientific evidence, Defendants have not done so. Though it is certainly reasonable, as this Court held in *Kalamazoo River*, 171 F.3d at 1072-73, to require a party to refute scientific evidence with scientific evidence, Plaintiffs are not required to produce expert testimony on causation . . . .
>
> * * *
>
> We conclude that when a plaintiff claims that a defendant was negligent in filling a hotel room with a cloud of a

> poisonous substance, and there is evidentiary support for such claims, expert testimony is not required to show negligence, and the district court erred in holding otherwise. [*Gass*, 558 F3d at 432-434.]

Here, like in *Gass*, defendant has not submitted any scientific evidence that the mold in her condominium *could not* have cause plaintiffs' injuries. Defendant speculates that the children's illness was caused by a virus, because at one point the children's doctor treated them for a virus. However, she offers no scientific evidence that a virus did indeed cause the children's illness.

The evidence submitted by plaintiffs is that both Sebastian and Layla were healthy children before winter 2005. At the same time as the flood and subsequent mold growth in defendant's condominium, both children began experiencing a dramatic decline in health. They suffered from coughing, wheezing, vomiting, lack of oxygen, nosebleeds, and diarrhea. Their medical problems required numerous trips to the hospital emergency room and to their doctor's office. Mario, Kimberly, the children's pediatrician, and the children's grandmother confirmed this sequence of events. Witnesses also confirmed Kimberly's intense distress stemming from her children's illness.

Kimberly also testified that at the same time her children were experiencing these severe health problems, she began to notice a foul odor, "like a dirty diaper," within her condominium. The children were treated for a viral infection, but did not respond to the treatment. They were also treated with strong antibiotics that also failed to relieve their symptoms. While no doctor was able to testify specifically that the children were ill because of their exposure to toxic mold, all the microbial evidence showed massively high levels of

surface and airborne mold toxins in both plaintiffs' and defendant's condominiums. Defendant's expert, Connie Morbach, confirmed the deleterious health effects of mold. Dr. Mark Banner, plaintiffs' expert, testified that the molds in the units were toxic and are known to be toxic to humans and that they can cause toxic reactions in people. Additionally, the children's allergy doctor concluded, in his records, that mold exposure was a possible contributing factor to Sebastian's symptoms. He also stated that "a probable confounding factor is exposure to mold at home after extensive water damage." He further found the timing of the children's illness significant because the children had been otherwise healthy before their mold exposure and their symptoms resolved after they moved from their home.

This is not a complicated case: the children were sick, the children were removed from the home, the mold was discovered, and the children recovered. Testimony established extremely high levels of mold and that mold can cause the types of symptoms suffered by the children. "It does not take an expert to conclude that, under these circumstances, [defendant] more likely than not [is] responsible for [p]laintiffs' injuries." *Gass*, 558 F 3d at 433. Here, there was ample circumstantial evidence that would "facilitate reasonable inferences of causation, not mere speculation." *Skinner*, 445 Mich at 164.

The trial court did not err by refusing to grant defendant's motions for JNOV and for a directed verdict.

III. MARIO GENNA'S TESTIMONY

Defendant argues that the trial court erred by allowing testimony from Mario Genna about defendant's offer to pay for mold remediation and by allowing Mario

Genna to refresh his memory from the typewritten list of contents of his condominium.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

Defendant argues that the trial court erred by allowing plaintiff Mario Genna to testify about any settlement negotiations. Defendant claims that all testimony about settlement negotiations should have been precluded, yet defendant's attorney repeatedly questioned witnesses about this very topic. "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence . . . ." *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998). Because defendant initiated much of the testimony on this subject, this issue is without merit.

Defendant also asserts that the trial court erred by allowing Mario Genna to testify regarding the contents of the condominium from a typewritten list of personal effects totaling $75,000. This typewritten list was based on a similar handwritten list that had already been excluded from evidence by an earlier ruling of the trial court.[1] Mario Genna was asked about his expenses and attempted to use the typewritten list to refresh his recollection of the damaged items that had been in his condominium at the time of the mold exposure and their value. Defendant's attorney objected. The trial

[1] Following a hearing, on July 26, 2007, the trial court granted defendant's motion in limine and ordered, "The handwritten content damage list of Genna is precluded from use at the time of trial."

court ultimately rejected defendant's argument that the list was excluded from evidence by the motion in limine.

It is true that the document used by Mario to refresh his memory was not the exact same "handwritten" list that was excluded by the order stemming from the motion in limine. However, it was a typewritten list identical to the one excluded. Nonetheless, this list was never placed into evidence; it was merely used to refresh Mario's memory. A witness may refresh his or her recollection with a writing if there is a proper foundation. To lay a proper foundation, the proponent must show that (1) the witness's present memory is inadequate, (2) the writing could refresh the witness's present memory, and (3) reference to the writing actually does refresh the witness's present memory. *Moncrief v Detroit*, 398 Mich 181, 190; 247 NW2d 783 (1976). Here, plaintiffs satisfied these requirements.

Accordingly, it was not improper for the trial court to have allowed Mario Genna to refresh his memory from the document in question.

IV. ECONOMIC DAMAGES

Defendant argues that Mario Genna's testimony that he lost contents of the condominium worth almost $75,000 was not competent, was based on hearsay, and was immediately objected to by defendant. We disagree.

When plaintiffs' attorney asked Mario Genna about the value of the contents of his condominium, defendant's attorney immediately objected on the grounds that Mario Genna did not have the expertise to testify in that area. He never made an objection based on hearsay. Where an objection below is taken on different grounds from those raised on appeal, the issue is not preserved for review. *Marietta v Cliffs Ridge, Inc*, 385 Mich 364, 374; 189 NW2d 208 (1971).

In regard to Mario Genna's expertise about the value of the contents of his home, we conclude that the trial court correctly allowed this testimony. Defendant asserts that Mario Genna could not have known which items were salvageable and which items were not because he is not a mold specialist. However, there was testimony from one of the mold experts that any porous items should be thrown out. In addition, defendant's son testified that *most* of the contents of his mother's condominium were "loaded up in a dumpster and taken to a landfill" because they had been exposed to mold. Furthermore, there were photographs of the interior of the Genna condominium that showed the contents of their home. Mario Genna would have been aware of the value of those items, because they were his belongings and he knew how much he had paid for them.

Jurors are expected to apply their " 'common experience' " in assessing facts. *Grimes v Dep't of Transportation*, 475 Mich 72, 85 n 41; 715 NW2d 275 (2006). Using their common experience, the jurors likely concluded that Mario Genna's testimony about the value of the contents of his home was accurate given the corroborating evidence, the commonplace items plaintiffs were replacing (soap, pillows, sheets, furniture, groceries, etc.), and the lack of any evidence contrary to his testimony. When the claimed negligence involves " 'a matter of common knowledge and observation,' " no expert testimony is required. *Daniel v McNamara*, 10 Mich App 299, 308; 159 NW2d 339 (1968) (citation omitted). In short, the trial court properly allowed the testimony of Mario Genna about the value of the contents of his home.

Affirmed. Plaintiffs, being the prevailing party, may tax costs pursuant to MCR 7.219.

KOPF v BOLSER

Docket No. 285795. Submitted December 1, 2009, at Lansing. Decided December 15, 2009, at 9:05 a.m.

Robert L. Kopf brought an action in the Otsego Circuit Court against Evelyn J. Dobias, seeking damages for injuries sustained when, while walking, the plaintiff was struck by a vehicle driven by Dobias. Dobias died after the action was filed and Benjamin T. Bolser, personal representative of Dobias's estate, was substituted as the defendant. The parties submitted to a case evaluation, and plaintiff accepted the award of $60,000, but defendant rejected it. Defendant filed an offer of judgment of $7,500, and plaintiff filed a $70,000 counteroffer. An agreement was not reached, the case proceeded to trial, and the jury determined that plaintiff was 20 percent at fault and suffered damages totaling $25,000. The trial court, Janet M. Allen, J., on August 9, 2007, ordered a judgment of $20,000 in favor of plaintiff "together with taxable costs and applicable interest." On August 24, 2007, plaintiff filed his taxation of costs and interest in the amount of $8,666.16. Defendant objected and, after the parties agreed to stipulate costs and interest in the amount of $8,300.16, a stipulated order was entered October 10, 2007. On October 17, 2007, defendant filed a motion for offer-of-judgment sanctions under MCR 2.405. The court eventually entered an order denying the claim as untimely. Defendant appealed the order denying offer-of-judgment sanctions.

The Court of Appeals *held*:

Because the adjusted verdict to plaintiff of $28,300.16 was more favorable to defendant than the average offer of $38,750, defendant would be entitled to costs under MCR 2.405(D)(1) if the request was timely. The request had to be filed within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment. Neither party moved for a new trial or to set aside the judgment. The motion for offer-of-judgment sanctions was filed on October 17, 2007, more than 28 days after the August 9, 2007, judgment. MCR 2.403(O) does not require a specific bill to be filed with the request for offer-of-judgment sanctions, but does require the request to be filed timely. The August 9, 2007, judgment adjudicated the rights

and liabilities of the parties and was the "judgment" for purposes of MCR 2.405(D), notwithstanding the taxation of costs issue, which was not a cause of action. Defendant did not file his motion within the 28-day period.

Affirmed.

JUDGMENTS — OFFER-OF-JUDGMENT SANCTIONS.

A request for the imposition of offer-of-judgment sanctions must be filed within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment; the requesting party need not file a specific bill with the request, but must put the opposing party on notice of the intent to recover sanctions; a "judgment" for purposes of the 28-day period is one that adjudicates the rights and liabilities of the parties, notwithstanding issues regarding the taxation of costs and interest that have yet to be calculated (MCR 2.405[D]).

Powers, Chapman, DeAgostino, Meyers & Milia, P.C. (by *Robert P. Milia*), for plaintiff.

Bensinger, Cotant & Menkes, P.C. (by *Patrick J. Michaels*), for defendant.

Before: BECKERING, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM. Defendant, as personal representative of the estate of Evelyn J. Dobias, deceased, appeals as of right the trial court's May 15, 2008, order dismissing as untimely his claims for offer-of-judgment sanctions under MCR 2.405. We affirm.

Plaintiff filed this tort action against Dobias in September 2003. He alleged that in July 2002, Dobias negligently struck him with her vehicle while he was out walking, and that his resulting injuries were severe enough to permit recovery under MCL 500.3135. Dobias died shortly after the action was filed and defendant was substituted as the defendant. In October 2004, defendant moved for summary disposition on the

issue of serious impairment of a body function. The trial court granted the motion. Thereafter, plaintiff moved for rehearing and reconsideration. The court granted plaintiff's motion and denied defendant's motion for summary disposition.

In October 2006, the parties submitted to a case evaluation, which resulted in a nonunanimous award of $60,000 in favor of plaintiff. Plaintiff accepted the award, but defendant rejected it. Defendant subsequently filed an offer of judgment in the amount of $7,500. Plaintiff then filed a counteroffer in the amount of $70,000. No agreement was reached and the case proceeded to a jury trial in May 2007. Defendant admitted negligence on the part of Dobias, injury, and proximate cause. At the close of proofs, defendant moved for a directed verdict on the issue of serious impairment of body function. Plaintiff also moved for a directed verdict. The court denied both motions. The jury found that plaintiff was 20 percent at fault for his injuries, suffered serious impairment of an important body function, and suffered damages totaling $25,000. On the basis of this verdict, on August 9, 2007, the trial court ordered a judgment in favor of plaintiff in the amount of $20,000, "together with taxable costs and applicable interest." On August 24, 2007, plaintiff filed his taxation of costs and interest in the amount of $8,666.16. Defendant filed objections and the parties agreed on October 3 or 4 to stipulate costs and interest in the amount of $8,300.16. The stipulated order was entered on October 10, 2007.[1]

[1] We note that the trial court's October 10, 2007, order states: "[U]pon the Stipulation of the Parties . . . the taxable costs allowable to Plaintiff including interest are $8,330.16." But the parties apparently agree and the trial court's May 15, 2008, order dismissing defendant's motion for sanctions indicates that the taxable costs and interest awarded plaintiff totaled $8,300.16.

On October 17, 2007, defendant filed a motion for offer-of-judgment sanctions under MCR 2.405.[2] On November 6, 2007, the trial court heard oral arguments on the motion and identified two areas that required further briefing, including whether the motion was timely as required by the court rule. On May 15, 2008, the court entered the order appealed, dismissing defendant's claim as untimely. Defendant now appeals as of right.[3]

Defendant argues that the trial court erred by dismissing as untimely his motion for offer-of-judgment sanctions. We disagree.

We review the trial court's denial of offer-of-judgment sanctions, premised on its interpretation of MCR 2.405(D), de novo. See *Castillo v Exclusive Builders, Inc*, 273 Mich App 489, 492; 733 NW2d 62 (2007). Court rules are to be construed by the principles of statutory interpretation, and "in accordance with the ordinary and approved usage of the language in light of the purpose to be accomplished by its operation." *Smith v Henry Ford Hosp*, 219 Mich App 555, 558; 557 NW2d 154 (1996). "This Court must apply the clear language of the court rule as written." *Braun v York Properties, Inc*, 230 Mich App 138, 150; 583 NW2d 503 (1998). See also *Castillo*, *supra*.

MCR 2.405(D) states, in part:

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[2] The motion was signed on October 15, but stamped by the trial court as filed on October 17.

[3] On June 5, 2008, defendant filed this appeal, appealing not only the May 15, 2008, order dismissing his motion for offer-of-judgment sanctions, but also the May 31, 2007, denial of his motion for a directed verdict and the May 23, 2005, order granting plaintiff's motion for reconsideration and denying defendant's motion for summary disposition. A panel of this Court issued an order dismissing as untimely the appeals of the two earlier orders. *Kopf v Bolser*, unpublished order of the Court of Appeals, entered July 3, 2008 (Docket No. 285795).

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

MCR 2.405 defines "adjusted verdict" as "the verdict plus interest and costs from the filing of the complaint through the date of the offer," MCR 2.405(A)(5), and "average offer" as "the sum of an offer and a counteroffer, divided by two," MCR 2.405(A)(3). The parties agree that in this case, the adjusted verdict was $28,300.16 and the average offer was $38,750. Because the adjusted verdict to plaintiff of $28,300.16 was more favorable to defendant than the average offer of $38,750, defendant would be entitled to costs under MCR 2.405(D)(1).

At issue, however, is the court rule's time limitation on requests for costs. MCR 2.405(D) states, in part: "A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment." Defendant filed his motion for offer-of-judgment sanctions on October 17, 2007, more than 28 days after the August 9, 2007, judgment finding him liable to plaintiff for $20,000 plus taxable costs and interest. Neither party moved for a new trial or to set aside the judgment. Defendant essentially argues that the 28-day limit does not apply in this case and a "reasonable time" standard should be applied or, alternatively, that the 28 days should be counted from the October 10, 2007, stipulated order setting the amount of taxable costs and interest, rather than the August 9, 2007, judgment.

In arguing that the 28-day limit does not apply here, defendant relies on *Fairway Enterprises, Inc v Na-Churs Plant Food Co*, 163 Mich App 497; 415 NW2d 257 (1987).[4] In his brief on appeal, defendant states that the trial court in *Fairway* denied a motion for attorney fees and expenses pursuant to GCR 1963, 316.7-316.8 (now MCR 2.403[O]) on the ground that a bill of costs was not filed within the 28-day limit, but that this Court reversed the trial court, applying a "reasonable time" standard. *Fairway*, *supra* at 498-499. It is important to note, however, that the trial court denied the motion because of the 28-day limit contained in MCR 2.625(F). *Fairway*, *supra* at 498-499. Although MCR 2.403(O) currently contains a 28-day limit, that limit was not added until 1990. 434 Mich cxliii, cxlvi (1990). At the time *Fairway* was decided, MCR 2.403(O) did not contain a time limit, and this Court held that the trial court erroneously imported a time limit from MCR 2.625. *Fairway*, *supra* at 499. In this case, the trial court did not import a time limit from another court rule. MCR 2.405(D), the rule under which sanctions were sought, contains an explicit and mandatory time limitation of 28 days. The other cases cited by defendant in support of this argument, *Giannetti Bros Constr Co, Inc v City of Pontiac*, 152 Mich App 648, 651-655; 394 NW2d 59 (1986), and *Oscoda Chapter of PBB Action Comm, Inc v Dep't of Natural Resources*, 115 Mich App 356, 361-362; 320 NW2d 376 (1982), are distinguishable from this case for the same reasons.

It is also noteworthy that the rationale supporting this Court's application of a "reasonable time" standard in *Fairway*, *Giannetti*, and *PBB Action Comm* is not

[4] Defendant erroneously states that *Fairway* is binding on us as a published decision of this Court. *Fairway* was released on October 6, 1987, and is thus not binding. See MCR 7.215(J)(1).

frustrated by the subsequent addition of a 28-day limit to MCR 2.403(O). The *Fairway* Court did not apply the time limit in MCR 2.625 in awarding costs under MCR 2.403(O) because the former rule deals with taxation of court costs, which are easily determined by the clerk, while the latter rule deals with reasonable attorney fees, which require judicial determination. *Fairway*, *supra* at 499. Even after the addition of the 28-day limit, however, parties are still afforded a reasonable time to determine the actual amount of reasonable attorney fees, because MCR 2.403(O), unlike MCR 2.625, does not require a specific bill to be filed with the request. See *Badiee v Brighton Area Schools*, 265 Mich App 343, 376; 695 NW2d 521 (2005). What the rule requires is only a timely request for costs that puts the party that rejected the case evaluation on notice of the opposing party's intent to recover actual costs. *Id*. at 376-377. In *Badiee*, *supra* at 376-377, this Court held that filing a request for costs under MCR 2.403(O) within the 28-day period, followed by an affidavit containing specific amounts submitted some five weeks later, was not untimely. The *Badiee* Court held that "[i]f the court rules required a party seeking case-evaluation sanctions to specify the amount of actual costs with particularity, then MCR 2.403 would specifically provide such a requirement as MCR 2.625 does." *Badiee*, *supra* at 376. The reasoning in *Badiee* regarding MCR 2.403(O) applies equally to MCR 2.405(D). MCR 2.405, like MCR 2.403, does not require the specificity of MCR 2.625. Like MCR 2.403, it deals with reasonable attorney fees, which require judicial determination. Accordingly, we conclude that the 28-day limit in MCR 2.405(D) must be applied in this case.

Alternatively, defendant argues that the August 9, 2007, judgment finding him liable to plaintiff is not "the judgment" for purposes of MCR 2.405(D). According to

defendant, because the amount of taxable costs and interest was unknown at the time of the judgment, the parties' claims were not yet resolved. Defendant notes that the amount of taxable costs and interest, and thus the adjusted verdict, remained unknown until October 3 or 4 when the parties stipulated the amount, and argues that "the judgment" for purposes of MCR 2.405(D) is the October 10, 2007, stipulated order memorializing the parties' agreement as to the amount.

In *Braun*, *supra* at 150, this Court defined "judgment" for purposes of MCR 2.403(O)(8): "[T]he *judgment* is the judgment adjudicating the rights and liabilities of particular parties, regardless of whether that judgment is the final judgment from which the parties may appeal." (Emphasis in original.) *Braun* was a multiparty case, where judgment against three of the plaintiffs was entered on February 1, 1995, and judgment for the fourth was entered on February 6, 1995. *Braun*, *supra* at 150. The *Braun* Court held that for the first three plaintiffs, the 28-day period for requesting sanctions under MCR 2.403(O)(8) began running on February 1, not February 6. *Braun*, *supra* at 150. Although *Braun* involved MCR 2.403, while this case involves MCR 2.405, the pertinent language in the two rules is identical, and the rules should be interpreted consistently with each other. See *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 530-532; 676 NW2d 616 (2004) (holding that the language used by the Legislature in two separate statutes was virtually identical, calling for identical interpretation by the courts).

Defendant argues that the parties' claims, i.e., their "rights and liabilities," have not been fully adjudicated until, by an order of the court, the exact amount of the adjusted verdict, including taxable costs and applicable interest, is known. Here, the trial court's May 15, 2008,

order dismissing defendant's motion for sanctions as untimely stated that "[a] final judgment *resolving all claims* between the parties was filed on August 9" (emphasis added). The term "claim" has been defined as a cause of action. Black's Law Dictionary (8th ed), p 264. In the case cited by defendant, *Nowack v Botsford Gen Hosp*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2001 (Docket Nos. 217771, 220466), wherein a judgment did not start the 28-day period for requesting case-evaluation sanctions, the judgment only granted partial summary disposition to the defendant, leaving a cause of action outstanding.[5] In this case, the August 9, 2007, judgment adjudicated the rights and liabilities of the parties, notwithstanding the taxation of costs issue. The amount of taxable costs and interest yet to be calculated was not a cause of action.

Furthermore, aside from the plain language of the court rule, it was not impossible to determine that the adjusted verdict would be more favorable to defendant than the average offer following the issuance of the August 9, 2007, judgment. The judgment found defendant liable to plaintiff for $20,000, plus taxable costs and interest, and the average offer was $38,750. On August 24, 2007, plaintiff timely filed a bill of costs, pursuant to MCR 2.625, in the amount of $8,666.16. Although the stipulated order regarding the amount of taxable costs and interest was not entered until October 10, defendant knew as of August 24 that the highest possible adjusted verdict would be $28,666.16, a verdict more favorable to defendant than the average offer.

A judgment adjudicating the rights and liabilities of the particular parties, so that there is no cause of action outstanding, starts the 28-day period for requesting

[5] Regardless, we are not bound by unpublished opinions of this Court. See MCR 7.215(C)(1).

offer-of-judgment sanctions under MCR 2.405(D).[6] Although the August 9, 2007, judgment provided that plaintiff be awarded "taxable costs and applicable interest," the judgment adjudicated the rights and liabilities of the parties. Therefore, under MCR 2.405(D), a request for offer-of-judgment sanctions was required to be "filed and served within 28 days after the entry of the judgment," thereby providing plaintiff with notice that defendant was seeking sanctions. Defendant did not file his motion within 28 days of August 9, 2007. Under the plain language of the court rule, defendant was not entitled to offer-of-judgment sanctions.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219(A).

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[6] Our holding is subject to the explicit exceptions listed in MCR 2.405(D), i.e., 28 days after entry of an order denying a timely motion for a new trial or timely motion to set aside the judgment.

KLOOSTER v CITY OF CHARLEVOIX

Docket No. 286013. Submitted November 9, 2009, at Lansing. Decided December 15, 2009, at 9:10 a.m.

Nathan Klooster petitioned the Tax Tribunal for the review of a determination of the board of review of the city of Charlevoix to affirm a city tax assessor's determination that there had been a transfer of ownership of the subject real property in 2005 that, pursuant to MCL 211.27a(3), required reassessment of the taxable value of the property. The property was originally acquired by petitioner's parents, as tenants by the entirety, by warranty deed in 1959. In 2004, petitioner's mother quitclaimed her interest to petitioner's father, who thereafter, as the sole owner, quitclaimed the property to himself and petitioner as joint tenants with rights of survivorship. Petitioner's father died in 2005, and petitioner became the sole owner of the property. In 2006 the subject reassessment occurred. The Tax Tribunal affirmed, viewing the death of petitioner's father as causing a transfer of ownership. Petitioner appealed.

The Court of Appeals *held*:

1. Section 27a(7)(h) of the General Property Tax Act, MCL 211.27a(7)(h), provides that when there is a transfer between two or more persons that creates or terminates a joint tenancy, it will not constitute a transfer of ownership within the meaning of MCL 211.27a(3), first, if at least one of the persons was an original owner of the property before the joint tenancy was initially created, or second, if at the time of the conveyance, the property is held as a joint tenancy and at least one of the persons was a joint tenant when the joint tenancy was initially created and that person has remained a joint tenant since that time.

2. The first requirement of § 27a(7)(h) is satisfied because the petitioner's father was an original owner of the property before the joint tenancy was initially created.

3. The second conditional requirement of § 27a(7)(h) is not applicable because the property was not held as a joint tenancy at the time that petitioner's father, as the sole owner, quitclaimed the property to himself and petitioner as joint tenants with rights of survivorship.

4. The term "conveyance" for purposes of the second element of § 27a(7)(h) requires that there be some instrument in writing affecting the title of the real property. The petitioner's father's death was not a conveyance because no instrument in writing was created that affected the title to the subject real estate.

5. There was no transfer of ownership because petitioner meets the first requirement of § 27a(7)(h) and the second requirement is not applicable. The Tax Tribunal erred by affirming the tax assessment. The order of the Tax Tribunal must be reversed and the case must be remanded for further proceedings.

Reversed and remanded.

TAXATION — REAL PROPERTY — JOINT TENANCIES.

A transfer between two or more persons that creates or terminates a joint tenancy does not constitute a transfer of ownership within the meaning of MCL 211.27a(3), which provides for the reassessment of the taxable value of real property upon a transfer of ownership, where at least one of the persons was an original owner of the property before the joint tenancy was originally created, or where, at the time of the conveyance the property is held as a joint tenancy and at least one of the persons was a joint tenant when the joint tenancy was initially created and has remained a joint tenant since that time; the term "conveyance" for purposes of the second conditional requirement requires that there be some instrument in writing affecting the title of the real property (MCL 211.27a[3], [7][h]).

Law, Weathers & Richardson, P.C. (by *Steven F. Stapleton* and *Crystal L. Rice*), for petitioner.

Young, Graham & Elsenheimer, P.C. (by *Bryan E. Graham*), for respondent.

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM. In this tax dispute, we must decide, under the circumstances of this case, whether the death of a joint tenant constitutes a transfer of ownership within the meaning of § 27a, MCL 211.27a, of the General Property Tax Act (GPTA), MCL 211.1 *et seq*.

We hold it does not. Accordingly, the Michigan Tax Tribunal erred when it found that a transfer of ownership occurred that allowed the taxable value of the real property to be reassessed at a higher value. We reverse.

I. BASIC FACTS

In 1959, James and Dona Klooster, petitioner's parents, acquired title by warranty deed to certain real property located in Charlevoix, Michigan. They held the property as tenants by the entirety. On August 11, 2004, Dona quitclaimed her interest to James. On the same day, James, now as the sole owner, quitclaimed the property to himself and petitioner as joint tenants with rights of survivorship. In January 2005, James died and, by operation of law, petitioner became the sole owner of the property. Subsequently, on September 10, 2005, petitioner executed a quitclaim deed creating a joint tenancy with rights of survivorship with his brother, Charles Klooster.

In 2006, petitioner received a notice of assessment from the city of Charlevoix. It stated that there had been a transfer of ownership in 2005[1] and, thus, it had reassessed the taxable value of the property using its true cash value, or market value, to determine the state equalized value. This process, commonly referred to as "uncapping," increased the taxable value of the property from $37,802 to $72,300.

Petitioner appealed this decision to the board of review, which adopted the tax assessor's decision without any explanation of its own. Petitioner appealed the board of review's decision to the Tax Tribunal. The Tax Tribunal affirmed the assessor's determination that

[1] The assessment notice did not identify the event that caused the "transfer of ownership."

there had been a transfer of ownership in 2005. In its view, James's death had caused the transfer of ownership and, thus, the taxable value of the property was properly uncapped. This appeal followed.

II. APPLICABLE LAW

Historically, real property in Michigan was reassessed according to its true cash value on a yearly basis. However, in 1994, Michigan adopted the "Proposal A" amendment to Const 1963, art 9, § 3. Proposal A limited increases in property taxes absent a transfer in ownership " 'by capping the amount that the "taxable value" of the property may increase each year, even if the "true cash value," that is, the actual, market value, of the property rises at a greater rate.' " *Moshier v Whitewater Twp*, 277 Mich App 403, 405; 745 NW2d 523 (2007), quoting *WPW Acquisition Co v City of Troy*, 466 Mich 117, 122; 643 NW2d 564 (2002).

Consequently, the GPTA was amended in order carry out the mandate of Proposal A, and it now governs the processes by which property is taxed consistent with Proposal A's mandate. Thus, under the GPTA, when a transfer of ownership of a parcel of property does not occur, the taxable value of a parcel of property will be the lesser of (1) the property's current state equalized value or (2) the prior year's taxable value less any losses, "multiplied by the lesser of 1.05 or the inflation rate, plus all additions." MCL 211.27a(2). This provision functions to limit, or "cap," property tax increases when there has been no transfer of ownership. However, when there is a transfer of ownership, the taxable value is "uncapped" and a reassessed taxable value is set on the basis of the state equalized value in the year following the transfer of ownership. MCL 211.27a(3); *Signature Villas, LLC v City of Ann Arbor*, 269 Mich

App 694, 697; 714 NW2d 392 (2006). "Uncapping" typically results in a higher tax assessment, as is the case here.

Given the foregoing, whether a property's taxable value remains capped is intrinsically linked to whether there has been a "transfer of ownership." The GPTA defines "transfer of ownership" to mean "the conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest." MCL 211.27a(6). The GPTA provides a nonexhaustive list of events that will constitute a transfer of ownership, MCL 211.27a(6), and events that do not constitute such a transfer, MCL 211.27a(7).

Significantly, for purposes of this case, the GPTA includes the creation and termination of joint tenancies amongst those transfers that do not constitute a transfer of ownership, provided certain conditions are met. Specifically, § 27a(7)(h) of the GPTA states that a "transfer of ownership" does not include

> [a] transfer creating or terminating a joint tenancy between 2 or more persons if at least 1 of the persons was an original owner of the property before the joint tenancy was initially created and, if the property is held as a joint tenancy at the time of conveyance, at least 1 of the persons was a joint tenant when the joint tenancy was initially created and that person has remained a joint tenant since the joint tenancy was initially created. A joint owner at the time of the last transfer of ownership of the property is an original owner of the property. For purposes of this subdivision, a person is an original owner of property owned by that person's spouse. [MCL 211.27a(7)(h).]

Accordingly, when there is a transfer between two or more persons that creates or terminates a joint tenancy, it will not constitute a transfer of ownership within the meaning of MCL 211.27a(3) if (1) at least one of the

persons was an original owner of the property before the joint tenancy was initially created and, (2) *if the property is held as a joint tenancy at the time of conveyance*, at least one of the persons was a joint tenant when the joint tenancy was initially created and that person has remained a joint tenant since that time. See *Moshier*, *supra* at 409-410. The second requirement is a conditional requirement: it need only be met in instances where the property was held as a joint tenancy at the time of the conveyance; if the property was not so held, this requirement is inapplicable.

III. ANALYSIS

Petitioner argues that the Tax Tribunal erred by determining that James's death constituted a transfer of ownership under § 27a(7)(h), MCL 211.27a(7)(h), of the GPTA.[2] We agree. Our review of the Tax Tribunal decision is limited to determining "whether the tribunal erred in applying the law or adopted a wrong principle . . . ." *Moshier*, *supra* at 407. Further, to the extent that we must construe the meaning of the statute, our review is de novo. *Signature Villas, LLC*, *supra* at 699. Our goal in interpreting a statutory provision is to ascertain the Legislature's intent. *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 245; 697 NW2d 130 (2005). This is accomplished by first examining to the language used. *TMW Enterprises Inc v Dep't of Treasury*, 285 Mich App 167, 172; 775 NW2d 342 (2009). If the language is plain and unambiguous,

[2] We note that although the tax assessor did not indicate what caused the "transfer of ownership" in 2005, the parties below and on appeal focus exclusively on James's death. Thus, it is not necessary for us to consider whether the creation of the joint tenancy with Charles in 2005 constituted a transfer of ownership. Accordingly, our decision in this matter focuses solely on whether James's death constitutes a transfer of ownership under the statute.

then we must apply the statute as written to the facts before us. *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 506; 778 NW2d 282 (2009). In such instances, judicial construction is neither necessary nor permitted. *Beattie v Mickalich*, 284 Mich App 564, 570; 773 NW2d 748 (2009).

Here, the first requirement of § 27a(7)(h) is satisfied. James and petitioner created a joint tenancy in 2004 by a quitclaim deed. Before this joint tenancy was created, James was an original owner of the property: He and his wife acquired the property by warranty deed in 1959. Thus, as the parties do not dispute, "at least 1 of the persons was an original owner of the property before the joint tenancy was initially created . . . ." MCL 211.27a(7)(h).

With respect to the second conditional requirement of § 27a(7)(h), we conclude that it is not applicable because the condition triggering the second mandate is not present in this matter. Specifically, and contrary to respondent's argument on appeal, James's death does not constitute a "conveyance" within the meaning of § 27a(7)(h). As already noted, under the plain language of § 27a(7)(h), the conditional requirement is only mandated in instances where the property was held as a joint tenancy "*at the time of conveyance . . . .*" *Id. (emphasis added).* The GPTA does not define the term conveyance and, in such instances, we give undefined terms their plain and ordinary meaning and we may rely on dictionary definitions. *TMW Enterprises Inc*, *supra* at 172. We must also be cognizant of legal terms of art, which are to be accorded their peculiar and appropriate meanings. *Priority Health v Comm'r of the Office of Financial & Ins Services*, 284 Mich App 40, 45; 770 NW2d 457 (2009); MCL 8.3a. It is well established, as a legal term, that "conveyance" means every instru-

ment *in writing* which affects the title to any real estate. See MCL 565.35 (defining "conveyance"); *McMurtry v Smith*, 320 Mich 304, 307; 30 NW2d 880 (1948). Further, Black's Law Dictionary (8th ed) defines "conveyance" as "[t]he transfer of an interest in real property from one living person to another, by means of an instrument . . . [or the] document . . . by which such a transfer occurs." Accordingly, the term conveyance, as that term is used in the second element of § 27a(7)(h) and giving it its peculiar and appropriate meaning, requires that there be some instrument *in writing* affecting the title of the real property.

James's death was not a conveyance. While James's death had a de facto effect on the property's title, because by operation of law petitioner became the sole owner, the death did not, in effect, create a conveyance because no instrument *in writing* was created that affected title to the subject real estate. Rather, the most recent prior conveyance, as reflected on the record, occurred when the joint tenancy was created between James and petitioner in 2004. And, at that time, the property was not held as a joint tenancy, because James had a sole ownership interest in the real estate.

Respondent provides little support for its contention that James's death is a conveyance. It merely asserts that James's death terminated the joint tenancy and, thus, constituted a conveyance and it otherwise fails to provide its own definition of conveyance. We cannot adopt such an overly broad definition of that term, when it is plain that the word "conveyance" has acquired a particular legal meaning. If we were to do so, it would be contrary to the Legislature's clear intent, because we must presume that the Legislature is aware that the term "conveyance" is a legal term of art and intentionally chose to use it in lieu of some other broader, or narrower, one. See *Priority Health*, *supra* at 45.

Because the property was not held as a joint tenancy at the time the property was conveyed to James and petitioner, the conditional requirement set forth in § 27a(7)(h) simply does not apply.

IV. CONCLUSION

Because petitioner meets the requirements of § 27a(7)(h), there was no transfer of ownership and the taxable value of the property should not have been uncapped under MCL 211.27a(3). The Tax Tribunal erred by affirming the tax assessment. Given our conclusion, we need not address petitioner's claim that the board of review failed to articulate sufficient reasons for its decision.

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

In re HRC

Docket Nos. 290213 and 290214. Submitted October 6, 2009, at Detroit. Decided December 15, 2009, at 9:15 a.m.

The Monroe Circuit Court, Family Division, Pamela A. Moskwa, J., entered an order terminating the parental rights of Rosie Lee Compton and Ronnie Compton, Sr., to eight minor children. The Department of Human Services had petitioned to have the parental rights terminated on the basis of sexual abuse, physical abuse, and educational neglect. The respondents appealed separately, and the appeals were consolidated.

The Court of Appeals *held*:

1. A trial court presiding over a juvenile matter may not conduct in camera interviews, on any subject whatsoever, with the child. The trial court erred by conducting in camera interviews with the children for the purpose of determining their best interests. The error affected the respondents' substantial rights. The use of the unrecorded, in camera interviews in the termination proceedings violated the respondents' due process rights. The portion of the trial court's opinion and order pertaining to its best interests determination must be vacated and the case must be remanded for new findings, by a different judge, regarding the children's best interests.

2. The respondents do not have standing to challenge the effectiveness of the counsel that represented one of their children.

3. The trial court did not err by finding at least one statutory ground for termination as to both Rosie and Ronnie on the basis of evidence establishing that Ronnie sexually abused at least two of his daughters and Rosie failed to protect the children from the sexual abuse despite knowing about it. This part of the trial court's opinion and order must be affirmed.

4. If the petitioner erred in failing to provide a case services plan and reunification efforts, the error was harmless under the facts of this case.

5. There is no evidence that the jury failed to follow the instructions given by the trial court.

Affirmed in part, vacated in part, and remanded.

1. CONSTITUTIONAL LAW — JUVENILE PROCEEDINGS — IN CAMERA INTERVIEWS — DUE PROCESS.

The use of an unrecorded, in camera interview of children in the context of a juvenile proceeding, for whatever purpose, constitutes a violation of the parents' fundamental due process rights; a trial court presiding over a juvenile proceeding has no authority to conduct in camera interviews of the children involved.

2. PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — EFFECTIVE ASSISTANCE OF COUNSEL.

The respondent in a child protective proceeding does not have standing to challenge the effectiveness of the child's attorney.

3. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — SERVICE PLANS — REUNIFICATION SERVICES.

When a child is removed from the parents' custody, the petitioner must make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan; the petitioner is not required to provide reunification services when termination of parental rights is the agency's goal.

William P. Nichols, Prosecuting Attorney, and *Michael C. Brown*, Assistant Prosecuting Attorney, for the Department of Human Services.

Lambrix & Bartlett, PLC (by *James P. Bartlett*), for Rosie Lee Compton.

LaVoy & Zagorski, P.C. (by *Jill M. LaVoy*), for Ronnie Compton, Sr.

Before: K. F. KELLY, P.J., and JANSEN and FITZGERALD, JJ.

K. F. KELLY, P.J. In these consolidated appeals of an order terminating parental rights we must decide whether a trial court presiding over a juvenile proceeding may conduct unrecorded, in camera interviews of the minor children when considering whether termination is in their best interests. See MCL 712A.19b(5). The trial court made no ruling on this issue and

respondents now appeal as of right the order terminating their rights to the children and raise other additional grounds for relief. We hold that a trial court presiding over a juvenile proceeding has no authority to conduct in camera interviews of the minor children. Accordingly, we vacate the trial court's findings regarding the children's bests interests and remand for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

The family involved in these proceedings has a protracted history with protective services. Before the petition was filed in the instant matter, the family had been referred to protective services 24 times. These referrals concerned allegations of physical abuse, truancy, or physical and educational neglect. Physical abuse was suspected because the male children often had bruises, while physical neglect was suspected because the children often came to school improperly dressed or having poor hygiene. In addition, the children missed school often, approximately 20 to 30 days a year, and arrived to school late without excuses. There were also ongoing concerns regarding suspected medical and educational neglect of one child, SHC, who was deaf and had very little knowledge of American Sign Language (ASL).

On May 30, 2008, the oldest child, SRC,[1] ran away from home after her father, Ronnie, had grounded her. When the police found the child, she told an officer that Ronnie had physically and sexually abused her. SRC did not reveal, at the time, that she had fought with Ronnie and her mother, Rosie. On June 1, 2008, the officer interviewed SRC's younger sister, HRC, who also al-

[1] By the time this matter went to trial, SRC had reached the age of majority.

leged that Ronnie and David, one of Ronnie's adult sons, had sexually abused her. Consequently, petitioner obtained a court order requiring that the children be removed from respondents' home. Respondents, however, fled the state with their children. The children were eventually found in Indiana, at their grandmother's house. Petitioner removed the children and had them placed in foster care.[2] On June 11, 2008, petitioner filed a petition to terminate respondents' parental rights on the basis of sexual abuse, as well as allegations of physical abuse and educational neglect.

Before the adjudication hearing on July 24, 2008, however, petitioner learned that SRC had reported the sexual abuse when she was mad at her parents and also that HRC had recanted her allegations that Ronnie had sexually abused her. Accordingly, at the hearing, petitioner decided not to pursue termination of respondents' parental rights, but only sought temporary custody of the children, in exchange for respondents' pleas admitting the physical abuse and educational neglect. Rosie admitted the educational neglect and Ronnie admitted both the educational neglect and physical abuse. As part of the plea agreement, respondents agreed that visitation would be suspended until each respondent had a psychological evaluation. The trial

[2] HRC and AMC were placed together; REC, PLC, and KEC were placed together; and, WSC and TMC were placed together but their placement frequently changed. Petitioner had some difficulty finding the best placement for SHC because of his special educational needs. Initially, SHC was placed in the St. Louis Center, a residential care facility for children with developmental disorders. The center, however, was not the most suitable placement for SHC because the center was geared toward children that functioned at a lower level. The opportunities for SHC were explored over the course of the proceedings and it was recommended that he be placed with deaf foster parents. However, at the time of the termination hearing, he remained at the center while preparations for his placement with that family were being made.

court accepted the pleas and asserted jurisdiction over the children. Sibling visits were ordered.

The initial dispositional hearing was held on August 13, 2008, but the psychological examinations of respondents had not been completed. Thus, the hearing was continued to August 28, 2008. At that hearing, petitioner indicated that it would be refiling a termination petition because it had received new evidence regarding the sexual abuse. Petitioner renewed its petition to terminate respondents' parental rights on September 5, 2008, and the trial court authorized that petition. In response, respondents moved to withdraw their plea agreements.

Petitioner then filed an amended petition on September 22, 2008. It alleged that Ronnie had sexually abused SRC, HRC, and KEC, that David had also sexually abused HRC and KEC, and that Rosie had failed to protect the children from the sexual abuse despite knowing about it. Petitioner also alleged that Ronnie had physically abused the children and that respondents had failed to provide the children with proper education and proper hygiene. In addition, petitioner claimed that respondents had failed to provide proper medical care for SHC, whose cochlear ear implant required regular medical examination in order to prevent infection. Respondents' alleged failure to take SHC to these appointments had exposed him to serious health risks. Petitioner also alleged that SHC had suffered educational neglect because he knew very little ASL and had no effective way of communicating.

Subsequently, the trial court granted respondents' motions to withdraw their pleas and also excluded the psychological evaluations conducted in conjunction with the plea agreements. Respondents exercised their right to a jury trial on the question of jurisdiction and a

trial began on October 21, 2008. After hearing the testimony of the witnesses, the jury returned a verdict finding that the statutory grounds for jurisdiction under MCL 712A.2(b) had been proven by a preponderance of the evidence as to HRC, AMC, REC, PLC, SHC, WSC, TMC, and KEC.

Before making a decision on termination, the trial court heard testimony from each child's counselor regarding whether termination was in each child's best interests, as well as from respondents. On November 25, 2008, the trial court found that the statutory grounds for termination under MCL 712A.19b(3)(b)(*i*) and (*ii*), (j), and (k)(*ii*) and (*iii*) had been proven by clear and convincing evidence.[3] However, the trial court, noting the strong ties between the parents and siblings, stated, "[T]he Court is not prepared to terminate today." The trial court then reserved its ruling on termination and ordered:

> The sibling visits will continue. The Court will order that DHS provide an opportunity for the — for [HRC, AMC, REC, and PLC,] . . . in their individual therapy sessions, to have a meeting with their parents.
>
> * * *
>
> [A]nd I am going to want to review the matter in about thirty days and hear from the therapists, and the Court will also conduct interviews with the children in chambers, of those four children. At that point, the Court will decide whether to make such an attempt with regard to the younger [four] children . . . .

Petitioner moved for reconsideration of this order on the basis that joint counseling could cause psychological

[3] The trial court found that petitioner had failed to show by clear and convincing evidence that SHC had been medically neglected under MCL 712A.19b(3)(g).

trauma and interfere with the pending criminal investigation of Ronnie's sexual assaults. The trial court stayed the order for joint counseling and proceeded with off the record, in camera interviews of all the children. Subsequently, on January 15, 2009, the trial court terminated respondents' parental rights to all the children. It stated, "The Court having considered the testimony and also the subsequent interviews of the children and all of the record as a whole, the Court finds that termination of parental rights is in the best interests of the children . . . ." Respondents appealed separately, and their appeals were consolidated.

II. DUE PROCESS

Respondents first argue that the trial court erred by conducting in camera interviews of the children in making its best interests determination, thereby violating their due process rights. Specifically, respondents contend that Michigan law permits in camera interviews of children only for the limited purpose of determining a child's parental preference in the context of a custody dispute. We agree. Because respondents did not object to the trial court's decision to conduct the interviews, our review is for plain error affecting substantial rights. *Wolford v Duncan*, 279 Mich App 631, 637; 760 NW2d 253 (2008). Further, whether the court's decision to conduct an in camera interview violated respondents' due process rights presents a question of constitutional law that we review de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009).

A. IN CAMERA INTERVIEWS

An understanding of the in camera interview's use in the context of familial disputes will inform our decision.

Thus, before addressing respondents' argument, we first consider the in camera interview's purpose and its due process implications.

An in camera interview is an ex parte communication that occurs off the record in a judge's chambers and in the absence of the other interested parties and their attorneys. See Black's Law Dictionary (8th ed). Generally, such ex parte communications are not permitted except as provided by law. Michigan Code of Judicial Conduct, Canon 3. In most circumstances, the in camera interview, or review, is reserved for purposes of determining whether certain evidence or testimony is admissible during the proceedings. See, e.g., MRE 612 (permitting in camera review to redact irrelevant material from documentary evidence); MCR 6.201 (allowing in camera review to excise privileged material); *Davis v O'Brien*, 152 Mich App 495, 505; 393 NW2d 914 (1986) (requiring in camera review to redact privileged material).

The Child Custody Act (CCA), MCL 722.21 *et seq*., permits the use of in camera interviews, but for a different reason: When the court makes its best interests determination, it is well settled that it may interview the children in camera limited to determining their parental preferences.[4] See, e.g., *In re Leu*, 240 Mich 240, 245-246; 215 NW 384 (1927); *Burghdoff v Burghdoff*, 66 Mich App 608, 612; 239 NW2d 679 (1976); *Molloy v Molloy*, 247 Mich App 348, 350; 637 NW2d 803 (2001); *Surman v Surman*, 277 Mich App 287, 297-298; 745 NW2d 802 (2007); see also MCR

[4] While no provision of the CCA explicitly permits the use of an in camera interview, MCL 722.23(i) does require a court to specifically consider a child's parental preference, which is but one factor a court must consider when making its best interests determination. The court's authority to conduct the in camera interview derives from this factor, and the well-established caselaw.

3.210(C)(5). And, although the judge is limited in his or her line of questioning, the rules of evidence do not apply. MRE 1101. The purpose behind this practice is to reduce "the emotional trauma felt by a child required to testify in open court or in front of his or her parents," *Molloy*, *supra* at 352, and to relieve the child of having to openly choose sides, *Gulyas v Gulyas*, 75 Mich App 138, 144-145; 254 NW2d 818 (1977).

A court's concern for a child's well-being in a custody proceeding, however, must not outweigh considerations of fundamental fairness in proceedings that affect parental rights. *Molloy*, *supra* at 352. While questioning in an in camera interview does not constitute a due process violation as long as the interview is limited to the child's parental preferences, *id* at 350; *Lesauskis v Lesauskis*, 111 Mich App 811, 816-817; 314 NW2d 767 (1981), it is not difficult to see how the use of an in camera interview for fact-finding presents multiple due process problems: Should questions or answers arise concerning disputed facts unrelated to the child's preference, there is no opportunity for the opposing party to cross-examine or impeach the witness, or to present contradictory evidence; nor is there created an appellate record that would permit a party to challenge the evidence underlying a court's decision. *Molloy*, *supra* at 360; *Foskett v Foskett*, 247 Mich App 1, 10-11; 634 NW2d 363 (2001). And, as this Court has noted, even an interview limited appropriately in its scope, "will result in information that affects other child custody factors . . . ." *Molloy*, *supra* at 353. Nonetheless, this Court has concluded that due process, in the context of custody disputes, permits in camera interviews of children for the limited purpose of determining their parental preference. *Id*. at 350.

Under the juvenile code, MCL 712A.1 *et seq*., termination of parental rights is appropriate when one or

more statutory grounds for termination under MCL 712A.19b(3) is proven by clear and convincing evidence and termination is in the best interests of the child. MCL 712A.19b(5). While a court in a juvenile proceeding is required to make a finding regarding the child's best interests, there is, significantly, no statutory provision that would permit a trial court presiding over a juvenile proceeding to conduct an in camera interview. Nor is there any caselaw, let alone any longstanding caselaw, that permits a trial court in a juvenile proceeding to conduct an in camera interview regarding the child's best interests. Accordingly, there is no authority that permits a trial court presiding over a juvenile matter to conduct in camera interviews, on any subject whatsoever, with the children.

B. ANALYSIS

In the instant matter the trial court was presiding over a termination of parental rights matter and, thus, the juvenile code applied. After hearing the testimony presented by the parties during trial, as well as the testimony produced for purposes of the best interests determination, the trial court announced that it was not ready to make a best interests determination. In lieu of considering the whole record evidence and making a decision, the trial court instead opted to conduct in camera interviews of all the children. It did not indicate that the interviews would be limited to any purpose, but intended that they would be generally used to determine the children's best interests. The trial court conducted these interviews, without objection from either party, and subsequently found that termination was in the children's best interests. The court made no statements on the record reflecting the types of questions the children were asked or the evidence that was

elicited. And, there is no reviewable record whatsoever regarding what occurred during these interviews.

The court erred by conducting the in camera interviews. A trial court presiding over a juvenile matter must abide by the relevant substantive and procedural requirements of the juvenile code. See *In re AP*, 283 Mich App 574, 595; 770 NW2d 403 (2009). It is not free to pick and choose procedures from the CCA and implant them into juvenile proceedings. Stated simply, the CCA's substantive and procedural requirements are not applicable to proceedings conducted under the juvenile code. *Id*. As noted, nothing in the juvenile code, the caselaw, the court rules, or otherwise permits a trial court presiding over a termination of parental rights case to conduct in camera interviews of the children for purposes of determining their best interests. Accordingly, we hold that a trial court presiding over a juvenile proceeding has no authority to conduct in camera interviews of the children involved.

Having concluded that the trial court plainly erred, we must next consider whether that error affected respondents' substantial rights. We conclude that it did. " 'Due process applies to any adjudication of important rights.' " *In re Brock*, 442 Mich 101, 110; 499 NW2d 752 (1993), quoting *In re LaFlure*, 48 Mich App 377, 385; 210 NW2d 482 (1973). It is a flexible concept that calls for procedural protections as the particular situation demands. *In re Brock*, *supra* at 111. Due process requires fundamental fairness, which will involve consideration of the private interest at stake, the risk of an erroneous deprivation of such interest through the procedures used, the probable value of additional or substitute procedures, and the state or government interest, including the function involved and the fiscal or administrative burdens imposed by substitute proce-

dures. *Id.*; *Dobrzenski v Dobrzenski*, 208 Mich App 514, 515; 528 NW2d 827 (1995).

A balancing of these factors dictates the conclusion that the use of unrecorded, in camera interviews in termination proceedings violates parents' due process rights. The private interest at stake in a termination hearing is a parent's fundamental liberty interest in the care and custody of his or her child, *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003), as well as the child's interest in his or her own proper care and custody, see *In re Clausen*, 442 Mich 648, 686; 502 NW2d 649 (1993); *Herbstman v Shiftan*, 363 Mich 64, 67-68; 108 NW2d 869 (1961). The state's interest is aligned with the child's, because it seeks the outcome consistent with the child's best interests. *Molloy*, *supra* at 355-356. Obviously, the stakes for the private parties involved are very high: parents stand to lose their constitutional right to the care and custody of the child forever, while the child risks the loss of the care of his or her natural parents. Further, given the characteristics of the in camera interview, the risk of an erroneous deprivation of these fundamental rights is substantial, while the value of an in camera procedure is low. Unrecorded, off the record, in chambers interviews of children could potentially unduly influence a court's decision and could affect the court's findings, not just with regard to the child's best interests, but also with regard to whether the statutory grounds for termination exist. See *id*. at 359. Not only that, but as we have already noted, such procedures provide no opportunity for cross-examination, impeachment, or meaningful appellate review. See *id.* at 360; *Foskett*, *supra* at 10-11. The risk of error associated with the use of the in camera interview is plainly unwarranted, especially considering the fact that the testimony elicited through such a procedure can be obtained another way at little cost to

the state or the parties involved; for example, through another witness's testimony or by documentary evidence. Accordingly, given the fundamental parental rights involved in termination proceedings, the risk of an erroneous deprivation of those rights given the in camera procedure, and the fact that the information is otherwise easily obtained, it is clear that the child's interest in avoiding the discomfort caused by testifying in open court does not outweigh the parents' interest in having the child testify on the record. Thus, it is our view that the use of an unrecorded and off the record in camera interview in the context of a juvenile proceeding, for whatever purpose, constitutes a violation of parents' fundamental due process rights.[5]

Here, after the trial court conducted its in camera interviews of all the children involved, it terminated respondents' rights to all the children. Respondents had no opportunity to learn what testimony was elicited or to counter the information obtained, and no way of knowing how that information may have influenced the

[5] Moreover, we note that the rationale permitting the use of in camera interviews in the context of custody disputes is simply not applicable to termination cases. In custody disputes, the courts are sympathetic to the child's well-being and employ in camera interviews to spare a child the trauma of testifying in open court regarding the child's parental preference. In a termination case, on the other hand, it makes no logical sense for a court to elicit testimony from a child regarding his/her parental preference. In most termination proceedings, the child has a choice not between parents, but between natural parents and the state. Thus, the question of parental preference is largely irrelevant in the context of a termination case. In addition, the due process test balances out differently because the interests involved, and what is at stake, are different in custody disputes. Namely, the courts of this state have found that the child's interest in avoiding openly voicing a parental preference, in light of the low likelihood of error given the limited nature of the in camera interview employed in the custody context, outweighs the parent's interest in having the testimony occur in open court. See *Molloy*, *supra* at 353-360; *Lesauskis*, *supra* at 816-817.

court's decision. In addition, the trial court's decision to use in camera interviews resulted in an inadequate record for meaningful judicial review at the appellate level. Accordingly, we conclude that the trial court's decision to interview the children in camera fundamentally and seriously affected the basic fairness and integrity of the proceedings below and the decision regarding the children's best interests must be vacated.[6] Further, because we do not know what information the trial court learned during those interviews, we cannot ascertain whether the trial court would be able to set aside any information obtained in making a new determination pursuant to MCL 712A.19b(5). Thus, in the interest of substantial justice, this matter shall be assigned to a different judge on remand, who shall make findings as to each child's best interests before deciding whether termination of respondents' parental rights is warranted. See *People v Evans*, 156 Mich App 68, 72-73; 401 NW2d 312 (1986).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondents next argue that SHC was denied effective assistance of counsel because he was not provided with an interpreter consistent with the Deaf Persons' Interpreters Act, MCL 393.501 *et seq*.,[7] and therefore his lawyer guardian ad litem was ineffective.

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[6] Because the trial court conducted in camera interviews of the children after it found that statutory grounds for termination existed, we vacate only that portion of the trial court's opinion pertaining to its best interests determination.

[7] Specifically, respondents complain that SHC was not provided an interpreter as required by MCL 393.503(1), which provides:

> In any action before a court or a grand jury where a deaf or deaf-blind person is a participant in the action, either as a plaintiff, defendant, or witness, the court shall appoint a qualified interpreter to interpret the proceedings to the deaf or deaf-blind person, to

It is true that children have a right to appointed counsel in child protective proceedings, MCL 712A.17c(7), and that a child's attorney appointed under the juvenile code "has the same duties that any other client's attorney would fulfill when necessary." *In re AMB*, 248 Mich App 144, 224; 640 NW2d 262 (2001). In addition, although child protective proceedings are not criminal in nature, where the right to effective counsel arises from the Sixth Amendment, the Due Process Clause indirectly guarantees effective assistance of counsel in the context of child protective proceedings. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002).

Respondents' argument, however, wrongly assumes that they have standing to challenge the alleged violation of SHC's constitutional rights. Generally, persons do not have standing to assert constitutional or statutory rights on behalf of another person. *People v Wood*, 447 Mich 80, 89; 523 NW2d 477 (1994). And, this Court has held that a respondent in a child protective proceeding lacks standing to challenge the effectiveness of the child's attorney. As this Court stated in *In re EP*, 234 Mich App 582, 598; 595 NW2d 167 (1999), overruled on other grounds 462 Mich 341 (2000):

> [C]onstitutional protections are generally personal and cannot be asserted vicariously, but rather only " 'at the instance of one whose own protection was infringed.' " A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties. Because the right to effective assistance of counsel is a constitutional one, it is personal to the child and respondent may not assert it on behalf of the child. [Citations omitted.]

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interpret the deaf or deaf-blind person's testimony or statements, and to assist in preparation of the action with the deaf or deaf-blind person's counsel.

Accordingly, because respondents do not have standing to challenge the effectiveness of SHC's counsel, we decline to address the merits of this argument.[8]

IV. GROUNDS FOR TERMINATION

Respondents next argue that the trial court erred by finding that the statutory grounds for termination were proven by clear and convincing evidence and that termination was in the children's best interests. We disagree.

In a termination of parental rights proceeding, a trial court must find by clear and convincing evidence that one or more grounds for termination exist and that termination is in the child's best interests. *In re Hansen*, 285 Mich App 158,161; 774 NW2d 698 (2009). We review the trial court's findings of fact under the "clearly erroneous" standard. *In re Archer*, 277 Mich App 71, 73; 744 NW2d 1 (2007). A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *In re JK*, *supra* at 209-210. We give deference to the trial court's special opportunity to judge the credibility of the witnesses. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Here, the trial court found that clear and convincing evidence established grounds for termination under MCL 712A.19b(3)(b)(*i*) and (*ii*), (j), and (k)(*ii*) and (*iii*). Those provisions provide:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *

[8] Nonetheless, even if we were to consider this argument, it would fail. Respondents have not shown that they were prejudiced by the alleged ineffective assistance of SHC's counsel.

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

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

(*ii*) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

(*ii*) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

(*iii*) Battering, torture, or other severe physical abuse.

After our review of the record, we cannot conclude that the trial court erred by finding at least one statutory ground for termination as to both Ronnie and Rosie. The evidence established that Ronnie sexually abused at least two of his daughters. Although Ronnie denied sexually abusing the children, the trial court apparently believed the testimonies of SRC and HRC, both of whom asserted that Ronnie sexually abused them. It is not for this Court to displace the trial court's credibility determination. *In re Miller*, *supra* at 337. Further, Ronnie's treatment of SRC and

HRC is probative of how he will treat their other siblings. *In re Powers*, 208 Mich App 582, 588-589; 528 NW2d 799 (1995). And MCL 712A.19b(3)(b)(*i*) specifically states that it applies to a child on the basis of the parent's conduct toward the child's siblings. Thus, because grounds for termination of Ronnie's parental rights were established under at least MCL 712A.19b(3)(b)(*i*), termination of his rights to all the children is proper.

We also find that clear and convincing evidence supported a statutory ground for termination as to Rosie's parental rights. Specifically, Rosie failed to protect SRC and HRC from the sexual abuse despite knowing about it. Although Rosie denied knowing about the abuse, the evidence established that Rosie gave HRC a pregnancy test when HRC was 11 years old and yelled at Ronnie after she found out that HRC was pregnant. The fact that Rosie also did not question HRC regarding who was the perpetrator, did not seek medical treatment, and did not report the incident to the authorities suggest that Rosie knew the perpetrator was either Ronnie or David and did not wish to reveal that information. Given Rosie's history of hiding the sexual abuse and failing to prevent it, we cannot conclude that the trial court erred by finding that clear and convincing evidence supported grounds for termination of Rosie's parental rights to all the children under MCL 712A.19b(3)(b)(*ii*) and (j).

Having concluded that at least one ground for termination existed, we need not consider the additional grounds upon which the trial court based its decision. See *In re Jenks*, 281 Mich App 514, 518 n 3; 760 NW2d 297 (2008). Accordingly, we conclude that the trial court did not err by finding at least one statutory ground in support of termination as to both Ronnie and Rosie. Finally, because we have vacated the trial court's best interest determination, it is unnecessary for us to consider respondents' arguments related to that issue.

V. REUNIFICATION EFFORTS

Respondents next argue that their due process rights were violated between the time that respondents entered their pleas and the second termination petition was filed because no case service plan was developed pursuant to MCL 712A.18f. We disagree. We review de novo the constitutional question whether the proceedings complied with respondents' due process rights. *In re Rood*, *supra* at 91.

Generally, when a child is removed from the parents' custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan. *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005). MCL 712A.18f provides, in relevant part:

> (1) If, in a proceeding under section 2(b) of this chapter, an agency advises the court against placing a child in the custody of the child's parent, guardian, or custodian, the agency shall report in writing to the court what efforts were made to prevent the child's removal from his or her home or the efforts made to rectify the conditions that caused the child's removal from his or her home. The report shall include all of the following:
>
> (a) If services were provided to the child and his or her parent, guardian, or custodian, the services, including in-home services, that were provided.
>
> (b) If services were not provided to the child and his or her parent, guardian, or custodian, the reasons why services were not provided.
>
> (c) Likely harm to the child if the child were to be separated from his or her parent, guardian, or custodian.
>
> (d) Likely harm to the child if the child were to be returned to his or her parent, guardian, or custodian.
>
> (2) Before the court enters an order of disposition in a proceeding under section 2(b) of this chapter, the agency

> shall prepare a case service plan that shall be available to the court and all the parties to the proceeding.
>
> (3) The case service plan shall provide for placing the child in the most family-like setting available and in as close proximity to the child's parents' home as is consistent with the child's best interests and special needs. The case service plan shall include, but is not limited to, the following:
>
> * * *
>
> (e) Except as otherwise provided in this subdivision, unless parenting time, even if supervised, would be harmful to the child as determined by the court under section 13a of this chapter or otherwise, a schedule for regular and frequent parenting time between the child and his or her parent, which shall not be less than once every 7 days.

Petitioner, however, is not required to provide reunification services when termination of parental rights is the agency's goal. *In re Terry*, 240 Mich App 14, 25 n 4; 610 NW2d 563 (2000); see also MCR 3.977(D). MCL 722.638(1)(a)(*ii*) mandates that petitioner seek termination of parental rights when the parents are suspected of perpetuating sexual abuse upon the minor children or their siblings and when a parent fails to intervene to eliminate that risk. Accordingly, when petitioner filed its first petition to terminate respondent's parental rights on June 11, 2008, it was not required to provide respondents with any reunification services or to provide parenting time consistent with MCL 712A.18f.

At the very first adjudication hearing on July 24, 2008, however, respondent withdrew its termination petition in exchange for respondents' pleas regarding educational neglect and physical abuse. Respondents agreed that visitation would be suspended until appropriate and until each submitted to, and completed, psychological examinations. As part of the plea agreement, petitioner also explicitly agreed to provide re-

spondents services as required by law. At the initial dispositional hearing on August 13, 2008, the psychological exams had not been completed and the hearing was continued to August 28, 2008. At the August 28th hearing, instead of presenting a reunification plan, petitioner indicated that it would be refiling its termination petition, which it refiled on September 5, 2008.

Respondents allege that petitioner was required to provide services, and allow visitation, between the time that the first petition was withdrawn and the second petition was filed consistent with MCL 712A.18f(3)(e). This argument lacks merit. Under normal circumstances, petitioner's withdrawal of its original petition would trigger the administration of services and parenting time would be required, if appropriate. However, respondents specifically agreed as part of their plea agreements that visitation would be suspended until appropriate and that the court would have jurisdiction over the children in the interim, and the agreement indicated that services would be provided. A plea agreement validly entered into binds the parties to abide by its terms. See *People v Arriaga*, 199 Mich App 166, 168; 501 NW2d 200 (1993). Thus, although services would be provided as required by law, respondents had no right to visitation as required under MCL 712A.18f(3)(e). Rather, the parties specifically agreed that visitation was not appropriate. By the time the psychological exams were completed, petitioner's goal had again become termination of respondents' parental rights and, thus, no services or visitation were required. See *In re Terry*, *supra* at 25 n 4.

Respondents also complain that no report was ever filed regarding the likelihood of harm to the children if never returned to their parents or if they remained separated from their parents as required by MCL 712A.18f(1). This argument also fails. When this case was

initiated, petitioner was not bound by the requirements of MCL 712A.18f(1) because its goal was termination of respondents' parental rights. And, to the extent that petitioner was required to file such a report but did not, it is our view that the error was harmless and does not require reversal. Respondents' parental rights were terminated primarily because of Ronnie's sexual abuse of the children and Rosie's failure to prevent the abuse. Thus, none of petitioner's efforts, as documented in a report as required by MCL 712A.18f(1), could have remedied the circumstances that led to termination. Accordingly, petitioner was not required to abide by MCL 712A.18f and, to the extent that petitioner was required to follow its mandate, petitioner's error was harmless.

VI. JURY INSTRUCTIONS

Lastly, respondents contend that the jury failed to follow the trial court's instructions and that reversal of the jury's jurisdictional finding is required. We disagree. We review claims of instructional error de novo. *Burnett v Bruner*, 247 Mich App 365, 375; 636 NW2d 773 (2001). Reversal is only warranted if the failure to reverse would be inconsistent with substantial justice. *Id.*; MCR 2.613(A).

After our review of the record, it is clear that respondents mischaracterize the colloquy that occurred between a juror and the trial court. Once the jury returned to the courtroom, the following exchange occurred:

> *The Court*: Would everyone—everyone can be seated except I would ask the foreperson of the jury to remain standing. Who is our foreperson of the jury? Will you—
>
> *Juror*: We didn't pick one, but I can—
>
> *The Court*: Didn't pick one? You did not follow the Court's instructions. Okay. Nonetheless, and you are going to speak for the jury, and has the jury reached a verdict?

Juror: Yes, your Honor.

The trial court confirmed that five of the six jurors agreed to the verdict, then read the verdict aloud, and the juror confirmed that the verdict was correct.

Given this exchange, there is no indication on the record that the jury did not follow the trial court's substantive instructions. Rather, the record reveals that the only error that occurred was as to who would speak for the jury. The misunderstanding was clear and did not warrant further inquiry from the trial court. Thus, respondents have failed to demonstrate that the jury did not follow the court's instructions or that permitting the verdict to stand would be inconsistent with substantial justice. Reversal is not required.

VII. CONCLUSION

Because the trial court conducted in camera interviews of the children after it found that statutory grounds for termination existed, we vacate only that portion of the trial court's opinion pertaining to its best interests determination and remand for proceedings not inconsistent with this opinion. On remand, this matter shall be assigned to a different judge, who shall make findings as to each child's best interests before deciding whether termination of respondents' parental rights is warranted.

Affirmed in part, vacated in part, and remanded for further proceedings. We do not retain jurisdiction.

PEOPLE v LACALAMITA

Docket No. 286705. Submitted December 10, 2009, at Detroit. Decided December 15, 2009, at 9:20 a.m.

Anthony Lacalamita III was convicted by a jury in the Oakland Circuit Court, Rudy J. Nichols, J., of one count of first-degree premeditated murder, two counts of assault with intent to commit murder, and three counts of possession of a firearm during the commission of a felony. Defendant appealed, arguing that the verdict was against the great weight of the evidence, that the great weight of the evidence supported a verdict of guilty but mentally ill, and that the trial court erred by denying defendant's request to present a surrebuttal argument during closing arguments.

The Court of Appeals *held*:

1. There was conflicting evidence regarding defendant's mental illness and legal insanity and the jury properly exercised its authority to weigh the evidence, assess credibility, and resolve the conflicting evidence. The evidence presented did not preponderate heavily against the jury's finding of legal sanity and it would not be a miscarriage of justice to allow the verdict to stand. Conflicting testimony is an insufficient ground for granting a new trial.

2. The trial court did not abuse its discretion by denying defendant's request to present a surrebuttal argument. MCR 6.414(G) references only the prosecution's ability to make a rebuttal argument.

Affirmed.

1. MOTIONS AND ORDERS — NEW TRIAL — CONFLICTING TESTIMONY.

Conflicting testimony presented during a trial is an insufficient ground for granting a new trial.

2. TRIAL — CLOSING ARGUMENTS — REBUTTAL ARGUMENTS — SURREBUTTAL ARGUMENTS.

MCR 6.414(G) references only the prosecution's ability to make a rebuttal argument during closing arguments and does not provide for a surrebuttal argument by the defendant.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *John S. Pallas*, Chief, Appellate Division, and *Marilyn J. Day*, Assistant Prosecuting Attorney, for the people.

Peter Ellenson for defendant.

Before: DONOFRIO, P.J., and SAWYER and OWENS, JJ.

PER CURIAM. Defendant appeals as of right his jury trial convictions of one count of first-degree premeditated murder, MCL 750.316, two counts of assault with intent to commit murder, MCL 750.83, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. Because the jury's verdict was not against the great weight of the evidence and because the trial court did not abuse its discretion by denying defendant's request to make a surrebuttal argument, we affirm.

This case arises from the fatal shooting of Madeline Kafoury and the nonfatal shootings of Paul Riva and Alan Steinberg on April 9, 2007, at the offices of Gordon Advisers in Troy, Michigan. Steinberg testified that he met defendant while working at Gordon Advisers because he had supervised defendant on a couple of audits. According to Steinberg, defendant's employment was terminated by Gordon Advisers a few days before the shootings. On the day of the incident, Steinberg was in his office at approximately 10:00 a.m. While Steinberg was standing in his office, he saw defendant standing in his doorway. Defendant, who was holding a shotgun, said hello and asked Steinberg to sit down and then asked whether Steinberg would like to be shot. Steinberg approached defendant and told him he could not have a gun in the office. Defendant then cocked the

gun, and when Steinberg grabbed it, defendant shot Steinberg in the upper thigh.

Riva, a partner at Gordon Advisers, testified that Kafoury was a receptionist at Gordon Advisers and was the receptionist on the day of the incident. Around 10:00 a.m. on the morning of the incident, Kafoury came into Riva's office and told him that defendant wanted to see the partners in the conference room. Riva walked out of his office and saw defendant, who pointed his gun at Riva and shot him in the chest. Defendant also shot Kafoury. Defendant then left the building and headed north on I-75 where he was eventually apprehended by the police.

Defendant first argues that the verdict was against the great weight of the evidence because the evidence clearly showed that he was legally insane at the time of the offense. We review for an abuse of discretion a trial court's grant or denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Generally, a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence. *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998). "Conflicting

testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Further, the resolution of credibility questions is within the exclusive province of the jury. *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993).

As our Supreme Court explained in *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001):

> Legal insanity is an affirmative defense requiring proof that, as a result of mental illness . . . the defendant lacked "substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law." MCL 768.21a(1). Importantly, the statute provides that "[t]he *defendant* has the burden of proving the defense of insanity by a preponderance of the evidence." MCL 768.21a(3). [Emphasis in original.]

A "mental illness" is defined as "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 330.1400(g).

Where expert testimony is presented in support of an insanity defense, the probative value of the expert's opinion depends on the facts on which it is based. *People v Dobben*, 440 Mich 679, 697; 488 NW2d 726 (1992). Further, a trial court must generally defer to a jury's determination, unless " 'it can be said that directly contradictory testimony was so far impeached that it "was deprived of all probative value or that the jury could not believe [the testimony]," or [the testimony] contradicted indisputable physical facts or defied physical realities . . . .' " *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003), quoting *Lemmon*, *supra* at 645-646.

Here, Dr. Norman Miller, an expert for the defense, concluded, on the basis of his meetings with defendant

and a review of defendant's mental health history, that defendant was mentally ill and legally insane at the time of the incident. However, Dr. Carol Holden and Dr. Charles Clark, expert witnesses for the prosecution, each concluded that defendant was not legally insane or even mentally ill at the time of the incident. Dr. Holden and Dr. Clark both met with defendant and reviewed eyewitness accounts of the shooting, as well as reviewed defendant's past mental health history.

Dr. Miller opined that defendant was in a manic and delusional state at the time of the incident and believed that he was involved in a battle of good and evil. However, both Dr. Holden and Dr. Clark found no evidence that defendant was in a manic state because of his organized and systematic thinking and the calm and deliberate way in which he carried out the shootings. Dr. Holden and Dr. Clark both acknowledged that defendant had a long history of mental health treatment, but, unlike Dr. Miller, both concluded that defendant was not suffering from a mental illness as defined by MCL 330.1400(g) at the time of the incident. Rather, they each believed that defendant suffered from a personality disorder. Despite Dr. Miller's contradictory opinions, the testimony of Dr. Clark and Dr. Holden was not impeached to the extent that it was deprived of all probative value or that the jury could not believe it. Ultimately there was conflicting evidence regarding defendant's mental illness and legal insanity, and the jury exercised its authority to weigh the evidence, assess credibility, and resolve the conflicting evidence. The evidence presented did not preponderate heavily against the jury's finding of legal sanity and it would not be a miscarriage of justice to allow the verdict to stand.

Alternatively, defendant contends that the great weight of the evidence supported a verdict of guilty but mentally ill. However, as analyzed above, the prosecu-

tion and defense presented the jury with conflicting evidence about whether defendant was even mentally ill under the statute. The jury opted not to find defendant guilty but mentally ill. Again, conflicting testimony is an insufficient ground for granting a new trial, *Lemmon*, *supra* at 647, and the jury's verdict was not against the great weight of the evidence.

Finally, defendant argues that the trial court erred by denying defendant's request to present a surrebuttal argument because defendant had the burden to prove the only disputed issue of whether he was legally insane. Defendant contends that the trial court's decision denied him his constitutional right to present a defense and to make a closing argument. This Court reviews the trial court's ruling with regard to closing arguments for an abuse of discretion. *Wilson v Gen Motors Corp*, 183 Mich App 21, 27-28; 454 NW2d 405 (1990).

Further, " '[i]nterpretation of a court rule is a question of law that this Court reviews de novo.' " *People v Buie*, 285 Mich App 401, 416; 775 NW2d 817 (2009), quoting *Wilcoxon v Wayne Co Neighborhood Legal Services*, 252 Mich App 549, 553; 652 NW2d 851 (2002). When interpreting a court rule, this Court applies " 'the same rules as when we engage in statutory interpretation.' " *Id*. The goal of rule interpretation " 'is to give effect to the intent of the authors.' " *Id*. When interpreting a court rule, the first step is to consider the language of the rule. *Id*. " 'If the language of the court rule is clear and unambiguous, then no further interpretation is required or allowed.' " *Id*. " '[W]hen reasonable minds can differ on the meaning of the language of the rule, then judicial construction is appropriate.' " *Id*.

MCR 6.414(G) provides:

> After the close of all the evidence, the parties may make closing arguments. The prosecutor is entitled to make the

> first closing argument. If the defendant makes an argument, the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments.

The plain language of the relevant court rule references only the prosecution's ability to make a rebuttal argument. Further, as the trial court noted, the prosecution's burden to prove the elements of the crime beyond a reasonable doubt was still greater than defendant's burden to prove insanity by a preponderance of the evidence. Therefore, on the basis of the plain language of MCR 6.414(G) and the fact that the prosecution carried the heavier burden, we conclude that the trial court's decision to prohibit defendant from making a surrebuttal argument was not an abuse of discretion. *Wilson, supra* at 27-28. In addition, defendant's constitutional arguments are misplaced because he was, in fact, permitted to present an insanity defense and was permitted to make a closing argument.

Affirmed.

PEOPLE v DIMOSKI

Docket No. 286876. Submitted December 10, 2009, at Detroit. Decided December 17, 2009, at 9:00 a.m.

Slobodan B. Dimoski pleaded guilty in the Macomb Circuit Court to a charge of fraudulent use of funds provided under a building contract in violation of MCL 570.152. The court, Peter J. Maceroni, J., sentenced defendant to three years' probation and ordered him to pay restitution of $120,000 to the victim. Defendant subsequently moved to reduce the amount of restitution by the amount of a civil judgment that the victim obtained against him, which he had not yet paid. The court granted the motion, and the prosecution appealed by delayed leave granted.

The Court of Appeals *held*:

There is a distinction between the statutory scheme for restitution under the Crime Victim's Rights Act, MCL 780.751 *et seq*., and the statutory scheme for civil damages. Restitution is not a substitute for civil damages, and a civil judgment alone provides no basis for reducing a restitution award. MCL 780.766 was the restitution provision of the Crime Victim's Rights Act relied on in this case. MCL 780.766(2) mandates full restitution. Accordingly, the trial court erred when it reduced the amount of restitution by the amount of the unpaid civil judgment. The victim will have the benefit of both a civil judgment and a restitution order to obtain monetary relief from defendant. The availability of two methods does not mean the victim will have a double recovery, but merely increases the probability that defendant will be forced to pay for his wrongdoing.

Order reducing restitution reversed in part and case remanded.

CRIMINAL LAW — RESTITUTION — CRIME VICTIM'S RIGHTS ACT — VICTIMS OF CRIME — CIVIL JUDGMENTS — REDUCTION OF RESTITUTION AMOUNT.

A court may not reduce the amount of restitution a defendant is ordered to pay a crime victim by the amount of an unpaid civil judgment the victim obtained against the defendant (MCL 780.766).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Robert Berlin*, Chief Appellate Attorney, and *Margaret DeMuynck*, Assistant Prosecuting Attorney, for the people.

Before: DONOFRIO, P.J., and SAWYER and OWENS, JJ.

PER CURIAM. The prosecution appeals by delayed leave granted an opinion and order reducing the amount of defendant's court-ordered restitution of $120,000 by the amount of a civil judgment for $104,224.31 that the victim obtained against defendant. We reverse and remand.

I. FACTS

Defendant was charged with fraudulent use of funds provided under a building contract, MCL 570.152, and larceny by conversion of property valued at $20,000 or more, MCL 750.362. Pursuant to a plea agreement reached in March 2005, defendant pleaded guilty to the former charge, and the plea was taken under advisement for 11 months pursuant to MCL 771.1. Defendant was required to make monthly payments on the complainant's mortgage. If he complied, the plea would be vacated and he would be allowed to plead guilty to larceny by conversion of property valued at $200 or more but less than $1,000. However, defendant did not comply, and in September 2007, the trial court set aside the original plea.

On September 14, 2007, defendant pleaded guilty of fraudulent use of funds provided under a building contract, MCL 570.152, and was sentenced to three years' probation. The trial court referred the issue of restitution to a dispute resolution center. The victim,

Zora Radosavac, and defendant agreed that defendant would pay restitution of $120,000, with a payment plan to be determined by the trial court. The mediation agreement was "incorporated as Restitution Order."

Defendant later moved to reduce the amount of his restitution. In defendant's brief in the trial court, he argued that the amount of restitution should be reduced by $104,224.31, the amount of a civil judgment that the complainant had obtained against him, and further reduced by the amounts of other payments he had made that are not pertinent to this appeal, leaving a balance of $2,775.69. He argued that failure to reduce the restitution order would result in a windfall for the complainant.

The prosecution disagreed with defendant's request for credit for the civil judgment and argued that the law established the victim's right to restitution. According to the prosecution, a civil judgment should not be construed as a waiver of the mandated right to restitution.

The trial court agreed with defendant and granted his motion to reduce the amount of his restitution because, it concluded, the "directive [in MCL 780.766(8)] is clear."

II. STANDARD OF REVIEW

This Court generally reviews an order of restitution for an abuse of discretion. *People v Cross*, 281 Mich App 737, 739; 760 NW2d 314 (2008); *In re McEvoy*, 267 Mich App 55, 59; 704 NW2d 78 (2005). But when the question of restitution involves a matter of statutory interpretation, the issue is reviewed de novo as a question of law. *Cross*, 281 Mich App at 739; *In re McEvoy*, 267 Mich App at 59.

III. ANALYSIS

The prosecution argues that the trial court erred in reducing the amount of restitution defendant was ordered to pay by the amount of a civil judgment that the complainant had obtained against defendant. We agree. This issue is one of first impression.

The trial court relied on MCL 780.766(2), (8), (9), and (13), which provide:

> (2) Except as provided in subsection (8), when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate. . . .
>
> * * *
>
> (8) The court shall order restitution to the crime victim services commission or to any individuals, partnerships, corporations, associations, governmental entities, or other legal entities that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss. The court shall also order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the crime. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation. However, an order of restitution shall require that all restitution to a victim or victim's estate under the order be made before any restitution to any other person or entity under that order is made. *The court shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive compensation for that loss*, and the court shall state on the record with specificity the reasons for its action.

(9) *Any amount paid to a victim or victim's estate under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim or the victim's estate* in any federal or state civil proceeding and shall reduce the amount payable to a victim or a victim's estate by an award from the crime victim services commission made after an order of restitution under this section.

* * *

(13) An order of restitution entered under this section remains effective until it is satisfied in full. An order of restitution is a judgment and lien against all property of the defendant for the amount specified in the order of restitution. The lien may be recorded as provided by law. An order of restitution may be enforced by the prosecuting attorney, a victim, a victim's estate, or any other person or entity named in the order to receive the restitution in the same manner as a judgment in a civil action or a lien. [Emphasis added.]

The trial court focused on the emphasized portion of subsection (8), although it mistakenly attributed the quotation to subsection (9). The court stated:

> Under these circumstances, the Court is guided by the instruction of (8), (9), and (13) relative to the amount to be received under the civil judgment. Insofar as the prior judgment was entered by a colleague of this Court, it strikes the Court as entirely duplicative to, in effect, compensate the victim twice for the harm inflicted, *Bell*[1] notwithstanding. As emphasized above, the court "shall not order restitution to be paid to a victim . . . if the victim . . . has received **or is to receive compensation for that loss."** MCL 780.766(9) [sic]. Hence, the directive is clear. The prosecutor does agree, and the Court hereby orders, that the $120,000.00 amount should also be reduced by three $1,000.00 mortgage payments that defen-

[1] *People v Bell*, 276 Mich App 342; 741 NW2d 57 (2007).

> dant made on the victim's behalf, as well as by $10,000 he already paid to the victim. Accordingly, the amount of restitution shall be offset by the amount to the prior judgment entered ($104,224.31) . . . .

In *In re McEvoy*, 267 Mich App at 66-67, this Court recognized the distinction between the statutory schemes for restitution and civil damages. A minor admitted several charges against him for vandalizing a school. The trial court ordered his parents to pay restitution to the insurer that paid for the damage. On appeal, the parents argued in part that the parental liability statute, MCL 600.2913, which limited their liability in a civil action to $2,500, should apply to their liability for the restitution ordered under the juvenile code, MCL 712A.1 *et seq*.[2] This Court disagreed and explained that the setoff provisions in MCL 780.794(9) and MCL 712A.30(9), which are the same as that in MCL 780.766(9),

> clearly recognize[] that the statutory scheme for restitution is separate and independent of any damages that may be sought in a civil proceeding. This Court has repeatedly recognized that restitution is not a substitute for civil damages. *People v Orweller*, 197 Mich App 136, 140; 494 NW2d 753 (1992); *People v Tyler*, 188 Mich App 83, 89; 468 NW2d 537 (1991). Accordingly, we conclude that the juvenile code does not limit the amount of restitution for which a supervisory parent may be held liable. [*In re McEvoy*, 267 Mich App at 67.]

Although the issue in that case was different than the issue before the Court in this matter, the recognition of the distinction between the statutory schemes for restitution and damages sought in a civil proceeding is instructive.

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[2] The statutory scheme for restitution in the juvenile code is the same as that in the Crime Victim's Rights Act. *In re McEvoy*, 267 Mich App at 63.

Because the trial court's decision was premised on MCL 780.766(8), we find helpful a discussion of the purposes of the predecessor of this provision originally enacted in 1985 PA 87, which was then located at MCL 780.766(10) and provided:

> The court shall not order restitution with respect to a loss for which the victim or victim's estate has received or is to receive compensation, including insurance, except that the court may, in the interest of justice, order restitution to the crime victims compensation board or to any person who has compensated the victim or victim's estate for such a loss to the extent that the crime victims compensation board or the person paid the compensation. An order of restitution shall require that all restitution to a victim or victim's estate under the order be made before any restitution to any other person under that order is made.

In *People v Washpun*, 175 Mich App 420, 425-426; 438 NW2d 305 (1989), this Court explained the two purposes of the provision as follows:

> Two purposes behind the Legislature's inclusion of [MCL 780.766(10)] may be fairly readily discerned. One apparent legislative intent behind subsection (10) is to avoid ordering restitution which would doubly compensate a victim. The abhorrence of double compensation is well established in our jurisprudence. The Legislature wanted to place the financial burden of crime on the criminal, while fully, but not overly, compensating the victim and reimbursing any third party, such as an insurer, who compensated the victim on an interim basis. . . .
>
> * * *
>
> The second principal effect of subsection (10) would seem to be to prevent application of the "collateral source doctrine" to crime victims' restitution situations. Without such a statutory directive, the victim could recoup damages from the criminal without regard to previous payment

> from insurance companies or other ancillary sources. By enacting subsection (10), the Legislature limits restitution to those who have losses which are, as of the time restitution is paid, *still* out of pocket. [Citations omitted.]

Like the present case, *United States v Bramson*, unpublished opinion of the United States Court of Appeals for the Fourth Circuit, decided February 24, 1997 (Docket No. 96-4151); 107 F3d 868 (CA 4, 1997),[3] cert den 521 US 1127 (1997), involved the effect of an unpaid civil judgment on an order of restitution. The defendant was convicted of money laundering and ordered to make restitution in the amount of $3.6 million. After he was sentenced, the victim obtained a civil judgment against him for $35.6 million in damages for insurance fraud. The defendant argued that he was entitled to have the restitution order modified by reducing the restitution amount by the amount of the unpaid civil judgment in order to comply with 18 USC 3663(e)(1). The court disagreed, stating:

> [J]ust because the victims have a valid district court judgment does not mean that they will receive compensation. The 'is to receive' language in 18 U.S.C. § 3663(e)(1) requires actual receipt or certainty regarding receipt. Mere speculation that a victim will receive compensation is insufficient to require a modification of a restitution award. [*Bramson*, unpub op at 4.]

The court noted that the authorities cited by the defendant concerned amounts that were actually recovered from a civil action, not amounts that may potentially be recovered. "Thus, the civil judgment alone provides no basis for reduction in the restitution award." *Id*. The court also explained the practical

[3] The disposition is reflected in a table. The text of the unpublished decision is available on Westlaw and Lexis.

benefit of allowing an order of restitution as a means of recovery in addition to a civil judgment:

> In addition, restitution is appropriate in the instant case despite the civil order because it is more likely that money will be recovered as a result of the restitution order. As a practical matter, restitution is much more easily collected by probation officials than by private citizens with a civil judgment, since probation officials are in a far better position to monitor the Appellant's financial status. [*Id*. at 5 n 2.]

In light of the recognized distinction between the statutory scheme for restitution and civil damages, *In re McEvoy*, 267 Mich App at 67, and the statutory mandate for "full restitution," MCL 780.766(2), we hold that the trial court erred in reducing the amount of restitution by the amount of the unpaid civil judgment. Although the victim will have the benefit of both a civil judgment and a restitution order to obtain monetary relief from the defendant, the availability of two methods does not mean that the victim will have a double recovery, but merely increases the probability that the perpetrator of a crime will be forced to pay for the wrongdoing committed.

We reverse the trial court's order to the extent that it reduced the amount of restitution by the amount of the unpaid civil judgment and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

AL-MALIKI v LaGRANT

Docket No. 287641. Submitted December 10, 2009, at Detroit. Decided December 22, 2009, at 9:00 a.m.

Susan E. Al-Maliki brought an action in the Wayne Circuit Court, Warfield Moore, Jr., J., against Gloria J. LaGrant, seeking damages for injuries sustained in an automobile accident. Defendant moved for summary disposition, arguing solely that plaintiff's injuries did not satisfy the serious impairment of body function threshold established in *Kreiner v Fischer*, 471 Mich 109 (2004). Defendant conceded the issue of causation for purposes of her motion. The court raised the issue of causation sua sponte during the hearing on the motion and ultimately granted summary disposition for defendant on the ground that plaintiff had not presented evidence that the automobile accident caused her claimed injuries. The court did not reach the merits of the issue regarding whether plaintiff's injuries constituted a serious impairment of a body function. Plaintiff appealed, alleging that the trial court erred by failing to provide notice and a reasonable opportunity to be heard regarding the issue of causation and by denying plaintiff's motion for reconsideration.

The Court of Appeals *held*:

The basic requirements of due processes in a civil case, notice and a meaningful opportunity to be heard, were not satisfied in this case. The trial court had the responsibility to provide plaintiff the opportunity to be heard on the issue once the court decided to bring up the issue sua sponte. The court did not fulfill its responsibility.

Reversed and remanded.

Law Offices of Ziad A. Fadel, P.C. (by *Ziad A. Fadel*), for plaintiff.

James C. Rabaut & Associates (by *Suzanne M. Kalka*) for defendant.

Before: DONOFRIO, P.J., and SAWYER and OWENS, JJ.

PER CURIAM. In this action predicated on the no-fault act, MCL 500.3101 *et seq*., plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Because the basic requirements of notice and a meaningful opportunity to be heard have not been satisfied in this case, we reverse and remand.

This case arose out of an October 7, 2006, car accident in Livonia, Michigan, where plaintiff's vehicle was struck from the rear by a vehicle driven by defendant while plaintiff was waiting at a red light. Plaintiff filed a complaint alleging that she suffered serious impairment of body function including neck pain, muscle spasms, and reduced range of motion in her neck as a result of defendant's negligent driving. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing solely that plaintiff's injuries did not satisfy the serious impairment threshold.[1] At oral argument on the motion, the trial court raised the issue of causation sua sponte and ultimately granted summary disposition on the ground that plaintiff had not presented evidence that the automobile accident caused her claimed injuries without reaching the merits of whether plaintiff's injuries constituted a serious impairment of body function.

On appeal, plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. A trial court's decision whether to grant a motion for summary disposition is a question of law that is reviewed de novo on appeal. *Brown v Brown*, 478 Mich

[1] Defendant actually filed two motions for summary disposition. One motion alleged plaintiff was the possessory owner of the uninsured car at the time of the accident, and is therefore barred from benefits by MCL 500.3113. The trial court denied this motion and it is not at issue on appeal.

545, 551; 739 NW2d 313 (2007). If the motion is brought under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* at 551-552. Where, as here, "the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party 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." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A motion based on MCR 2.116(C)(10) is properly granted when the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Brown*, *supra* at 552.

Further, when a court reviews a motion for summary disposition, MCR 2.116(I)(1) provides that "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." Under this rule, a trial court has authority to grant summary disposition sua sponte, as long as one of the two conditions in the rule is satisfied. *Boulton v Fenton Twp*, 272 Mich App 456, 462-463; 726 NW2d 733 (2006).

In this case, plaintiff's claim of error is, in essence, a claim of procedural due process error. Whether a party has been afforded due process is a question of law. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005). Due process is a flexible concept, the essence of which requires fundamental fairness. *Id*. at 159. The basic requirements of due process in a civil case include notice of the proceeding and a meaningful opportunity to be heard. *Id*. Where a court considers an issue sua

sponte, due process can be satisfied by affording a party an opportunity for rehearing. *Paschke v Retool Industries (On Rehearing)*, 198 Mich App 702, 706; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994).

Under MCR 2.119(F), a trial court has discretion to grant rehearing or reconsideration of a decision on a motion. "The rule allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000). The trial court may even give a party a second chance on a previously decided motion. *Id*. Additionally, in *Boulton*, *supra* at 463-464, this Court determined that any error by a court in granting summary disposition sua sponte without affording a party an adequate opportunity to brief an issue and present it to the court may be harmless under MCR 2.613(A), if the party is permitted to fully brief and present the argument in a motion for reconsideration.

Here, the causation issue on which the trial court relied to grant defendant's motion for summary disposition was indeed considered sua sponte by the trial court, because the issue of causation was not included in defendant's motion. The sole argument in defendant's brief in support of her motion was that plaintiff's neck injuries did not amount to a serious impairment of body function and did not satisfy the threshold injury standard announced in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). In fact, a careful reading of defendant's brief in support of the motion shows that defendant even conceded the issue of causation for purposes of her motion for summary disposition. The brief states as follows:

> The factual dispute concerning the nature and extent of the Plaintiff's injuries in this case is not material to the

> determination of whether the plaintiff has suffered a serious impairment of the body function, for purposes of this argument. Even if the Defendant considers the worst-case scenario, assuming for purposes of this part of the motion that the Plaintiff's complaints are objectively manifested and related to this automobile accident, her general ability to lead her normal life **has still not been affected**.

Thus, the record clearly reveals that plaintiff had no notice that the causation issue would be raised at the summary disposition motion hearing and rightly should have been surprised by the trial court's inquiry at the motion hearing regarding causation.

Despite the facts that defendant conceded causation for purposes of her *Kreiner* motion and plaintiff lacked notice, during oral argument on the motion, the trial court posed the question whether plaintiff's injuries were caused by the car accident. Defense counsel stated, "There's nothing that we have to show this Court that there's any relationship to her diagnosed condition eight months post accident." Defense counsel also argued that plaintiff "hasn't shown the approximate [sic] causal relationship of the condition diagnosed and found eight months later as being related to the date of the accident." Plaintiff's counsel responded to the causation issue by quoting the following from a report prepared by Steve Geiringer, M.D., after plaintiff reported to his office for an independent medical examination:

> "It would appear that the primary musculoskeletal problem still causing symptoms is residual muscle tightness in the neck, although it is very possible that the MVA [motor vehicle accident] led to or exacerbated a cervical disc condition in the earlier 'stages.' "

The trial court immediately granted defendant's motion stating, "No, sir. . . . Sir, it's not there, just not."

Plaintiff's counsel responded by asking the trial court if he could "produce to you a report from Dr. Sabana Khan." The trial court answered, "Well, you should have done that, sir. It's too late now." Plaintiff's counsel again pleaded with the court stating, "There is in fact a report, Judge. I can get that. This issue is not original." The trial court did not allow plaintiff's counsel the opportunity he requested to present more evidence and instead granted defendant's motion for summary disposition and entered an order dismissing plaintiff's claim. The order stated, in part, "IT IS FURTHER ORDERED that Defendant's Motion for Summary Disposition, pursuant to the *Kreiner* decision, be, and is hereby granted for the reasons set forth by this Court on the record." The language on the order that the trial court granted the motion based on *Kreiner* is suspect because the trial court never evaluated the *Kreiner* factors at oral argument and based its decision to grant defendant's motion only on the causation issue. We note that a substitute trial judge signed the order in the stead of the trial judge who actually heard the oral argument and granted defendant's motion.

Shortly thereafter, plaintiff filed a motion for reconsideration. Plaintiff included with the motion a letter from Dr. Nicholas S. Griffiths, plaintiff's chiropractor, stating, "Mrs. Al-Maliki's condition and injuries are directly related to the automobile collision she was in." The trial court denied plaintiff's motion for reconsideration without explanation.

Our review of the record reveals that the basic requirements of notice and a meaningful opportunity to be heard have not been satisfied in this case. *Reed, supra* at 157. The trial court decided the matter on an issue not before the court at that juncture because defendant clearly conceded causation for purposes of

her *Kreiner* motion. We are mindful of the fact that the trial court has the authority to grant summary disposition sua sponte under MCR 2.116(I)(1). However, the trial court may not do so in contravention of a party's due process rights. *Boulton, supra* at 462-463. When the trial court decided to bring up the issue of causation at the motion hearing, the trial court then had the responsibility to provide plaintiff the opportunity to be heard on the issue. The record reveals that the trial court was dismissive of plaintiff's counsel and did not consider evidence plaintiff attempted to provide orally regarding causation in an attempt to avoid summary disposition. Also, plaintiff's counsel sought time to present documentary evidence establishing causation since causation had now become an issue in the summary disposition stage of litigation. The trial court denied plaintiff time to present the evidence stating only that it was "too late now" without further explanation. And when plaintiff provided new evidence regarding causation at the time she moved for reconsideration, the trial court did not credit the evidence, finding that the motion for reconsideration merely presented the same issue ruled on by the court when granting summary disposition. For these reasons we conclude that procedural error occurred because the basic requirements of notice and a meaningful opportunity to be heard have not been satisfied in this case.[2]

Reversed and remanded. We do not retain jurisdiction. Costs to plaintiff.

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[2] We offer no opinion regarding the merits of plaintiff's no-fault claim.

TAYLOR v KENT RADIOLOGY, PC

Docket No. 286078. Submitted September 9, 2009, at Grand Rapids. Decided December 22, 2009, at 9:05 a.m.

Richard and Karen Taylor brought a medical malpractice action in the Kent Circuit Court against Kent Radiology, P.C., Louis Bixler, M.D., and Trinity Health-Michigan, alleging that Bixler had breached the standard of care applicable to a radiologist by failing to diagnose a fracture that Richard Taylor sustained in a fall and that the other defendants were vicariously liable for the malpractice. Plaintiffs subsequently stipulated the dismissal of Trinity. The jury returned a verdict in plaintiffs' favor, awarding Richard Taylor past and future economic damages, but did not award Karen Taylor damages. After the court, Dennis C. Kolenda, J., entered a judgment, plaintiffs moved for additur, and defendants moved for remittitur, judgment notwithstanding the verdict, or a new trial. Mark Trusock, J., who replaced retired Judge Kolenda, heard the motions and denied them. Defendants appealed, and plaintiffs cross-appealed.

The Court of Appeals *held*:

1. Plaintiffs alleged a traditional medical malpractice claim, rather than a claim for a lost opportunity to achieve a better result, and did not amend or seek to amend their complaint to include a lost-opportunity claim. Thus, the second sentence of MCL 600.2912a(2), which requires a plaintiff seeking recovery for the loss of an opportunity to survive or achieve a better result to prove that "the opportunity was greater than 50%," did not apply in this action, and plaintiffs were not required to present evidence about the degree by which Bixler's malpractice affected Richard Taylor's opportunity for a better outcome. Plaintiffs only had to prove by a preponderance of the evidence that Bixler's failure to diagnose the fracture injured Taylor. Plaintiffs presented evidence that Taylor's fracture worsened between Bixler's examination and the time it was properly diagnosed. The aggravation of the fracture made reconstructive surgery harder to perform and necessitated a second surgery. There was also evidence that the delayed treatment accelerated the rate of development and severity of Taylor's arthritis. The trial court did not err by denying defendants'

motions for a directed verdict and judgment notwithstanding the verdict. Nor did the trial court err when it refused to instruct the jury on the burden of proof applicable to lost-opportunity claims.

2. The trial court did not err by directing a verdict in plaintiffs' favor on the issue of comparative negligence. Plaintiffs did not sue to recover damages for the original foot injury; rather, they sought damages for the aggravation of that injury. The statutes imposing comparative fault only require the allocation of liability in proportion to the fault for the injury for which the plaintiff is seeking damages. In this case, plaintiffs could only be allocated liability to the extent that they were at fault for the aggravation of the original foot injury, but there was no evidence that Taylor bore any fault for the aggravation. Even assuming that the jury should have been permitted to consider Taylor's possible fault for the original injury, there was no evidence showing that he was at fault and the doctrine of res ipsa loquitor did not establish an inference of negligence.

3. The trial court did not err by characterizing the costs to hire persons to perform household tasks that Richard Taylor would otherwise have performed as economic losses or permitting plaintiffs to characterize them as such and did not abuse its discretion by allowing plaintiffs' expert witness to testify about the future costs to replace services.

4. The trial court did not err by denying defendants' motion for a new trial or remittitur. Defendants argued that the award of damages was excessive. A court should exercise the power of remittitur with great restraint, examining the evidence in the light most favorable to the nonmoving party to determine whether the evidence supported the jury's award. If the award falls reasonably within the range supported by the evidence and within the limits of what reasonable minds would consider just compensation, the court should not disturb it. Moreover, the jury's decision to not award past economic damages for lost income did not preclude an award for future lost income. The amount of future economic damages the jury awarded fell reasonably within the range supported by the evidence.

5. The trial court did not abuse its discretion when it refused to request that Judge Kolenda be recalled to hear plaintiffs' motion for additur. There was no indication that Judge Trusock was incapable of deciding the motion on the merits and according to law and no evidence that the request would have been granted or that Judge Kolenda would have been available.

6. The trial court did not abuse its discretion by denying plaintiffs' motion for additur or a new trial. Plaintiffs argued that

the award of damages was inadequate. MCR 2.611(A)(1)(d) and (e) permit a court to grant a new trial when the verdict is clearly or grossly inadequate or excessive or against the great weight of the evidence. Alternatively, if the only error in the trial was the inadequacy or excessiveness of the verdict, MCR 2.611(E)(1) permits the court to deny the motion for a new trial on the condition that the nonmoving party consent to the entry of a judgment in the amount that the court finds to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support. Whether the verdict is clearly or grossly inadequate or excessive or against the great weight of the evidence depends on the nature of the evidence adduced at trial. The plaintiff must prove each element of his or her case, and damages such as those for medical expenses are distinct from damages for such things as pain and suffering. The jury is free to credit or discredit any evidence, and the jury is not required to award one item of damages merely because it awarded another item. Plaintiffs argued that the decision to not award noneconomic damages was inconsistent with the jury's award of economic damages and against the great weight of the evidence of noneconomic damages presented. Plaintiffs, however, presented little testimony concerning noneconomic damages.

Affirmed.

K. F. KELLY, J., concurred in the result only.

1. NEGLIGENCE — MEDICAL MALPRACTICE — LOSS OF OPPORTUNITY TO SURVIVE OR ACHIEVE A BETTER RESULT.

The second sentence of MCL 600.2912a(2), which requires a plaintiff seeking recovery for the loss of an opportunity to survive or achieve a better result to prove that "the opportunity was greater than 50%," does not apply to traditional claims of medical malpractice that allege that a physician's breach of the standard of care proximately caused a specific, concrete injury.

2. NEGLIGENCE — MEDICAL MALPRACTICE — DAMAGES — ECONOMIC LOSSES — REPLACEMENT SERVICES.

Costs incurred to replace services, including substitute services for domestic or household tasks, that the injured person would have performed are economic losses recoverable in a medical malpractice action (MCL 600.1483[2], 600.2945[c], 600.6305[1]).

3. JUDGMENTS — VERDICTS — INADEQUATE VERDICTS — NEW TRIAL — ADDITUR

A trial court may grant a new trial when the verdict is clearly or grossly inadequate or excessive or is against the great weight of the

> evidence; alternatively, if the only error in the trial was the inadequacy or excessiveness of the verdict, the court may deny the motion for a new trial on the condition that the nonmoving party consent to the entry of a judgment in the amount that the court finds to be the lowest (if the verdict was inadequate) or the highest (if the verdict was excessive) amount the evidence will support; whether the jury's verdict is clearly or grossly inadequate or excessive or against the great weight of the evidence depends on the nature of the evidence adduced at trial, and the court will defer to the jury's judgment on the weight accorded the evidence concerning damages (MCR 2.611[A][1][d] and [e], 2.611[E][1]).

Gruel Mills Nims & Pylman LLP (by *Scott R. Melton* and *William F. Mills*) for Richard and Karen Taylor.

Berry, Johnston, Sztykiel, Hunt & McCandless, P.C. (by *Steven C. Berry* and *Christopher S. Berry*), for Kent Radiology, P.C., and Louis Bixler, M.D.

Before: M. J. KELLY, P.J., and K. F. KELLY and SHAPIRO, JJ.

PER CURIAM. In this medical malpractice case, defendants Kent Radiology, P.C., and Louis Bixler, M.D., appeal as of right a verdict in favor of plaintiffs, Richard and Karen Taylor.[1] On appeal, defendants argue that the trial court erred when it denied their motions for a directed verdict and judgment notwithstanding the verdict, erred when it refused to instruct the jury on the burden of proof in medical malpractice cases involving a lost opportunity to survive or achieve a better outcome, erred when it directed a verdict in plaintiffs' favor as to defendants' defense of comparative negligence, erred with regard to the evidence concerning plaintiffs' economic losses, and erred when it denied defendants'

[1] Because Karen Taylor's claims are derivative in nature, we shall use "Taylor" to refer solely to plaintiff Richard Taylor and, when necessary, shall refer to plaintiff Karen Taylor by her full name.

motion for a new trial or remittitur. On cross-appeal, plaintiffs argue that the trial court erred when it refused to ask for the recall of the judge who presided over the trial to hear plaintiffs' postjudgment motion for a new trial or additur and erred when it denied that same motion. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. TAYLOR'S INJURY AND TREATMENT

Taylor testified that he owns and operates Richard Taylor Mobile Home Services. His business involves setting up and finishing mobile and modular homes. He explained that the work is hands-on and that he performed much of the work himself. Taylor stated that he is no longer able to perform the work because he injured his foot.

Taylor fell and injured his foot while performing finishing work on a home. At the time, he was working on a ladder just under the eaves of a single-story home. He indicated that he was about four or five feet off the ground when the ladder, which was placed on beach sand, started to slide after the sand gave way. Taylor said that his leg got caught in the ladder as the ladder spun and fell. Another builder at the worksite took Taylor home after the fall. Taylor said that when he got home he iced his foot, which was "sorer than the dickens."

Taylor did not remember the exact date of the injury and admitted that he told a staff person at one physician's office that the injury occurred sometime after Thanksgiving 2003. However, he testified that he stayed off his foot after the injury and went to see his family physician, Dr. Richard Crissman, within one or

two days. Crissman testified that he saw Taylor for his foot injury on December 4, 2003. In his notes, Crissman wrote that Taylor had "fallen through and off of a ladder" on the day before the office visit. Crissman testified that he physically examined Taylor's foot and did not "feel that there was a fracture there." Crissman diagnosed Taylor with a sprained "foot/ankle" and treated him by applying a supportive dressing called a gelocast.

On December 8, 2003, Taylor went back to see Crissman with continued complaints of pain in his foot. After this visit, Crissman sent Taylor to St. Mary's Hospital[2] for an x-ray of his foot. On that day, Dr. Louis Bixler was the radiologist assigned to examine the emergency films and plain films at St. Mary's hospital.

Bixler testified that on a typical day he would examine a minimum of 150 studies. Bixler had no specific memory of viewing the films that were part of the foot study done for Taylor's right foot. However, he acknowledged that he prepared a report for the study, which contained three views: AP, lateral, and oblique.[3] Bixler testified that the study included two lateral views—one that was light and one that was dark. Bixler stated that he typically prefers the darker views because you can see bone detail better. In his report, Bixler noted that he saw "no evidence of fracture" in the AP and oblique views. Bixler testified that he must have reviewed all the views, including the lateral views, because he would not have reviewed an incomplete study. For that reason, he concluded that the missing reference to the lateral

[2] Defendant Trinity Health-Michigan does business as St. Mary's Mercy Medical Center in Grand Rapids, Michigan.

[3] An AP, or anterior-posterior, view is an overview of the foot with a focus on the toes. The lateral view is a side view, and the oblique view is of the foot slightly rotated.

views in his report must have been a typographical error. Bixler's report also included a recommendation for a bone scan of the tarsometatarsal joints if the symptoms persisted.

Crissman testified that he received Bixler's report on the same day that the x-rays were taken, but did not see Taylor until December 9, 2003. Taylor said that Crissman told him the results of the x-rays: that there was no break and that it was only a sprain. Crissman again wrapped Taylor's foot in a gelocast. Taylor testified that Crissman told him to elevate his foot and let "pain be your guide" with regard to activities. Taylor said he wrapped his foot tight each day and returned to work. He even began to duct-tape his boot in order to stabilize his foot and make it possible to "hobble on it."

Crissman saw Taylor for continued reports of foot pain from December 2003 through March 2004. Finally, after an appointment on March 12, 2004, Crissman suggested that Taylor see an orthopedic surgeon, Dr. Kevin Kane, with River Valley Orthopedics.

Taylor went to River Valley Orthopedics and had new x-rays taken. A staff person at the office then approached Taylor and informed him that he had a broken ankle. Taylor testified that he got a little "testy" at this point and asked, " 'What do you mean it's broke?' " Taylor explained that he had been working on "this thing." The staff person also told him that Kane had looked at the film and would rather pass it on to Dr. Patricia Kolodziej because she was more experienced with ankle surgeries.

Taylor first saw Kolodziej on April 8, 2004. Kolodziej informed Taylor that he had a broken talus. Kolodziej recommended surgery to try and reconstruct the talus and "put the pieces back in as normal a position as possible and try and get it to heal." She also told Taylor

that a broken talus was a very serious injury and that he "would not have a normal foot regardless of [the] timing of the surgery."

One of Taylor's expert orthopedic surgeons, Dr. James Gilbert, testified that the key to a successful treatment of a talus fracture is the accurate restoration of the joint surfaces. Gilbert noted that the talus bears more weight than any other bone in the body and, for that reason, there is an advantage to treating a talus fracture as early as possible. This is because "delayed treatment allows further collapse of the fracture fragments and further displacement. And it is much, much easier to reposition the fragments back to their anatomical position if the fracture is treated fresh rather than delayed." Gilbert stated that the film of Taylor's talus showed evidence that the talus had begun to collapse and evidence of avascular necrosis—bone death caused by loss of blood flow.

Kolodziej tried to surgically repair Taylor's talus on April 23, 2004. However, after the surgery Kolodziej had x-rays taken, and those x-rays revealed that one of the fragments had displaced. For that reason, the surgery had to be redone. During the second surgery, Kolodziej felt that she had to place a screw into the joint in order to secure the fragment. Although Kolodziej testified that Taylor's recovery was better than that of the average person with this injury, she admitted that the first surgery was harder as a result of the delayed diagnosis and agreed that the second surgery would not have been necessary were it not for the delayed diagnosis. Kolodziej monitored Taylor over the next few months and noted that the repair appeared to hold, but that the area of the talus that broke off showed signs of avascular necrosis and that the subtalar joint showed signs of arthritis within that time.

B. THE PRESENT LITIGATION

In May 2006, plaintiffs sued defendants. Taylor sued Bixler for breaching the standard of care applicable to a radiologist by failing to diagnose the talus fracture on December 8, 2003. Taylor sued Kent Radiology and Trinity Health-Michigan under the theory that they were vicariously liable for Bixler's malpractice. However, plaintiffs eventually stipulated to the dismissal of Trinity Health-Michigan.

In June 2006, defendants answered plaintiffs' complaint. In their answer, defendants asserted as a defense that Taylor's claims were barred because he sustained the original injury as a result of his failure to use ordinary care while working. The case eventually proceeded to trial before Judge Dennis Kolenda in February 2008.

The jury returned a verdict in favor of plaintiffs on February 26, 2008. The jury found that Bixler had breached the standard of care and that the breach caused Taylor to suffer injuries. The jury awarded Taylor $10,775.18 in past economic damages, which was the total cost of Taylor's second surgery. The jury also awarded Taylor $262,900 in future economic damages. The jury did not award Taylor any noneconomic damages and did not award Karen Taylor any damages—economic or noneconomic.

On March 17, 2008, the trial court entered a judgment in favor of plaintiffs for $273,675.18. On March 28, 2008, plaintiffs moved for additur, and on April 4, 2008, defendants moved for judgment notwithstanding the verdict, remittitur, or a new trial. Judge Mark Trusock, who had replaced Judge Kolenda after Judge Kolenda retired, heard these motions. On June 9, 2008, Judge Trusock denied the parties' motions.

This appeal followed.

II. LOST OPPORTUNITY FOR A BETTER OUTCOME

A. STANDARDS OF REVIEW

We shall first address defendants' arguments that the trial court erred when it denied defendants' motion for a directed verdict, denied their motion for judgment notwithstanding the verdict (JNOV), and improperly instructed the jury. Specifically, defendants contend that plaintiffs failed to sustain their burden of proof under the second sentence of MCL 600.2912a(2), which involves the burden of proof for claims premised on a lost opportunity to survive or achieve a better outcome, and, for that reason, the trial court should have granted their motions for a directed verdict and JNOV. Defendants also contend that the trial court erred when it refused to instruct the jury on the proper burden of proof under MCL 600.2912a(2).

This Court reviews de novo a trial court's decision with regard to both a motion for a directed verdict and a motion for JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). Motions for a directed verdict or JNOV are essentially challenges to the sufficiency of the evidence in support of a jury verdict in a civil case. See *Napier v Jacobs*, 429 Mich 222, 229-230; 414 NW2d 862 (1987). This Court reviews challenges to the sufficiency of the evidence in the same way for both motions: we "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). "Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted." *Id.*, citing *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d

208 (1995). If reasonable persons, after reviewing the evidence in the light most favorable to the nonmoving party, could honestly reach different conclusions about whether the nonmoving party established his or her claim, then the question is for the jury. *Sparks v Luplow*, 372 Mich 198, 202; 125 NW2d 304 (1963).

This Court also reviews de novo claims of instructional error. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal." *Id.*

B. PROCEDURAL BACKGROUND: DEFENDANTS' MOTIONS FOR DIRECTED VERDICT AND JNOV

On the sixth day of trial, defendants moved for a directed verdict. Defendants argued that under MCL 600.2912a(2) plaintiffs had to prove "that more likely than not Dr. Bixler's failure to detect evidence of the fracture in December of 2003, caused Mr. Taylor to lose an opportunity to achieve a better result that was greater than 50 percent." Defendants concluded that this burden required plaintiffs to prove both that the lost opportunity was greater than 50 percent and to prove what that better outcome would have been. Defendants argued that this case was not an "aggravation case" because MCL 600.2912a(2) specifically applies to all medical malpractice cases.

In response, plaintiffs flatly rejected that this was a lost opportunity case: "We're no longer talking about a lost opportunity for a better result, we're talking about an admitted injury, even if we accept, pure and simple, the testimony of their own experts." For this reason, plaintiffs further argued, the statute governing lost opportunity did not apply.

The trial court determined that there was sufficient evidence to go to a jury under a traditional medical malpractice theory: "In this particular case, we've got a continuum of things. We've got an injury, plain and simple. Then whatever was the outcome of that injury is another matter. Enduring the surgery was one thing. Getting the better result afterwards is something else."

After the close of proofs, the trial court instructed the jury that, in order to award damages, it had to find that Bixler breached the standard of care and that the breach caused Taylor harm. Specifically, the trial court instructed the jury that it had to find that Bixler's failure to diagnose resulted in a worsening of Taylor's condition—that is, the trial court framed the case as an aggravation case. Defendants' trial counsel objected to this instruction and argued that the trial court should have instructed the jury on the lost opportunity for a better outcome. The trial court disagreed. The court, however, did not determine that the case did not involve a lost opportunity and therefore did not require a lost opportunity instruction. Rather, it based its decision on the fact that the parties' evidence and positions at trial were such that either there was clearly a more than 50 percent loss of opportunity or there was no loss of opportunity at all.

After the trial, defendants moved for JNOV. Defendants argued, in relevant part, that the trial court should grant the motion because plaintiffs failed to meet their burden of proving that Taylor lost a greater than 50 percent opportunity for a better outcome. The trial court denied the motion.

C. LOST OPPORTUNITY CASES

Defendants' claims that the trial court erred when it refused to direct a verdict in their favor or grant their

motion for JNOV presume that the second sentence of MCL 600.2912a(2) applied to this case and imposed a burden on plaintiffs that plaintiffs failed to meet and about which the trial court failed to properly instruct the jury. MCL 600.2912a(2) generally addresses the burden of proof in medical malpractice actions:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

Although the second sentence appears to apply to all medical malpractice actions, the second sentence also limits its application to those medical malpractice actions that seek recovery for a specific type of harm: lost opportunity. Therefore, the second sentence does not appear to apply to traditional claims that a physician's breach of the standard of care proximately caused a concrete injury as opposed to a lost opportunity to survive or for a better outcome. Our Supreme Court recently examined this very issue in *Stone v Williamson*, 482 Mich 144; 753 NW2d 106 (2008).

In *Stone*, the plaintiff had an abdominal aortic aneurysm that went undetected despite physical examination and testing. *Id.* at 147 (opinion by TAYLOR, C.J.). The aneurysm eventually ruptured and the plaintiff underwent emergency surgery to repair the rupture. *Id.* at 147-148. The plaintiff ultimately had to have his legs amputated at mid-thigh and suffered other severe complications, which were in part due to preexisting conditions. *Id.* at 148. The plaintiff later sued his radiologist for negligently failing to diagnose the aneurysm, which

the plaintiff alleged led to the rupture and all the resultant harm. At trial, the plaintiff presented evidence that, had the aneurysm been detected, he could have had elective surgery to repair it; he also presented evidence that there was a 95 percent chance that a patient who has elective surgery to repair such an aneurysm will have a good result, which included surviving the rupture as well as avoiding medical complications. *Id.* On appeal, our Supreme Court had to in part determine whether the requirements set forth in the second sentence of MCL 600.2912a(2) applied to the plaintiff's case. *Id.* at 150. Six justices of the Supreme Court concluded that MCL 600.2912a(2) did not apply to the facts of that case.

Chief Justice TAYLOR, who was joined by Justices CORRIGAN and YOUNG, noted that the lower courts had assumed that the second sentence of MCL 600.2912a(2) applied to the plaintiff's claims. *Id.* at 151. However, the plaintiff argued that he did not plead a claim for loss of an opportunity and, instead, argued that his claim was "a simple case of physical injury directly caused by negligence." *Id.* Chief Justice TAYLOR agreed that the lost opportunity doctrine was a unique theory of recovery that was distinct from traditional medical malpractice actions: " 'This theory is potentially available in situations where a plaintiff cannot prove that a defendant's actions were the cause of his injuries, but can prove that the defendant's actions deprived him of a chance to avoid those injuries.' " *Id.* at 152, quoting *Vitale v Reddy*, 150 Mich App 492, 502; 389 NW2d 456 (1986). Chief Justice TAYLOR explained that this theory of liability was adopted by the Supreme Court in *Falcon v Mem Hosp*, 436 Mich 443; 462 NW2d 44 (1990). See *Stone*, 482 Mich at 153-154 (discussing the *Falcon* decision). Before the decision in *Falcon*, he stated, "medical-malpractice plaintiffs alleging that the defen-

dant's act or omission hastened or worsened the injury (such as by failing to diagnose a condition) had to prove that the defendant's malpractice more probably than not was the proximate cause of the injury." *Id.* at 154-155.

Chief Justice TAYLOR then proceeded to examine the Legislature's apparent response to *Falcon*. He stated that the Legislature added the language now found in MCL 600.2912a(2) just three years after the decision in *Falcon*. *Id.* at 155-157. Chief Justice TAYLOR concluded that the two sentences in MCL 600.2912a(2) create a paradox that cannot be reconciled; namely, the first sentence requires a plaintiff to prove proximate cause in medical malpractice cases, but the second sentence refers to cases "in which such proof not only is unnecessary, but is impossible." *Id.* at 157. Because the second sentence of MCL 600.2912a(2) cannot be enforced as written, Chief Justice TAYLOR determined that a plaintiff should be left with the traditional burden in medical malpractice cases: the plaintiff must show that he or she suffered a present physical injury to person or property that was more likely than not caused by the defendant's breach of the applicable standard of care. *Id.* at 161. For this reason, Chief Justice TAYLOR concluded that the trial court erred when it instructed the jury that it had to find that the plaintiff in *Stone* had lost a greater than 50 percent opportunity for a better result. *Id.* at 162. However, he determined that the error did not warrant relief, because the jury clearly found that the traditional elements had been met—that is, that "defendants' negligence more probably than not caused plaintiff's injuries." *Id.* at 163.

Justice CAVANAGH, who was joined by Justices WEAVER and KELLY, agreed that the evidence presented in *Stone* supported a traditional medical malpractice

claim, but did not agree that MCL 600.2912a(2) was unenforceable. *Id.* at 165 (opinion by CAVANAGH, J.). Justice CAVANAGH argued that the Legislature's amendment of MCL 600.2912a explicitly recognized a cause of action for the loss of an opportunity to achieve a better result. *Id.* at 172. Further, Justice CAVANAGH argued that, when MCL 600.2912a(2) is interpreted in light of the decision in *Falcon*, it can be rationally applied. *Id.* at 175-177. Specifically, Justice CAVANAGH noted that the second sentence of MCL 600.2912a(2) "cannot limit recovery for the loss of an opportunity to cases in which the loss was greater than 50 percent, because any plaintiff who satisfied that condition would have a traditional medical-malpractice claim for the death or physical harm itself." *Id.* at 175-176. For that reason, Justice CAVANAGH concluded that the second sentence must establish a threshold for those cases in which the plaintiff cannot prove by a preponderance of the evidence that the defendant's malpractice caused a specific physical harm—that is, the plaintiff can still recover for the lost opportunity when the change in the opportunity was less than 50 percent as long as the opportunity was at least 50 percent to begin with. *Id.* at 176-178. Nevertheless, Justice CAVANAGH agreed with Chief Justice TAYLOR that there was evidence from which the jury could have concluded by a preponderance of the evidence that the malpractice in that case actually caused the injuries at issue; for that reason, the plaintiff "did not assert, or need to resort to, a claim for loss of opportunity." *Id.* at 178. Because the plaintiff in *Stone* proved a traditional medical malpractice claim based on his physical injuries, Justice CAVANAGH agreed that the jury verdict should be upheld. *Id.*

Justice MARKMAN agreed with Justice CAVANAGH that MCL 600.2912a(2) was enforceable and provided a cause of action to recover for the loss of an opportunity

to achieve a better result, but disagreed about the proper application of the threshold provided under the second sentence. *Id.* at 218-219 (opinion by MARKMAN, J.). Justice MARKMAN concluded that a lost opportunity case is any case in which "it is possible that the bad outcome would have occurred even if the patient had received proper treatment." *Id.* at 218. Because the plaintiff in *Stone* might have had to have his legs amputated even with proper treatment, Justice MARKMAN determined that the case was a lost opportunity case. However, Justice MARKMAN concluded that the case should still be affirmed because the lost opportunity was more than 50 percent. *Id.* at 219.

Thus, four justices agreed that MCL 600.2912a(2) is enforceable and recognizes a cause of action for lost opportunity that is separate and distinct from the traditional medical malpractice claim. In addition, six justices agreed that a plaintiff need not rely on the lost opportunity cause of action when the plaintiff can show by a preponderance of the evidence that the medical malpractice caused a specific physical harm. In such a case, the plaintiff may plead and prove a claim based on traditional medical malpractice and MCL 600.2912a(2) will not apply. Consequently, whether the second sentence of MCL 600.2912a(2) applies depends on the nature of the claims brought by the plaintiff; if the plaintiff only brought a traditional medical malpractice claim, the second sentence of MCL 600.2912a(2) will not apply and the plaintiff will be left with the traditional burden of proof. See *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 99; 776 NW2d 114 (2009) (opinion by TALBOT, P.J.) (stating that there was no basis for this Court to review the case as a lost opportunity case under MCL 600.2912a(2) because a review of the lower court record revealed that the plaintiff only pleaded a traditional medical malpractice claim); *Velez v*

Tuma, 283 Mich App 396, 407; 770 NW2d 89 (2009) (stating that the burden of proof under MCL 600.2912a(2) did not apply to the case at issue because the case was a traditional medical malpractice case).

D. THE NATURE OF PLAINTIFFS' CLAIM

As this Court recently noted, a " 'plaintiff's theory in a medical malpractice case must be pleaded with specificity and the proofs must be limited in accordance with the theories pleaded.' " *Ykimoff*, 285 Mich App at 99 (opinion by TALBOT, P.J.), quoting *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 284; 602 NW2d 854 (1999), citing, in part, MCR 2.111(B)(1). The level of specificity required under MCR 2.111(B)(1) is that level which reasonably informs the adverse party of the nature of the claims against him or her. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). A plaintiff's complaint should not be so ambiguous as to leave the defendant to " 'guess upon what grounds [the] plaintiff believes recovery is justified' "; such extreme ambiguity " 'violates basic notions of fair play and substantial justice' " and undermines the defendant's " 'opportunity to present a defense.' " *Id.*, quoting *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992).

In the present case, plaintiffs alleged that Bixler undertook "to examine, diagnose, treat, attend, and care" for Taylor. Further, Bixler violated the standard of care and was "guilty of negligence and malpractice," in relevant part, by "[f]ailing to properly review and interpret the foot x-rays of [Taylor] taken at [St. Mary's] on or about December 8, 2003" and by "[f]ailing to provide [Taylor] with a proper review and interpretation of foot x-rays taken on or about that same time[.]" These failings, plaintiffs further alleged,

"caused Richard Taylor's talar fracture to remain untreated, undiagnosed, and to progressively worsen, and necessitated extensive surgical intervention" and caused Taylor to suffer "ongoing disability, loss of earnings and earning potential, pain, suffering, disfigurement and emotional distress."

From an examination of plaintiffs' complaint, it is evident that plaintiffs alleged a traditional medical malpractice claim. Indeed, there is not one reference to a lost opportunity to achieve a better outcome in the complaint; rather, plaintiffs alleged that Bixler breached the standard of care and that his breach proximately *caused* a worsening of Taylor's talar fracture. This same allegation was repeated in the affidavit of merit signed by plaintiffs' expert radiologist and attached to the complaint.

The first time plaintiffs made any assertion that could be construed to implicate a lost opportunity claim was in their trial brief. In that brief, plaintiffs summarized the expert testimony and noted that "both Dr. Gilbert and Dr. [Christopher] Chiodo agree that [Taylor] would have had a greater than 50 percent chance of a better outcome" had it not been for Bixler's failure to diagnose the fracture. However, in this same section plaintiffs alleged that the evidence showed that the failure to diagnose led to a worsening of the fracture. Further, plaintiffs also clearly stated that Bixler's malpractice constituted an aggravation of a preexisting injury.

Plaintiffs also did not amend or move to amend their complaint to include a lost opportunity claim and did not ask the trial court to instruct the jury on such an alternative basis for relief. Indeed, during his opening statement, plaintiffs' trial counsel indicated his belief

that the evidence would show that Bixler's failure to diagnose the fracture led to an aggravation of the fracture:

> Now, it's going to be our position in this case that, because of this delay, there was an aggravation of the fracture to the point that Rich is disabled from doing the kind of work that he did before.
>
> I will concede to you that he had a fracture in December, and that is a serious injury, we'll concede that all day long. But because that fracture was not diagnosed and reported, that condition became aggravated, as I've shown you in the X-rays and as the experts will testify, to the point that he's got a permanent disability in part because of the delayed diagnosis.

He also stated that the evidence would show that Bixler's failure to diagnose made the initial surgery to repair Taylor's talus more difficult and ultimately caused Taylor to have to undergo a second surgery. Finally, although plaintiffs' counsel also mentioned that the evidence would show that Taylor would have had a greater than 50 percent chance of a better outcome had he been diagnosed properly in December 2003, he did so in the context of emphasizing that the proofs would show that Bixler's negligence caused the bad outcome—namely the early onset of arthritis. See, e.g., *Stone*, 482 Mich at 160 (opinion by TAYLOR, C.J.) (noting that a plaintiff who has a greater than 50 percent initial likelihood of obtaining a better result—such as survival—can support a traditional medical malpractice claim).

On the basis of plaintiffs' complaint alone, we conclude that this case did not involve a lost opportunity claim. See *Ykimoff*, 285 Mich App at 99; *Velez*, 283 Mich App at 407. Moreover, examining plaintiffs' complaint, trial brief, and statements at trial in context, it is clear that plaintiffs framed their claim as a traditional medical malpractice claim. Defendants cite no authority for

the proposition that a plaintiff can be held to a burden of proof for a cause of action that the plaintiff did not bring. MCL 600.2912a(2) did not apply to plaintiffs' claim, and plaintiffs were not required to present evidence about the degree by which Bixler's malpractice affected Taylor's opportunity for a better outcome. See *Fulton v William Beaumont Hosp*, 253 Mich App 70; 655 NW2d 569 (2002); *Klein v Kik*, 264 Mich App 682; 692 NW2d 854 (2005). If defendants felt that plaintiffs did not have the evidence to support their burden of proof for a traditional medical malpractice claim, defendants should have moved for summary disposition, directed verdict, or JNOV on the basis that plaintiffs' evidence was insufficient to prove by a preponderance that Bixler's malpractice caused Taylor's injuries. Instead, defendants tried to get the trial court to impose the burden of proof for a lost opportunity claim on plaintiffs' traditional medical malpractice claim. The trial court properly rejected that attempt. Further, even if defendants had challenged the sufficiency of plaintiffs' evidence in their motions for directed verdict or JNOV, those challenges would still have failed.

E. CAUSATION

As already noted, this case involved only a traditional medical malpractice claim. For that reason, plaintiffs were not required to present evidence concerning the degree of any opportunity to achieve a better result that may have been lost by Bixler's negligence. Instead, plaintiffs only had to prove by a preponderance of the evidence that Bixler's failure to diagnose Taylor's fracture injured Taylor. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004) (stating the elements of a traditional medical malpractice claim). Plaintiffs clearly met that burden.

" 'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Id.* In order to establish that a particular action was the cause in fact of an injury, the plaintiff must show that " 'but for' the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994) (citations omitted).

> Generally, an act or omission is a cause in fact of an injury only if the injury would not have occurred without (or "but for") that act or omission. While a plaintiff need not prove that the act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause. [*Craig*, 471 Mich at 87.]

In this case, plaintiffs presented evidence that there was a worsening of Taylor's fracture between the time that Bixler examined Taylor's x-rays in December 2003 and the time when Taylor's fracture was properly diagnosed in March 2004. At trial, Bixler himself admitted that he had testified at his deposition that a comparison of the x-rays taken in December 2003 to a CT scan of Taylor's foot taken after the fracture was diagnosed revealed that the fracture had worsened. Plaintiffs' expert radiologist, Dr. Kevin Berger, also testified that the images from March 2004 revealed that the break had worsened: there were a few more millimeters of separation, there was a loss of smooth surfaces, and the fracture had extended into other areas of the anatomy. Similarly, defendants' expert radiologist, Dr. Donald Simon, testified that a comparison of images showed that the fracture had worsened by the time it was diagnosed. One of plaintiffs' expert orthopedic

surgeons, Dr. Christopher Chiodo, also confirmed that the fracture had worsened by the time it was actually diagnosed. He stated that there was a significant shift in the fragments and that there was no longer a smooth joint. Chiodo also connected Bixler's failure to diagnose the fracture in December 2003 with the worsening of the fracture. Chiodo explained that if you allow the patient to walk on the fractured talus, "you expose these fractures to tremendous repetitive cyclical loading, thousands of heel strikes per day, it's not going to heal and it's going to shift."

At trial, it was essentially undisputed that the aggravation of the fracture not only made Taylor's first reconstructive surgery harder to perform, but also necessitated the second surgery. Kolodziej agreed that the first surgery was much more difficult as a result of the delay. She explained that with a fresh fracture the surgery is significantly easier:

> [T]he anatomy is more preserved. You can free up the fracture fragments easier. You can identify the pieces easier. There's more mineralization in the bone that you can see it by X-ray easier as opposed to later on when things start to become fibrosed, full of scar tissue, and the edges are no longer sharp and clear and the bone is softer.

Kolodziej testified that it was her opinion that the second surgery would not have been necessary had the surgery been treated within the first couple of weeks after the fracture. Further, Dr. John Anderson, defendants' expert in orthopedic surgery testified that the delay in treatment resulted in a more difficult first surgery and likely caused the need for the second surgery. Accordingly, plaintiffs plainly established that Bixler's failure to diagnose Taylor's talar fracture in December 2003 proximately caused the need for a second surgery.

In addition, there was ample testimony to show that, but for Bixler's failure to diagnosis the fracture, Taylor would not have suffered further physical injury. Chiodo testified at length about the evidence that Taylor was developing progressive arthritis in his subtalar joint. Chiodo testified that, where cartilage is not congruent in a joint, the motion of the bones "will erode or destroy the articular cartilage," which he explained *is* arthritis: "Arthritis is the loss of cartilage so that the two bones that form the joint no longer glide smoothly but grind with bone on bone, if you will." Chiodo indicated that with early treatment, Taylor might not have developed arthritis or might have developed less severe arthritis. Indeed, he testified that there was a "much greater chance, more than 50 percent, that [Taylor] would either not develop arthritis or develop less severe arthritis . . . ." However, Chiodo opined that the delay in the diagnosis caused the progressive arthritis that was already visible:

> Yes. Again, you have these two fracture fragments. The joints aren't lined up. The cartilage isn't in place and then you subject that malaligned cartilage to repetitive loads and repetitive weight bearing and repetitive motions and that leads to erosion of that cartilage because it wasn't protected or put back into place or held with screws.

Thus, although Chiodo left open the possibility that Taylor might still have developed some level of arthritis, he testified that Taylor already had arthritis and that it was caused when Taylor was permitted to bear weight on his fractured talus and was more severe than what it would have been. Chiodo further testified that Taylor's foot would have been more functional had it been treated earlier and stated that a "substantial" portion of Taylor's current disability was attributable to the delay in the diagnosis of the fracture.

Similarly, plaintiffs' other expert orthopedic surgeon, Dr. James Gilbert, testified that "it's fair to say and true that [Taylor] would have developed some arthritis in his ankle or subtalar joint even if he had been treated in December." However, he also opined that the delay directly caused "the degree of arthritis" to be "much greater." Gilbert also stated that Taylor was already a candidate for fusion of the subtalar joint. Gilbert testified that, had there been no delay in treatment, "the degree of arthritis would have been much, much less and would have occurred at a much later date than it has" and that the need for a fusion of the joint would have been delayed.

Given this testimony, plaintiffs presented sufficient evidence to prove that Bixler's failure to diagnose Taylor's talar fracture *directly* caused Taylor's current level of arthritis and, even though he might have eventually developed some arthritis, the delay in the diagnosis accelerated the rate of development and increased the severity of the arthritis. This in turn accelerated the timetable for the need to have fusion surgery.

F. CONCLUSION

Plaintiffs did not plead a claim for a lost opportunity to achieve a better result. Therefore, the second sentence of MCL 600.2912a(2) did not apply to plaintiffs' malpractice claim. See *Ykimoff*, 285 Mich App at 99; *Velez*, 283 Mich App at 407. Because plaintiffs only alleged a traditional medical malpractice claim and presented sufficient evidence from which a jury could conclude that Bixler's malpractice proximately caused Taylor's injuries, defendants were not entitled to a directed verdict or JNOV. *Sparks*, 372 Mich at 202.

For the same reason, we also conclude that the trial court did not err when it refused to instruct the jury on the burden imposed by the second sentence of MCL 600.2912a(2). Plaintiffs never pleaded a lost opportunity claim; rather, plaintiffs' claim was grounded in ordinary medical malpractice. For that reason, the trial court was not required to give an instruction on the burden of proof applicable to lost opportunity claims. See *Stone*, 482 Mich at 162-163 (opinion of TAYLOR, C.J.), *id.* at 178 (opinion of CAVANAGH, J.); *Velez*, 283 Mich App at 407 (stating that the jury instruction concerning lost opportunity is not applicable to cases involving traditional medical malpractice).

III. COMPARATIVE NEGLIGENCE

A. STANDARDS OF REVIEW

Defendants next argue that the trial court erred when it directed a verdict in plaintiffs' favor on defendants' defense of comparative negligence. This Court reviews de novo a trial court's decision with regard to a motion for a directed verdict. *Sniecinski*, 469 Mich at 131. This Court also reviews de novo the proper interpretation of statutes and court rules. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

B. APPLICATION OF COMPARATIVE NEGLIGENCE

The statutes governing comparative negligence require the trier of fact to allocate liability "in direct proportion to the person's percentage of fault" for "personal injury, property damage, or wrongful death"—that is, the statutes seek to assign liability to persons in direct proportion to that person's fault for the injury that is the subject of the suit. MCL 600.2957(1); see also MCL 600.2959; MCL 600.6304. For that reason, the

allocation of fault is necessarily limited to fault for the injury for which the plaintiff seeks damages. See MCL 600.2957(1); MCL 600.2959; MCL 600.6304(2) (stating that the trier of fact shall examine the conduct of each person at fault and the "causal relation between the conduct and the damages claimed" when determining the percentages of fault); MCL 600.6304(8) (defining fault, in relevant part, as conduct that proximately caused the *damage* sustained by a party); *Lamp v Reynolds*, 249 Mich App 591, 596; 645 NW2d 311 (2002) (stating that the enactment of the comparative fault statutes reveals "a legislative intent to allocate liability according to the relative fault of all the persons contributing to the accrual of a plaintiff's damages.").

In the present case, plaintiffs did not sue to recover damages for Taylor's original foot injury; plaintiffs sued to recover damages resulting from the *aggravation* of Taylor's foot injury. Understood in this light, defendants would have had the jury reduce plaintiffs' award of damages for the aggravation of Taylor's preexisting injury on the basis of his alleged negligent conduct that did not contribute to the accrual of the damages for the aggravation. However, because the statutes imposing comparative fault only require the allocation of liability in proportion to the fault for the injury for which the plaintiff is seeking damages, under the facts of this case, plaintiffs could only be allocated liability to the extent that they were at fault for the aggravation of the preexisting foot injury.

At trial, there was no evidence that Taylor acted unreasonably with regard to the treatment of his injured foot—that is, there was no evidence that Taylor bore any fault for the aggravation of his foot injury. Indeed, at trial defendants conceded that there was no evidence that Taylor failed to follow his physician's instructions for the

treatment of his foot injury, and Bixler conceded that it was reasonable for Taylor's physician to rely on his evaluation of the x-rays and proceed accordingly. Because Taylor did not engage in any conduct that could be construed to have aggravated his foot injury, the trial court properly directed a verdict in plaintiffs' favor on the issue of comparative negligence.[4]

In any event, even if we were to conclude that the jury should have been permitted to consider Taylor's possible fault for his original foot injury, we would nevertheless conclude that the trial court properly directed a verdict on this issue. Defendants failed to present any evidence that Taylor's original injury was the result of his own negligence, and there was no other evidence from which the jury could have concluded that Taylor was negligent.

C. EVIDENCE OF NEGLIGENCE FOR THE ORIGINAL INJURY

At trial, Taylor testified that his fall should never have happened, but did not explain how the fall actually occurred. He noted that he was "on beach sand with the ladder" and the sand gave way. He stated that he tried to jump down, but his foot got caught in the ladder.

From this testimony, the jury could only have speculated concerning whether Taylor fell as a result of his own negligence. There was no testimony about who owned the ladder, who set the ladder up, the condition of the ladder,

[4] Defendants' reliance on *Shinholster v Annapolis Hosp*, 471 Mich 540; 685 NW2d 275 (2004), for the proposition that comparative negligence may be assigned for any and all pretreatment negligence, including negligence that did not cause the injury for which damages are sought, is misplaced. Our Supreme Court's opinion makes it clear that comparative fault may only be assigned for pretreatment conduct if the pretreatment conduct proximately caused the injury at issue. *Id.* at 551. In this case, the injury at issue was the aggravation of the preexisting condition, not Taylor's original foot injury. But see *id.* at 553 n 9.

the condition of the terrain, whether there were others present, whether the sand shifted as a result of some outside force, or any of a host of other possibilities. Absent more concrete facts establishing that Taylor was responsible for his own fall, a jury could not reasonably have found that Taylor's negligence proximately caused his original foot injury. The best that can be said of the theory that Taylor's own negligence must have caused his original injury is that the theory was consistent with the known facts. However, mere consistency with the known facts is not enough; the theory must be deducible from those facts or it is mere conjecture. *Skinner*, 445 Mich at 164. And when a party's theory of causation is merely conjecture, the trial court has a duty to direct a verdict on that issue. *Id.* at 165.

Moreover, defendants' reliance on the doctrine of res ipsa loquitur does not save their defense from this evidentiary deficiency. The doctrine of res ipsa loquitur permits an inference of negligence from circumstantial evidence when a party is otherwise unable to prove the occurrence of a negligent act. *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987). In order to rely on res ipsa loquitur, defendants had to show, in relevant part, that the event at issue was caused " 'by an agency or instrumentality' " within Taylor's exclusive control. *Id.* at 150-151 (citation omitted). In this case, there was no evidence that the ladder or worksite where the ladder was placed was under Taylor's exclusive control. Because the ladder might have been improperly placed by another worker or might have shifted through some action by a third party, one cannot infer from the fall of the ladder alone that Taylor was negligent. Consequently, res ipsa loquitur does not establish an inference of negligence.

For these reasons, the trial court did not err when it directed a verdict in favor of plaintiffs on the issue of comparative negligence.

IV. HOUSEHOLD SERVICES AS ECONOMIC DAMAGES

A. STANDARDS OF REVIEW

We shall next address defendants' claims of error concerning the characterization and presentation of evidence of plaintiffs' economic losses. This Court reviews a trial court's evidentiary decisions for abuse of discretion. *Craig*, 471 Mich at 76. This Court reviews de novo the proper interpretation of statutes. *Estes*, 481 Mich at 578-579.

B. ECONOMIC LOSSES

Defendants first appear to argue that, under the facts of this case, Taylor's economic damages do not include the costs that he will incur to hire persons to perform the household tasks that he would otherwise have performed. For this reason, defendants contend, the trial court erred to the extent that it characterized or permitted the characterization of these services as involving economic losses.

In a medical malpractice action, the trier of fact must divide an award of damages into those for past economic, past noneconomic, future economic, and future noneconomic losses. See MCL 600.1483(2) (referring to damages for economic loss and damages for noneconomic loss); MCL 600.6305(1). Although economic losses are not defined in MCL 600.1483 or MCL 600.6305, this Court has turned to the definition provided in MCL 600.2945(c) in order to determine whether a claim for damages in a medical malpractice action should be characterized as one for economic or noneconomic losses. *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 664-665; 761 NW2d 414 (2008). Under MCL 600.2945(c), economic losses are defined as

> objectively verifiable pecuniary damages arising from medical expenses or medical care, rehabilitation services, custodial care, loss of wages, loss of future earnings, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, or other objectively verifiable monetary losses.

This definition clearly includes the costs incurred to replace services—including substitute domestic services—that would have been performed by the injured person. Further, this Court has explicitly held that such replacement costs are economic losses. *Thorn*, 281 Mich App at 666-667. Consequently, the trial court did not err when it characterized the cost of replacement services as economic losses or permitted plaintiffs to characterize them as such.

Defendants also appear to argue that economic losses include only those costs that a party has actually incurred: "Absent evidence that Mr. and Mrs. Taylor incurred some costs to replace those services that Mr. Taylor would otherwise perform, this item of damage is definitely not an 'economic loss.' " It is difficult to see how an injured party can incur a cost based on the need to hire a person to perform a service that the injured party would have performed before the point in time when the injured party would have performed it; nevertheless, it is well settled that a finder of fact can award damages for economic losses that a plaintiff has not yet incurred.[5] See MCL 600.6305(1) (requiring the trier of fact to make specific findings concerning future economic loss and the periods over which they will accrue); MCL 600.6305(2) (noting that the calculation

[5] This is in contrast to some statutory causes of action, such as that under the no-fault act's replacement services provision, which requires a replacement service to be reasonably incurred before it becomes compensable. See MCL 500.3107(1)(c).

must be based on the costs and losses during the period that the plaintiff will sustain those costs and losses). Further, to the extent that defendants argue that there is no evidence that plaintiffs incurred past economic losses for replacement services because family and friends donated the replacement services, we note that the jury did not award any past economic damages other than the cost of Taylor's second surgery. For that reason, even if we were to conclude that Taylor's past economic damages were somehow limited to costs that he had actually incurred, the jury's award of past economic damages was clearly supported by the evidence. Moreover, to the extent that defendants argue that there was no evidence at trial that plaintiffs will incur future costs for replacement services, defendants are incorrect.

At trial, Taylor testified that he performed the remodeling work on his home up until the time of his injury and that a substantial amount of work remained to be done. He said that he would probably need to pay someone $35,000 to complete the work that remained. Taylor also said that he did all the maintenance work on the family vehicles, but could no longer perform the maintenance and was unable to do the work around the house that he used to do. Further, although Taylor admitted that he had had help from family and friends up to the time of the trial, he also testified that he had had to hire others to perform some of the work that he could no longer perform. Thus, there was evidence that Taylor performed specific services that he can no longer perform and that he has in fact hired people to perform those services in the past and presumably will have to continue to hire people to perform those services in the future. Consequently, there was a sufficient basis for plaintiffs' expert economist, Scott Vander Linde, to testify concerning the future costs to replace those services. See MRE 703.

The trial court did not abuse its discretion when it permitted plaintiffs' expert economist to testify about the future costs to replace the services that Taylor would have performed. Likewise, the trial court did not err by characterizing the costs to replace services that Taylor would have performed as economic losses.

V. DEFENDANTS' MOTION FOR REMITTITUR

A. STANDARD OF REVIEW

Finally, defendants argue that the trial court erred when it denied their motion for a new trial or remittitur based on an excessive award of damages. This Court reviews for abuse of discretion a trial court's decision to deny a motion for remittitur. *Unibar Maintenance Services, Inc v Saigh*, 283 Mich App 609, 629; 769 NW2d 911 (2009).

B. REMITTITUR

The power of remittitur should be exercised with restraint. *Shaw v City of Ecorse*, 283 Mich App 1, 17; 770 NW2d 31 (2009). When deciding whether to grant a motion for remittitur, the trial court must examine all the evidence in the light most favorable to the nonmoving party to determine whether the evidence supported the jury's award. *Id.* "If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, it should not be disturbed." *Id.*, citing *Palenkas v Beaumont Hosp*, 432 Mich 527, 532-533; 443 NW2d 354 (1989).

In this case, defendants' claim for remittitur depends on two assumptions: (1) that the jury's award of damages could not reflect Taylor's future lost income as a result of the aggravation of his foot injury and, for that

reason, (2) the award must represent the cost to replace future services, for which there was no evidence. As already noted, there was sufficient evidence to support the testimony of plaintiffs' expert concerning the projected cost to replace the services that Taylor had performed in the past but would no longer be able to perform. In addition, the jury's decision not to award past economic damages for lost income does not necessitate the conclusion that the jury must also have found that Taylor would not suffer future lost income as a result of the aggravation of his foot injury. The jury may reasonably have concluded that Taylor's income loss up to the time of trial was largely a function of his original injury and, for that reason, refused to award him damages for past lost income. Nevertheless, the jury could still reasonably have concluded that Taylor would suffer a future loss of income and could reasonably have concluded that a portion of that loss was attributable to the aggravation of his foot injury. At trial, plaintiffs' expert economist opined that the cost to replace Taylor's services over the course of the remainder of his life would be $677,509. He also opined that Taylor's lost income during the remainder of his life would be $387,983. Although the combined total of these losses is more than $1 million, the jury determined that Taylor was only entitled to $262,900 in future economic damages. This amount falls reasonably within the range supported by the evidence and otherwise appears just; therefore, the trial court did not err when it declined to disturb this award. *Shaw*, 283 Mich App at 17.

VI. MOTION TO RECALL JUDGE KOLENDA

A. STANDARD OF REVIEW

On cross-appeal, plaintiffs first argue that the trial court erred when it refused to ask for the recall of Judge

Kolenda to hear plaintiffs' motion for additur or a new trial. This Court reviews a trial court's discretionary decisions for abuse. *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006). And this Court will not disturb the trial court's decision unless it falls outside the range of principled outcomes. *Id.* at 472.

B. ANALYSIS

On May 23, 2008, plaintiffs filed a motion in which they asked the trial court to "ask" the court administrator to pursue the steps necessary to recall Judge Kolenda. Although the trial court may not have had the authority to directly recall Judge Kolenda, see MCL 600.226, it surely had the authority to at least *request* that he be recalled. Nevertheless, it cannot be said that the trial court abused its discretion by refusing to make such a request. There was no indication that the trial court was incapable of deciding plaintiffs' motion on the merits and according to the law. Likewise, there was no evidence that the court administrator would have granted the request and no evidence that Judge Kolenda would have been available had such a request been made. Therefore, on these facts, one cannot conclude that the trial court abused its discretion when it refused to "ask" for Judge Kolenda to be recalled to hear the motion.

VII. PLAINTIFFS' MOTION FOR ADDITUR OR A NEW TRIAL

A. STANDARD OF REVIEW

Finally, plaintiffs argue that the trial court erred when it denied plaintiffs' motion for a new trial or additur. This Court reviews a trial court's decision on a motion for additur or a new trial for abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

B. ADDITUR OR NEW TRIAL

Our court rules permit a trial court to grant a new trial when a verdict is "clearly or grossly inadequate or excessive" or when the verdict is "against the great weight of the evidence . . . ." MCR 2.611(A)(1)(d) and (e). However, as an alternative, when the trial court determines that the only error in the trial was the "inadequacy or excessiveness of the verdict," the trial court may deny the motion for a new trial on the condition that the nonmoving party consent to the entry of a judgment "in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support." MCR 2.611(E)(1). Whether a jury's verdict is clearly or grossly inadequate or against the great weight of the evidence necessarily depends on the nature of the evidence adduced at trial. See *Kelly*, 465 Mich at 39. This is because the plaintiff has the burden to prove each element of his or her case, and damages such as medical expenses are distinct from damages for things such as pain and suffering. *Id.* Further, this Court will defer to the judgment of the jury on the weight to be accorded the evidence concerning damages: "In short, the jury is free to credit or discredit any testimony. It may evaluate the evidence on pain and suffering differently from the proof of other damages. No legal principle requires the jury to award one item of damages merely because it has awarded another item." *Id.*

In this case, plaintiffs have not identified any evidence that the jury's decision to award only economic damages was motivated by passion or prejudice. See MCR 2.611(A)(1)(c). Rather, plaintiffs argue that the jury's decision not to award noneconomic damages is inconsistent with its decision to award economic dam-

ages and is against the great weight of the evidence of noneconomic damages presented at trial.

At trial, plaintiffs presented relatively little testimony concerning Taylor's noneconomic damages. With regard to pain, Taylor testified that his original injury was "sorer than the dickens," but he did not testify much about his pain and suffering during treatment and after his corrective surgeries. Further, although there were records that indicate that Taylor complained about pain to his physicians and there was testimony that such an injury would be painful, there were also records and testimony that he did not require extensive measures to treat pain. Similarly, Taylor testified about how his injury affected his ability to work with his company and around his home, but he only briefly mentioned how the injury had affected his social and leisure life. He testified that he was on medication for depression and that the loss of his ability to advance his business had affected him emotionally, but he also admitted that he was being treated for depression before the accident.

Karen Taylor testified more extensively about the effect of Taylor's injury on their social lives. She testified that, since the injury, she and her husband did not go boating, ride motorcycles, or garden together. She also testified that he did not hunt or fish anymore. She stated that the injury had affected their relationship "a little bit" because Taylor seemed a little angry and had sad moments. Karen Taylor did not, however, testify about the severity of the changes or the importance of the activities they once did together.

Although the testimony and evidence could have supported some measure of noneconomic damages, a reasonable jury could also have concluded that plaintiffs failed to meet their burden of proof. See *Kelly*, 465

Mich at 39; see also *Taylor v Mobley*, 279 Mich App 309, 314-315; 760 NW2d 234 (2008) (stating that the jury was free to disbelieve the plaintiff's testimony regarding noneconomic damages and to credit all countervailing evidence on the issue). As already noted, Taylor himself gave very little testimony about the effects of the injury on his activities other than his ability to perform chores and work in his business. Likewise, although Karen Taylor's testimony supported the conclusion that she and Taylor had suffered noneconomic damages, her testimony was understated and did not go into detail. Under these facts, plaintiffs have failed to establish that the jury's decision not to award noneconomic damages was clearly or grossly inadequate or contrary to the great weight of the evidence. Therefore, the trial court did not err when it denied plaintiffs' motion for additur or a new trial based on an inadequate award of damages.

There were no errors warranting relief.

Affirmed. Because none of the parties prevailed in full on appeal, none of the parties may tax costs. MCR 7.219(A).

K. F. KELLY, J. I concur in the result only.

HEATON v BENTON CONSTRUCTION COMPANY

Docket No. 285805. Submitted October 13, 2009, at Lansing. Decided October 27, 2009. Approved for publication December 22, 2009, at 9:10 a.m.

Gerald T. Heaton and Jonna Heaton brought an action in the Shiawassee Circuit Court, Gerald D. Lostracco, J., against Benton Construction Company, doing business as Great Lakes Superior Walls (Great Lakes), Pristine Home Builders, Daniel J. Bonawitt, and others, seeking damages, under theories of breach of contract, express and implied warranties, and negligence, for damage that occurred to a home that Pristine (operated by Bonawitt, a licensed builder) built for the Heatons. Bonawitt subcontracted with Great Lakes to design, manufacture, and install precast concrete foundation walls for the home and the walls shifted twice during the construction of the home. The essence of plaintiffs' claim was that Great Lakes negligently failed to warn, inspect, or instruct regarding using its foundation walls with appropriately designed and constructed shear walls. A default judgment was entered against Pristine and Bonawitt, and the other defendants, except Great Lakes, settled. The case was submitted to the jury only on plaintiffs' negligence theory after being tried on the issues of Great Lakes' liability and damages. Bonawitt participated at trial only regarding damages. The jury found Great Lakes 60 percent negligent and Pristine and Bonawitt 40 percent negligent. The court entered an order granting partial remittitur of the $272,500 jury award to $195,000, as the amount that the evidence showed that plaintiffs' home diminished in value. The court also awarded plaintiffs a reasonable attorney fee for case evaluation sanctions. Great Lakes appealed the judgment entered after the jury verdict and the order granting remittitur. Plaintiffs cross-appealed the orders granting remittitur and a reasonable attorney fee for case evaluation sanctions.

The Court of Appeals *held*:

1. The precast concrete walls made by Great Lakes were a "product" with the meaning of the relevant products liability statutes, MCL 600.2945 and MCL 600.2947. Even though plaintiffs' claim was one of ordinary negligence, it still could come

within the broad definitions of "product liability action" and "production" in MCL 600.2945(h) and (i).

2. The trial court did not err by concluding under the facts of this case that Bonawitt was not a sophisticated user as contemplated by MCL 600.2945(j) and MCL 600.2947(4), and, therefore, the sophisticated user defense provided for in MCL 600.2947(4) was inapplicable. No manifest injustice resulted from the trial court's failure to instruct the jury regarding Great Lakes' claim to a sophisticated user defense.

3. The trial court erred by granting the motion for remittitur. The evidence supported the verdict wherein the jury added the $77,500 plaintiffs incurred to partially repair their home to the $195,000 the home lost in value even with the repairs. The order granting remittitur must be reversed and the case must be remanded for the entry of a judgment for plaintiffs consistent with the verdict of the jury.

4. The attorney fee awarded as case evaluation sanctions was not outside the range of reasonable and principled outcomes and was not an abuse of discretion.

Judgment affirmed, order granting remittitur reversed, and case remanded for entry of judgment for plaintiffs consistent with the jury's verdict.

MURRAY, P.J., concurred in the determination of the majority that this is a products liability action, but dissented from the determination that, under the facts of this case, Daniel J. Bonawitt was not a sophisticated user. As a result, the trial court should have granted Great Lakes' motion for summary disposition and dismissed plaintiffs' claim to the extent that it was premised on a failure to warn. The trial court's order should be reversed in part and the case should be remanded for dismissal of the failure to warn theory. Such a dismissal does not necessitate dismissal of the entire judgment, because plaintiffs also posited a failure to instruct theory separate from the failure to warn theory.

PRODUCTS LIABILITY — WORDS AND PHRASES — SOPHISTICATED USERS — DEFENSES — FAILURE TO WARN.

A "sophisticated user" for purposes of the sophisticated user defense to a claim of failure to warn in a products liability action, means a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect (MCL 600.2945[j], 600.2947[4]).

The Gallagher Law Firm (by *Jennifer M. Endl, Peter C. Brown*, and *Byron P. Gallagher, Jr.*) for Gerald T. and Jonna Heaton.

Garan Lucow Miller, P.C. (by *Robert D. Goldstein* and *Paul E. Tower*), for Benton Construction Company.

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

PER CURIAM. Plaintiffs filed this action for damages, asserting that defendants' negligence caused the foundation of their home to shift during its construction. Defendant Benton Construction Company, doing business as Great Lakes Superior Walls (Great Lakes), appeals by right the judgment entered after a jury verdict finding it 60 percent negligent and defendants Pristine Home Builders (Pristine) and Daniel J. Bonawitt (Bonawitt) 40 percent negligent. Great Lakes also appeals the trial court's order granting partial remittitur of the $272,500 jury award in plaintiffs' favor to $195,000, as the amount the evidence showed that plaintiffs' home diminished in value. Great Lakes contends it should have been granted judgment as a matter of law, but if not, the jury's verdict should have been reduced to $77,500, the cost of repairing the damage to plaintiffs' home. Plaintiffs cross-appeal the trial court's order granting remittitur and the trial court's determination of a reasonable attorney fee for case evaluation sanctions. We affirm, but also reverse the trial court's order granting remittitur and remand for entry of judgment for plaintiffs consistent with the jury's verdict.

Plaintiffs Gerald T. Heaton and Jonna Heaton entered a contract with defendant Pristine, operated by defendant Bonawitt, a licensed builder, to build their retirement home at Scenic Lake in Shiawassee County. Bonawitt subcontracted with defendant Great Lakes

(hereinafter, defendant) to design, manufacture, and install precast concrete foundation walls for the home. During the construction of the home the foundation walls twice shifted, first in September 2005 after the retaining foundation wall was partially backfilled and again in October 2005 after shear (supporting) walls were installed on the advice of defendant and further backfilling. Plaintiffs sued under theories of breach of contract, express and implied warranties, and negligence. Defendants Pristine and Bonawitt were defaulted. The other defendants, except Great Lakes, settled. The case was tried to a jury on the issues of defendant's liability and damages; Bonawitt participated at trial without counsel on the issue of damages only. Ultimately, the case was submitted to the jury only on plaintiffs' negligence theory.

Defendant first argues that the trial court erred by not granting one of its dispositive motions for judgment as a matter of law. Specifically, the trial court denied defendant's motion for summary disposition under MCR 2.116(C)(10), denied defendant's motions for a directed verdict after opening statement and at the close of plaintiffs' proofs, and denied defendant's motion for judgment notwithstanding the verdict (JNOV). Our review of the trial court's decision regarding each of these motions is de novo. *Diamond v Witherspoon*, 265 Mich App 673, 680-681; 696 NW2d 770 (2005).

Defendant's motion under MCR 2.116(C)(10) tested the factual sufficiency of plaintiffs' claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court was required to consider the substantively admissible evidence the parties submitted in the light most favorable to the nonmoving party. *Id*. at 120-121; MCR 2.116(G)(5). If the evidence the parties proffer does not establish that a disputed material issue

of fact remains for trial and if it appears that a party is entitled to judgment as a matter of law, summary disposition is appropriate. MCR 2.116(C)(10), (G)(4), (I)(1); *Maiden*, *supra* at 120.

When reviewing a trial court's decision on a motion for a directed verdict, this Court must view the evidence presented up to the point of the motion and all legitimate inferences from the evidence in the light most favorable to the nonmoving party to determine whether a fact question existed. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). A trial court properly grants a directed verdict only when no factual question exists upon which reasonable minds could differ. *Diamond*, *supra* at 681. Similarly, a motion for JNOV should be granted only when there was insufficient evidence presented to create an issue of fact for the jury. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004). This Court must view the testimony and all legitimate inferences drawn from the testimony in the light most favorable to the nonmoving party. *Diamond*, *supra* at 682; *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Diamond*, *supra* at 682.

Defendant argues that it was entitled to judgment as a matter of law because, although plaintiffs couched their complaint in terms of negligence, the case was actually a products liability claim for failure to warn. Defendant contends that the undisputed facts establish that it furnished a "product," precast concrete foundation walls. See *Fenton Area Pub Schools v Sorensen-Gross Constr Co*, 124 Mich App 631, 639; 335 NW2d 221 (1983), noting that MCL 600.2945 does not define "product" but a dictionary defines " 'product' as 'a

thing produced by labor'." Here, the undisputed facts established defendant's "product" was neither defective nor the cause of the foundation movement at issue. Rather, the foundation shifted because Bonawitt failed to initially install shear walls, and then subsequently installed shear walls that were inadequately designed or constructed. The lynchpin of defendant's argument is that Bonawitt was a "sophisticated user" of defendant's foundation walls, having been a licensed builder since 1997, and experienced in all phases of construction, including the use of shear walls. Consequently, defendant argues that, under MCL 600.2947(4), it had no duty to warn Bonawitt of the need for shear walls. Finally, defendant correctly notes that the question of duty is one for the trial court to decide as matter of law, citing *Antcliff v State Employees Credit Union*, 414 Mich 624, 640; 327 NW2d 814 (1982) ("It is well-settled law that the question of duty is to be resolved by the court rather than the jury."). For these reasons, defendant argues, the trial court erred by not granting one of its dispositive motions for judgment as a matter of law.

The statutes pertinent to this issue provide:

> (g) "Product" includes any and all component parts to a product.
>
> (h) "Product liability action" means an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product.
>
> (i) "Production" means manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling.
>
> (j) "Sophisticated user" means a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable

> about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user. [MCL 600.2945(g), (h), (i), and (j).]
>
> * * *
>
> (4) Except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user. [MCL 600.2947(4).]

The trial court denied defendants motion for two reasons: (1) plaintiffs' claim was not one of products liability but rather one for ordinary negligence, and (2) under the facts of the case, Bonawitt was not a "sophisticated user" as contemplated by the statute. "This Court reviews de novo the interpretation and application of statutes as questions of law." *Gilliam v Hi-Temp Products Inc*, 260 Mich App 98, 108; 677 NW2d 856 (2003). "In addition, we review the trial court's factual findings that support its legal holdings for clear error." *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

First, we accept defendant's argument that its precast concrete foundation walls were a "product" within the meaning of the products liability statutes. Second, for purposes of our analysis of this issue, we accept defendant's assertion that even though plaintiffs' claim was one of ordinary negligence, it still could come within the broad definitions of "product liability action" and "production" in MCL 600.2945(h) and (i). Splicing these two definitions together, they would read, pertinent to this case: " 'Product liability action' means an action based on a legal . . . theory of liability brought

for . . . damage to property caused by or resulting from the assembly, inspection, . . . warning, [or] instructing [regarding the use of] a product." Thus, the fact that plaintiffs' theory of liability was one of negligence does not preclude its action from coming within the statutory definition of a products liability action because negligence is "a legal . . . theory of liability brought for . . . damage to property." Further, the essence of plaintiffs' claim was that defendant negligently failed to warn, inspect, or instruct regarding using its foundation walls with appropriately designed and constructed shear walls.

Nevertheless, we conclude that the trial did not err by ruling on the basis of the facts of this case that Bonawitt was not a sophisticated user as contemplated by the statute. A "sophisticated user" is one who "by virtue of training, experience, [or] a profession, . . . is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect." MCL 600.2945(j). Here, although Bonawitt was a licensed builder engaging in home construction since 1997, he testified that he had built only 12 houses under his license and had never used the type of foundation that Great Lakes provided. In Bonawitt's words, he "built like one and a half houses a year, adequate to support my family." Further, Bonawitt testified that he relied on various subcontractors and engineers for their expertise regarding various aspects of construction. He also testified that he relied on a "Builder Guideline Booklet," which is subtitled "Site Preparation and Framing Attachment Requirements," that Great Lakes provided him. Specifically, Bonawitt read page 36 of this booklet that addressed shear walls as stating that with respect to plaintiffs' home, shear walls were not necessary because no continuous span of the foundation was greater than 42 feet. This page of

defendant's booklet also warns: "Shear walls may need to be individually reviewed by an engineer." Bonawitt testified he had graduated from high school and had some college-level credits. These facts establish that Bonawitt did not have the education, experience, or professional standing that defendant's own builders' booklet warns may be necessary regarding the use of shear walls to support its foundation walls. Consequently, because we find no error in the trial court's ruling that Bonawitt was not a "sophisticated user" as defined in MCL 600.2945(j), the "sophisticated user" defense provided for in MCL 600.2947(4) is inapplicable.

Moreover, MCL 600.2947(4) only limits products liability with respect to a duty to provide an "adequate warning" to sophisticated users where not otherwise required by state or federal statute or regulation. Plaintiffs' theory of liability was much broader than simply the failure to provide an adequate warning. It included a claim for breach of a duty to provide adequate instructions regarding the need for shear walls, and for defendant's active participation with Bonawitt in devising the shear walls that subsequently failed to adequately support the foundation walls. Plaintiffs' theory of the case, supported by the evidence, is best characterized as an "application of the basic rule of the common law, which 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." *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967); see also *Johnson v A & M Custom Built Homes of West Bloomfield, PC*, 261 Mich App 719, 722; 683 NW2d 229 (2004), and *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 707-708; 532 NW2d 186 (1995), overruled in part on other grounds *Smith v*

Globe Life Ins Co, 460 Mich 446, 455 n 2 (1999). Applying the appropriate legal analysis to the facts of this case we conclude the trial court did not err by denying defendant's motions for judgment as a matter of law based on its claim to a sophisticated user defense under MCL 600.2947(4).

Next, defendant argues that the trial court erred by failing to instruct the jury regarding its claim to a sophisticated user defense. This Court reviews de novo claims of instructional error. *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). To preserve an instructional issue for appeal, a party must request the instruction before instructions are given and must object on the record before the jury retires to deliberate. MCR 2.516(C); *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 300; 616 NW2d 175 (2000). Here, defendant points only to an oblique comment by defense counsel *after* the jury was instructed that the Court of Appeals is "nitpicky" and that "this is actually a products liability case and products liability instructions should apply . . . ." Defendant fails to show where in the record counsel requested that the trial court give the jury a specific instruction on its claim to a sophisticated user defense. The failure to timely and specifically object precludes appellate review absent manifest injustice. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 403; 628 NW2d 86 (2001). No manifest injustice occurred here because, as we have earlier concluded, the trial court properly ruled as a matter of law that Bonawitt was not a sophisticated user within the meaning of MCL 600.2945(j) and MCL 600.2947(4).

Both parties appeal the trial court's partial grant of remittitur. Defendant contends the trial court abused its discretion by only reducing the jury verdict in plaintiffs' favor from $272,500 to $195,000. Defendant

asserts that the jury's verdict should have been reduced to the cost of repairing the damage to plaintiffs' home, which Great Lakes argues was $77,500. Plaintiffs, on the other hand, argue on cross appeal that after the foundation shifted the second time, the house could be restored to its predamaged condition only by tearing down what had been erected at that time and rebuilding. The evidence at trial showed that plaintiffs had already expended $220,000 to $250,000, so the cost of repair would certainly have exceeded that amount. Thus, the jury properly added the $77,500 plaintiffs incurred to partially repair their home to the $195,000 the home lost in value even with the partial repairs. Because the evidence supported the jury's verdict, plaintiffs assert the trial court abused its discretion by granting remittitur. We agree.

When a jury awards damages that appear excessive because of the influence of passion or prejudice, or the jury award is clearly or grossly excessive, a court may grant a new trial. MCR 2.611(A)(1)(c)-(d). Alternatively, a trial court may offer the prevailing party an opportunity to consent to judgment in the highest amount the court finds is supported by the evidence. MCR 2.611(E)(1). This Court reviews a trial court's decision regarding a motion for remittitur or a new trial for an abuse of discretion. *Palenkas v Beaumont Hosp*, 432 Mich 527, 531; 443 NW2d 354 (1989). An abuse of discretion occurs when a court chooses an outcome that is outside the range of principled outcomes. *McManamon v Redford Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006).

Analysis of this issue must start with the principle that the adequacy of the amount of the damages is generally a matter for the jury to decide. *Kelly v Builders Square, Inc*, 465 Mich 29, 35; 632 NW2d 912

(2001). Moreover, a verdict should not be set aside merely because the method the jury used to compute damages cannot be determined. *Diamond*, *supra* at 694. This Court must view the evidence in the light most favorable to the nonmoving party. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003). "A trial court's order of remittitur is governed by MCR 2.611(E)(1)." *Palenkas*, *supra* at 531. Accordingly, remittitur is justified only "if the jury verdict is 'excessive,' i.e., if the amount awarded is greater than 'the highest amount the evidence will support.' " *Id*., quoting MCR 2.611(E)(1).

Both parties cite *Baranowski v Strating*, 72 Mich App 548; 250 NW2d 744 (1976), regarding the proper measure of damages in a negligence action for damages to real property. In that case, the plaintiffs sought damages in a contract and negligence action against a builder after the foundation of the plaintiffs' home settled because of unsuitable soil. This Court affirmed the trial court's assessment of damages ($20,600) as the amount of the loss in value because the cost of repair—$50,000 to place the home on a secure footing—was far greater than its loss in value. The Court opined: "[T]he measure of damages to real property in a negligence suit where the damage cannot be repaired is the difference between the market value of the property before and after the injury; where the damage can be repaired and the cost of repair is less than the value of the property prior to the injury, cost of repair is the proper measure." *Id*. at 562. Before stating this general rule, the Court was careful to note "that there is and should be no fixed rule for measuring compensation in cases such as this." *Id*. Pertinent to the instant case, the *Baranowski* Court rejected the defendants' claim that the measure of the cost of repair was the plaintiffs' expenses to partially cure the problem ($5,508.20). *Id*.

at 563. Rather, "the measure of cost of repair is . . . what expense would be necessary to put the house in the condition it would have been in had defendants not breached the duty they owed to the plaintiffs." *Id*.

As to damages, the trial court instructed the jury consistent with M Civ JI 51.05:

> In this case the Plaintiffs claim damages to their home. If you decide that Plaintiff [sic] is entitled to such damages, the amount should be measured by the lesser of the reasonable expense of necessary repairs to the property which was damaged or the difference between the fair market value of the property immediately before the occurrence and its fair market value immediately after the occurrence.

As noted above, the evidence adduced at trial would have permitted the jury to find that the damage to the home caused by the second foundation shift was essentially irreparable. Engineer Scott Walkowicz testified regarding the dilemma plaintiffs faced:

> When we were approached by Mr. Heaton he was at that point, already having problems with his house. His primary interest was whether or not the house could reasonably be saved or repaired and brought back to a condition that you would expect for a newly constructed house. So we went through, did field work, and as we were going through there some of the observations that we made—I'm not sure if I should state those—but ultimately it came down to the opinion that it would be a very, very difficult thing[,] if not impossible[,] to repair the house to the condition that it should've been prior to having moved, and that was due to a number of reasons; that there was lesser or kind of partial repairs whereby we can stabilize it and have reasonable confidence that it wouldn't move again or move further. Those were our two ultimate opinions.

Plaintiffs chose to stabilize, but not repair the foundation, and partially repair other damage to the struc-

ture at a cost of $77,500. Plaintiffs' real estate expert, Robert Vertalka, testified that the value of plaintiffs' home even after these partial repairs had still diminished by $195,000. Vertalka testified:

> *Counsel:* And I want to make sure that we understand whether that one hundred and ninety-five thousand dollar loss includes any of the costs that the homeowner would incur to partially cure or stabilize the problem with the foundation.
>
> *Vertalka:* It does not.
>
> *Counsel:* So any costs the homeowner incurred to stabilize or partially cure would be in addition to this loss in value?
>
> *Vertalka:* That's correct.

On the basis of this evidence and *Baranowski*, *supra* at 563, we conclude that defendant's argument that the jury award should have been reduced to $77,500 is without merit. Consequently, defendant's final argument that the trial court erroneously awarded case evaluations sanctions must also fail.

Further, we agree with plaintiffs that because the evidence supported the jury's award, the trial court abused its discretion by granting remittitur. *Palenkas*, *supra* at 531; *McManamon*, *supra* at 138; MCR 2.611(E)(1). In general, a defendant found negligent is liable for all injuries resulting directly from his or her wrongful act, whether foreseeable or not, if the damages were the legal and natural consequences of the defendant's conduct and might reasonably have been anticipated. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 524; 687 NW2d 143 (2004), quoting *Sutter v Biggs*, 377 Mich 80, 86-87; 139 NW2d 684 (1966). In this case, viewing the evidence in the light most favorable to plaintiffs, *Wiley*, *supra* at 499, the jury could have found: (1) that the cost of repair (complete rebuild

after damage) was in excess of $272,500, (2) that the $77,500 plaintiffs expended to stabilize the home was necessary to render it habitable and marketable, and (3) that the true damages to plaintiffs as a result of defendant's negligence was the sum of the cost to stabilize and the loss of the house's market value despite the repairs and after stabilization. In the light most favorable to plaintiffs, the evidence supported the jury's verdict and was consistent with the trial court's instruction. Because the evidence strongly supported the jury's award, the trial court abused its discretion by granting remittitur. MCR 2.611(E)(1); *Palenkas*, *supra* at 531; *McManamon*, *supra* at 138.

The final issue on appeal is plaintiffs' claim that the trial court abused its discretion when awarding case evaluation sanctions by determining that a reasonable hourly attorney fee rate was $185 and $70 an hour was reasonable for paralegal services. We disagree.

When case evaluation sanctions are appropriate, the actual costs to be charged are the costs taxable in any civil action plus a reasonable attorney fee. MCR 2.403(O)(6); *Dessart v Burak*, 470 Mich 37, 40; 678 NW2d 615 (2004). Here, plaintiffs had the burden of establishing the reasonableness of the requested attorney fee. *Smith v Khouri*, 481 Mich 519, 528-529; 751 NW2d 472 (2008). The trial court must determine a reasonable attorney fee on the basis of a reasonable hourly or daily rate for services necessitated by the rejection of the evaluation. MCR 2.403(O)(6)(b); *Dessart*, *supra* at 40. The determination of a reasonable hourly rate for an attorney fee to include in a sanction is within the trial court's discretion. *Zdrojewski v Murphy*, 254 Mich App 50, 73; 657 NW2d 721 (2002). The trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Smith*, *supra* at 526.

In determining a reasonable hourly rate for an attorney fee, MCR 2.403(O)(6)(b), "a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services . . . ." *Smith*, *supra* at 530. In doing so, "trial courts have routinely relied on data contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan." *Id*. In this case, the trial court rejected plaintiffs' requested hourly attorney fee rate of $225, which was in the 75th percentile of such a State Bar study. Instead, the trial court determined that because the instant case was not overly complex, a reasonable attorney fee rate in the court's locality was closer to the median hourly rate of $195 according to same study. We conclude that the trial court's decision was within the range of reasonable and principled outcomes and, thus, was not an abuse of discretion. *Smith*, *supra* at 526.

We affirm, but also reverse the trial court's order granting remittitur and remand for entry of judgment for plaintiffs consistent with the jury's verdict. We do not retain jurisdiction. Because plaintiffs have prevailed regarding the issues on which defendant appealed, they may tax costs pursuant to MCR 7.219.

MURRAY, P.J. (*concurring in part and dissenting in part*). I concur in the majority's opinion that this is a products liability case, but respectfully disagree with its conclusion that Daniel J. Bonawitt was not a sophisticated user. In my view, Bonawitt was a sophisticated user, and, as a result, the trial court should have granted defendant Great Lakes Superior Walls' motion for summary disposition, and dismissed plaintiffs' claim to the extent that it was premised on a failure to warn.

Although the parties argue over whether plaintiffs' claim was actually one in negligence or products liabil-

ity, it was both. In other words, plaintiffs' claim was one of products liability that was based on a negligence theory. See *Prentis v Yale Mfg Co*, 421 Mich 670, 682; 365 NW2d 176 (1984); *Lemire v Garrard Drugs*, 95 Mich App 520, 523; 291 NW2d 103 (1980); *Bullock v Gulf & Western Mfg*, 128 Mich App 316, 319; 340 NW2d 294 (1983). Such a theory, as the majority recognizes, also falls squarely within the plain language of the statute. MCL 600.2946. And, although there are several statutory defenses and standards that are applicable to one or more products liability theories, defendant relies exclusively on the "sophisticated user" defense to a failure to warn theory contained in MCL 600.2945(j) and MCL 600.2947(4).[1]

The statutory definition of "sophisticated user" is:

> "Sophisticated user" means a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user. [MCL 600.2945(j)]

I would hold that there was no genuine issue of material fact that Bonawitt was a sophisticated user. It is undisputed that Bonawitt had been a professional homebuilder for the past 12 years, and that this was his exclusive line of business. The evidence is also undisputed that Bonawitt had built approximately 19 homes during his 12 years of business, and it is clear that when he contracted with plaintiffs to build their home, he

[1] I am assuming, because it is not addressed by the parties, that the "sophisticated user" defense applies to plaintiffs' cause of action even though the transaction was between defendant and Bonawitt, and this discussion is over whether Bonawitt, rather than plaintiffs, was a "sophisticated user."

held himself out as a professional homebuilder. Consequently, because of his training, experience, and profession, Bonawitt was a sophisticated user. At a minimum, given his profession and experience, he would generally be expected to be familiar with retaining walls that he purchased for use in building a home.

In light of this conclusion, I would reverse the trial court's order in part, and remand for dismissal of plaintiffs' failure to warn theory. Such a dismissal would not necessitate dismissal of the entire judgment, because plaintiffs also posited a failure to instruct theory, which is different from a failure to warn. See MCL 600.2945(i) (defining "production" as both "instructing" and "warning") and *Talcott v Midland*, 150 Mich App 143, 148; 387 NW2d 845 (1985). In all other respects, I concur in the majority opinion.

In re MKK

Docket No. 292065. Submitted December 2, 2009, at Lansing. Decided December 22, 2009, at 9:15 a.m.

Nicholas V. Mattson brought an action in the Washtenaw Circuit Court, Family Division, seeking entry of an order of filiation declaring him the father of MKK, a minor born out of wedlock to Casey Jo Keilman. Jennifer L. and Matthew R. Linden, the child's maternal aunt and uncle, then filed a petition seeking to adopt the child. Accompanying the adoption petition was Keilman's petition for a hearing to identify the father and determine or terminate his parental rights pursuant to MCL 710.36(1). The trial court in the paternity action, Darlene A. O'Brien, J., denied Keilman's motion to stay the paternity action and ordered DNA testing to determine paternity. Mattson filed a motion to stay the adoption proceedings. Following a hearing during which the results of DNA testing indicating a 99.99 percent probability that Mattson is the father were presented, the trial court in the adoption case, Donald E. Shelton, J., denied the motion to stay the adoption case. Following an August 6, 2008, hearing, Judge Shelton entered an order finding that Mattson was the child's putative father, concluding that Mattson had not provided substantial support or established a custodial relationship to the extent that the provisions of MCL 710.39(2) applied, and stated that the case would proceed to a best interests hearing pursuant to MCL 710.39(1). Judge Shelton also stated that the paternity action was stayed pending conclusion of the adoption proceedings. The paternity case was then reassigned to Judge Shelton. Mattson moved to consolidate the cases, and Judge Shelton denied the motion. Following a best interests hearing, Judge Shelton, in a March 18, 2009, opinion and order, concluded that it was not in the child's best interests to grant custody to Mattson, but did not terminate Mattson's parental rights. Judge Shelton also determined that placement with the Lindens was not in the child's best interests and denied the adoption petition. Mattson then brought a motion to disqualify Judge Shelton, which the judge and the chief judge of the circuit court denied. The Lindens appealed and Mattson cross-appealed.

The Court of Appeals *held*:

1. Although proceedings under the Adoption Code, MCL 710.21 *et seq*., should, in general, take precedence over proceedings under the Paternity Act, MCL 722.711 *et seq*., adoption proceedings may be stayed upon a showing of good cause, as determined by the trial court on a case-by-case basis. Here, there was good cause to stay the adoption proceedings in favor of the paternity action. Judge Shelton erred by denying Mattson's motion to stay and by proceeding with the best interests hearings under MCL 710.39 without first determining the issue of paternity. The court's August 6, 2008, and March 18, 2009, orders must be vacated and the case must be remanded to allow the paternity case to proceed.

2. The timing of a paternity action is only one factor to be considered in determining whether there is good cause under MCL 710.25(2) to stay adoption proceedings. Because 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, giving a paternity action priority over an adoption proceeding does not necessarily conflict with protecting the best interests of the child.

3. Mattson failed to establish any grounds for the disqualification of Judge Shelton. Judge Shelton's basis for proceeding with the case and applying the standards for terminating a putative father's rights was reasonable. In and of itself, the judge's actions were not reflective of a high probability of bias to the extent that due process principles required disqualification. The motion for disqualification was properly denied.

August 6, 2008, and March 18, 2009, orders vacated and case remanded to allow paternity action to proceed.

1. ADOPTION — PATERNITY ACTIONS — PRECEDENCE OF ADOPTION ACTIONS.

Proceedings under the Adoption Code generally take precedence over proceedings under the Paternity Act, but adoption proceedings may be stayed upon a showing of good cause, as determined by the trial court on a case-by-case basis (MCL 710.21 *et seq*., 722.711 *et seq*.).

2. JUDGES — DISQUALIFICATION OF JUDGES.

A motion to disqualify a trial court judge must be filed within 14 days after the moving party discovers the ground for disqualification; untimeliness is a factor in deciding whether the motion should be granted (MCR 2.003[D][1]).

Williams, Williams, Rattner & Plunkett, P.C. (by *John F. Mills*), for Matthew R. and Jennifer L. Linden.

Steven P. Tramontin for Nicholas V. Mattson.

Herbert A. Brail for Casey Jo Keilman.

Before: BECKERING, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM. This case involves the interplay of the Adoption Code, MCL 710.21 *et seq*., and the Paternity Act, MCL 722.711 *et seq*. Respondent, the minor child's putative father, filed a separate paternity action,[1] seeking entry of an order of filiation. This adoption case commenced when petitioners, the minor child's maternal aunt and uncle, filed a petition to adopt the child. The trial court denied respondent's motion to stay the adoption proceedings in an August 6, 2008, order. The court then stayed the paternity action pending the conclusion of the adoption proceedings. Petitioners appeal as of right the trial court's March 18, 2009, order denying their adoption petition. Respondent cross-appeals, challenging the trial court's: September 2, 2008, order holding that he failed to provide substantial and regular support under MCL 710.39(2); failure to decide his September 10, 2008, motion to dismiss; October 14, 2008, order denying his motion to amend the home study; March 18, 2009, order denying him custody of the child; and May 6, 2009, order denying his motion to disqualify the trial court judge. We vacate the trial court's August 6, 2008, and March 18, 2009, orders and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

On December 19, 2007, appellee Casey Jo Keilman informed respondent that she was pregnant with the

[1] Washtenaw Circuit Court Docket No. 08-000889-DP.

child and intended to give the child up for adoption. Respondent objected to the planned adoption and on February 7, 2008, filed a notice of intent to claim paternity. On the day the child was born, March 22, 2008, Keilman signed the necessary paperwork to place him up for adoption, naming petitioners as the intended adoptive parents and immediate custodians. Immediately upon discharge from the hospital, the child was placed with petitioners.

Respondent filed his paternity action on April 16, 2008. That case was initially assigned to Judge Darlene A. O'Brien. On May 7, 2008, petitioners filed their petition to adopt the child. The adoption case was assigned to Judge Donald E. Shelton. Accompanying the adoption petition was Keilman's petition for a hearing to identify the father and determine or terminate his parental rights pursuant to MCL 710.36(1).[2]

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[2] MCL 710.36(1) states:

> If a child is claimed to be born out of wedlock and the mother executes or proposes to execute a release or consent relinquishing her rights to the child . . . , and the release or consent of the natural father cannot be obtained, the judge shall hold a hearing as soon as practical to determine whether the child was born out of wedlock, to determine the identity of the father, and to determine or terminate the rights of the father as provided in [section 39] of this chapter.

MCL 710.39 states, in 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

In a June 17, 2008, order, Judge O'Brien denied Keilman's motion to stay the paternity action and ordered DNA testing to determine paternity. On July 25, 2008, respondent filed a motion to stay the adoption proceedings pending the outcome of his paternity action. He argued that the paternity action should be decided first because its outcome would render this adoption case moot. Petitioners opposed the motion, arguing that the Paternity Act did not prevent respondent's rights as a putative father from being determined and terminated under the Adoption Code, under which the rights of the adoptee are paramount. Keilman concurred and also asserted that respondent only filed the paternity action in an attempt to thwart her adoption plan.

At the July 30, 2008, hearing on respondent's motion to stay, the results of the DNA testing were presented. The testing revealed a 99.99 percent probability that respondent was the child's biological father. Respondent argued that he was probably only one hearing away from being declared the child's legal father and the Adoption Code should not supersede his effort to do so under the Paternity Act. Petitioners and Keilman responded that the results of the DNA testing were irrelevant to the adoption proceedings and those proceedings had priority over respondent's paternity case pursuant to MCL 710.21a, which lists the general purposes of the Adoption Code, and MCL 710.25.[3] Judge Shelton denied respondent's motion, stating that he did

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such 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 section 51(6) of this chapter or section 2 of chapter XIIA.

[3] MCL 710.25 states:

not "believe that these actions are necessarily in conflict. I don't think one can delay the other." He then bifurcated the adoption proceedings.

On August 6, 2008, Judge Shelton conducted a hearing, at which the parties presented evidence regarding respondent's efforts to provide support and care during Keilman's pregnancy and the 90-day period before notice of the hearing was mailed to him. It was undisputed that respondent was the child's father and he and Keilman were never married. Keilman did not place respondent's name on the birth certificate, told the hospital staff not to release any information regarding her admission to give birth because she did not want respondent present, which he was not, and declined to sign an affidavit of parentage. Keilman testified that she did not talk to respondent between the time she informed him of the pregnancy and the hearing date. She acknowledged, however, that she met him at a park-n-ride lot in April 2008, but that he did not request to see the child. She showed him a photograph. Respondent testified that he asked Keilman by email who her doctor was, wanted to be present for the birth, and telephoned two hospitals in an attempt to find Keilman. He also wanted to be named on the birth certificate and was willing to sign an affidavit of parentage. Respondent testified that he repeatedly asked to see the child since his birth, but Keilman always replied that the child had already been given up for adoption. Beginning in January 2008, respondent attended parenting classes and worked with a social services employee to prepare

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(1) All proceedings under this chapter shall be considered to have the highest priority and shall be advanced on the court docket so as to provide for their earliest practicable disposition.

(2) An adjournment or continuance of a proceeding under this chapter shall not be granted without a showing of good cause.

himself for becoming a parent. Respondent testified that he sent money to Keilman on three occasions in February 2008 by certified mail. He also offered to help Keilman with her medical bills in one of the certified letters. After the letters were returned to him, he did not send any more letters. Keilman testified that she did not receive any certified mail at her home and was unaware that respondent had tried to send money in February 2008. She did not recall respondent's asking about her doctor or medical bills. In the month preceding the hearing, respondent sent money for the child to petitioners' counsel on four occasions. Respondent also opened a bank account for the child.

Judge Shelton found that respondent was the child's putative father as established by the DNA testing. He stated that whether respondent provided substantial and regular support during the 90-day period before notice of the hearing was served was irrelevant in this case; rather, the real question was whether Keilman impeded respondent's efforts to provide support during her pregnancy. Judge Shelton found Keilman's testimony credible and stated:

> I will say, frankly, this case seems to have been engineered during this period of time which is disturbing to me but to the extent that the engineering involves sending certified mail with—and then claiming that the impeding was that a person did not go and get the certified mail, I do not find that that is impeding as provided by—by the case law.

Accordingly, Judge Shelton concluded that respondent did not fall under MCL 710.39(2) and, therefore, that the case would proceed to a best interests hearing pursuant to MCL 710.39(1). The judge then stated: "The paternity action is stayed pending conclusion of these proceedings." At the time of this ruling, the paternity case was still assigned to Judge O'Brien.

On August 26, 2008, respondent's paternity case was reassigned to Judge Shelton. Three days later, respondent filed a motion to consolidate the paternity and adoption cases. Respondent argued that pursuant to MCL 722.717(1)(b), an order of filiation was required to be entered because he had acknowledged paternity before the court. He further argued that the cases should be consolidated so that the trial court could address the paternity issue first, because if respondent was the legal father, his rights could only be terminated pursuant to MCL 712A.19b, not MCL 710.39. At a September 3, 2008, hearing, petitioners argued that respondent's motion to consolidate was moot because both cases had been assigned to Judge Shelton. Respondent argued that all that remained was for the trial court to recognize him as the legal father and that procedural and substantive due process required that the paternity action be decided first. Judge Shelton stated that respondent had raised interesting constitutional issues, but the law was clear that he should not rule on such issues unless required to do so. The judge granted petitioners' motion to exclude testimony pertaining to constitutional issues and denied respondent's motion to consolidate. Judge Shelton reasoned that if he found in respondent's favor under MCL 710.39(1), it would not be necessary to reach the constitutional issues. If he found that adoption was in the child's best interests, he would then entertain further briefing of the constitutional issues.

Judge Shelton conducted a four-day best interests hearing beginning on September 4, 2008. In a March 18, 2009, opinion and order, the judge made several findings of fact and then addressed the best interests factors set forth in MCL 710.22(g), acknowledging that the parties agreed that factors (*viii*) through (*x*) did not apply. He found the evidence sufficient to support an adverse

finding regarding respondent for all factors except factor (*v*), for which the evidence was equivocal, and factor (*vii*), for which the evidence was not sufficient to support an adverse finding. Accordingly, Judge Shelton concluded that it was not in the child's best interests to grant custody to respondent. The judge did not, however, terminate respondent's parental rights.

Judge Shelton also concluded that placement with petitioners was not in the child's best interests and denied the adoption petition, stating:

> It is highly likely that the child will learn the identity of his biological mother and father, and of this litigation, and that will have an adverse effect on the child growing up. The mother will certainly be around in [the child's] life in a way that would be very confusing. In the small community where they all live, the father will likely also be around and his presence will add more confusion to [the child]. That scenario would not be in the child's best interest. . . . [A]n adoption plan with her [the mother's] aunt and uncle in the same community creates significant problems given the facts and circumstances of this case.

Thereafter, petitioners and Keilman moved for rehearing. At an April 8, 2009, hearing, Judge Shelton denied the motions and ordered the parties to submit, pursuant to MCL 710.62, their proposed plans for the disposition of the child, including custody, parenting time, and child support. The judge memorialized his holding in an April 22, 2009, order. On April 23, 2009, respondent filed a motion under MCR 2.003(B)(1) (now [C][1][a]) to disqualify Judge Shelton, arguing that the judge was biased against him and had denied him due process. On May 6, 2009, Judge Shelton heard the motion and stated that he had no bias. He denied the motion as untimely and without merit. Thereafter, the matter was referred to the chief judge of the circuit court, who found, pursuant to MCR 2.003(C)(1) (now

[D][1]), that respondent should have filed his motion, at the latest, within 14 days after Judge Shelton's March 18, 2009, opinion and order denying respondent custody of the child. The chief judge further found that there was no evidence of bias, prejudice, or deep-seated favoritism or antagonism.

Petitioners now appeal as of right. Respondent cross-appeals.[4]

II. INTERPLAY OF THE ADOPTION CODE AND PATERNITY ACT

Respondent argues that he was denied both procedural and substantive due process by Judge Shelton's application of the Adoption Code and decision to stay his paternity action until completion of the adoption proceedings. Although respondent frames this as a constitutional issue, it is primarily an issue of statutory construction. We must determine whether the Adoption Code or the Paternity Act takes precedence when contemporaneous actions have been filed under each. Although proceedings under the Adoption Code should, in general, take precedence over proceedings under the Paternity Act, adoption proceedings may be stayed upon a showing of good cause, as determined by the trial court on a case-by-case basis. In this case, there was good cause to stay the adoption proceedings in

[4] On December 1, 2009, after the parties filed their claims of appeal and appellate briefs, Judge Shelton entered an order pertaining to both this case and respondent's related paternity action, awarding sole physical and legal custody of the child to Keilman, ordering respondent to pay monthly child support, and awarding respondent parenting time of two hours every other week to be supervised by petitioners. Respondent's counsel informed this Court of the order in a letter dated the same day and the parties addressed the order at oral arguments. We must, however, decline to address the parties' arguments regarding the order, because they are not properly before this Court. An appeal of right can only be taken after an order is entered, not before. MCR 7.204(A)(1)(a).

favor of respondent's paternity action. Judge Shelton erred by denying respondent's motion to stay and proceeding with the § 39 hearings. Therefore, the judge's August 6, 2008, and March 18, 2009, orders must be vacated.

A. STANDARD OF REVIEW AND RULES OF STATUTORY CONSTRUCTION

We review constitutional issues and questions of statutory construction de novo. *Dep't of Transportation v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008). "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). The purpose of judicial statutory construction is to ascertain and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). In determining the Legislature's intent, we must first look to the language of the statute itself. *Id*. Moreover, when considering the correct interpretation, the statute must be read as a whole. *Id*. at 237. A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. *Walters v Leech*, 279 Mich App 707, 709-710; 761 NW2d 143 (2008). The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme. *Id*. at 710; see also *Wayne Co v Auditor General*, 250 Mich 227, 233; 229 NW 911 (1930). The Legislature is presumed to be familiar with the rules of statutory construction and, when promulgating new laws, to be aware of the consequences of its use or omission of statutory language, *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich App 675, 687; 658 NW2d 849 (2003); *Lumley v Univ of*

Michigan Bd of Regents, 215 Mich App 125, 129-130; 544 NW2d 692 (1996), and to have considered the effect of new laws on all existing laws, *Great Wolf Lodge of Traverse City, LLC v Pub Service Comm*, 285 Mich App 26, 42; 775 NW2d 597 (2009).

B. THE PATERNITY ACT

There are several ways to establish paternity. When a child is born out of wedlock, one way is to seek a judicial determination of paternity under the Paternity Act. *Aichele v Hodge*, 259 Mich App 146, 154-155; 673 NW2d 452 (2003). The Paternity Act " 'was created as a procedural vehicle for determining the paternity of children "born out of wedlock," and enforcing the resulting support obligation.' " *Sinicropi v Mazurek*, 273 Mich App 149, 163; 729 NW2d 256 (2006), quoting *Syrkowski v Appleyard*, 420 Mich 367, 375; 362 NW2d 211 (1985); see also MCL 722.712. Once a paternity action has been filed, the parties are required to submit to blood or tissue typing determinations, which may include DNA identification profiling, during the pretrial stage. MCL 722.716(1). If the testing shows that there is a 99 percent or higher probability of paternity, paternity is presumed. MCL 722.716(5). Paternity is established once an order of filiation is entered. MCL 722.717(1) states:

> The court shall enter an order of filiation declaring paternity and providing for the support of the child under 1 or more of the following circumstances:
>
> (a) The finding of the court or the verdict determines that the man is the father.
>
> (b) The defendant acknowledges paternity either orally to the court or by filing with the court a written acknowledgement of paternity.

> (c) The defendant is served with summons and a default judgment is entered against him or her.

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. See *In re LE*, 278 Mich App 1, 19, 22; 747 NW2d 883 (2008).

C. THE ADOPTION CODE

Adoption is strictly statutory. The Adoption Code was designed for the following general purposes:

> (a) To provide that each adoptee in this state who needs adoption services receives those services.
>
> (b) To provide procedures and services that will safeguard and promote the best interests of each adoptee in need of adoption and that will protect the rights of all parties concerned. If conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount.
>
> (c) To provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time.
>
> (d) To achieve permanency and stability for adoptees as quickly as possible.
>
> (e) To support the permanency of a finalized adoption by allowing all interested parties to participate in proceedings regarding the adoptee. [MCL 710.21a.]

The Adoption Code provides provisions to accomplish these goals. As indicated, MCL 710.25 states:

> (1) All proceedings under this chapter shall be considered to have the highest priority and shall be advanced on the court docket so as to provide for their earliest practicable disposition.

> (2) An adjournment or continuance of a proceeding under this chapter shall not be granted without a showing of good cause.

Unless there is parental consent to the adoption, an adoption petition must be accompanied by, among other things, proof of release of parental rights or an order terminating parental rights over the child. MCL 710.26(1)(a). If the child is claimed to be born out of wedlock and the mother executes or proposes to execute a consent or release relinquishing her rights or joins in a petition for adoption by her husband, and the consent or release of the natural father cannot be obtained, the trial court must hold a hearing to determine whether the child was born out of wedlock, determine the identity of the father, and determine or terminate the father's rights. MCL 710.36.

If the father is putative, the court must determine his rights pursuant to MCL 710.39. The two-tiered standard set forth in § 39 for terminating the parental rights of a putative father is based on principles set forth in multiple United States Supreme Court cases.[5]

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[5] These cases are set forth in *In re BKD*, 246 Mich App 212, 221-222; 631 NW2d 353 (2001), in which this Court stated:

> The United States Supreme Court has held that the father of an illegitimate child, who has taken steps to establish a custodial or supportive relationship with the child has a constitutionally protected interest in continuing that relationship. *Caban v Mohammed*, 441 US 380; 99 S Ct 1760; 60 L Ed 2d 297 (1979); *Stanley v Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972). Accordingly, the Due Process and Equal Protection Clauses bar the state from terminating the parental rights of the father of an illegitimate child without the same showing of unfitness that would be necessary to terminate the rights of a mother or a married father. *Caban*, *supra* at 392-394; *Stanley*, *supra* at 658. However, where the father of an illegitimate child has not taken steps to establish a custodial or supportive relationship, the state may constitutionally terminate his parental rights through procedures and standards that are less stringent than those required to terminate the parental rights of a mother or a married father. *Lehr*

See *In re BKD*, 246 Mich App 212, 222; 631 NW2d 353 (2001), citing *In re Barlow*, 404 Mich 216, 229 n 8; 273 NW2d 35 (1978). As explained in *In re BKD*, 246 Mich App at 222, "[s]ubsection 39(1) determines the rights of putative fathers who have failed to establish a custodial or supportive relationship according to a less rigorous best interests standard." If a putative father has failed to establish such a relationship, but appears at the hearing and requests custody of the child, the trial 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." MCL 710.39(1). Conversely, "subsection 39(2) determines the rights of putative fathers who have established a relationship according to the more rigorous standard applied to mothers and married fathers." *In re BKD*, 246 Mich App at 222. If a putative father has established a custodial or supportive relationship, his parental rights can only be terminated pursuant to § 51(6) of the Adoption Code, MCL 710.51(6), which pertains to stepparent adoptions, or pursuant to child protective proceedings, MCL 712A.1 *et seq*. MCL 710.39(2).

D. ANALYSIS

Respondent argues that he was denied due process by Judge Shelton's application of the Adoption Code and decision to stay his paternity action in favor of the adoption proceedings. According to respondent, an

v Robertson, 463 US 248, 267-268; 103 S Ct 2985; 77 L Ed 2d 614 (1983); *Quilloin v Walcott*, 434 US 246, 255-256; 98 S Ct 549; 54 L Ed 2d 511 (1978).

adoption petition should not be allowed to interfere with a putative father's attempt to establish paternity or his constitutional right to a relationship with his child, particularly when the paternity claim is filed before the adoption petition. Petitioners and Keilman argue that the rights of a putative father may be properly adjudicated under the Adoption Code, particularly MCL 710.39, and that giving paternity actions priority over adoption proceedings would impede the speedy resolution of adoptions, subjugate the rights of adoptees to those of putative fathers, and permit putative fathers to thwart adoption efforts.

"The Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property without due process of law," *Lehr v Robertson*, 463 US 248, 256; 103 S Ct 2985; 77 L Ed 2d 614 (1983), and the United States Supreme Court has recognized that "the relationship between parent and child is constitutionally protected," *Quilloin v Walcott*, 434 US 246, 255; 98 S Ct 549; 54 L Ed 2d 511 (1978). It is noteworthy, however, that respondent is not a legal parent because he has not yet perfected paternity and " 'the mere existence of a biological link' does not necessarily merit constitutional protection." *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 193; 740 NW2d 678 (2007), quoting *Lehr*, 463 US at 261. 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." *Nugent*, 276 Mich App at 193. One exception is when a putative father has established a custodial or supportive relationship under MCL 710.39(2). See *In re BKD*, 246 Mich App at 221-222. In this case, Judge Shelton determined that respondent failed to establish such a relationship.

Petitioners and Keilman correctly assert that adoption proceedings must be completed as quickly as possible and, in general, be given priority on the court's docket. See MCL 710.21a(c) and (d); MCL 710.25(1). But the Legislature created an exception to this general rule in MCL 710.25(2), which states that "[a]n adjournment or continuance of a proceeding under this chapter shall not be granted without a showing of good cause." Furthermore, while petitioners and Keilman are correct that the Adoption Code generally protects the parental rights of putative fathers, see *In re BKD*, 246 Mich App at 221-222, there may be circumstances in which a putative father makes a showing of good cause to stay adoption proceedings in favor of a paternity action. For example, in cases such as this, 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. Upon a motion to stay adoption proceedings, the trial court must make a good cause determination based on the particular circumstances of the case.

In so holding, we do not intend to create a "race to the courthouse," where a paternity action takes precedence over an adoption proceeding merely because the paternity action was filed first; rather, the timing of a paternity claim is but one factor to be considered in determining whether there is good cause under MCL 710.25(2) to stay adoption proceedings. Furthermore, 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 this case, respondent established good cause for delaying the adoption proceedings in favor of his paternity action. There was never any genuine dispute that respondent was the child's biological father. He wished to be present for the child's birth, to be named on the child's birth certificate, and to sign an affidavit of parentage, if Keilman had agreed. At the hearing on respondent's motion to stay the adoption proceedings, he presented DNA test results establishing a 99.99 percent probability that he was the child's father. Moreover, there was no unreasonable delay in respondent's attempt to establish paternity. This is not a case in which a putative father delayed filing a paternity action for many months or years, or until an adoption petition had already been filed. To the contrary, respondent filed a notice of intent to claim paternity before the child's birth. He filed his paternity action shortly after the birth and before petitioners filed their adoption petition. Considering the timing of respondent's paternity claim, along with his efforts to provide support and prepare for fatherhood by taking parenting classes and working with social services, there is little merit to the argument that he filed his paternity action simply to thwart Keilman's adoption plan.

In sum, while adoption proceedings must, in general, take precedence over other actions, such proceedings

may be stayed upon a showing of good cause. Here, respondent established good cause to stay the adoption proceedings in favor of his paternity action. Judge Shelton erred by denying respondent's motion to stay and proceeding with the § 39 hearings without first determining the issue of paternity. The August 6, 2008, order denying respondent's motion and March 18, 2009, order denying respondent custody must be vacated.

III. RESPONDENT'S MOTION TO DISQUALIFY THE TRIAL COURT JUDGE

Respondent further argues that Judge Shelton should have been disqualified and that this case should be assigned to a different judge on remand. Respondent argues that Judge Shelton demonstrated bias against him and violated his due process rights. We disagree.

Respondent filed a motion to disqualify Judge Shelton on April 23, 2009, which Judge Shelton and the chief judge of the circuit denied. The motion was supported by the affidavit of respondent. We review a trial court's factual findings regarding a motion for disqualification for an abuse of discretion and its application of the facts to the law de novo. *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

MCR 2.003 provides the procedure and noninclusive list of grounds for the disqualification of a trial court judge.[6] MCR 2.003(C)(1) (now [D][1]) states:

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[6] MCR 2.003 was amended on November 25, 2009, at which time the sections were renumbered. Even under the amended court rule, including the addition of MCR 2.003(C)(1)(b), respondent has failed to establish a basis for disqualification of Judge Shelton.

> *Time for filing*. To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted.

MCR 2.003(B)(1) stated at the time relevant to this action that a trial court judge "is disqualified when the judge cannot impartially hear a case," including when the "judge is personally biased or prejudiced for or against a party or attorney." See present MCR 2.003(C)(1)(a).

Initially, we find that respondent's motion for disqualification was untimely. As indicated, MCR 2.003(C)(1) (now [D][1]) requires that a motion to disqualify "be filed within 14 days after the moving party discovers the ground for disqualification," and provides that "untimeliness . . . is a factor in deciding whether the motion should be granted." Respondent argues that Judge Shelton demonstrated bias against him by denying every motion he filed, but that the "final blow" was the judge's April 22, 2009, order stating that custody would be determined under MCL 710.62. Thus, according to respondent, his April 23, 2009, motion for disqualification was timely filed. But we agree with the chief judge of the circuit that respondent knew or should have discovered the alleged ground for disqualification when Judge Shelton issued the March 18, 2009, order denying him custody. The judge denied respondent custody pursuant to his finding that it was not in the child's best interests and, at that point, respondent had no prospects for gaining custody. Moreover, Judge Shelton announced his decision to determine custody under MCL 710.62 on April 8, 2009,

several days before he issued the April 22, 2009, order memorializing his decision. Therefore, we find it disingenuous for respondent to argue that the April 22, 2009, order was truly the "final blow" triggering the 14-day period to file a motion for disqualification. Additionally, we disagree with respondent's assertion that his due process ground for disqualification should not be subject to the time limitation. Because respondent's motion for disqualification was filed more than 14 days after he knew or should have discovered the alleged bases for disqualification, it was untimely and was, therefore, properly denied. See *Band v Livonia Assoc*, 176 Mich App 95, 118; 439 NW2d 285 (1989).

Moreover, regardless of the timing of respondent's motion, we find that respondent failed to establish a ground for disqualification. Respondent has not established that Judge Shelton is biased or prejudiced against him under MCR 2.003(B)(1) (now [C][1][a]). A trial judge is presumed to be impartial and the party who asserts partiality has a heavy burden of overcoming that presumption. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). A showing of prejudice usually requires that the source of the bias be in events or information outside the judicial proceeding. *Id*. at 495-496. Disqualification on the basis of bias or prejudice cannot be established merely by repeated rulings against a litigant, even if the rulings are erroneous. *In re Contempt of Henry*, 282 Mich App at 680. Further, while personal animus toward a party requires disqualification, *People v Lobsinger*, 64 Mich App 284, 290-291; 235 NW2d 761 (1975), respondent contends that Judge Shelton's bias is toward young biological fathers who desire to raise their children. A generalized hostility toward a class of claimants does not present disqualifying bias. *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009), rev'd on other grounds 485

Mich 986 (2009). Further, a trial judge's remarks made during trial, which are critical of or hostile to counsel, the parties, or their cases, ordinarily do not establish disqualifying bias. *Schellenberg v Rochester Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998).

Due process principles require disqualification, absent a showing of actual bias or prejudice, "in situations where experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," such as situations when the judge has a pecuniary interest in the outcome, has been the target of personal abuse or criticism from a party, is enmeshed in other matters involving a party, or has previously participated in the case as an accuser, investigator, fact-finder, or initial decisionmaker. *Cain*, 451 Mich at 498 (quotation marks, emphasis, and citations omitted); see also present MCR 2.003(C)(1)(b). Disqualification pursuant to the Due Process Clause is only required "in the most extreme cases." *Cain*, 451 Mich at 498. In this case, Judge Shelton's basis for proceeding with this case and applying the standards for terminating a putative father's rights was not without a reasonable basis. In and of itself, the judge's actions were not reflective of a high probability of bias to the extent that due process principles required disqualification. Accordingly, respondent's motion for disqualification was properly denied.

Given our conclusion regarding the first issue, we need not address the remaining issues raised by the parties on appeal.[7]

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[7] If respondent perfects his legal paternity, the adoption case may not proceed, and the other issues raised on appeal will be rendered moot. As set forth in MCL 710.31(1):

> Except as provided in section 23d of this chapter, if a child is born out of wedlock and the release or consent of the biological

We vacate the trial court's August 6, 2008, and March 18, 2009, orders and remand to allow respondent's related paternity case to proceed. We do not retain jurisdiction.

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father cannot be obtained, the child shall not be placed for adoption until the parental rights of the father are terminated by the court as provided in section 37 or 39 of this chapter, by the court pursuant to chapter XIIA [MCL 712A.1 *et seq*.], or by a court of competent jurisdiction in another state or country.

MORRISON v SECURA INSURANCE

Docket No. 286936. Submitted November 10, 2009, at Lansing. Decided December 29, 2009, at 9:00 a.m.

Kevin L. and Candice S. Morrison brought an action in the Ingham Circuit Court, Thomas L. Brown, J., against Secura Insurance, seeking a declaration regarding its liability for damages for injuries sustained when a Chevrolet Cavalier driven by Sarah Jo Warfield struck plaintiffs' motorcycle. Before the accident occurred, JoEllen Schwartz Fisher, Warfield's mother, purchased an insurance policy from Secura that listed Fisher as the named insured and both Fisher and Warfield as drivers of the three vehicles insured, including the Cavalier. Warfield was the only person who ever drove the Cavalier. Fisher, the owner and registrant of the Cavalier, prepaid the premiums for the entire year. Fisher and Warfield lived in the same residence. Before the accident, Fisher transferred title to the Cavalier to Warfield, who applied for a new title and registered the vehicle in her own name. Secura defended, arguing that Fisher did not have an insurable interest in the Cavalier at the time of the accident and so the policy was void. The court found that Fisher had an insurable interest in the vehicle at the time of the accident and granted summary disposition in favor of plaintiffs. The Court of Appeals granted Secura's delayed application for leave to appeal.

The Court of Appeals *held*:

1. An insured must have an insurable interest to support the issuance of a valid automobile liability insurance policy under Michigan law. The insurable interest must be that of a named insured. However, an insurable interest need not be in the nature of ownership, but rather can be any kind of benefit from the thing so insured or any kind of loss that would be suffered by its damage or destruction.

2. Fisher did have an unambiguous insurable interest in the Cavalier when she purchased the insurance policy and paid the entire year's premiums. Although public policy forbids the issuance of an insurance policy where the insured lacks an insurable interest, public policy does not appear to require an otherwise valid insurance policy to become void automatically, particularly,

where, as here, the actual risk never changed and was fully known. The purpose behind the insurable interest requirement, to prevent an insured from committing illegal or unethical acts in order to collect insurance proceeds, is not present under the facts of this case. The conveyance of the Cavalier was an intrafamily transfer, which is not treated the same as a transfer between strangers. Public policy does not support terminating what amounts to a family insurance policy upon an intrafamily vehicle transfer. The trial court did not err by granting summary disposition for plaintiffs.

Affirmed.

TALBOT, P.J., dissenting, stated that a legal basis does not exist for finding the requisite insurable interest in this case. The judgment and order of the trial court should be reversed. An insurable interest in property requires some benefit or loss to inure to the insured. Merely because Fisher voluntarily remained the insurer after she was no longer the registrant of the vehicle is not analogous to a statutory requirement that she do so upon penalty of a criminal sanction and does not meet the benefit/loss requirement to establish the existence of an insurable interest. An insurable risk based on potential pecuniary loss comprises a loss that a named insured might incur but there is no recognized precedent for attempting to ensure the pecuniary loss of another without any commensurate benefit or risk of loss to a named insured.

INSURANCE — INSURABLE INTERESTS.

Fundamental principles of insurance require the insured to have an insurable interest before he or she can insure; a policy issued when there is no such interest is void and it is immaterial that it is taken in good faith and with full knowledge; an insurable interest need not be in the nature of ownership, but rather can be any kind of benefit from the thing so insured or any kind of loss that would be suffered by its damage or destruction; although public policy forbids the issuance of an insurance policy where the insured lacks an insurable interest, it does not appear to require an otherwise valid insurance policy to become void automatically.

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *Timothy J. Donovan* and *Steven A. Hicks*), for plaintiffs.

Plunkett Cooney (by *Christine D. Oldani* and *David K. Otis*) for defendant.

Before: TALBOT, P.J., and O'CONNELL and DAVIS, JJ.

DAVIS, J. Defendant appeals by delayed application for leave to appeal granted the trial court's order granting summary disposition for plaintiffs in this declaratory judgment action. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises out of an automobile accident in which a 1997 Chevrolet Cavalier driven by Sarah Jo Warfield struck plaintiffs' motorcycle. . Plaintiffs suffered serious injuries. At issue is the validity of a no-fault insurance policy covering Warfield's vehicle.

The relevant facts in this case are not disputed. The insurance policy at issue was purchased by Warfield's mother, JoEllen Schwartz Fisher, in October 2005. It listed Fisher as the named insured, but both Fisher and Warfield were listed as "drivers" of three vehicles, including the Cavalier. Warfield was the only person who ever drove the Cavalier. Fisher prepaid the premiums for an entire year. At the time she did so, she was the owner and registrant of the Cavalier. Fisher and Warfield both lived in the same residence at all relevant times. In March of 2006, Fisher transferred title to the Cavalier to Warfield, who applied for a new title and registered the Cavalier in her own name. The accident occurred on April 14, 2006. Defendant's sole argument[1] is that Fisher did not have an insurable interest in the Cavalier at the time of the accident, and so the insurance policy was void at that time.

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[1] Defendant notes the (disputed) point that neither Fisher nor Warfield advised it of the change in ownership of the Cavalier, but we have not been presented with any argument suggesting that the policy's written terms dictated the policy's termination under the facts of this case. We note that the insurable risk to defendant has not changed, and defendant is free to cancel the policy upon sending notice to the insured as required by law.

"[U]nder Michigan law, an insured must have an 'insurable interest' to support the existence of a valid automobile liability insurance policy." *Allstate Ins Co v State Farm Mut Automobile Ins Co*, 230 Mich App 434, 439; 584 NW2d 355 (1998). Moreover, the insurable interest must be that of a " 'named insured.' " *Id.* at 440. This issue presents a question of law, which, like an order granting summary disposition, we review de novo. *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 711; 683 NW2d 699 (2004).

The Court in *Allstate Ins Co* observed that the "insurable interest" requirement arises out of long-standing public policy. *Allstate Inc Co*, *supra* at 438. Specifically, it arises out of the venerable public policy against "wager policies"; which, as eloquently explained by Justice COOLEY, are insurance policies in which the insured has no interest, and they are held to be void because such policies present insureds with unacceptable temptation to commit wrongful acts to obtain payment.[2] *O'Hara v Carpenter*, 23 Mich 410, 416-417 (1871). Thus, "fundamental principles of insurance" require the insured to "have an insurable interest before he can insure: a policy issued when there is no such interest is void, and it is immaterial that it is taken in good faith and with full knowledge."[3] *Agricultural Ins Co v Montague*, 38 Mich 548, 551 (1878). However, an "insurable interest" need not be in the nature of

[2] Early caselaw held that the insured's interest could be so *de minimis* in comparison to the value of the insurance that there existed a temptation to destroy insured property, as long as the insurer was aware of the risk it was insuring against, but it too indicated that the insured must have had *some* interest. *Hill v Lafayette Ins Co*, 2 Mich 476, 484-485 (1853).

[3] The essential holding was that parties could not waive the insurable interest requirement, even if both the insured and the insurer mutually agreed to do so. *Id*.

ownership, but rather can be any kind of benefit from the thing so insured or any kind of loss that would be suffered by its damage or destruction. *Crossman v American Ins Co*, 198 Mich 304, 308-311; 164 NW 428 (1917).

Plaintiffs argue, and the trial court found, that Fisher had an insurable interest in the vehicle because she "certainly has an insurable interest in protecting her daughter from financial ruin." While any concerned parent clearly has an *interest* in his or her child's welfare, financial or otherwise, we need not take up the additional challenge of evaluating whether that interest is insurable—in other words, whether that interest is sufficiently tangible that it can truly be insured against.[4] We agree with the trial court's result because of several other striking characteristics of the facts in this case.

It is undisputed that Fisher *did* have an unambiguous insurable interest in the Cavalier at the time she purchased the insurance policy and paid the entire year's premiums. The caselaw we have found on the genesis and development of the "insurable interest" requirement shows that public policy forbids the *issuance* of an insurance policy where the insured lacks an insurable interest. Public policy does not appear to

[4] We do not mean to suggest that this issue should be lightly disposed of or that the trial court's conclusion is necessarily incorrect, only that we need not reach it. Parents who provide vehicles for their children are obviously interested in something other than personal pecuniary gain, and they are understandably concerned—not to mention of the view that it is a significant life event—when those children are finally "on their own." Furthermore, no-fault insurance is fundamentally not something from which one could profit anyway, its goal being indemnification rather than compensation. Considering, additionally, parents' natural interest in the well-being—physical, emotional, and financial—of their children, we would, at a minimum, conclude that the trial court's conclusion is worthy of serious consideration in an appropriate case.

require an otherwise valid insurance policy to become void automatically. Particularly where, as here, the actual risk never changed and was fully known (i.e., Warfield was always the only driver of the Cavalier). We emphasize that we are *not* presented with a situation in which Fisher attempted to *renew* the insurance policy covering the Cavalier after she had parted with any interest in it.

Furthermore, and even more significantly, the purpose behind the "insurable interest" requirement is not present here: we cannot imagine how Fisher, or anyone in her position, could possibly be tempted by the transfer of ownership to commit any illegal or unethical act in order to collect proceeds from the insurance policy at issue. The "insurable interest" requirement arose in the context of insurance policies payable to the insured. In such a circumstance, it is obvious how an insured with "nothing to lose" might be tempted to commit socially intolerable acts for financial gain. But the nature of the no-fault insurance at issue here is radically different. Because the insurance here is less likely to be exploitable as a "wager policy," the basis for the "insurable interest" requirement is weakened.

Finally, the conveyance of the Cavalier here was an intrafamily transfer. Family members share large portions of their lives and properties in ways that they do not share with strangers in arm's-length transactions, and intrafamily vehicle transfers, particularly between parents and children, are common. The word "family" can mean many things, but Michigan jurisprudence recognizes that the term more commonly refers to relationships in which multiple people live together under a head of the household who has a legal or moral duty to support the others or other. See *Rogers v Kuhnreich*, 247 Mich 204, 206-209; 225 NW 622 (1929).

Notwithstanding Warfield's being over the age of majority, she and Fisher were clearly "immediate family members." See *Latham v Nat'l Car Rental Sys, Inc*, 239 Mich App 330, 337-338; 608 NW2d 66 (2000). Transferring vehicles between family members is not treated the same as it is between strangers. See *Clevenger v Allstate Ins Co*, 443 Mich 646, 658-659; 505 NW2d 553 (1993). Public policy clearly recognizes that the family unit is, and always has been, entitled to a special status in the law. We would not find public policy supportive of terminating what amounts to a family insurance policy upon an intrafamily vehicle transfer.

Thus, we need not reach the issue whether, at the time of the accident, Fisher had an "insurable interest" in the Cavalier. Fisher did have an "insurable interest" in the Cavalier at the time the insurance policy was bought and paid for, the insured-against risk did not change, the basis for the "insurable interest" requirement is weak, and the public policy favoring family units is strong. The trial court's result was, therefore, correct.

Affirmed.

O'CONNELL, J., concurred.

TALBOT, P.J. (*dissenting*). I respectfully dissent from the majority opinion, which finds the retention of an insurable interest despite a change in the registration of ownership of a vehicle, impliedly based on a familial relationship between the insured and the registered owner.

"[U]nder Michigan law, an insured must have an 'insurable interest' to support the existence of a valid automobile liability insurance policy." *Allstate Ins Co v State Farm Mut Automobile Ins Co*, 230 Mich App 434,

439; 584 NW2d 355 (1998). "An insurable interest in property is broadly defined as being present when the person has an interest in property, as to the existence of which the person will gain benefits, or as to the destruction of which the person will suffer loss." *Madar v League Gen Ins Co* , 152 Mich App 734, 738; 394 NW2d 90 (1986), citing *Crossman v American Ins Co*, 198 Mich 304, 308-309; 164 NW 428 (1917). Moreover, the insurable interest must be that of a "named insured." *Allstate Ins Co*, *supra* at 440. Insurance policies "founded upon mere hope and expectation and without some interest in the property," are contrary to public policy and deemed void. *Crossman*, *supra* at 308; see also *Allstate Ins Co*, *supra* at 438-439.

In *Clevenger v Allstate Ins Co*, 443 Mich 646; 505 NW2d 553 (1993), our Supreme Court found that the registrant of an automobile had an insurable interest in an automobile she did not own because MCL 500.3101(1) required a registrant to carry no-fault insurance and MCL 500.3102(2) made it a misdemeanor to fail to do so. The Court concluded:

> As the registrant of a vehicle she permitted to be operated upon a public highway, [the seller] was required by the act to provide residual liability insurance on the vehicle under the threat of criminal sanctions, §§ 3101 and 3102. In this limited context, [her] insurable interest was not contingent upon title of ownership to the automobile but, rather, upon personal pecuniary damage created by the no-fault statute itself. [*Clevenger*, *supra* at 661].

This ruling is consistent with *Crossman's* definition of an "insurable interest" as requiring some benefit or loss to inure to the insured. The circumstances of this case are readily distinguishable. Warfield's mother was no longer a registrant of the vehicle at the time of the accident. Merely because she voluntarily remained the

insurer is not analogous to a statutory requirement that she do so upon penalty of a criminal sanction and, therefore, does not meet the benefit/loss requirement to establish the existence of an insurable interest.

Plaintiffs contend, and the majority concurs, that Warfield's mother had an insurable interest in the vehicle because she had a legitimate concern, impliedly as a parent and member of the same household, in saving her adult daughter from financial ruin that might result from liability for the automobile accident. However, there is no legal precedent for finding an insurable interest on this basis.[1] As explained in *Clevenger*, an insurable interest based on potential pecuniary loss comprises a loss that the named insured might incur. There is no recognized precedent for attempting to ensure the pecuniary loss of another without any commensurate benefit or risk of loss to a named insured.[2] In fact, public policy directly contradicts this concept. See *Crossman*, *supra* at 308, 311. Because a legal basis does not exist for finding the requisite insurable interest in this case, I would reverse the trial court's ruling.

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[1] Plaintiffs assert that an insurable interest can be found on the basis of considerations apart from ownership and registration. See *Madar, supra*; *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713; 635 NW2d 52 (2001); *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339; 764 NW2d 304 (2009). However, these cases are distinguishable because they deal with personal protection insurance (PIP) benefits and not liability coverage.

[2] Plaintiffs also rely on *Stover v Secura Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 9, 2005 (Docket No 252613), for the proposition that an insurable interest need not be premised on being an owner or registrant. However, in *Secura*, the insurable interest was based on the named insured's risk of pecuniary loss resulting from having commingled funds with the owner of the vehicle. Unpublished cases are not binding precedent. MCR 7.215(C)(1).

SKELLY v SKELLY

Docket No. 287127. Submitted December 10, 2009, at Detroit. Decided December 29, 2009, at 9:05 a.m.

Thomas M. Skelly brought an action in the Wayne Circuit Court against Patricia M. Skelly, seeking a judgment of divorce. The court, Maria L. Oxholm, J., granted a judgment of divorce on July 23, 2008. Plaintiff appealed, alleging that the trial court erred by distributing to the defendant 50 percent of two installments of a performance bonus that the plaintiff received from his employer before the judgment was entered and 40 percent of the final third installment of the performance bonus and of any future bonuses that the plaintiff would receive.

The Court of Appeals *held*:

1. The trial court erred by determining that the first two payments of plaintiff's retention bonus were marital property and that the third payment was separate property subject to invasion. Assets earned by a spouse during the marriage are properly considered to be part of the marital estate, whether the assets are received during the existence of the marriage or after the judgment of divorce. Here, the retention bonus was not earned during the marriage (plaintiff had to be working for his employer through May 31, 2009, to be entitled to the bonus and had to return all monies received if not employed through that date), therefore, no portion of the bonus was marital property. Plaintiff had not earned the bonus until after the judgment of divorce was entered.

2. The trial court erred when it concluded that the third installment was plaintiff's separate property subject to invasion. A separate estate is the property that a party generally takes away from the marriage separate from the marital assets. Plaintiff did not take his retention bonus away from the marriage because he had yet to earn it. The award of any portion of the retention bonus to defendant must be reversed.

3. Any future bonus paid to plaintiff will not have been earned during the marriage and will be based solely on the potential occurrence of future events unrelated to the marriage. The trial court erred by granting defendant 40 percent of any bonuses that plaintiff may earn in the future.

Reversed.

DIVORCE — PROPERTY DIVISION — MARITAL ESTATE.

Assets earned by a spouse during the marriage are properly considered part of the marital estate and are subject to division; bonuses from a spouse's employer that are not earned during the marriage and are based solely on the potential occurrence of future events unrelated to the marriage are not part of the marital estate subject to division.

Judith A. Curtis for plaintiff.

Kenneth E. Prather, Sr., P.C. (by *Kenneth E. Prather, Sr.*), for defendant.

Before: DONOFRIO, P.J., and SAWYER and OWENS, JJ.

PER CURIAM. In this divorce case, plaintiff appeals as of right the judgment of divorce wherein the trial court distributed a portion of plaintiff's retention bonus and future bonuses to defendant. We reverse.

I. FACTS

Plaintiff filed this complaint for divorce after a 25-year marriage. Defendant filed a countercomplaint requesting spousal support. At the time of the parties' divorce, plaintiff was the Director of International Tax at Ford Motor Company. His 2007 earnings totaled $289,257.58, which included a performance bonus of $13,500 and the first installment payment of his retention bonus totaling $108,000. The retention bonus was designed to "entice" plaintiff to remain with the company. If plaintiff remained employed by Ford on May 31, 2008, and on May 31, 2009, he would receive second and third installment payments of his retention bonus totaling $36,000 each. However, if plaintiff did not remain employed at Ford through May 31, 2009, he was re-

quired to pay back all the retention bonus monies. At the time of the divorce, defendant was unemployed and was a homemaker.

After hearing testimony from both plaintiff and defendant, the trial court awarded defendant the marital home and her jewelry, and awarded plaintiff his Ford 401k account, restricted stock units, a rental house, his motorcycle, his fishing boat, his deposit on his apartment, and a swim club membership. The trial court ordered an equal division of the marital portion of plaintiff's pension. The trial court also ordered that the first two installment payments of the retention bonus be equally divided between the parties. As to the third installment that would be paid on May 31, 2009, the trial court commented that

> [w]hile the Court understands that this would probably be considered separate property, because it would represent a year of work that the Plaintiff commits to with Ford without the assistance of the Defendant, the Court's invading that separate property. And I'm doing so because I think that the Defendant's income or ability to earn is very limited at this point in time. And also because that Retention award in the Court's mind, is based on performance during the marriage. And so I'm dividing that 60 percent to the Plaintiff and 40 percent to the Defendant.

The trial court further divided any of plaintiff's future bonuses, granting plaintiff 60 percent and defendant 40 percent.

The trial court also found that defendant was in need of spousal support and awarded her $5,000 a month. At the conclusion of the hearing, plaintiff's counsel attempted to clarify the court's award of plaintiff's bonuses to defendant. The following exchange took place:

> *Plaintiff's counsel:* Your Honor, there was one other question that came up. The award as to the '09 bonus, the

> Retention bonus, that's the limit of the Court's award with respect to bonuses? I mean, there's not some ongoing award?
>
> *Trial court:* Yes, there is. I said that.
>
> *Plaintiff's counsel:* Just as to the '09 bonus?
>
> *Trial court:* No, no. Any future bonuses.
>
> *Plaintiff's counsel:* I mean, even if it's not a Retention bonus?
>
> *Trial court:* Yes
>
> *Plaintiff's counsel:* If he gets a bonus at any time in the future, she's going to get 40 percent of it?
>
> *Trial court:* Correct. That's the Court's Order. It is. It's modifiable support so we'll have to take a look at these things as it becomes — as it comes to pass, but I think that it's fair. I do.

On July 23, 2008, the trial court entered a judgment of divorce that implemented the trial court's verbal ruling at the hearing.

II. PLAINTIFF'S RETENTION BONUS

Plaintiff argues that the trial court clearly erred when it determined that the first two payments of plaintiff's retention bonus were marital property and when it determined that the third payment was separate property subject to invasion. We agree.

"In granting a divorce judgment, the trial court must make findings of fact and dispositional rulings. The trial court's factual findings will not be reversed unless they are clearly erroneous, i.e., if this Court is left with the definite and firm conviction that a mistake has been made. If this Court upholds the trial court's findings of fact, it must then decide whether the dispositional ruling was fair and equitable in light of those facts. The trial court's dispositional ruling is discretionary and

will be affirmed unless this Court is left with the firm conviction that it was inequitable." *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005) (citations omitted).

The trial court, when dividing marital property, must first determine marital and separate assets. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). "Generally, assets earned by a spouse during the marriage are properly considered part of the marital estate and are subject to division, but the parties' separate assets may not be invaded." *Korth v Korth*, 256 Mich App 286, 291; 662 NW2d 111 (2003). Separate assets may be invaded when one of two statutory exceptions are met: MCL 552.23, MCL 552.401. *Reeves*, *supra* at 494. Invasion "is allowed [under MCL 552.23] when one party demonstrates additional need," meaning that the property awarded to that party is insufficient for her suitable support and maintenance. *Id.* Invasion is allowed under MCL 552.401 when one party "significantly assists in the acquisition or growth" of the other party's separate asset, in which case "the court may consider the contribution as having a distinct value deserving of compensation." *Id.* at 495.

Defendant argues that *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997), should apply to plaintiff's retention bonus because the facts of *Byington* are similar to the instant case. We conclude that *Byington* actually supports plaintiff's argument that defendant is not entitled to any portion of the retention bonus. In *Byington*, the plaintiff filed for divorce, but the parties agreed to delay the division of the marital estate for several reasons. During the delay, the defendant entered into a new employment contract containing a contingent bonus package. Before entry of the judgment of divorce, the defendant became eligible to

receive the compensation from this bonus package. The trial court ruled that the compensation package was not part of the marital estate and awarded the whole package to the defendant. This Court reversed, holding that, because the compensation package was earned before the judgment of divorce was entered, it was part of the marital estate. This Court held that assets earned by a spouse during the marriage are properly considered part of the marital estate. This is true whether the assets are received during the existence of the marriage or after the judgment of divorce. *Id.* at 109-110.

Here, the retention bonus was not earned during the marriage; thus, no portion of the retention bonus was marital property. Plaintiff had not yet earned the $180,000 retention bonus at the time of the parties' divorce. It is undisputed that plaintiff was required to work until May 31, 2009, in order to receive the $180,000 bonus. Although two installation payments were made during the marriage, plaintiff had not earned that money when it was disbursed because he had not satisfied the condition subsequent (i.e., remain employed until May 31, 2009) required by the agreement between him and his employer. If plaintiff had not remained employed by Ford until May 31, 2009, plaintiff would have been required to repay the installments he had previously received. Consequently, plaintiff did not earn the retention bonus until May 31, 2009, which occurred after the judgment of divorce was entered even though part of it had been advanced to him. Unlike in *Byington*, where the compensation package was earned before the entry of the judgment of divorce, no portion of plaintiff's retention bonus was earned during the marriage. The trial court erred when it determined that any portion of the retention bonus was marital property.

Furthermore, the trial court erred when it concluded that the third payment was separate property subject to invasion. A party's separate estate is the property the party generally takes away from the marriage separate from the marital assets, *Reeves*, *supra* at 494. However, plaintiff did not take his retention bonus away from the marriage because he had yet to earn it. Therefore, the third installment of the retention bonus should not have been considered as separate property, and, as a result, was not subject to division by the trial court at all. We reverse the trial court's award of any portion of the retention bonus to defendant.

III. AWARD OF FUTURE BONUSES

Plaintiff argues the trial court erred when it granted defendant 40 percent of any bonuses he may earn in the future from his employer. We agree.

Whether or not a future, unearned bonus can be divided in a divorce judgment is an issue of first impression for this Court. "Assets earned by a spouse during the marriage are properly considered part of the marital estate." *Byington*, *supra* at 110. However, any future bonuses paid to plaintiff in this case will not have been earned during the marriage, and should not have been considered a part of the marital estate.

In this case, the trial court included the award of 40 percent of plaintiff's future bonuses within the property division provisions in the judgment of divorce. Like the retention bonus previously discussed, future, speculative bonuses do not fit into either the category of marital assets, or separate assets, because they do not yet exist. These bonuses were not earned during the marriage and are based solely on the potential occurrence of future events unrelated to the marriage. Thus, the trial court clearly erred when it granted defendant

a 40 percent interest in any future bonuses earned by plaintiff over the course of his prospective career. *Byington*, *supra* at 110; *Burkey v Burkey (On Rehearing)*, 189 Mich App 72, 76; 471 NW2d 631 (1991) ("The trial court correctly determined that the valuation [of the retirement plan] reached by the trial court could not be dependent upon the happening of future events after the divorce.").

The trial court erred in granting defendant 40 percent of any bonuses plaintiff may earn in the future from his employer.

IV. EQUITABLE DIVISION OF THE MARITAL PROPERTY

Plaintiff argues that the distribution of the marital estate was inequitable and unfair because the property division was skewed by the inclusion of the awards of plaintiff's retention bonus and any future bonuses. Because our decision reverses the trial court's clearly erroneous conclusions regarding the retention bonus and future bonuses, this issue is now moot.

Reversed.

CURRY v MEIJER, INC

Docket No. 288187. Submitted December 1, 2009, at Grand Rapids. Decided December 29, 2009, at 9:10 a.m.

Robert A. and Carrie A. Curry brought an action in the Calhoun Circuit Court against Meijer, Inc., Faber Brothers, Inc., Stream and Lake Tackle, Inc., and others, seeking damages for injuries sustained when Robert fell from a tree stand purchased from Meijer, manufactured by Loc-On Corporation, and supplied exclusively to Meijer by either Stream and Lake Tackle or Faber Brothers. Plaintiffs alleged negligent design and manufacture, failure to warn, sale of a defectively designed and manufactured tree stand, breach of express and implied warranties, and loss of consortium. Meijer filed a cross-claim, seeking indemnification from Stream and Lake Tackle and Faber Brothers. Meijer, Stream and Lake Tackle, and Faber Brothers filed motions for summary disposition. Meijer argued, in part, that it made no express warranty and that it could not be liable for breach of an implied warranty because plaintiffs failed to show, under MCL 600.2947(6)(a), that Meijer did not exercise reasonable care. The trial court, Allen L. Garbrecht, J., agreed with Meijer and granted defendants' motions for summary disposition. Plaintiffs appealed.

The Court of Appeals *held*:

1. MCL 600.2947(6) governs the liability of a nonmanufacturing seller in actions alleging breach of an implied warranty. A breach of an implied warranty claim is a type of, and not separate from, a breach of reasonable care claim. Breach of implied warranty is not a separate theory upon which to bring a products liability claim against a nonmanufacturing seller. MCL 600.2947(6)(a) requires a showing of fault to impose liability. The statute requires a plaintiff to establish that a nonmanufacturing seller failed to exercise reasonable care in addition to establishing proximate cause to prevail on a products liability claim based on breach of an implied warranty.

2. The trial court properly granted summary disposition on the basis that plaintiffs failed to present any evidence of a breach of reasonable care on the part of defendants with respect to the tree stand.

Affirmed.

BANDSTRA, J., concurring, agreed that MCL 600.2947(6)(a) protects a nonmanufacturing seller of a product from liability unless the seller failed to exercise reasonable care regarding the sale, regardless of the theory of liability advanced. He wrote separately, however, to note that the statute is not as clear or unambiguous as the majority portrays it to be. The statutes' reference to a "breach of any implied warranty" when, historically, it was not always necessary to establish any failure to exercise reasonable care to pursue such a breach, introduces some question and confusion about the statute's meaning.

PRODUCTS LIABILITY — BREACH OF IMPLIED WARRANTIES — REASONABLE CARE — NONMANUFACTURING SELLERS.

Breach of an implied warranty is not a separate theory upon which to bring a products liability claim against a nonmanufacturing seller; a plaintiff must establish that a nonmanufacturing seller failed to exercise reasonable care in addition to establishing proximate cause to prevail on a products liability claim based on the breach of an implied warranty (MCL 600.2947[6][a]).

DeNardis, McCandless & Miller, P.C. (by *Mark F. Miller, Ronald F. DeNardis*, and *Linda M. Galante*), for Robert A. and Carrie A. Curry.

Vittorio E. Porco for Meijer, Inc.

Thomas P. Murray, Jr. & Associates (by *Thomas P. Murray, Jr.*) for Faber Brothers, Inc.

Garan Lucow Miller, P.C. (by *Megan K. Cavanagh* and *Michael P. McCasey*), for Stream and Lake Tackle, Inc.

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

MURRAY, J. Plaintiffs appeal as of right the trial court's order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). At issue is whether the trial court erred by ruling that MCL 600.2947(6)(a) of the Revised Judicature Act requires a plaintiff to establish a failure to exercise reasonable care to prevail on a breach

of implied warranty claim against a nonmanufacturing defendant. We hold that such a showing is necessary and, because plaintiffs failed to meet this burden, summary disposition of plaintiffs' complaint was appropriate. Accordingly, we affirm.

I. BACKGROUND

On November 25, 2001, plaintiff Robert Curry was injured when he fell approximately 20 feet from a tree stand while hunting in Calhoun County. Curry had purchased the tree stand from defendant Meijer, Inc., some time between 1993 and 1995. The tree stand, manufactured by Loc-On Corporation, was supplied exclusively to Meijer by defendant Stream and Lake Tackle, Inc. (SLT), in 1993, and exclusively by defendant Faber Brothers, Inc., in 1994 and 1995.

Curry and his wife subsequently initiated suit against the seller and distributors of the tree stand alleging negligent design and manufacture, failure to warn, sale of a defectively designed and manufactured tree stand, breach of express and implied warranties, and loss of consortium.[1] Defendants answered in turn, and Meijer filed a cross-claim seeking indemnification from Faber Brothers and SLT.

Following the close of discovery, Meijer, SLT, and Faber Brothers filed motions for summary disposition. Meijer argued that it made no express warranty and

[1] Plaintiffs' first complaint named Loggy Bayou Enterprises of Arkansas and Meijer as defendants. Plaintiffs later filed two amended complaints, identical in substance to the original, adding the remaining defendants to this action. The manufacturer, Loc-On, is defunct and is not a party to this action. After initial discovery, Loggy Bayou was dismissed because it did not manufacture the tree stand in question, but only purchased naming rights. Defendant Stream and Lake Wholesale, Inc., was also dismissed because it was unauthorized to conduct business in the state of Michigan.

that it could not be liable for breach of implied warranty where plaintiffs could not show that Meijer did not exercise reasonable care under MCL 600.2947(6)(a), Curry purchased the tree stand without relying on Meijer's skill and judgment, and the tree stand owner's manual disclaimed all warranties except a three-year limited warranty. SLT's motion was identical in substance to Meijer's, with the additional arguments that besides plaintiffs' failure to show that SLT distributed the tree stand, plaintiffs' theory of causation was based on speculation and conjecture. Faber Brothers contested its liability on the grounds that Robert Curry was aware of the aforementioned three-year limited warranty and the accompanying warranty disclaimer, Curry misused the tree stand by failing to wear a safety belt, plaintiffs could not prove Faber Brothers distributed the tree stand, and plaintiffs could not overcome the statutory presumption of nonliability where the tree stand was in compliance with industry standards.

Plaintiffs responded that because a breach of implied warranty claim against a seller or distributor does not require a showing of negligence and because a seller or distributor need not know the particular purpose for which a good was purchased, expert testimony that the tree stand was defectively designed and not fit for its intended purpose was sufficient to withstand defendants' motion for summary disposition. Additionally, plaintiffs contended that an implied warranty of merchantability could not be disclaimed, the nonliability aspect of the products liability statute applied only to the negligence (or reasonable care) portion of the statute, Robert Curry did not misuse the tree stand or if he did such misuse was foreseeable, and Curry's claims that he purchased the tree stand from Meijer and that Faber Brothers and SLT were the only potential distributors of the tree stand were sufficient to survive a causation challenge.

Agreeing with defendants' arguments, the trial court found that under MCL 600.2947(6)(a), "for the Plaintiffs to prevail on a breach of implied warranty claim against a non-manufacturing Defendant, they must show that the Defendant failed to exercise reasonable care—that the Defendant knew or had reason to know of the alleged defect." Thus, the court granted summary disposition because plaintiffs could neither satisfy this burden nor show that defendants had provided plaintiffs with any express warranties. In light of this order, Meijer stipulated to dismissal of its cross-claims, and on September 17, 2008, the trial court entered the final order from which plaintiffs now appeal.

II. ANALYSIS

Before this Court, plaintiffs challenge the trial court's ruling only insofar as it held that MCL 600.2947(6) requires a showing of negligence to sustain a breach of implied warranty claim. We review de novo matters of statutory interpretation as well as the grant or denial of a motion for summary disposition. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274,

278; 681 NW2d 342 (2004). Where the burden of proof rests with the nonmoving party, that party must respond with documentary evidence to demonstrate the existence of a genuine issue of material fact for trial. *Maiden*, 461 Mich 120-121. The failure of the nonmoving party to so respond results in the entry of judgment for the moving party. *Id*.

Before 1996, it was settled in Michigan that a plaintiff was not required to establish negligence to recover under a breach of implied warranty theory. *Piercefield v Remington Arms Co*, Inc, 375 Mich 85, 96; 133 NW2d 129 (1965). Rather, at common law, a plaintiff need only show that a product was sold in a defective condition and the defect caused the plaintiff's injury. *Id*. at 96-97. However, tort reform legislation effective in 1996 displaced application of the common law in certain products liability actions. *Greene v A P Products, Ltd*, 475 Mich 502, 507-508; 717 NW2d 855 (2006). Thus, MCL 600.2947(6), contained within the Revised Judicature Act, now governs the liability of a nonmanufacturing seller in breach of implied warranty cases. That section provides:

> In a product liability action, a seller other than a manufacturer is not liable for harm allegedly caused by the product unless either of the following is true:
>
> (a) The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries.
>
> (b) The seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm. [MCL 600.2947(6).]

At issue, then, is whether the tort reform legislation now requires a showing of fault, i.e., that a seller failed

to exercise reasonable care, to maintain an action for breach of implied warranty (as defendants argue) or whether the tort reform legislation left the traditional test for breach of implied warranty intact (as plaintiffs argue). Because plaintiffs failed to present any evidence of negligence on the part of defendants as required to withstand defendants' summary disposition motions,[2] *Maiden*, 461 Mich 120-121, plaintiffs' claim is wholly dependent on resolution of this issue.

We begin our analysis by reviewing the plain language of the statute to determine the Legislature's intent. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Where the language is clear and unambiguous, "further construction is neither required nor permitted." *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

MCL 600.2947(6)(a) and (b) clearly and unambiguously predicate product liability on a nonmanufacturing seller for harm allegedly caused by the product under only two scenarios: (a) where the seller fails to exercise reasonable care, or (b) where there is a breach of an express warranty. The language is about as clear and unambiguous as it could be. However, plaintiffs argue that there are two liability standards within subsection (a), i.e., failure to exercise reasonable care and breach of implied warranty. While subsection (a) contains the clause, "including breach of any implied warranty," the grammatical context and placement of this clause indicate that the Legislature did not intend to create a third avenue of liability. See *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009) ("statutory language must be read and understood in its grammatical con-

[2] Plaintiffs only presented evidence that the tree stand may have been defective.

text, unless it is clear that something different was intended") (citations and quotation marks omitted), and *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (interpretation of critical statutory language involves consideration of both the placement and purpose of the critical phrase in the statutory scheme as well as its grammatical context); see also *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 315; 683 NW2d 148 (2004) ("the Legislature is presumed to know the rules of grammar").

Important regarding grammatical context is that the Legislature chose to use the term, "including," in the phrase discussing the breach of an implied warranty. The *Random House College Dictionary* (rev ed, 1988) defines the verb, "include," in relevant part as "to contain as a subordinate element; involve as a factor" and "to take in or consider as a part or member of." This definition is crucial because, in context, the phrase "including breach of any implied warranty," is a present participial phrase derived from the verb, "include," and is used as an adjective to modify "care."[3] Consequently,

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[3] In *In re Forfeiture of $5,264*, 432 Mich 242, 254 n 9; 439 NW2d 246 (1989), our Supreme Court interpreted the meaning of a similar statutory clause that also employed the term, "including." In finding that the phrase modified the relevant antecedent noun, the Court explained:

> "A *participle* is a verbal adjective, a word having the function of both verb and adjective. As a verb form, it can take an object and be affected in meaning by an adverb. *As an adjective, it can modify a noun or pronoun and can itself be modified by an adverb*. [Shaw, *Errors in English and Ways to Correct Them* (New York: Harper & Row, 3d ed, 1986), p 227]."
>
> A participle may be in the present (singing, asking), past (sung, asked) or perfect (having sung or having been sung, having asked or having been asked) tense. *Id*. A *participial phrase* takes its name from the initial word in the phrase. *Id*., p 229.
>
> From these basic rules of grammar, we infer that the proviso "including but not limited to" is a present participial phrase

as used in the aforementioned participial phrase, a breach of any implied warranty constitutes a "subordinate element" of the broader reasonable care standard. Put another way, a breach of implied warranty claim is a type of, and not separate from, a breach of reasonable care claim.

Further buttressing this conclusion is that the last clause of subsection (a), which imposes a final condition to imposing liability, refers to a singular failure, i.e., "that failure," that must be a proximate cause of the person's injuries. MCL 600.2947(6)(a). The only failure in subsection (a) to which this language refers is the failure to exercise reasonable care. Plaintiffs' argument would be more attractive if the Legislature had used the disjunctive, "or," in place of the participle, "including," so that the statute would have read "and that failure *or breach of any implied warranty* was a proximate cause of the person's injuries." *Yankee Springs Twp v Fox*, 264 Mich App 604, 608; 692 NW2d 728 (2004) ("The disjunctive term 'or' refers to a choice or alternative between two or more things."). Under that scenario, then, the language would impute liability if: "the seller failed to exercise reasonable care, *or* breached any implied warranty." The plain language, however, makes no such allowance. Thus, breach of implied warranty is not a separate theory upon which to bring a products liability claim against a nonmanufacturing seller.

Of additional significance is the location of the breach of implied warranty clause within § 2947(6). *Bush*, 484 Mich 167. Specifically, that clause appears in subsection (a), which deals with fault, as opposed to subsection (b), under which the breach of an express

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derived from the verb "include." The phrase as used in the first sentence of [MCL 333.7521(1)(f)] is an adjective modifying the noun "thing." [Emphasis in original.]

warranty (with causation) alone is sufficient to impose liability. This distinction is key because traditionally a breach of warranty claim sounds in "contract" whereas the use of reasonable care, an element of negligence, sounds in "tort." *Hill v Harbor Steel & Supply Corp*, 374 Mich 194, 203; 132 NW2d 54 (1965). Thus, the placement of the breach of implied warranty provision as a modifier in the "tort" subsection of § 2947(6) further indicates the Legislature's intent to add an element of fault to a traditional breach of implied warranty claim.[4]

Contrary to plaintiffs' argument, our holding that § 2947(6)(a) requires a showing of fault to impose liability does not render the clause, "including breach of any implied warranty," mere surplusage or nugatory. See *Sun Valley Foods*, 460 Mich 237. Rather, it is plaintiffs' interpretation that would inject uncertainty into this section. Indeed, were subsection (a) to permit

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[4] This conclusion is also consistent with the broader statutory scheme of tort reform, *Bush*, 484 Mich 167, which this Court has previously described as "a series of bills that overhauled the tort system in Michigan[,]" *Wysocki v Felt*, 248 Mich App 346, 359; 639 NW2d 572 (2001). Similarly, although review of legislative history is not to be considered when interpreting an unambiguous statute, *In re Certified Question*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003), we note that our conclusion is consistent with Senate Legislative Analysis, SB 344, January 11, 1996, p 11, which provides:

> [MCL 600.2947(6)(a)] establishes a fault-based standard of liability for nonmanufacturing product sellers, by providing that a seller is not liable unless it failed to exercise reasonable care or a product failed to conform to an express warranty, and the failure was a proximate cause of the harm. By holding sellers responsible only for their own wrongdoing, the bill will eliminate unnecessary and burdensome legal costs and insurance premiums. Since manufacturers ultimately indemnify sellers for the harm caused by the manufacturers' own products, claims should be brought directly against them. In addition, placing liability on the party that is in the best position to prevent harm will encourage product safety.

two types of claims as plaintiffs contend, then the implied warranty "exception" would swallow the rule. In other words, any time a plaintiff alleged injury resulting from a product defect, he would need only establish a breach of implied warranty; the reasonable care standard would seldom, if ever, come into play. This would in effect render the entire subsection surplusage or nugatory because the common-law breach of implied warranty standard would become the de facto standard in most if not all product defect cases. Such an interpretation runs afoul of the clear intent of the Legislature.

Plaintiffs cite two opinions from this Court decided after tort reform legislation was enacted in support of their position that " 'the theories of negligence and implied warranty remain separate causes of action with different elements.' " *Kenkel v Stanley Works*, 256 Mich App 548, 556; 665 NW2d 490 (2003), quoting *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 395; 628 NW2d 86 (2001). The defendants in both those cases, however, were manufacturers, rather than nonmanufacturing sellers as is the case here. *Kenkel*, 256 Mich App 551; *Bouverette*, 245 Mich App 393. As such, neither *Kenkel* nor *Bouverette* applied—much less even mentioned—§ 2947(6), which is undisputedly dispositive in this case. Reliance on those cases is not instructive.[5]

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[5] While plaintiffs point out that unpublished caselaw of this Court, see *Adams v Meijer, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 18, 2001 (Docket No. 224213), and *Hastings Mut Ins v Gen Motors Corp*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2005 (Docket No. 252427), as well as several federal district court decisions from the Eastern District of Michigan have reached conflicting conclusions regarding whether MCL 600.2947(6)(a) allows for the imposition of liability without a showing of fault, neither unpublished decisions from this Court nor federal caselaw is binding precedent. *Sharp v City of Lansing*, 464 Mich 792, 803; 629

As we noted in footnote five, the United States Court of Appeals for the Sixth Circuit addressed this precise issue last year. In *Croskey v BMW of North America, Inc*, 532 F3d 511, 520-521 (CA 6, 2008), the court held that the straightforward language of § 2947(6)(a) compelled the conclusion that a nonmanufacturing seller can only be liable for failing to exercise reasonable care or for breach of an express warranty:

> The plain language of the statute indicates that the legislature did not intend failure to exercise reasonable care and breach of implied warranty to be separate products liability claims. Section 600.2947(6)(a) states that a non-manufacturing seller is not liable unless "[t]he seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries." Had the legislature intended this section to allow for two separate claims, it would have used the conjunction "or": "the seller failed to exercise reasonable care, *or* breached any implied warranty." The legislature's use of "including" indicates, as the district court ruled in this case, that breach of implied warranty claims are to be considered *a type* of reasonable care claim, not a separate claim. *See Coleman v. Maxwell Shoe Co.*, 475 F Supp. 2d 685 (E.D. Mich. 2007). This conclusion is further supported by the

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NW2d 873 (2001); *Kisiel v Holz*, 272 Mich App 168, 172 n 2; 725 NW2d 67 (2006); MCR 7.215(C)(1). Regardless, we note that the United States Court of Appeals for the Sixth Circuit recently resolved this conflict in the federal district court consistent with our holding in this case. See *Croskey v BMW of North America, Inc*, 532 F3d 511, 519-521 (CA 6, 2008). The Sixth Circuit's rationale, as well as that articulated by Judge Lawrence Zatkoff in *Coleman v Maxwell Shoe Co, Inc*, 475 F Supp 2d 685, 687-691 (ED Mich, 2007), and Judge Gerald Rosen in *Mills v Curioni, Inc*, 238 F Supp 2d 876, 885-888 (ED Mich, 2002), are well reasoned and consistent with our judicial duty to enforce all the plain language in a statute. We also decline to address plaintiffs' arguments pertaining to civil jury instructions and the definition of fault in MCL 600.6304(8), because plaintiffs improperly raise both issues for the first time in their reply brief. *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003); MCR 7.212(G).

> last clause of § 600.2947(6)(a): "and that failure [to exercise reasonable care] was a proximate cause of the person's injuries." The legislature did not use the language "and that failure or breach of implied warranty was a proximate cause of the person's injuries." Clearly, the only claim envisioned by the legislature in § 600.2947(6)(a) was failure to exercise reasonable care.
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> * * *
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> Therefore, a plaintiff can recover against a non-manufacturing seller only if the seller fails to exercise reasonable care, or breaches an *express* warranty. Both the plain language of § 600.2947(6) and the legislative intent behind the statute show that non-manufacturing sellers cannot be held liable for damages due to breach of implied warranty, unless they failed to exercise reasonable care. Given the plain language of the statute, it is clear that the district court did not err in denying plaintiff's request to give the model jury instruction. It was necessary to modify the instruction to reflect the law as it applied to the seller, defendant BMW NA. As modified, the instruction includes reference to the breach of implied warranty, as requested by plaintiff, but also includes the negligence element as required by Michigan statutory law. [Emphasis in original.]

We agree with this rationale.

Finally, plaintiffs advance a public policy argument for our use in interpreting the statute. Essentially, plaintiffs argue that because many consumer goods sold in the United States are manufactured in China (by which plaintiffs must also mean unavailable to be sued), the Legislature could not have intended to drastically limit the liability of nonmanufacturing sellers by requiring plaintiffs to show fault in breach of implied warranty cases. Initially, we note that the tree stand in this case was manufactured by an American-owned corporation, so what Chinese manufacturers have to do with this case is not at all clear. Additionally, because we

are not dealing with common-law tort issues, plaintiffs' argument invoking economic policy issues should be raised to their state representative or senator for debate within the halls of our Legislature, not to the Judiciary. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 43; 576 NW2d 641 (1998); *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003). We will not engage in judicial activism simply to rectify the injustice plaintiffs perceive will result from a straightforward application of § 2947(6)(a).

III. CONCLUSION

In sum, MCL 600.2947(6)(a) requires a plaintiff to establish that a nonmanufacturing seller failed to exercise reasonable care in addition to establishing proximate cause to prevail on a products liability claim based on breach of implied warranty. Because plaintiffs failed to present any evidence of a breach of reasonable care on the part of defendants with respect to the tree stand, the trial court properly granted defendants' motion for summary disposition.[6]

Affirmed.

Defendants may tax costs, having prevailed in full. MCR 7.219(A).

MARKEY, P.J., concurred.

BANDSTRA, J. (*concurring*). I concur with the majority that the statute applicable here, MCL 600.2947(6)(a), protects Meijer from liability because plaintiffs have no proof that Meijer "failed to exercise reasonable care" in selling the tree stand to them. However, I write sepa-

[6] Given our holding, it is unnecessary to address defendant Faber Brothers' argument regarding whether any implied warranty was disclaimed.

rately to note that the statute is not as clear or unambiguous as the majority portrays it to be. As plaintiffs' argument demonstrates, the statute's reference to a "breach of any implied warranty" when, historically, it was not always necessary to establish any failure to exercise reasonable care to pursue such a breach, introduces some question and confusion about the statute's meaning. Notwithstanding that, I agree that the statute, properly interpreted, protects a nonmanufacturing seller of a product from liability unless that seller failed to exercise reasonable care regarding the sale, regardless of the theory of liability advanced.

GRANGER LAND DEVELOPMENT COMPANY v
DEPARTMENT OF TREASURY

Docket No. 286355. Submitted December 2, 2009, at Lansing. Decided December 29, 2009, at 9:15 a.m.

Granger Land Development Company and Granger Waste Management Company brought an action in the Court of Claims against the Department of Treasury, seeking the refund of use taxes paid under protest. The taxes had been imposed on materials used to make landfill cells and the equipment used or consumed by plaintiffs in the operation of the landfill cells. Plaintiffs alleged that the materials and equipment were used or consumed as part of the industrial process of processing solid waste material in the cells to generate methane gas as it decomposes and, therefore, plaintiffs were entitled to the exemption from sales and use taxation applicable to materials and equipment used in industrial processing. Defendant alleged that the materials and equipment were not used in an industrial process or, in the alternative, that the materials were incorporated into real property and the equipment was used to groom real property and, therefore, the exemption did not apply. The Court of Claims, Paula J. M. Manderfield, J., determined that plaintiffs were entitled to the exemption and ordered defendant to refund the taxes paid under protest. Defendant appealed.

The Court of Appeals *held*:

1. The industrial processing exemption, MCL 205.94o(4)(d) and (5)(a), does not apply to tangible personal property that both is permanently affixed to and becomes a structural part of real estate, even if the personal property is otherwise used in industrial processing.

2. No bright-line test applies for determining whether and when an item of personal property has become sufficiently connected with real property that it should be treated as part of the real estate. Michigan courts traditionally examine all the relevant factors and determine case-by-case whether personal property has become sufficiently affixed to real property that it should be treated as part of the real estate. Factors to examine include whether the property was actually or constructively annexed to

the real estate, whether the property was adapted or applied to the use or purpose of that part of the realty to which the property in question is connected or appropriated, and whether the property owner intended to make the property a permanent accession to the realty.

3. Plaintiffs, under the unique facts of this case, did not actually or constructively annex the landfill cells at issue to their real property. The erection and maintenance of the cells does not amount to an adaption of the land. Finally, although the cells could remain in place indefinitely, it does not necessarily follow that plaintiffs intended the erection of the cells to be an accession to the real estate. Plaintiffs intend to use and actually use the raw material and personal property as part of its industrial process. If the waste material left after plaintiffs finish their processing does become constructively annexed to the real property at some future point, that fact does not render the personal property consumed in the processing subject to the use tax.

4. The heavy equipment that plaintiffs use to physically transport and process the waste and to erect the cells is clearly being used as part of the industrial processing of the waste and not to design, engineer, construct, or maintain real property and is therefore exempt from use tax.

Affirmed.

1. TAXATION — USE TAX ACT — INDUSTRIAL PROCESSING EXEMPTION.

The industrial processing exemption from taxation under the Use Tax Act for personal property used or consumed during industrial processing does not apply to tangible personal property that both is permanently affixed to and becomes a structural part of real estate, even if the personal property is otherwise used in industrial processing (MCL 205.94o[4][d] and [5][a]).

2. TAXATION — REAL PROPERTY — PERSONAL PROPERTY.

The determination whether personal property has become sufficiently affixed to real property so that it should be treated as part of the real estate for purposes of taxation is made case-by-case after examining all the relevant factors including whether the property was actually or constructively annexed to the real estate, whether the property was adapted or applied to the use or purpose of that part of the realty to which the property in question is connected or appropriated, and whether the property owner intended to make the property a permanent accession to the realty.

3. TAXATION — USE TAX ACT — PERSONAL PROPERTY — INDUSTRIAL PROCESSING EXEMPTION.

Personal property used or consumed in the design, engineering, construction, or maintenance of real property does not fall within the exemption from taxation under the Use Tax Act applicable to personal property used or consumed during industrial processing (MCL 205.94o[6][d]).

Willingham & Coté, P.C. (by *James L. Dalton* and *Kimberlee A. Hillock*), for plaintiffs.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Kevin T. Smith*, Assistant Attorney General, for defendant.

Before: BECKERING, P.J., and CAVANAGH and M. J. KELLY, JJ.

M. J. KELLY, J. In this suit for a tax refund, defendant Department of Treasury (the Department) appeals as of right the Court of Claims order compelling the Department to refund the full amount of taxes paid by plaintiffs Granger Land Development Company and Granger Waste Management Company (collectively Granger). On appeal, the primary question is whether the personal property at issue was exempt from Michigan's use tax. Because we conclude that the Court of Claims correctly determined that the property at issue was exempt, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. GRANGER'S LANDFILL AND GAS OPERATION

Granger owns and operates landfills. The waste Granger deposits in its landfills generates methane gas as it decomposes. In addition, the landfills generate significant amounts of wastewater as rainfall and other naturally occurring sources of water seep through the

waste deposited in the landfills. This wastewater is known as leachate. Under existing pollution control laws, Granger must monitor and control both the gas and leachate generated as part of its landfill operations.

In a typical landfill operation, the landfill operator will monitor the gas levels and react to unsafe levels as needed, which may include burning the gas off. Likewise, in a typical operation, the operator will capture the leachate and send it to a wastewater plant for treatment. However, Granger does not operate the landfills at issue in a typical fashion. Rather, Granger takes steps to encourage the decomposition process in order to generate gas with a particular composition. Granger recovers the gas and then sells it to a related company, which burns the gas to generate electricity. The related company then sells the electricity to a local utility. Granger also captures the leachate generated in the landfill and circulates it back into the landfill, which further promotes gas production.

In order to meet its pollution control and gas production needs, Granger establishes landfill cells for the waste. A cell consists of an impermeable barrier that is placed on an area of land that may span several acres. Granger establishes the barrier to ensure that liquids do not contaminate groundwater and to facilitate the capture and circulation of leachate. Granger will then place uniform layers of solid waste on the barrier. Before placing the waste in a cell, Granger uses heavy machinery to crush and compact the waste. This processing ensures that the solid waste is relatively uniform and anoxic, which encourages the anaerobic decomposition of the waste. Granger then uses loaders and bulldozers to distribute the waste uniformly in the cell.

As the solid waste accumulates in the cell, Granger lays pipelines—referred to as horizontal wells—at vari-

ous levels within the cell, including the bottom-most layer. The horizontal wells are protected from the weight of subsequent layers of solid waste and the compactor by spreading tire chips over the piping. The tire chips also serve to create a pathway for gas in the event that some piping is accidentally crushed. Granger uses the horizontal wells to capture the gas generated during decomposition and to capture and circulate leachate. Granger connects the horizontal wells to a system that both transports the recovered gas and monitors it for the composition necessary to burn it efficiently. As required by law, Granger also installs vertical wells within the cells in order to monitor gas levels.

Granger uses bulldozers and other equipment to construct the cells. Granger also sprays an organic cover over the cells to prevent the solid waste from blowing away between deposits and to inhibit the escape of gas from the cell or the infiltration of oxygen, which would inhibit the generation of methane gas. Granger also uses the bulldozers to lay gravel for access roads.

When a cell reaches its maximum capacity, Granger caps the cell with nonorganic material to reduce outside air infiltration and improve collection efficiency. Granger then places another impermeable barrier over the cell to prevent the escape of gas and the entry of water. Finally, Granger covers the barrier with two feet of soil and plants vegetation to prevent erosion. Even after Granger caps a cell, it will continue to monitor and recover gas from the cell. A typical cell has a lifespan of 60 to 75 years before being closed and will continue to generate gas for another 30 years after being closed. Although Granger has excavated the waste left after a cell ceases to generate commercial levels of gas in order to recover the horizontal wells and reuse the cell, it does not routinely do so.

B. PROCEDURAL HISTORY

In January 2005, the Department audited Granger's landfill operations. The Department determined that Granger's operation of the landfills constituted the design, construction, or maintenance of real property and did not involve the use of processing equipment. For that reason, it determined that Granger must pay sales or use tax on the materials and equipment—such as the tire shreds, gravel, liners, piping, and bulldozers—that it used or consumed during the operation of its landfills from May 2000 to January 2004. The Department determined that Granger Land Development Company owed $194,296.02 in taxes and that Granger Waste Management Company owed $84,069.32 in taxes. After making adjustments for various exemptions, the Department revised the assessments to $141,549 for Granger Land Development Company and to $5,858 for Granger Waste Management Company. Granger paid these assessments under protest.

In April 2005, Granger sued the Department for a refund of the assessments that it paid for the period at issue. In its complaint, Granger alleged, in part, that the materials and equipment that it used or consumed were used or consumed as part of an industrial process; namely, the processing of solid waste to generate gas. Because it used or consumed the materials and equipment as part of an industrial process, Granger argued that it was entitled to the exemption from sales and use taxation applicable to materials and equipment used in industrial processing.

In response, the Department argued that the materials and equipment were not used in an industrial process or, in the alternative, that they were nevertheless not entitled to the exemption because the materials

were incorporated into real property and the equipment was used to groom real property.

After a bench trial, the Court of Claims determined that the creation and maintenance of the landfill cells constituted an industrial process. It further determined that Granger did not affix the cells, including all the components of the cells, to its real property and did not intend that the cells become part of its real property. Accordingly, the Court of Claims concluded that the materials used or consumed in the creation of the cells qualified for the industrial process exemption. It also concluded that Granger did not use its heavy equipment, such as the bulldozers at issue, to design, construct, or maintain real property, but rather used the equipment as part of an industrial process. For these reasons, the Court of Claims determined that Granger was entitled to the industrial processing exemption for all the property at issue and ordered the Department to refund Granger's tax payments.

This appeal followed.

II. THE INDUSTRIAL PROCESS EXEMPTION

A. STANDARD OF REVIEW

On appeal, the Department argues that the Court of Claims erred when it determined that the personal property at issue was exempt from taxation under the Use Tax Act, MCL 205.91 *et seq*. Specifically, the Department argues that the property used or consumed in the construction of Granger's landfill cells is not exempt because Granger affixes the personal property to its real property. Similarly, the Department argues that Granger uses the bulldozers and other heavy equipment to design or maintain the landfills and, for that reason, the equipment is also not exempt.

This Court reviews de novo the proper interpretation of statutes such as the Use Tax Act. *AutoAlliance Int'l, Inc v Dep't of Treasury*, 282 Mich App 492, 499; 766 NW2d 1 (2009).

B. MICHIGAN'S USE TAX

The Michigan Legislature has imposed a use tax on consumers for the "privilege of using, storing, or consuming tangible personal property in this state . . . ." MCL 205.93(1); see *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 408; 590 NW2d 293 (1999). The provisions of the Use Tax Act complement those of the General Sales Tax Act, MCL 205.51 *et seq*., and were generally designed to avoid the imposition of both use and sales tax on the same property. *Elias Bros Restaurants, Inc v Treasury Dep't*, 452 Mich 144, 153 n 19, 153-154; 549 NW2d 837 (1996). The Legislature also sought to avoid multiple layers of taxation—referred to as pyramiding—by exempting property used or consumed in the production of goods that will ultimately be subject to a use or sales tax when purchased by consumers. *Id*. at 152.[1] Accordingly, the use tax does not apply to property sold to an "industrial processor for use or consumption in industrial processing." MCL 205.94o(1)(a).

On appeal, the Department does not challenge whether Granger engaged in industrial processing during the relevant taxing period.[2] For that reason, we shall assume that the erection and maintenance of landfill cells—including the modification of the waste

[1] The industrial processing exemption has existed since at least 1939 in both the General Sales Tax Act and the Use Tax Act. See 1939 PA 313, §1(b) and 1937 PA 94, §4(g).

[2] Industrial processing means "the activity of converting or conditioning tangible personal property by changing the form, composition,

stored in the cells—for the production and capture of methane gas constitutes industrial processing.[3] See MCL 205.94o(3); MCL 205.94o(7)(a). The Department does, however, challenge whether Granger's use of various materials and machinery during any industrial processing should be excluded from the use tax under the industrial processing exemption. Specifically, the Department argues that Granger affixes the personal property that it uses in the erection and maintenance of its landfill cells to real property and, for that reason the property so used is excluded from exemption under the industrial processing exemption. See MCL 205.94o(4)(d); MCL 205.94o(5)(a). Similarly, the Department argues that Granger uses the bulldozers and other heavy machinery to design, engineer, construct, or maintain real property, which are activities that are specifically excluded from the definition of industrial processing. See MCL 205.94o(6)(d).

C. PERSONAL PROPERTY AFFIXED AND BECOMING PART OF REAL ESTATE

Beginning with the enactment of 1939 PA 313, the exemption for personal property used or consumed during industrial processing has been defined to exclude personal property that is permanently affixed to, and becomes a structural part of, real estate. See *R C Mahon Co v Dep't of Revenue*, 306 Mich 660, 663; 11 NW2d 280 (1943). Under the modern Use Tax Act, this exclusion from exemption is codified at both MCL 205.94o(4)(d) and MCL 205.94o(5)(a). MCL 205.94o(4)(d) provides that property that is eligible

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quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail." MCL 205.94o(7)(a).

[3] The Department also limits its analysis to application of the Use Tax Act. Therefore, we shall limit our analysis accordingly.

for an industrial processing exemption includes "[t]angible personal property, not permanently affixed and not becoming a structural part of real estate, that becomes a part of, or is used and consumed in installation and maintenance of, systems used for an industrial processing activity." Similarly, MCL 205.94o(5)(a) provides that personal property that is not eligible for an industrial processing exemption includes "[t]angible personal property permanently affixed and becoming a structural part of real estate . . . ." Construing these statutory provisions together, see *Dep't of Labor & Economic Growth v Dykstra*, 283 Mich App 212, 225; 771 NW2d 423 (2009), it is plain that the industrial processing exemption does not apply to tangible personal property that both is permanently affixed to and becomes a structural part of real estate—even if the personal property is otherwise used in industrial processing. Accordingly, we must determine whether Granger permanently affixed the personal property it used in the erection and maintenance of its landfill cells to real estate and whether the personal property so affixed became a structural part of the real estate.

There are innumerable ways that a person can affix personal property to real estate; some items may be physically attached to the real estate whereas other items may be put in place with the intent that the property will become part of the real estate through its size and character. See, e.g., *Velmer v Baraga Area Schools*, 430 Mich 385, 395; 424 NW2d 770 (1988) (noting that the milling machine at issue was constructively "affixed" to the real property by reason of its weight). Although there is no bright-line test for determining whether and when an item of personal property has become sufficiently connected with real property that it should be treated as part of the real estate,

Michigan courts have traditionally examined all the relevant factors to determine on a case-by-case basis whether personal property has become sufficiently affixed to real property that it should be treated as a part of the real estate. See *Tuinier v Bedford Charter Twp*, 235 Mich App 663, 668; 599 NW2d 116 (1999). Thus, Michigan courts will examine

> (1) whether the property was actually or constructively annexed to the real estate; (2) whether the property was adapted or applied to the use or purpose of that part of the realty to which the property in question is connected or appropriated; and (3) whether the property owner intended to make the property a permanent accession to the realty. [*Id.*]

Determining whether Granger actually or constructively annexed its landfill cells to the real estate is somewhat complicated by the scale of the processing activity at issue—the sizeable area involved, the depth of the cells, and the decades throughout which the processing activity occurs. It is perhaps counterintuitive to entertain the idea that, under some factual scenarios, the waste deposited in a landfill to a depth of tens of feet and spanning several acres might not be constructively annexed to the underlying real estate, especially considering that Granger admitted that the cells would remain in place for decades. Indeed, if Granger were bringing in similar volumes of soil to fill low areas and shape its property in order to facilitate the property's use for a particular purpose over the same time span, one might readily conclude that the fill became part of the real estate by virtue of its volume and character. However, under the unique facts of this case, we conclude that Granger did not actually or constructively annex the cells or their components to its real property.

In order to generate methane gas, Granger must process the waste somewhere. And, given the volume of the material used, the nature of the process itself,

and the time span involved, it is impractical for Granger to process the waste in a traditional manufacturing facility. For that reason, Granger processes the waste in landfill cells that it constructs over time for that purpose. Although the cells are erected on Granger's land, Granger takes no affirmative steps to actually attach the cells to its real property. Likewise, even though the enormous mass of waste material involved implicates constructive annexation, Granger takes significant steps to insulate the waste from the underlying real property. Granger takes these steps to prevent the waste from contaminating the real property and to facilitate the decomposition process that generates the gas. Indeed, even after it caps a cell, Granger continues to monitor and control the gas production within the cell and may later connect the cell to newly established adjacent cells. The erection of independent cells facilitates both the processing and storage of the raw material used in the industrial process—in this case waste. See MCL 205.94o(3)(k) (defining industrial processing to include the storage of in-process materials). Moreover, there is no evidence that Granger erects the cells in order to improve the land or make it more valuable in and of itself; rather, Granger erects the cells to facilitate the processing of waste material into gas that it can sell to third parties. Given these unique facts, we conclude that Granger has neither actually nor constructively attached the landfill cells to its real property.

For the same reasons, we conclude that the erection and maintenance of the cells does not amount to an adaptation of the land under the second test. Granger adapts the land to facilitate the erection of cells; it does not erect the cells to facilitate the use of the land.

Finally, although there is evidence that the cells could remain in place indefinitely, it does not necessarily follow that Granger intended the erection of the cells to be an accession to the real estate. During their commercial lifespan, Granger intends the cells to generate gas and, for that reason, maintains the cells as separate processing units. Further, the fact that cells might conceivably remain in place indefinitely—even after the expiration of their commercial life—does not alter this conclusion. Rather, the abandonment of the cells on Granger's property at some future point in time would be akin to the onsite disposal of waste products by a traditional manufacturer. See, e.g., *Minnaert v Dep't of Revenue*, 366 Mich 117, 122-123; 113 NW2d 868 (1962). The fact that Granger processes its raw material on the same location that it might eventually dispose of the waste material left over after processing does not mean that the materials used in the cells became part of the real estate during the period of processing; Granger intends to use and actually uses the raw material and personal property as part of its industrial process. And, if the waste material left after Granger finishes its processing does become constructively annexed to the real estate at some future point, that fact does not render the personal property consumed in the processing subject to the use tax.

The Court of Claims correctly determined that the materials used to erect the cells at issue were exempt from use tax as property used or consumed in industrial processing.[4]

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[4] We also find it noteworthy that our resolution of this issue prevents the type of pyramiding that the Legislature intended to alleviate by enacting an industrial processing exemption. *Elias Bros Restaurants, Inc*, 452 Mich at 152.

D. PERSONAL PROPERTY USED TO DESIGN, ENGINEER, CONSTRUCT, OR MAINTAIN REAL PROPERTY

Industrial processing is broadly defined to apply to the conversion or conditioning of personal property rather than real property. See MCL 205.94o(7)(a). Additionally, MCL 205.94o(6)(d) clarifies that industrial processing does not include activities involving the "[d]esign, engineering, construction, or maintenance of real property . . . ." Therefore, personal property used or consumed in the design, engineering, construction, or maintenance of real property will not fall within the exemption applicable to personal property used or consumed during industrial processing.

In this case, Granger uses bulldozers, compactors, and Trashmasters to process the waste used in the cells. Granger sorts and compacts the waste in order to make it as uniform as possible and to remove pockets of air. It then uses the machines to transport and spread the waste within the cells. Granger also uses the bulldozers to make it possible to access the cells during the period within which the cells are actively being filled and to erect the structural components of the cells. As we have already noted, the individual cells and their internal components do not become a part of the real estate during the cells' commercial life. Because Granger uses the heavy equipment at issue to physically transport and process the waste and to erect the cells, the heavy machinery is clearly being used as part of the industrial processing of the waste and not to design, engineer, construct, or maintain real property. See MCL 205.94o(3)(f) (defining industrial processing to include the design, construction, or maintenance of production); MCL 205.94o(4)(b) (defining exempt property to include machinery used in an industrial processing activity); MCL 205.94o(4)(f) (defining exempt property to include machinery used to move property in

the process of production). Consequently, the Court of Claims did not err when it determined that the heavy machinery was also exempt from use tax.

III. CONCLUSION

The Court of Claims did not err when it determined that the personal property at issue was not subject to Michigan's use tax. Accordingly, the Court of Claims did not err when it ordered the Department to refund the use taxes paid by Granger.

Affirmed.

IRON MOUNTAIN INFORMATION MANAGEMENT, INC
v STATE TAX COMMISSION

CVS PHARMACY, INC v STATE TAX COMMISSION

NES RENTAL HOLDINGS, INC v STATE TAX COMMISSION

IRON MOUNTAIN INFORMATION MANAGEMENT, INC
v STATE TAX COMMISSION

IRON MOUNTAIN INFORMATION MANAGEMENT, INC
v STATE TAX COMMISSION

IRON MOUNTAIN INFORMATION MANAGEMENT, INC
v STATE TAX COMMISSION

IRON MOUNTAIN INFORMATION MANAGEMENT, INC
v STATE TAX COMMISSION

IRON MOUNTAIN INFORMATION MANAGEMENT, INC
v STATE TAX COMMISSION

MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP v
STATE TAX COMMISSION

Docket Nos. 291579, 291586, 291729 through 291734, and 291907. Submitted December 7, 2009, at Detroit. Decided December 29, 2009, at 9:20 a.m.

Iron Mountain Information Management, Inc., brought an action in the Washtenaw Circuit Court against Robert Naftaly, in his capacity as chairperson of the State Tax Commission, Douglas Roberts and Frederick Morgan, in their capacities as members of the State Tax Commission, the State Tax Commission (STC), James Rushton, in his capacity as Pittsfield Charter Township assessor, and Pittsfield Charter Township, seeking, in part, a writ of mandamus or superintending control to issue an order classifying the property in a particular manner. Plaintiff had disputed the classification and protested to the March board of review, which affirmed the classification. Plaintiff appealed the decision of the March board of review by filing a classification complaint petition with the STC pursuant to MCL 211.34c(6). The STC agreed with the assessor's classification and issued a decision in favor of the assessor. The STC moved in the circuit court for summary disposition, alleging that the circuit court did not have jurisdiction to review the STC's decision and that the appeal was untimely. The trial court, David S. Swartz, J., denied the STC's motion and entered an order granting relief in favor of Iron Mountain. Naftaly, Roberts, Morgan, and the STC appealed.

In a similar separate action brought in the Oakland Circuit Court by CVS Pharmacy, Inc., against Naftaly, Roberts, Morgan, the STC, Glenn Lemmon, in his capacity as assessor for the city of Novi, and the city of Novi, CVS sought similar relief. The court, Shalina Kumar, J., granted relief in favor of CVS. Naftaly, Roberts, Morgan, and the STC appealed.

In similar separate actions in the Wayne Circuit Court by NES Rental Holdings, Inc., against Naftaly, Roberts, Morgan, the STC, Linda Bade, in her capacity as assessor for the city of Detroit, and the city of Detroit, and by Iron Mountain against Naftaly, Roberts, Morgan, the STC, Bade, and the city of Detroit, and by Iron Mountain against Naftaly, Roberts, Morgan, the STC, Sherron Schultz, in her capacity as assessor for the city of Livonia, and the city of Livonia, and by Iron Mountain against Naftaly, Roberts, Morgan, the STC, Tom Yack, in his capacity as Canton Township Supervisor, and Canton Township, and by Iron Mountain against Naftaly, Roberts, Morgan, the STC, Linda Bade, in her capacity as assessor for the city of Detroit, and the city of Detroit, the trial court, Virgil C. Smith, Jr., J., granted summary disposition in favor of the respective plaintiffs. Naftaly, Roberts, Morgan, and the STC appealed.

In a similar separate action brought in the Midland Circuit Court by Midland Cogeneration Venture Limited Partnership against Naftaly, Roberts, Morgan, and the STC the trial court, Jonathan E. Lauderbach, J., granted relief in favor of the plaintiff. Naftaly, Roberts, Morgan, and the STC appealed. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The plain language of MCL 211.34c(6) states that an appeal may not be taken from the STC's decision in a property classification appeal.

2. Review under MCL 24.301 of the Administrative Procedures Act is not applicable because these cases do not involve a contested case. The STC's review of a decision of a local board of review in a property classification dispute does not involve a contested case.

3. No right of review of the STC's decision by the circuit court exists under MCR 7.101 because the Legislature has specifically provided in MCL 211.34c(6) that the STC's final decision on a property classification appeal is not reviewable.

4. Const 1963, art 6, § 28 clearly vests the Legislature with the authority to exert substantial control over the mechanics of how administrative decisions are to be appealed. The provisions of MCL 211.34c(6) are not constitutionally infirm. The orders of the trial courts must be reversed and the cases must be remanded to

the appropriate trial court for entry of an order granting summary disposition in favor of the defendants in each case.

Reversed and remanded.

TAXATION — STATE TAX COMMISSION — PROPERTY CLASSIFICATION DISPUTES — APPEAL.

The State Tax Commission's decision on a property classification appeal is not reviewable by the circuit court; the State Tax Commission's review of a decision of a local board of review in a property classification dispute does not involve a contested case subject to review under the Administrative Procedures Act; no right of review of the State Tax Commission's decision by the circuit court exists under MCR 7.101 (MCL 24.301, 211.34c[6]).

Honigman Miller Schwartz and Cohn LLP (by *Michael B. Shapiro* and *Jason Conti*) for Iron Mountain Information Management, Inc., CVS Pharmacy, Inc., NES Rental Holdings, Inc., and Midland Cogeneration Venture Limited Partnership.

Gary B. Pasek for Midland Cogeneration Venture Limited Partnership.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Steven B. Flancher* and *Michael R. Bell*, Assistant Attorneys General, for Robert Naftaly, Douglas Roberts, Frederick Morgan, and the State Tax Commission.

Before: GLEICHER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM. In each of these consolidated appeals the plaintiff disputed the classification of subject parcels of property and protested the assigned classification to the March board of review. Each plaintiff then appealed the decision of the March board of review by filing a classification complaint petition with the State Tax Commission (STC) pursuant to MCL 211.34c(6) of the

General Property Tax Act, MCL 211.1 *et seq*. In each case the STC agreed with the assessor's classification and issued its decision by way of a letter to the plaintiffs from the STC's executive secretary. Each plaintiff filed a complaint in circuit court seeking, in part, a writ of mandamus or superintending control to compel the STC to (1) issue a valid order, and (2) classify the plaintiff's subject parcel or parcels in a particular manner. The STC moved for summary disposition, asserting, in part, that the circuit court does not have jurisdiction to review the STC's decision in a property classification appeal under MCL 211.34c(6), and that, even if the court did have jurisdiction under MCL 24.306 of chapter 6 of the Administrative Procedures Act, MCL 24.301 *et seq.*, plaintiffs' appeals to the circuit court were untimely because the plaintiffs did not file their appeals within 21 days of receipt of the letters from the STC. The trial court in each case denied the STC's motion for summary disposition and ordered the STC to submit a proper order complying with MCL 209.105.[1] None of the trial courts directly addressed the STC's jurisdictional challenge. We reverse.

I. STANDARD OF REVIEW

"Whether a trial court has subject-matter jurisdiction is a question of law that this Court reviews de novo." *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 472; 628 NW2d 577 (2001). This Court also reviews de novo legal issues of statutory construction. *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 698; 736 NW2d 594 (2007).

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[1] In Docket Nos. 291579, 291586, and 291907, the trial courts also issued a writ of mandamus for the STC to classify the plaintiffs' properties in a specific manner.

II. ANALYSIS

The goal in statutory construction is to discern and give effect to the Legislature's intent. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The intent of the Legislature is most reliably shown through the words used in the statute. *Id.* If the language in the statue is unambiguous, judicial construction is neither required nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

This Court in *Hopkins v Parole Bd*, 237 Mich App 629, 637-638; 604 NW2d 686 (1999), stated that,

> [g]enerally, three potential avenues of review exist by which an aggrieved party may challenge an administrative body's decision: (1) review pursuant to a procedure specified in a statute applicable to the particular agency, (2) the method of review for contested cases under the Administrative Procedures Act (APA), MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*, or (3) an appeal pursuant to § 631 of the Revised Judicature Act, MCL 600.631; MSA 27A.631, and Const 1963, art 6, § 28, in conjunction with MCR 7.104(A).

A

Under MCL 211.34c(6), which is the applicable statute in this case,

> [a]n owner of any assessable property who disputes the classification of that parcel shall notify the assessor and may protest the assigned classification to the March board of review. An owner or assessor may appeal the decision of the March board of review by filing a petition with the state tax commission not later than June 30 in that tax year. The state tax commission shall arbitrate the petition based on the written petition and the written recommendations of the assessor and the state tax commission staff. *An appeal may not be taken from the decision of the state tax commission regarding classification complaint petitions and the*

> *state tax commission's determination is final and binding for the year of the petition.* [Emphasis added.]

The plain language of MCL 211.34c(6) clearly states that an appeal may not be taken from the STC's decision in a property classification appeal. The Legislature has effectively barred appeals from the STC's decision in such an appeal.

B

Review under MCL 24.301 of the APA is not applicable, because these cases do not involve a contested case. Under the APA, "contested case" means "a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3). Under MCL 211.34c(6), the STC arbitrates the petition on the basis of the written petition and the written recommendations of the assessor and the STC's staff. Thus, the STC's review of a decision of a local board of review in a property classification dispute does not involve a contested case.

C

Under MCL 600.631 of the Revised Judicature Act,

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

MCR 7.104(A) states with regard to appeals under MCL 600.631: "An appeal in the circuit court under MCL 600.631 is governed by MCR 7.101 and 7.103, except that the bond requirements do not apply." MCR 7.101(A)(3) provides that "This rule does not restrict or enlarge the right of review provided by law or make an order or judgment reviewable if it is not otherwise reviewable." Because the Legislature has specifically provided that the STC's final decision on a property classification appeal under MCL 211.34c(6) is not reviewable, no right of review of the STC's decision by the circuit court exists under MCR 7.101.

D

Lastly, Const 1963, art 6, § 28 provides, in relevant part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts *as provided by law*. [Emphasis added.]

In *McAvoy v H B Sherman Co*, 401 Mich 419, 443; 258 NW2d 414 (1977), the Court construed art 6, § 28, regarding the phrase "as provided by law," stating:

> It would be inaccurate to contend that art 6, § 28, guarantees an unencumbered, *de novo* right to appeal. The very wording of the provision states otherwise. Article 6, § 28, specifically provides that such rulings "shall be subject to direct review by the courts *as provided by law*." (Emphasis added.)
>
> The phrase "as provided by law" clearly vests the Legislature with the authority to exert substantial control over the mechanics of how administrative decisions are to be appealed.

Through the express language of MCL 211.34c(6), the

Legislature exerted control over the mechanics of how administrative decisions are to be appealed by providing that an appeal of an STC decision on a property classification appeal is precluded "for the year of the petition."[2] This Court can find nothing in that statute that renders it constitutionally infirm.[3]

Reversed and remanded for entry of an order granting summary disposition in favor of defendants in each case. Jurisdiction is not retained.

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[2] The Legislature did not preclude review by other mechanisms. For example, a party could pay the property taxes due for a subject parcel, and then file a claim in the Michigan Tax Tribunal for a refund of taxes paid because of an improper classification.

[3] In light of our conclusion, we need not address plaintiffs' argument that the letter from the executive secretary of the STC to each plaintiff advising of its determination on the property classification appeal was not a valid order under MCL 209.105 because it was not signed by the chairman of the commission and the seal of the commission was not affixed to the letter.

CITY OF ROCKFORD v 63RD DISTRICT COURT

Docket No. 287501. Submitted October 6, 2009, at Lansing. Decided December 29, 2009, at 9:25 a.m.

The city of Rockford brought an action in the Kent Circuit Court against the 63rd District Court and the chief judge of the district court (defendants), seeking declaratory and injunctive relief to prevent the consolidation of both divisions of the court in one facility in Grand Rapids Township. The trial court, Donald A. Johnston, J., allowed Kent County to intervene as a defendant and granted summary disposition in favor of defendants. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court properly interpreted MCL 600.8251(2), which governs the location of district courts of the second class, such as the 63rd District Court. The trial court did not err by determining that the 63rd District Court was not required to maintain a full-time judicial presence in the city of Rockford. The phrase "shall sit" in MCL 600.8251(2), in the context of the entire district court act, MCL 600.8101 *et seq*., cannot mean that district courts are required to hold court full-time in every city in the district with a population of 3,250 or more, because the Legislature did not provide enough judges to do so.

2. The trial court properly determined that the only judicial services the 63rd District Court must provide in Rockford are those services it is required to provide as a second-class district court under the district court act. Most of the venue provisions applicable to the 63rd District Court do not require the court to sit in the political subdivision where the violation took place. Rather, venue in most instances is proper in the district where the violation took place. The only exception is provided in MCL 600.8416(1), which states that the small claims division of the 63rd District Court must hear small claims arising in Rockford at least once every 30 days.

3. The trial court did not err by concluding that the chief judge of the 63rd District Court had the authority to determine that the other district court judge, who was presiding over the first division of the district in a facility located in Rockford, would sit in Grand

Rapids Township. MCL 600.8251(4) vests the chief judge with the authority to designate the places or court locations within the district where each judge of the district court shall sit.

Affirmed.

1. COURTS — DISTRICT COURTS — PLACE OF SITTING.

The phrase "shall sit" in MCL 600.8251(2) does not require district courts of the second class to hold court full-time in each city and unincorporated village within the district having a population of 3,250 or more; the court generally is not required to sit in the political subdivision where a criminal violation or civil infraction occurred and venue is proper in most instances in the district where the violation took place unless provided otherwise by statute (MCL 600.8212).

2. COURTS — DISTRICT COURTS — JUDGES — PLACE OF SITTING.

Each judge of a district court shall sit at places within the district as designated by the presiding judge or chief judge of the district (MCL 600.8251[4]).

Law, Weathers & Richardson, P.C. (by *Steven F. Stapleton* and *Crystal L. Rice*), for the City of Rockford.

Bregman & Welch (by *Judy E. Bregman*) for the 63rd District Court and the chief judge of the district court.

Varnum LLP (by *Timothy E. Eagle* and *Bradley S. Defoe*) for Kent County.

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

WILDER, J. Plaintiff appeals as of right the trial court's order granting the motion for summary disposition of the 63rd District Court and 63rd District Court Chief Judge Sara Smolenski (defendants). We affirm.

This action involves the 63rd District Court's planned consolidation of both the first and second divisions of the court into one location in Grand Rapids Township. The 63rd District Court is a district court of the "second class" and its jurisdiction includes a large

portion of Kent County. MCL 600.8130(4). The district is divided into two election divisions and plaintiff city of Rockford is located in the first division. MCL 600.8251(2) governs the location of district courts of the second class and provides, in relevant part, that

> the court *shall sit* at any county seat within the district, and at each city and incorporated village within the district having a population of 3,250 or more . . . . The court is not required to sit in any political subdivision if the governing body of that subdivision by resolution and the court agree that the court shall not sit in the political subdivision. . . . *In addition to the place or places where the court is required to sit pursuant to the provisions of this subsection, the court may sit at a place or places within the district as the judges of the district determine.* [Emphasis added.]

It is undisputed that the 63rd District does not have a county seat, that Rockford is a city within the district containing a population of over 3,250, and that the governing body of Rockford has not agreed to the absence of the court from Rockford. Currently, Judge Steven R. Servaas presides over the first division in a facility located in Rockford, while Smolenski presides over the second division in a facility located in Grand Rapids Township near Cascade.

Kent County, which is the "funding unit" of the 63rd District Court and is responsible for providing facilities, MCL 600.8103(2), MCL 600.8104, MCL 600.8261, acquired property in Grand Rapids Township near the East Beltline and Knapp Street with plans to consolidate both divisions of the court into a new facility. On February 4, 2008, Smolenski issued a statement wherein she indicated her support for the proposed consolidation and stated that, as chief judge, she had ultimate authority to determine whether both divisions of the court would be consolidated at the new location. Thereafter, both the Rockford City Council and Servaas

expressed their objections to the consolidation plan, and plaintiff brought suit seeking declaratory and injunctive relief. Specifically, plaintiff asserted that the consolidation plan was in violation of the statutory mandate that the district court "shall sit" in Rockford. Thereafter, plaintiff and defendants both moved for summary disposition pursuant to MCR 2.116(C)(10) and the trial court granted defendants' motion.

On appeal plaintiff claims that the trial court erred by interpreting the controlling statute, MCL 600.8251(2), as it applied to the 63rd District Court. We review a trial court's interpretation of a statute de novo. *Auto-Owners Ins Co v Amoco Production Co*, 468 Mich 53, 57; 658 NW2d 460 (2003). "The primary goal of statutory construction is to ascertain and give effect to the intent of the Legislature." *Livingston Co Bd of Social Services v Dep't of Social Services*, 208 Mich App 402, 406; 529 NW2d 308 (1995). When the language in a statute is clear and unambiguous we do not engage in judicial interpretation and the statute must be enforced as written. *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995). "In construing the language of a statute, every word or phrase should be accorded its plain and ordinary meaning unless defined in the statute." *Livingston Co*, 208 Mich App at 406. Words and phrases used in a statute " 'should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole.' " (Citation omitted.) *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008). "Identical terms in different provisions of the same act should be construed identically . . . ." *Cadle Co v City of Kentwood*, 285 Mich App 240, 249; 776 NW2d 145 (2009). However, the use of different words connotes different meanings. *United States Fidelity & Guaranty Co v Michigan Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009).

As referenced above, MCL 600.8251(2) governs the location of district courts of the second class and, in relevant part, provides: "[i]n districts of the second class, *the court shall sit . . . at each city and incorporated village within the district having a population of 3,250 or more* . . . ." Our Supreme Court interpreted this same language in the context of a third-class district court in *Center Line v 37th Dist Judges*, 403 Mich 595; 271 NW2d 526 (1978). In *Center Line*, one of the four district judges of the 37th District Court sat in the city of Center Line while the district's three other judges sat in the city of Warren. *Id*. at 601-602. In 1975, Warren constructed a new courthouse with capacity for four judges and Center Line brought suit to prevent the 37th District Court from consolidating all four judges into the new facility. *Id*. On appeal, Center Line argued that consolidation of the four judges in one facility in Warren violated the statutory requirement (MCL 600.8251[3]) that district courts of the third class "shall sit" in cities with a population of 3,250 or more. Our Supreme Court rejected the plaintiff's argument that the phrase "shall sit" required the 37th District Court to remain located in Center Line on a full-time basis and held:

> If we were to adopt the city's position, using the 1970 census, we would be creating many "full-time" judge locations in the state where none now are thought to exist. We will not interpret the legislative language to achieve a result that body could not have intended. *The statute does not require a full-time judge* in Center Line, *only such services of a judge as may, consistent with the judicial needs of the district, be required to transact whatever judicial business is brought in the city*. [*Id*. at 604 (emphasis added).]

In determining which judicial services were required in Center Line, the Supreme Court interpreted and applied the district court act. *Id.* at 601, 605, citing MCL 600.8101 *et seq*. The parties agreed that, pursuant to

MCL 600.8416,[1] the small claims division of the district court was required to sit in Center Line " 'once each 30 days. ' " *Id*. at 604-605. Furthermore, pursuant to the venue provision in MCL 600.8312(3),[2] the district court of the third class district was also required to sit in Center Line to hear cases involving the violation of Center Line ordinances. *Id*. at 602, 604-607. Under an earlier version of the venue provision in MCL 600.8312(5),[3] a district court of the third class was not required to sit in any specific location within the district to hear general civil cases arising out of transactions within Center Line. *Id.* at 605. With regard to "the remaining business of the court," our Supreme Court affirmed the circuit court's ruling that these functions could be transacted " 'at any place within the geographical area of the . . . district. ' " *Id*. at 602.

We conclude that here, consistent with *Center Line*, the trial court properly interpreted MCL 600.8251(2).

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[1] In 1978, when *Center Line* was decided, MCL 600.8416 provided, "The small claims division of the district court shall sit at least once each 30 days at such locations as the district court is required to sit as set forth in section 8251."

[2] In 1978, MCL 600.8312(3) provided:

> In a district of the third class, venue in criminal actions for violations of state law and all city, village, or township ordinances shall be in the political subdivision thereof where the violation took place, except that when such violation is alleged to have taken place within a political subdivision where the court is not required to sit the action may be tried in any political subdivision within the district where the court is required to sit.

[3] In 1978, MCL 600.8312(5) provided:

> In districts of the second or third class venue in civil actions shall be in the district in which the subject of the action is situated, the cause of action arose or in the district in which the defendant is established or resides. If there is more than 1 defendant, actions shall be filed in the district in which any defendant is established or resides.

First, the trial court did not err by determining that the 63rd District Court was not required to maintain a full-time judicial presence in the city of Rockford. *Center Line*, 403 Mich at 604. To "sit" generally means " 'to hold court' or 'do any act of a judicial nature.' " *Id.* at 604 n 10 (citations omitted). As the trial court noted, reading "shall sit" in context with the entire district court act cannot mean district courts are required to hold court full-time in every city with a population of 3,250 or more because the Legislature did not provide enough judges to fulfill that requirement. For example, the populations of the city of Rockford, village of Sparta, city of East Grand Rapids, and city of Lowell each exceed 3,250, but the Legislature only designated two judges for the 63rd District Court. MCL 600.8130(4); see *Couzens*, 480 Mich at 249. Because MCL 600.8251(2) and MCL 600.8130(4) are *in pari materia* and must be construed so as to be harmonious with each other, *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 148; 762 NW2d 192 (2009), the trial court correctly held that the city of Rockford's contention that placed heavy reliance on the language of MCL 600.8251(2) in isolation and without context was misplaced.

Second, the trial court also properly determined that the only judicial services the 63rd District Court must provide in Rockford are those services it is *required* to provide as a second-class district court under the district court act. MCL 600.8312 provides, in relevant part:

> (2) In a district of the second class, venue in criminal actions for violations of state law and all city, village, or township ordinances shall be in the district where the violation took place.

* * *

> (5) Venue in civil actions, other than civil infraction actions, shall be governed by sections 1601 to 1659 except that for purposes of this subsection all references to "county" in sections 1601 to 1659 shall mean "district" with respect to districts of the second and third class.
>
> (6) Venue in civil infraction actions shall be determined as follows:
>
> * * *
>
> (b) In a district of the second class, venue shall be in the district where the civil infraction occurred.

It is apparent from a plain reading of the statute that most of the venue provisions applicable to the 63rd District Court do not require the court to sit in the political subdivision where the violation took place. Rather, venue in most instances is proper in the *district* where the violation took place. The only exception to this general rule is provided in MCL 600.8416(1), which states:

> The small claims division of the district court shall sit at least once each 30 days at the locations at which the district court is required to sit pursuant to section 8251.

Thus, while the small claims division of the 63rd District Court must hear small claims arising in Rockford, in order to meet the statutory requirement in MCL 600.8251(2) that it "shall sit" in cities with a population of 3,250 or more, it is not required to do so more than once every 30 days.[4]

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[4] We note that while plaintiff argues on appeal that the trial court failed to consider documents showing that the 63rd District Court does not have plans to offer any services in Rockford, plaintiff waived appellate review of this issue by agreeing with the trial court that the documents were irrelevant to the resolution of this case. *Grant v AAA Michigan/Wisconsin, Inc* (*On Remand*), 272 Mich App 142, 149; 724 NW2d 498 (2006).

Third, the trial court did not err when it concluded that, as chief judge of the 63rd District Court, Smolenski had the authority to determine that Servaas would "sit" in Grand Rapids Township. Rockford contends that because Servaas objects to sitting in Grand Rapids Township, MCL 600.8251(2) precludes Smolenski from assigning Servaas to sit outside his election district. We disagree.

MCL 600.8251(2) provides, in relevant part, that "[i]n addition to the place or places where the court is required to sit pursuant to the provisions of this subsection, the court may sit at a place or places within the district as the judges of the district determine." As we noted earlier, as used in MCL 600.8251(2), to "sit" generally means "to hold court" or "do any act of a judicial nature." There is no dispute that the 63rd District Court "sits" in Grand Rapids Township, following the agreement of both judges in 1989 that the court would sit in this second location within the district. Importantly, Rockford does not now dispute that the 63rd District Court, *as a court*, properly "sits" in Grand Rapids Township. Because the court properly sits in Grand Rapids Township, we therefore look to MCL 600.8251(4) in order to determine where each of the *judges* in the district will sit. MCL 600.8251(4) provides, in pertinent part, that "[e]ach judge of the district shall sit at places within *the district* as the presiding judge designates." (Emphasis added.) The trial court correctly concluded that the term "presiding judge" as used in MCL 600.8251(4) is interchangeable with the term "chief judge" used in MCR 8.110. See MCR 8.110(C)(2). Thus, we conclude that MCL 600.8251(4) vests Smolenski, as chief judge, with the authority to designate the places or court location(s) within the district where Servaas shall sit.[5]

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[5] See also MCL 600.8261, which states, in part, that "[c]ourt *facilities* shall be provided at those *places* where the court sits." (Emphasis added.)

For the foregoing reasons, the trial court did not err by granting defendants' motion for summary disposition.

Affirmed. A public question being involved in the instant matter, defendants, as prevailing parties, may not tax costs. MCR 7.219(A).

PEOPLE v WACLAWSKI

Docket No. 287146. Submitted November 10, 2009, at Detroit. Decided December 29, 2009, at 9:30 a.m.

Steven M. Waclawski was convicted by a jury in the Macomb Circuit Court, Mary A. Chrzanowski, J., of one count of first-degree criminal sexual conduct, two counts of second-degree criminal sexual conduct, five counts of using a computer to produce child sexually abusive material, and one count of producing child sexually abusive material and was sentenced to concurrent sentences for the convictions. The charges resulted from a search of defendant's computers that revealed pornographic images depicting underage boys and defendant. Defendant had originally been arrested in Illinois when he traveled there from Michigan to meet with a person that he thought was a 14-year-old boy. Defendant had met the person through Internet chat room communications (electronic messages) and had arranged to meet him for sex. The person was in fact a police detective and when defendant arrived at the assigned location he was arrested. When arrested, defendant admitted possessing child pornography on his computer. Defendant pleaded guilty in Illinois to one count of indecent solicitation of a child and was sentenced to two years' imprisonment. While he was imprisoned, police officers in Michigan obtained search warrants and searched defendant's home and office computers and discovered the photographs at issue. Defendant was returned to Michigan to face the charges pertaining to the photographs under the provisions of the Interstate Agreement on Detainers (IAD), MCL 780.601. During defendant's trial, the trial court granted defendant's motion to exclude all other acts evidence of defendant's Internet chats with alleged minors in Ohio and Illinois (the minors were actually police officers). The prosecution sought leave to appeal and moved for a stay of the circuit court proceedings. The Court of Appeals granted the application for leave to appeal and the motion for a stay in an unpublished order, entered February 14, 2007 (Docket No. 276094). The Court of Appeals issued an unpublished opinion per curiam on October 11, 2007, reversing the order excluding the other acts evidence and remanding the case to the circuit court for trial. On remand, the trial court ruled

that the other acts evidence was admissible and the jury eventually entered its guilty verdicts. Defendant appealed.

The Court of Appeals *held*:

1. The provisions of article IV of the IAD were triggered by the prosecution's completion and submission of a standard Form V of the IAD "Request for Temporary Custody" in order to bring defendant back to Michigan from Illinois. Defendant had the right under Article IV to be brought to trial within 120 days of his arrival in Michigan. The 120-day time limit may be tolled for any period that is the result of any necessary or reasonable continuance for good cause shown in open court with the defendant or the defendant's counsel present. Such a continuance includes any period of delay caused by the defendant's request or ordered to accommodate the defendant. A total of 574 days passed between the time defendant was returned to Michigan and his trial date. The facts show that the prosecution was responsible for only 100 days and defendant was responsible for 235 days. The trial court did not err in holding that the remaining 239-day delay caused by the appeal to the Court of Appeals should not count toward the running of the 120-day deadline set by the IAD. The order of the Court of Appeals granting the application for leave to appeal the motion excluding the other acts evidence is not deemed outside the scope of IAD Article IV(a) and (c) merely because it was issued without the physical presence of defendant or his counsel.

2. Although the 24-month delay was presumptively prejudicial and defendant asserted his right to a speedy trial, the reasons for the delay weigh against defendant and his ability to prepare a defense was not prejudiced. The trial court properly determined that defendant's right to a speedy trial was not violated.

3. The other acts evidence regarding defendant's online chats demonstrated intent and identity as well as common scheme, plan, or system and it was relevant and more probative than prejudicial. The trial court provided a comprehensive limiting instruction that the evidence could only be considered for very limited purposes. The trial court did not abuse its discretion by admitting the other acts evidence.

4. The Court of Appeals incorrectly held in *People v Reid*, 233 Mich App 457 (1999), that fellatio for purposes of MCL 750.520b(1)(a) requires the entry of a penis into another person's mouth, rather than any oral contact with the male genitals. A dictionary defines fellatio as the oral stimulation of the penis. The act depicted in one of the photographs showing an image of what is alleged to be defendant's face perpendicular to the victim's penis with his tongue out of his mouth in contact with the victim's penis

would constitute fellatio pursuant to the dictionary definition. Two of the photographs depicted defendant with his mouth open and the victim's penis inside defendant's mouth and clearly depict fellatio as interpreted by *Reid*. The trial court's jury instructions made it clear that the prosecution was required to demonstrate entry into defendant's mouth by the victim's penis and, as a result, fairly presented the issues to be tried and sufficiently protected defendant's rights. The trial court did not err by instructing the jury with regard to the charge of first-degree criminal sexual conduct.

5. Defendant did not show that error occurred with regard to the trial court's instructions regarding defendant's right to a unanimous verdict.

6. The trial court reasonably concluded that the victims suffered serious psychological injury as a result of defendant's abuse and properly scored defendant at 10 points for offense variable 4, MCL 777.34.

7. The trial court properly scored defendant 10 points for offense variable 9, MCL 777.39, because the record supports the inference that at least two other victims were placed in danger of physical injury when the sentencing offenses were committed.

8. The trial court properly determined that the evidence showed that defendant engaged in predatory conduct. The trial court properly scored offense variable 10, MCL 777.40, at 15 points.

9. There was ample evidence to support the trial court's decision to score 25 points for offense variable 12, MCL 777.42.

10. Defendant was not entitled to jail credit in Michigan for the time he served in an Illinois jail for his conviction in Illinois before he was returned to Michigan under the IAD.

11. The trial court did not abuse its discretion by concluding that the presentence investigation report was accurate with regard to the probation agent's reference to defendant's being uncooperative and refusing to answer questions.

12. The decision to allow the mothers of the victims to give victim impact statements was within the trial court's discretion. The trial court did not abuse its discretion by allowing references to the mothers' statements in the presentence investigation report.

13. There is no evidence that the police or the prosecutor engaged in an unlawful overbroad search of defendant's computer materials. To the extent that defendant, a former attorney and prosecutor, sought to claim an attorney-client privilege with re-

gard to material contained on the computers, the privilege is personal to defendant's clients and is not one that defendant could assert. Defendant failed to show that the search of the computers was improper or that the evidence seized should be suppressed.

14. There is no merit to defendant's claims that the March 20, 2006, search warrant was obtained with impermissible police hearsay, with an invalid, unsigned affidavit, and without a proper showing of probable cause. There was a substantial basis for the finding of probable cause to issue the search warrant. Defendant failed to show by a preponderance of the evidence that the affiant knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit supporting the search warrant and that false material was necessary to the finding of probable cause. Defendant failed to establish error with regard to the affidavit or the search warrant.

15. The search warrant pertaining to defendant's digital camera plainly indicated that the camera was located in Illinois and was presumably there as a result of defendant's Illinois arrest, conviction, and incarceration. There is no substance to defendant's argument that the camera was obtained by the government in violation of two Illinois court orders.

16. An original felony information was not filed by the prosecution. However, under MCR 6.112(G), dismissal for a violation of MCR 6.112(C) is precluded absent a showing of prejudice. Defendant failed to show prejudice and, therefore, the trial court did not err by failing to dismiss the case.

17. The trial court did not abuse its discretion by denying defendant's motion for a mistrial following a police officer's unresponsive, volunteered testimony that the police found marijuana in defendant's bedroom, which testimony violated the court's ruling that the evidence would be admitted only under a certain circumstance, which had not occurred. The comment was an isolated comment that was not repeated or explored further and the court provided a comprehensive curative instruction.

Affirmed.

1. CRIMINAL LAW — INTERSTATE AGREEMENT ON DETAINERS — WORDS AND PHRASES — DETAINER.

A "detainer" under the Interstate Agreement on Detainers is a written notification filed with the institution in which a prisoner is serving a sentence advising that the prisoner is wanted to face pending charges in the notifying state; once a detainer is filed, the Interstate Agreement on Detainers is triggered and compliance with the provisions of the agreement is required (MCL 780.601).

2. CRIMINAL LAW — INTERSTATE AGREEMENT ON DETAINERS — COMMENCEMENT OF PROCEEDINGS — TOLLING.

A prisoner transferred to Michigan under article IV(c) of the Interstate Agreement on Detainers must be tried within 120 days of the prisoner's arrival in Michigan; the 120-day time limit may be tolled for any period that is the result of any necessary or reasonable continuance for good cause shown in open court with the defendant or the defendant's counsel present, including any period of delay caused by the defendant's request or ordered to accommodate the defendant; an order of the Court of Appeals granting an application by the prosecution to bring an interlocutory appeal and staying the lower court proceedings may be a necessary and reasonable continuance granted for good cause shown although it was entered without the physical presence of the defendant or the defendant's counsel (MCL 780.601).

3. CRIMINAL LAW — CONSTITUTIONAL LAW — SPEEDY TRIAL.

The Court of Appeals applies a four-part balancing test in determining whether a criminal defendant has been denied the right to a speedy trial; the four factors include the length of the delay, the reason for the delay, the defendant's assertion of the right, and the prejudice to the defendant; the burden is on the defendant to show that he or she suffered prejudice where the delay from the date of the defendant's arrest until the time that the trial commences is under 18 months; prejudice is presumed and the burden is on the prosecution to rebut the presumption where the delay is over 18 months (US Const, Am VI; Const 1963, art 1, §20).

4. CRIMINAL LAW — CONSTITUTIONAL LAW — SPEEDY TRIAL — INHERENT DELAYS.

Although delays inherent in the court system, like docket congestion, are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant has been denied a speedy trial.

5. CRIMINAL LAW — CONSTITUTIONAL LAW — SPEEDY TRIAL RIGHT — INTERLOCUTORY APPEALS.

The time taken by the prosecution to successfully pursue an interlocutory appeal is taken out of the calculation when determining whether the defendant has been denied the right to a speedy trial.

6. CRIMINAL LAW — CONSTITUTIONAL LAW — SPEEDY TRIAL — PREJUDICE.

Two types of prejudice, prejudice to the person and prejudice to the defense, may occur as a result of a delay between the date of a defendant's arrest and the date of the defendant's trial; the most

significant concern is whether the defendant's ability to defend himself or herself has been prejudiced.

7. CRIMINAL LAW — EVIDENCE — EVIDENCE OF SIMILAR ACTS.

A four-part test is employed to show logical relevance where evidence of similar acts is offered to show a defendant's identification through modus operandi: the test requires that there is substantial evidence that the defendant committed the similar act, that there is some special quality of the act that tends to prove the defendant's identity, that the evidence is material to the defendant's guilt, and that the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice (MRE 404([b]).

8. CRIMINAL LAW — JURY INSTRUCTIONS — UNANIMOUS VERDICTS.

A criminal defendant has a right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement.

9. CRIMINAL LAW — SENTENCES — OFFENSE VARIABLE 4 — PSYCHOLOGICAL INJURY.

Ten points are properly scored under offense variable 4 when serious psychological injury requiring professional treatment occurred to a crime victim; the fact that professional treatment was not sought is not conclusive when scoring the variable (MCL 777.34).

10. CRIMINAL LAW — SENTENCES — OFFENSE VARIABLE 10 — PREDATORY CONDUCT.

Conduct, to be considered predatory conduct for purposes of offense variable 10, must have occurred before the commission of the sentencing offense; the preoffense conduct must also have been directed at the victim for the primary purpose of victimization (MCL 777.40).

11. CRIMINAL LAW — SENTENCES — OFFENSE VARIABLE 12 — CONTEMPORANEOUS FELONIOUS CRIMINAL ACTS.

A trial court may score points for offense variable 12 if the defendant committed felonious criminal acts contemporaneously with the sentencing offense; a contemporaneous criminal act is one that occurred within 24 hours of the sentencing offense and has not and will not result in a separate conviction (MCL 777.42).

12. SENTENCES — VICTIM IMPACT STATEMENTS — PRESENTENCE INVESTIGATION REPORTS.

Individuals who suffer direct or threatened harm as a result of a convicted individual's crime have the right to submit an impact

statement both at the sentencing hearing and for inclusion in the presentence investigation report, however, the right is not limited exclusively to the defendant's direct victims (MCL 780.764, 780.765).

13. ATTORNEY AND CLIENT — ATTORNEY-CLIENT PRIVILEGE — ASSERTION OF PRIVILEGE.

The attorney-client privilege belongs to the client, not the attorney; the privilege may be asserted by the client but not the attorney.

14. SEARCHES AND SEIZURES — AFFIDAVITS — HEARSAY EVIDENCE.

A search warrant may be issued on the basis of an affidavit that contains hearsay as long as the police have conducted an independent investigation to verify the information.

15. SEARCHES AND SEIZURES — AFFIDAVITS — FALSE INFORMATION — BURDEN OF PROOF.

A defendant seeking to suppress evidence obtained pursuant to a search warrant allegedly procured with an affidavit containing false information has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause.

16. CRIMINAL LAW — DEFECTIVE INFORMATIONS — PREJUDICE — BURDEN OF PROOF.

The dispositive question in determining whether a defendant was prejudiced by a defect in the information is whether the defendant knew the acts for which the defendant was being tried so that the defendant could adequately put forth a defense; the burden is on the defendant to demonstrate prejudice and thus establish that the error was not harmless (MCR 6.112).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Mark G. Sands*, Assistant Attorney General, for the people.

State Appellate Defender (by *Brandy Y. Robinson*) and Steven M. Waclawski*, in propria persona.*

Before: FORT HOOD, P.J., and SAWYER and DONOFRIO, JJ.

DONOFRIO, J. Defendant appeals as of right his jury trial convictions of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c, five counts of using a computer to produce child sexually abusive material, MCL 752.797(3), and one count of producing child sexually abusive material, MCL 750.145c(2). The trial court sentenced defendant to 209 to 480 months' imprisonment for the CSC-I conviction, 86 to 180 months' imprisonment for both CSC-II convictions, and 95 to 240 months' imprisonment for each of the remaining convictions, all sentences running concurrently. Because none of defendant's arguments on direct appeal or contained in his Standard 4 brief[1] merit relief, we affirm.

I

Defendant was initially arrested in Illinois when he traveled to that state to meet with a person he thought was a 14-year-old boy. Defendant had "met" the boy through Internet chat room communications (electronic messages) and arranged to meet him for sex. The boy was in fact a police detective, and when defendant arrived at the assigned location he was arrested.[2] When arrested, defendant admitted possessing child pornography on his computer. Subsequently, detectives in Michigan searched defendant's home and office computers, revealing various pornographic images depicting underage boys and defendant. The current charges

[1] Defendant raises several issues *in propria persona* in a supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

[2] Defendant pleaded guilty in Illinois to one count of indecent solicitation of a child, 720 Ill Comp Stat 5/11-6, and was sentenced to two years' imprisonment.

resulted from a search of defendant's computers, which revealed hundreds of images of male child pornography, some three dozen of which were taken in defendant's home and depicted three boys. The three boys had all spent the night at defendant's home on multiple occasions when no other adults were present. Three of the images, taken on August 23, 2001, allegedly depicted defendant performing fellatio on a 14-year-old boy with the first initial K.[3] Other photographs, taken on March 1, 2000, allegedly depicted P, a 12-year-old boy, with his penis being measured with a ruler. Photographs taken on June 15, 2001, allegedly depicted M, a 10-year-old boy, who was also photographed with his penis being measured with a ruler. Discovery of these pictures resulted in the Michigan charges against defendant.

The Attorney General's office prosecuted the case and filed a notice seeking to admit evidence of online electronic messages (chats) defendant exchanged with two underage boys named "Coty" and "Jason" located in Ohio and Illinois, respectively. Both "Coty" and "Jason" were in fact police officers. The prosecutor argued that the evidence was admissible pursuant to MRE 404(b) to prove defendant's intent, motive, scheme, plan, or system in perpetrating criminal sexual acts. Defendant moved the trial court to suppress all evidence of his online chats in Ohio and Illinois. The trial court granted defendant's motion to exclude the evidence in an opinion and order issued February 6, 2007, finding that the acts in Ohio and Illinois were "substantially different" from the acts alleged in the instant case and, therefore, the probative value was substantially outweighed by the danger of unfair prejudice. The prosecutor applied for leave to appeal and

[3] For the privacy of the victims in this case, we refer to each of the three victims only by the first letter of their first name to ensure anonymity.

moved to stay circuit court proceedings pending an interlocutory appeal. This Court granted the prosecutor's application and motion for a stay in an unpublished order entered February 14, 2007 (Docket No. 276094).

In an unpublished opinion issued October 11, 2007, this Court reversed the circuit court's February 6, 2007, order excluding other acts evidence and remanded the matter to the circuit court for trial. *People v Waclawski*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2007 (Docket No. 276094). The Internet chats constituting the challenged "other acts evidence" were well documented by the panel that handled the interlocutory appeal in the previous unpublished decision of this Court, thus, we include a portion of the fact section of that opinion detailing defendant's internet chats:

> On February 25, 2006, defendant contacted "jason_12parma" in a chat room, and they exchanged messages for about 45 minutes, discussing fellatio and a possible future sexual encounter. Defendant asserted that he was a 42-year-old man from Monroe, and "Jason" claimed to be a 12-year-old boy living in Ohio. "Jason" was actually an undercover police officer. Defendant and "Jason" communicated online on February 28, 2006, March 4, 2006, and March 6, 2006, discussing fellatio and the possibility of getting together so that defendant could perform fellatio on "Jason." On March 4, 2006, defendant asked "Jason" if he had been circumcised and whether he had ever measured his penis. When "Jason" stated that he had never measured it, defendant asked him to estimate its size.
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> On March 10, 2006, "Jason" contacted defendant and they communicated for about 90 minutes, discussing fellatio and arrangements they had made to meet on the following Friday. Defendant stated that he would find a "nice hotel" and perform fellatio on "Jason." On March 13, 2006, "Jason" contacted defendant, and they chatted about fellatio, masturbation, and the upcoming plans. On March

> 15, 2006, "Jason" contacted defendant, and they chatted about fellatio, masturbation, and they confirmed the upcoming plans for that Friday, March 17, 2006. Apparently, defendant did not arrive at the prearranged location on that date. Rather, he traveled to Wheaton, Illinois, for a similar encounter.
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> On March 4, 2006, defendant contacted "cotyme_91" in a chat room, and they exchanged messages for about 50 minutes, discussing fellatio, and specifically, defendant performing fellatio on "Coty." "Coty" lived in Illinois and claimed to be a 14-year-old boy. "Coty" was actually an undercover police officer. On March 15, 2006, "Coty" contacted defendant, and they chatted online, discussing defendant performing fellatio on "Coty" and a possible encounter the following weekend. "Coty" stated that his penis was small, and defendant asked how small. On March 17, 2006, "Coty" and defendant made arrangements to meet at a park in Wheaton on March 18, 2006, and go to defendant's hotel room, where defendant planned to perform fellatio on "Coty." When defendant arrived at the meeting place, he was arrested. In July 2006, defendant was convicted of indecent solicitation of a child, 720 Ill Comp Stat 5/11-6, and sentenced to two years in prison. [*Id.* at 2.]

In reversing the circuit court's order excluding the other acts evidence, this Court found that "the circuit court's discretion was exercised within an erroneous legal framework." *Id*. at 4. This Court then remanded the case back to the trial court for reconsideration of the issue in light of this Court's opinion. *Id*. On remand, at a hearing on November 2, 2007, the trial court revisited the other acts evidence issue and reversed itself, holding that it would allow the evidence under MRE 404(b) "insofar as it is logically relevant." The matter eventually proceeded to a jury trial where defendant was convicted as charged. Defendant now appeals as of right.

II

Defendant first argues that this Court must dismiss the charges against him because the prosecution failed to bring him to trial within 120 days of its request for disposition under the Interstate Agreement on Detainers (IAD), MCL 780.601. "We review for an abuse of discretion a trial court's decision on a motion to dismiss." *People v Stone*, 269 Mich App 240, 242; 712 NW2d 165 (2005). A court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes. *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008). "However, we review for clear error a trial court's attributions of delay." *Stone*, *supra* at 242. "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. "Additionally, we review de novo the interpretation and application of statutes." *Id*.

There are two subparts to this issue on appeal. First, there is the question whether the 120-day or the 180-day deadline set by the IAD applies to the facts of this case. It does not appear that the trial court ever addressed this question. Next, the second question involves the application of either the 120-day or the 180-day deadline to the procedural history of this case and whether pursuant to the IAD the trial court abused its discretion when it denied defendant's motion for dismissal of the charges against him for violating his rights under the IAD.

A

" 'Forty-eight States, [including Michigan,] the Federal Government, and the District of Columbia . . . have entered into the Interstate Agreement on Detainers . . . .' " *People v Swafford*, 483 Mich 1, 8; 762 NW2d

902 (2009), quoting *Alabama v Bozeman*, 533 US 146, 148; 121 S Ct 2079; 150 L Ed 2d 188 (2001). "The purpose of the IAD is to facilitate the prompt disposition of outstanding charges against an inmate incarcerated in another jurisdiction." *People v Patton*, 285 Mich App 229, 232; 775 NW2d 610 (2009).

In Michigan, the IAD was enacted into law by MCL 780.601. Article III (extradition instituted by the prisoner—time limit 180 days) and Article IV (extradition instituted by the prosecutor—time limit 120 days) of the IAD are relevant to whether the 120-day or the 180-day period applies in this case:

> Article III
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> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, *he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint*: Provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.
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> (b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by

the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production

of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: Provided, That the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: And provided further, That there shall be a period of 30 days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the

> prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.
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> (c) In respect of any proceeding made possible by this Article, *trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state*, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.
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> (d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.
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> (e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice. [Emphasis added.]

The parties are at odds about which document triggered the IAD and, as a result, which time line applies in the matter, 120 days or 180 days. The trial court did not make any findings in this regard. Defendant argues that the prosecutor initiated the application of the IAD's procedures pursuant to Article IV of the IAD on August 10, 2006, when the prosecutor sent a request for custody of defendant to the Illinois Department of Corrections (IDOC) through a standard Form V of the IAD "Request for Temporary Custody," in order to bring defendant back to Michigan to face the untried charges. The form lists the charges against defendant and states that the prosecutor "request[s] temporary

custody of the prisoner pursuant to Article IV(a) of the Interstate Agreement on Detainers (IAD)." The form was addressed to the prison warden and is signed by the prosecuting officer as well as a 40th District Court judge. Defendant further asserts that he made no valid request for extradition pursuant to the IAD. It appears from the record that on September 8, 2006, defendant completed Form I of the IAD "Notice of Untried Indictment, Information or Complaint and of Right to Request Disposition," and Form II of the IAD "Inmate's Notice of Place of Imprisonment and Request for Disposition of Indictments, Informations or Complaints." Form I demands that he be brought to trial within 180 days pursuant to Article IV of the IAD. Defendant alleges that the IDOC failed to mail his Form I to the 40th District Court. The prosecutor's brief on appeal indicates that the IDOC did not send the defendant's Form I request. For all these reasons, defendant asserts that the IAD mandates that he be brought to trial within 120 days of his arrival in Michigan subject only to tolling for delays requested by the defense pursuant to Article IV of the IAD.

The prosecutor responds that the 180-day period under Article III controls in this case because defendant did not acknowledge the prosecutor's Article IV request and instead filed his own demand to be tried on the instant charges in Michigan under Article III. The prosecutor contends that defendant acted contrary to his right to be tried within 120 days of his arrival in Michigan under Article IV when he demanded to face the Michigan charges within 180 days of his request under Article III. The prosecutor asks this Court to hold that by initiating his own Article III request defendant waived his right to the shorter 120-day period. The prosecutor cites no Michigan law for this proposition and instead cites cases from other states and federal

districts. The prosecutor also does not address the Form I mailing situation, wherein it appears that defendant's Form I request was never mailed by the IDOC or received by the district court.

The prosecutor ignores this Court's holding in *People v Gallego*, 199 Mich App 566, 574; 502 NW2d 358 (1993), that "[o]nce a detainer is filed, it is then that the IAD is triggered and compliance with the provisions of the agreement is required." This Court recently cited *Gallego* in its holding in *Patton*, *supra*. The *Patton* Court stated, "There is no exact definition of the term 'detainer,' but 'it has generally been recognized to mean written notification filed with the institution in which a prisoner is serving a sentence advising that the prisoner is wanted to face pending charges in the notifying state.' " *Patton*, *supra* at 232 n 1, quoting *Gallego*, *supra* at 574.

There is no doubt that the prosecutor sent a request for custody of defendant to Illinois on August 10, 2006, through a standard Form V of the IAD "Request for Temporary Custody," in order to bring defendant back to Michigan to face the untried charges before any action was taken on defendant's part. The form clearly lists the charges against defendant and states that the prosecutor "request[s] temporary custody of the prisoner pursuant to Article IV(a) of the Interstate Agreement on Detainers (IAD)." The form was addressed to Warden Deirdre Battaglia and is signed by the prosecuting officer as well as a 40th District Court judge on August 10, 2006. Pursuant to both *Patton* and *Gallego*, Form V of the IAD meets the generally recognized requirements of the term "detainer." *Patton*, *supra* at 232 n 1, quoting *Gallego*, *supra* at 574. As such, pursuant to *Gallego* once the prosecutor initiated Form V, " 'the IAD is triggered and compliance with the

provisions of the agreement is required.' " *Patton*, *supra* at 232, quoting *Gallego*, *supra* at 574. Because Article IV of the IAD was triggered by the prosecutor's completion and submission of Form V, compliance with the triggered provision is required, and therefore the appropriate time limit is 120 days pursuant to Article IV(c). *Id*.

B

Next, we must address whether the trial court abused its discretion is declining to dismiss the charges against defendant because of the prosecutor's failure to bring defendant to trial within the IAD's proper time line, which we have just determined is 120 days pursuant to Article IV(c).

A prisoner who is transferred to Michigan under Article IV(c) of the IAD must be tried within 120 days of his or her arrival in the state, MCL 780.601. "Failure to strictly comply with the 120-day provision requires the trial court to dismiss any charges brought against the defendant under the IAD." *Stone*, *supra* at 243. "However . . . the 120-day time limit may be tolled for any period that is the result of any necessary or reasonable continuance for good cause shown in open court with the defendant or the defendant's counsel present." *Id*. "[S]uch a continuance includes any period of delay caused by the defendant's request or ordered to accommodate the defendant." *Id*. IAD Article IV(c) states specifically, "In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." MCL 780.601.

"[I]f a delay is caused by the defendant's request or in order to accommodate the defendant, the period of delay attributable to defendant is not used in calculating the 120-day time period." *People v Cook*, 95 Mich App 645, 653; 291 NW2d 152 (1980). Here, the parties disagree on the assignment of days throughout the protracted proceedings. We have scoured the record and present the following summary of the procedural history of the case.

The Illinois court sentenced defendant on July 20, 2006, and defendant remained incarcerated in Illinois under the jurisdiction of the IDOC. On August 10, 2006, the Michigan Attorney General's office requested that defendant be transferred to Michigan custody pursuant to the IAD, MCL 780.601. Defendant was extradited to Michigan on October 10, 2006. After defendant requested adjournment of the preliminary examination three times, the district court bound defendant over for trial on December 8, 2006. Trial was scheduled to start January 17, 2007, then adjourned to February 15, 2007. In the mean time, the prosecutor filed a notice seeking to admit evidence of defendant's online chats with "Coty" and "Jason" pursuant to MRE 404(b). Defendant moved in the trial court to suppress evidence of his online chats and the trial court did so in an opinion and order issued February 6, 2007. The prosecutor applied for leave to appeal and moved to stay circuit court proceedings pending an interlocutory appeal. This Court granted the prosecutor's application and motion for a stay in an order entered February 14, 2007. This Court reversed the trial court's order excluding other acts evidence and remanded the matter to the circuit court for trial on October 11, 2007. *People v Waclawski*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2007 (Docket No. 276094).

On remand, at a hearing on November 2, 2007, the trial court revisited the other acts evidence issue and reversed itself, holding that it would allow the evidence under MRE 404(b) "insofar as it is logically relevant." Immediately following remand, defendant moved in the trial court to dismiss all charges against him on the basis of the denial of his rights under the protections of the IAD. The trial court considered defendant's motion at a hearing held November 13, 2007. Defendant argued that under the IAD, the state was required to bring defendant to trial within either 120 or 180 days and that both of those periods had passed even if one deducted delays and adjournments attributable to defendant are deducted. Defendant specifically argued that the delay in bringing him to trial because of the interlocutory appeal in Docket No. 276094—a total of 239 days from February 14 to October 11, 2007—was attributable to the prosecutor. Defendant pointed out that the prosecutor knew of the time restraints placed by the IAD, yet still pursued the appeal and a stay of proceedings pending appeal even though the challenged other acts evidence was not necessary for trial. It was defendant's position that because well over 180 days had passed, the circuit court no longer had jurisdiction over the charges and defendant was entitled to dismissal with prejudice. The prosecutor argued that dismissal was appropriate only where the prosecution committed egregious mistakes and that delays over the time limits were allowed where reasonable and for good cause. The prosecutor argued specifically that the Court of Appeals obtained jurisdiction over the matter when it granted the application and effectively found good cause to delay the trial when it granted a stay of circuit court proceedings pending appeal. Furthermore, the prosecutor contended that

because any effective continuance was granted for good cause, the time limits set by the IAD were tolled and defendant was not denied his right to a speedy trial under the statute. The trial court denied defendant's motion, explaining as follows:

> This court cannot find any bad faith on behalf of the People and your motion is denied . . . .
>
> I believe that the People acted in good faith. The Court of Appeals in its wisdom took as long as they took for whatever reason. This court was always prepared to proceed to trial. And I don't believe that a liberal construction would mandate that the People's ability to appeal what obviously was an error on this court's part in its interpretation of the law should be held against the state of Michigan and its People.

The circuit court signed a handwritten order denying defendant's motion on November 13, 2007. That order set a trial date of December 13, 2007. Defendant then moved to stay the trial pending an interlocutory appeal to this Court. The trial court considered that motion at a hearing held November 16, 2007. In a handwritten order signed November 16, 2007, the trial court denied defendant's motion to stay the trial but adjourned the trial date to January 15, 2008. The order states that the delay caused by this adjournment should be attributed to defendant. Defendant indeed applied to this Court for leave to appeal the trial court's November 13, 2007, order denying his motion to dismiss the charges against him on the basis of the denial of his right to a speedy trial under the IAD. Defendant moved for immediate consideration and to stay circuit court proceedings because his trial was scheduled to begin on January 15, 2008. This Court denied defendant's application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review" in an order dated

January 11, 2008. *People v Waclawski*, unpublished order of the Court of Appeals, entered January 11, 2008 (Docket No. 282315).

While his application was pending in this Court, on January 7, 2008, defendant moved to substitute counsel and the trial court granted that request and appointed new counsel to represent him. The trial court adjourned the trial until an undetermined date and used the former January 15, 2008, trial date to conduct a pretrial conference. At the January 15, 2008, pretrial conference, defendant's attorney requested an additional week to review the trial materials. The pretrial conference was adjourned until January 24, 2008. Defendant's counsel informed the trial court on January 24, 2008, that he had not completed his review of the record and requested an extension. As a result of the defense request, the trial court adjourned the status conference until February 19, 2008. On February 19, 2008, the trial court set defendant's trial for March 25, 2008. But on March 17, 2008, defendant requested another adjournment to prepare for trial. The trial court initially denied the request, but reconsidered after the prosecutor expressed concern that defense counsel would not be ready for trial. The trial court ultimately agreed and stayed trial until May 6, 2008. Defendant's jury trial finally commenced on May 6, 2008.

In the interest of clarity, we have assigned responsibility for all the days of the procedural history of the case to either the prosecutor or defendant as charged at each relevant event in the record leaving a space for "days in question." In doing so, we followed the rule articulated in *Cook, supra* at 652-653, that delays attributable to the defendant are charged against the defendant as well as the dictates of MCR 1.108 in setting forth the following time schedule.

DATES	EVENT	DAYS TO DEFENDANT (DAYS TOLLED)	DAYS TO PROSECUTOR (DAYS RUN)	DAYS IN QUESTION
10/10/2006	Defendant arrives in Michigan.			
10/10/2006-10/24/2006	Time between defendant's arrival in MI and first hearing on 10/24/2006.		14	
10/24/2006-11/17/2006	On 10/24/2006 defendant requests that his preliminary examination be adjourned to 11/17/2006.	24		
11/17/2006-12/1/2006	On 11/17/2006 defendant requests adjournment of his preliminary exam to 12/1/2006.	14		
12/1/2006-12/8/2006	Defendant and his attorney failed to attend the scheduled hearing on 12/1/2006. Defense attorney had filed a motion in advance of that day and the trial court granted it stating explicitly that the delay would be charged against defendant.	7		
12/8/2006-1/11/2007	Defendant was bound over for trial on 12/8/2006 and his trial date was scheduled for 1/17/2007. Defendant was arraigned in circuit court on 12/18/2006.		34	
1/11/2007-2/14/2007	On 1/11/2007 defendant requests adjournment of trial date to 2/15/2007 because defense counsel stated that he was not ready for trial.	34		
2/14/2007-10/11/2007	COA grants prosecutor's motion for leave to appeal and stays trial.			239
10/11/2007-11/2/2007	COA remands case to trial court and stay is lifted in the trial court.		22	
11/2/2007-11/13/2007	On 11/2/2007 defendant requests that the trial court not set a trial date until the next hearing on 11/13/2007 in order to wait for a decision on defendant's motion regarding the IAD and defendant himself states that "this case is nowhere near ready to be tried."	11		
11/13/2007-11/16/2007	On 11/13/2007 trial date is set for 12/13/2007.		3	

11/16/2007-1/15/2008	On 11/16/2007 defendant requests a stay to file an application for leave to appeal to the COA which the trial court denied, but instead granted an adjournment of the 12/13/2007 trial date to 1/15/2008. Then, defendant's request for new counsel was granted on 1/7/2008 and the 1/15/2008 trial date was converted into a pretrial conference date.	60		
1/15/2008-1/24/2008	Trial did not commence as scheduled on 1/15/2008 because defendant's new counsel requested additional time to review the file to determine what discovery was needed before a new trial date could be set.			
1/24/2008-2/19/2008	On 1/24/2008 defendant requested additional time to review the remainder of the discovery materials and coordinate with previous counsel. The trial court granted the request and set a final pretrial date for 2/19/2008.	26		
2/19/2008-3/17/2008	On 2/19/2008 trial date is set for March 25, 2008.		27	
3/17/2008-5/6/2008	On 3/17/2008 defense counsel requests adjournment of trial until 5/6/2008 in order to adequately prepare for trial.	50		
5/6/2008	Jury trial commences		0	
TOTAL		235	100	239

A total of 574 days passed from the time defendant was extradited to Michigan on October 10, 2006, to his trial date of May 6, 2008. After reviewing the record, it is clear that 127 days passed from October 10, 2006, to February 14, 2007, when this Court issued its order granting leave and staying circuit court proceedings in Docket Number 276094, 239 days passed from this Court's February 14, 2007, order to the date of its October 11, 2007, opinion in

Docket Number 276094, and 208 days from October 11, 2007, to the trial date on May 6, 2008.

Defendant argues that under Article IV(a) and (c) of the IAD, the prosecutor and the circuit court were required to bring him to trial within 120 days of his being extradited to Michigan on October 10, 2006. Our review of the record reveals that because the prosecutor was responsible for only 100 days (20 less than 120), the sole relevant issue is whether the 239-day period when trial was stayed by this Court is somehow attributed to the prosecutor and counted toward the 120-day deadline set by Article IV. In the trial court, the prosecutor contended that because any effective continuance was granted for good cause, the time limits set by the IAD were tolled and those days did not count against the prosecutor. The trial court agreed and denied defendant's motion on November 13, 2007.

The goal of judicial interpretation of a statute is to ascertain and give effect to the intent of the Legislature. *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). " 'The first step in that determination is to review the language of the statute itself.' " *Id*. (citation omitted). Thus, if the language is clear, no further construction is necessary or allowed to expand what the Legislature clearly intended to cover. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999).

Again, Article IV(c) of the IAD states specifically, "In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." MCL 780.601. While the prosecution

sought leave to appeal, it did so to correct the circuit court's erroneous decision on defendant's motion to exclude evidence, and the issue on appeal was resolved in the prosecutor's favor. This Court granted the application and stay of proceedings on the basis of its determination that the prosecutor's appeal had potential merit and clearly was one that needed to be resolved before the case went to trial. As such, the stay granted by this Court's February 14, 2007, order was a continuance that was both "necessary" and "reasonable" and was granted "for good cause shown" by a "court having jurisdiction of the matter" as required by the plain language of Article IV(c). See, also, *People v Meyers (On Remand)*, 124 Mich App 148, 156; 335 NW2d 189 (1983) (Pretrial delay caused by the need to obtain a transcript necessary to resolve a defendant's pretrial motion was found "necessary" and "reasonable" and tolled the running of the 120-day period under the IAD.)[4] Thus,

[4] This Court in *Meyers*, *supra* at 155-156, held as follows:

> On April 10, 1979, both the defendants were arraigned in circuit court. Defendant Charles Meyers objected to the filed information, arguing that he had only been bound over on a single count of armed robbery. After the prosecutor informed the court that the return indicated that defendant Charles Meyers had been bound over on both charges, counsel for defendant Charles Meyers stated: "Well, we'll probably have to wait for the filing of the transcript." The following day the prosecutor contacted the court reporter in attendance at the preliminary examination and requested preparation of the preliminary examination transcript.
>
> We agree with the circuit court's finding that the ensuing delay was necessary and reasonable and find that, under this peculiar set of facts, the act's 120-day period was properly tolled during the time it took to obtain the transcript, *i.e.*, from April 10, 1979, to June 11, 1979. Our conclusion is based upon a consideration of the following factors: (1) counsel for defendant Charles Meyers objected to the filed information, (2) the case could not proceed to trial while the parties were uncertain regarding the nature of the outstanding charges, (3) the defense counsel conceded that the examination transcript itself was necessary to clarify the problem, and (4) the prosecutor acted immediately to resolve the defen-

the 239-day delay when trial was stayed by this Court is not attributed to the prosecutor and is likewise not counted toward the 120-day deadline set by Article IV.

We find further support for our holding on this issue in Article IX of the IAD which states that, "[t]his agreement shall be liberally construed so as to effectuate its purposes." Again, the prosecution sought leave to appeal the circuit court's decision on the evidentiary issue in an attempt to right the circuit court's incorrect decision on defendant's motion to exclude the other acts evidence. This Court granted the application and stay because it believed that the prosecutor's appeal had merit and plainly needed to be resolved before the case proceeded to trial. Should the trial be lost after the prosecutor was denied the right to submit legally admissible evidence, jeopardy would have attached precluding an appeal on the evidentiary point. *People v Henry*, 248 Mich App 313, 318; 639 NW2d 285 (2001) (both the United States Constitution and the Michigan Constitution prohibit placing a defendant twice in jeopardy for a single offense). While defendant argues that the prosecutor could go forward without the improperly excluded evidence, the people have a right to a "criminal justice system in which the discovery of the truth [is] facilitated." *People v Yost*, 483 Mich 856, 859 (2009) (MARKMAN, J., concurring). The discovery of the truth relies on a process whereby all legally admissible evidence is admitted allowing the fact-finder a true picture of the events. Defendant has not provided any reason for us to ignore these pillars of the criminal law and

dant's objection. In addition, although only defendant Charles Meyers objected to the information at the arraignment, we hold that the 120-day period was tolled with respect to defendant Daniel Meyers as well because he was present at the arraignment when the objection was made and made no objection to the obvious delay that was to ensue.

instead interpret the IAD, a statutory time relief rule, in such a manner so as to allow a jury trial to proceed riddled with error to defendant's strategic advantage. It can even be said that defendant in fact created the circumstance that necessitated the delay when he sought to exclude the relevant other acts evidence. We cannot allow a defendant to trigger a situation whereby he or she creates an opportunity for the defendant to deny the people their right to have the defendant sentenced for his or her criminal deeds in contravention of the aims of the criminal law. Ultimately, this Court resolved the issue on interlocutory appeal in favor of the prosecutor. Under the specific circumstances presented in the instant case, the language of the statute is plain and it controls, meaning that no further construction is necessary. *Borchard-Ruhland*, *supra* at 284.

We also take this opportunity to point out that the requirement in Article IV(c) that good cause be shown in "open court [with] the prisoner or his counsel being present" is simply inapplicable to this Court. This Court does not conduct oral argument hearings in application matters. The requirement that a continuance be granted only in open court with the presence of defendant or counsel is obviously meant to limit adjournments granted ex parte to the prosecutor. As a general rule this Court will not consider ex parte applications and motions. See Court of Appeals IOP 7.209(I).[5] The docket entries in Docket Number 276094

[5] IOP 7.209(I) states as follows, in pertinent part:

> **Ex Parte Stay.** Court policy discourages the use of the *ex parte* stay rule. The Court has almost universally required that all parties be served with a motion for stay in the Court of Appeals before it is submitted on the motion docket. If the motion for stay is accompanied by a motion for immediate consideration under MCR 7.211(C)(6), and if both motions are personally served on all parties, the motions will be submitted to a panel of judges as

show that defendant was given the opportunity to respond to the prosecutor's application and motion and filed an answer to the application before it was submitted to the panel, which effectuates the same purpose. Furthermore, in this particular case, defendant, an attorney and former prosecutor, stated on the record at a hearing before the trial court on January 7, 2008, that he was aware that he did not have a right to appear at a proceeding before the Court of Appeals. Given Article IX's instruction that the IAD's provisions should be liberally construed to effectuate its purpose, this Court's February 14, 2007, order is not deemed outside the scope of IAD Article IV(a) and (c) merely because it was entered without the physical presence of defendant or his counsel.

Because of the dearth of law on this issue, the prosecutor raises alternative grounds to affirm the trial court's conclusion that the 239-day delay caused by the prosecutor's interlocutory appeal to this Court should not be assigned to the prosecutor and not count toward the running of the 120-day deadline set by the IAD. The prosecutor urges this Court to apply the body of law applicable to the speedy trial rules because both the IAD and the speedy trial rules effectuate the same purpose, citing *United States v Odom*, 674 F2d 228, 231-232 (CA 4, 1982). The prosecutor also cites *United States v Cephas*, 937 F2d 816, 819 (CA 2, 1991), wherein it is stated:

> Given the similarities in the case-law development of excludable time under the two acts, and in the interests of consistent judicial administration, we now expressly hold

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quickly as can be arranged by the district office in which the motions are filed. In matters of extreme urgency, it is possible to accomplish service, filing, submission, and a ruling in a matter of hours. Thus, there is virtually no justification for invoking the provisions of the *ex parte* rule.

> that the "for good cause shown" standard of the detainer act should encompass the same conditions and circumstances as the rules for excludable time under the speedy trial act. [*Id.*]

Indeed, this Court has held that the time the prosecution takes to successfully pursue an interlocutory appeal is "taken out of the calculation" for purposes of an alleged speedy trial violation. *People v Missouri*, 100 Mich App 310, 321; 299 NW2d 346 (1980). (See Section III of this opinion for a full discussion of the rules relating to speedy trial requirements). We do conclude that the bodies of law are analogous and find the speedy trial cases instructive.

For all these reasons, we conclude that the circuit court did not clearly err by holding that the 239-day delay caused by this Court's February 14, 2007, order staying proceedings would not count toward the running of the 120-day deadline set by the IAD.

III

Defendant next argues that he was deprived of his Sixth Amendment right to a speedy trial when 19 months lapsed between his arrest and the commencement of his trial as a result of delays largely attributable to the prosecution. The determination whether a defendant was denied a speedy trial is a mixed question of fact and law. *People v Walker*, 276 Mich App 528, 540; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008). The factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to review de novo. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). In addition, this Court must determine whether any error was harmless beyond a reasonable doubt. *Walker*, *supra* at 540. Violation of the constitutional right to a speedy

trial requires dismissal of the charge with prejudice. MCR 6.004(A); *Walker*, *supra* at 541.

Both the United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20; see also MCL 768.1; MCR 6.004(A). In determining whether a defendant has been denied this right, this Court applies a four-part balancing test. *Williams*, *supra* at 261-262. The four factors include: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Id*. The first and fourth factors are critical to our analysis. If the total delay, which runs from the date of the defendant's arrest until the time that trial commences, *id*. at 261, is under 18 months, then the burden is on the defendant to show that he or she suffered prejudice. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). However, if the delay is over 18 months, prejudice is presumed and the burden is on the prosecution to rebut the presumption. *Id*.

Applying these principles to the present matter, we cannot conclude, despite the length of delay in this matter, that the trial court erred by finding that defendant's right to a speedy trial was not violated.

A. LENGTH OF DELAY

Because the length of the delay between the issuance of defendant's arrest warrant on April 11, 2006, and the start of his trial on May 9, 2008, was approximately 24 months, the delay was presumptively prejudicial and the burden is on the prosecution to rebut the presumption. *Cain*, *supra* at 112. Although the length of delay in this case is considerable, there is no set number of days between a defendant's arrest and trial that is determinative of a speedy trial claim. *Williams*, *supra* at 261; also see *People v Cutler*, 86 Mich App 118, 126-127; 272 NW2d

206 (1978) (37-month delay, but no violation); *People v Smith*, 57 Mich App 556, 563-567; 226 NW2d 673 (1975) (19-year delay, but no violation). In any case, this factor weighs in defendant's favor and, because the delay in this case is presumptively prejudicial, it is necessary for us to examine the remaining factors. *Williams*, *supra* at 262.

B. REASONS FOR DELAY

In assessing the reasons for delay, this Court must examine whether each period of delay is attributable to the defendant or the prosecution. *Walker*, *supra* at 541-542. "Unexplained delays are charged against the prosecution. Scheduling delays and docket congestion are also charged against the prosecution." *Id*. at 542. However, "Although delays inherent in the court system, e.g., docket congestion, are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial." *Williams*, *supra* at 263 (citations and quotation marks omitted).

In the chart above in part II(B) of this opinion we clearly delineated whether certain delays were the fault of the prosecutor or defendant. The only amount of time we must include here that is not in the chart is the time between defendant's arrest warrant being issued in Michigan on April 11, 2006, and his arrival in Michigan on October 10, 2006. Defendant could not be arrested in Michigan because he was already detained in Illinois on other criminal charges. Defendant pleaded guilty to the Illinois charges on July 27, 2006. On August 10, 2006, the prosecutor then initiated the IAD process in order to have defendant extradited to Michigan to face the charges pending against him here. Clearly defendant needed to be brought back to Michigan to face the charges in Michigan but that could not happen until the

Illinois matter was resolved and the administrative process of the IAD instituted. We therefore assign the days between April 11, 2006, and July 27, 2006, to defendant because defendant was unavailable to be tried in Michigan at that time as a result of his own criminal behavior, arrest, and detention. After defendant pleaded guilty to the Illinois charges he became available for transfer to Michigan and thus, we assign the days beginning on July 28, 2006, until October 10, 2006, to the prosecutor. On the whole, these delays simply cancel each other out.

The remainder of the reasons for the delays are easily discernable from the record and we have outlined them in the chart above in part II(B) of this opinion. The prosecutor was responsible for 100 days of delay from the time defendant arrived in Michigan until his trial, defendant was responsible for 235 days of delay, and the remaining 239 days are a result of the delay associated with the interlocutory appeal brought to this Court by the prosecutor. As a result, defendant's main contention is that the delay caused by the prosecutor's interlocutory appeal that was pending before this Court for 239 days should be weighed against the government. However, this Court has held that the time the prosecution takes to successfully pursue an interlocutory appeal is "taken out of the calculation." *Missouri, supra* at 321. Thus, we do not assign this delay any weight in favor of either the prosecutor or defendant. Because the 239 day delay is not attributable to either party, this factor weighs against defendant because he was responsible for more than twice the number of days than the prosecutor.

C. ASSERTION OF RIGHT

There is some consternation between the parties about when defendant asserted his right to a speedy

trial. Defendant states that he submitted his demand for a speedy trial to the 40th District Court on July 20, 2006, from the Illinois jail. However the prosecutor points out that the only demand for a speedy trial that is contained in the court record is dated as having been received by the Macomb Circuit Court on December 27, 2007. Because defendant's claim that he submitted his demand for a speedy trial on July 20, 2006, is not supported by the record, we must credit only the request by defendant that is supported by the record, and that is the one dated December 27, 2007. The trial court did not even address the matter until a hearing on April 28, 2008, only a few weeks before trial. Because defendant's trial began little more than five months after he filed his December 27, 2007, speedy trial demand, this factor weighs only the slightest in defendant's favor.

D. PREJUDICE

With respect to prejudice, in his brief on appeal, defendant does not offer much of an explanation regarding how he was prejudiced by the delay. The prosecutor states that defendant was not prejudiced at all by the delay between the date of the arrest warrant and his trial date. In assessing this factor, this Court recognizes that "there are two types of prejudice[:] prejudice to the person and prejudice to the defense." *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993). "Prejudice to the defense is the more serious concern, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Williams*, *supra* at 264 (quotation marks and citations omitted). Our Supreme Court has repeatedly recognized in the context of lengthy pretrial incarcerations that the most significant concern is whether the defendant's ability to

defend himself or herself has been prejudiced. *Id*. Defendant makes no claim that because of the delay he was somehow unable to defend himself. To the contrary, the record shows that throughout the time defendant was awaiting trial he was represented by three different attorneys at his request, and that his attorneys continued to request more time in order to prepare for trial. Defendant himself once admitted to the trial court that the case was nowhere near ready to be tried. The prosecutor points out that there is no indication that a potential defense witness was lost or that other exculpatory evidence was misplaced during the delay. After reviewing the record, we conclude that defendant was not prejudiced by the delay. Accordingly, this factor weighs heavily against defendant.

E. CONCLUSION

Although a 24-month delay is presumptively prejudicial and defendant did assert his right to a speedy trial, because the reasons for the delay weighed against defendant and defendant's ability to prepare a defense was not prejudiced, we conclude that the trial court properly held that defendant's right to a speedy trial was not violated.

IV

Defendant next argues that he is entitled to a new trial on the basis that the trial court abused its discretion by allowing the jury to be exposed to unfairly prejudicial other acts evidence and he notes that even a cursory review of the record reveals that one of the primary reasons defendant stands convicted is the evidence admitted over defense objection that defendant sent sexually explicit electronic messages over the Internet to individuals he believed were minors. The

admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). A court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). The determination whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

Defendant specifically contends that he is entitled to a new trial because the trial court abused its discretion by allowing the jury to be exposed to unfairly prejudicial other acts evidence of his online chats in Ohio and Illinois under MRE 404(b). He asserts that review of the chats reveals that the conduct involved was entirely dissimilar from the charged offenses. The prosecutor responds that the trial court acted properly within its discretion by admitting the other acts evidence because it was probative with regard to defendant's intent to commit first-degree criminal sexual conduct as well as his common scheme of targeting minor male victims.

Use of other acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of a conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998); *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). A prosecutor may not introduce evidence of other crimes, wrongs, or acts in order to prove a defendant's character or propensity for criminal behavior. MRE 404(b); *People v VanderVliet*, 444 Mich

52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). However, the evidence may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case." MRE 404(b)(1).

Our Supreme Court in *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), stated as follows:

> In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), this Court articulated the factors that must be present for other acts evidence to be admissible. First, the prosecutor must offer the "prior bad acts" evidence under something other than a character or propensity theory. Second, "the evidence must be relevant under MRE 402, as enforced through MRE 104(b)[.]" *Id*. Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105.

"MRE 404(b) 'permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct.' " *People v Watson*, 245 Mich App 572, 576; 629 NW2d 411 (2001), quoting *Starr*, *supra* at 496. After reviewing the record, we conclude that the challenged evidence clearly demonstrates both intent and identity, as well as common scheme, plan, or system. Evidence that defendant questioned two persons that he believed to be male children under the age of 15 in Illinois and Ohio about their penis size, solicited them for the purpose of performing fellatio, arrived in Illinois with a digital camera, and admitted to the Illinois police that he intended to use the camera to take sexually explicit pictures of "Coty" shows that defen-

dant intended to perform fellatio on K and measure the penises of M and P. The evidence also demonstrates defendant's intent to photograph these incidents and defendant's identity as the person who in fact performed the acts depicted in the photographs. Regarding common scheme, plan, or system, clearly defendant selected male children under the age of 14 as his target victims, he had specific desires to inquire regarding their penis size, measure their penis size with a ruler, perform fellatio on them, and take sexually explicit photographs of the victims.

Furthermore, defendant pleaded not guilty to all charges brought against him in Michigan. All elements of a criminal offense are "in issue" when a defendant pleads not guilty. *Crawford*, *supra* at 389. Relevant evidence must be related to a fact that is of consequence to the action. *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). Because the evidence of defendant's possession of a digital camera in Illinois and his online chats with "Jason" and "Coty" regarding fellatio and penis size make it more likely that defendant performed fellatio on K, measured the penises of M and P, and photographed the incidents it is plainly relevant. MRE 401; MRE 402.

The probative value of the evidence is not outweighed by the danger of unfair prejudice under MRE 403. Unfair prejudice occurs "when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). On defendant's computer, the police found three photographs of someone performing fellatio on K, a 14-year-old boy, photographs of P, a 12-year-old boy, who was photographed with his penis being measured, and photo-

graphs of M, a 10-year-old boy, who was photographed with his penis being measured. As discussed above, the evidence of the online chats in Ohio and Illinois supply proof that defendant intended to perform fellatio on K who was the same age as "Coty" and two years older than "Jason." The evidence of the chats and the digital camera also supply proof that defendant intended to measure the penises of M, who was two years younger than "Jason" and four years younger than "Coty," and P, who was the same age as "Jason" and two years younger than "Coty." Further, this evidence provides proof that defendant was the person portrayed in the photographs and that he intended to photograph all these incidents. In sum, the evidence fulfilled purposes of supplying proof of intent, identity, and common scheme, plan, or system and it was relevant and more probative than prejudicial.

To the extent that the prosecution also offered evidence of the Ohio and Illinois chats to prove defendant's identity as the perpetrator, in *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), this Court stated:

> Although the *VanderVliet* Court adopted a new test for admission of evidence under MRE 404(b), the four-part test of *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), remains valid to show logical relevance where similar-acts evidence is offered to show identification through modus operandi. *People v McMillan*, 213 Mich App 134, 138; 539 NW2d 553 (1995). The *Golochowicz* test requires that (1) there is substantial evidence that the defendant committed the similar act (2) there is some special quality of the act that tends to prove the defendant's identity (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. *Golochowicz*, *supra* at 307-309.

Here, there is substantial evidence that defendant committed the other acts in Illinois and Ohio. He was convicted of indecent solicitation of a child in Illinois, and he used the same screen name to communicate with "Jason" in Ohio. The online chats in Ohio and Illinois, coupled with the discovery of defendant's digital camera in Illinois and his admission to the Illinois police that he intended to use the camera to take sexually explicit pictures of "Coty," show a special quality or circumstance because they show defendant's fixation on the penis size of prepubescent boys and his preoccupation with performing fellatio on them, as well as his desire to photograph these acts.

Defendant argues that as a result of the admission of the other acts evidence the jury convicted him because he was a "bad man." But, the trial court provided a comprehensive limiting instruction to the jury that the prior acts evidence could only be considered for very limited purposes. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). After reviewing the record, this Court concludes that the trial court's decision to admit the evidence under MRE 404(b) was within the range of principled outcomes and not an abuse of discretion.[6]

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[6] We end our analysis of this issue here with the discussion of the MRE 404(b) evidence and decline to address whether the other acts evidence is also admissible under MCL 768.27a as evidence of an offense listed under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The trial court decided the issue solely on the basis of the MRE 404(b) analysis and did not make any determinations regarding the effect of MCL 768.27a. Thus, arguments pertaining to the application of MCL 768.27a are not preserved for this Court's review. Furthermore, it is not necessary to the resolution of the issue on appeal by virtue of our MRE 404(b) analysis. We make no statement of whether the other acts evidence would have been alternatively or additionally admissible under the provisions of MCL 768.27a.

V

Next, defendant argues that his conviction for first-degree criminal sexual conduct must be vacated because there was a violation of due process guarantees when the trial court instructed the jury that mere touching could be sufficient to support a guilty verdict and when the jury was not instructed on which act was proven beyond a reasonable doubt. He further asserts that defense counsel was ineffective by failing to request the unanimity instruction. The prosecutor responds that the jury instructions make clear that the prosecutor must demonstrate entry into defendant's mouth by the victim's penis and asserts that no error occurred. Issues of law arising from jury instructions are reviewed de novo on appeal, but a trial court's determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989).

Over defense counsel's objection, the trial court read the following jury instruction on the elements of first-degree criminal sexual conduct:

> The Defendant is charged with the crime of first-degree criminal sexual conduct. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the Defendant engaged in a sexual act that involved entry into Defendant's mouth by [K's] penis. Any entry, no matter how slight, is enough. It

> does not matter whether the sexual act was completed or whether semen was ejaculated and/or the Prosecutor must prove beyond a reasonable doubt the touching of [K's] genital organs with the Defendant's mouth or tongue. Second, that the alleged sexual act occurred under circumstances that also involved child sexually abusive activity, production.

A trial judge must instruct the jury as to the applicable law, and fully and fairly present the case to the jury in an understandable manner. *McGhee*, *supra* at 606; *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). To prove CSC I under MCL 750.520b(1)(a), the prosecution was required to show that defendant engaged in sexual penetration with another person under the age of thirteen. "Sexual penetration" means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). "Fellatio" is not defined in the statute, but this Court has interpreted the act of fellatio to require the entry of a penis into another person's mouth. *People v Reid*, 233 Mich App 457, 480; 592 NW2d 767 (1999). The *Reid* Court interpreted fellatio not to consist of merely any oral contact with the male genitals. *Id*. (" '[F]ellatio' does not consist merely of 'any oral contact with the male genitals,' but rather requires entry of a penis into another person's mouth.") (emphasis and citation omitted).

The prosecutor urges that *Reid* must be overruled because its interpretation of fellatio is inconsistent with the plain language of the statute. We agree that the *Reid* Court's interpretation of fellatio is fundamentally flawed and contrary to the plain language of the statute. Again, if the plain language of the statute is clear and

unambiguous, no further construction is necessary, and this Court must enforce the statute as written. *Borchard-Ruhland*, *supra* at 284. Because "fellatio" is not defined in the statute, this Court may look to a dictionary definition. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008). *Random House Webster's College Dictionary* (1997), p 478, defines "fellatio" as "oral stimulation of the penis."

In this case, the prosecutor has provided three photographs that were shown to the jury during trial. We have viewed the photographs and one of them shows an image of what is alleged to be defendant's face perpendicular to the victim's penis with his tongue out of his mouth in contact with the victim's penis. We conclude on the basis of the image in the photograph that defendant was indeed orally stimulating the victim's penis with his tongue. Therefore, under the dictionary definition, what is depicted in the photograph would constitute fellatio. However, what is depicted in the photograph would not constitute fellatio as interpreted by this Court in *Reid*, *supra* at 480. We conclude that the definition of "fellatio" as adopted by *Reid* is incorrect because it ignores the plain meaning of the term and therefore the language of the statute. That being said, this Court is bound by its own decision in *Reid*, by virtue of MCR 7.215(J)(1).[7]

However, this issue may be decided more simply when considering that two other photographs depicting fellatio were shown to the jury at trial. We have reviewed the photographs. Both of the other photographs show images depicting defendant with his mouth open

[7] While it is tempting to utilize MCR 7.215(J)(2) to call for a conflict resolution panel in an effort to critique the reasoning in *Reid*, defining "fellatio," considering the fact that doing so is not at all necessary to the holding in this case, we decline to do so.

and the victim's penis inside defendant's mouth. The pictures clearly depict fellatio as interpreted by *Reid*. *Reid*, *supra* at 480. Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007). The instructions must include all the elements of the crime charged and any material issues, defenses, and theories for which there is supporting evidence. *McGhee*, *supra* at 606. Given the photographic evidence admitted in this case, the trial court's use of the phrase "touching of [the victim's] genital organs with Defendant's mouth or tongue" in instructing the jury does not defeat the required showing of penetration, when the trial court also instructed that fellatio required "entry into Defendant's mouth by [the victim's] penis." Again, when reviewing a trial court's jury instructions, this Court must look at the instructions as a whole, rather than the potentially misleading effect of a single isolated sentence. *Aldrich*, *supra* at 124. Even if somewhat imperfect, instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id*. We conclude that while somewhat imperfect, the jury instructions make clear that the prosecutor must demonstrate entry into defendant's mouth by the victim's penis and, as a result, fairly presented the issues to be tried and sufficiently protected defendant's rights. *Id*. We find no error.

Defendant also argues that the trial court erred by failing to give a specific unanimity instruction and that his attorney was ineffective for failing to request one. Because defendant failed to request a special unanimity instruction, or challenge the trial court's failure to give such an instruction, this issue is unpreserved. Thus, our review is limited to plain

error affecting defendant's substantial rights. *Knox*, *supra* at 508. "A defendant has the right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement." *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006). In this case, the trial court gave a general unanimity instruction, which is usually sufficient. *Id*. But as further explained in *Martin*,

> the trial court must give a specific unanimity instruction where the state offers evidence of alternative acts allegedly committed by the defendant and "1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." [*Id*., quoting *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994).]

Defendant does not provide any factual or legal basis to show why a general unanimity instruction was insufficient in this case. We cannot analyze what defendant has not presented. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Without defendant's explaining his argument, this Court must conclude that the general unanimity instruction was sufficient. *Martin*, *supra* at 338. Similarly, defendant has provided no basis for his ineffective assistance of counsel claim that was based on this issue. Defendant has not shown error.

VI

Defendant argues that he is entitled to resentencing because the trial court misscored offense variables (OV) 4, 9, 10, and 12. Defendant also argues that he is entitled to resentencing on counts 2 through 9 because his sentences amounted to an upward departure unsupported by substantial and compelling reasons. The prosecutor responds that the trial court scored the offense variables consistent with the evidence introduced at trial and did not abuse its discretion during sentencing. Preserved scoring issues are reviewed "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Defendant preserved this issue by objecting to the scoring of Offense Variables 4, 9, 10, and 12 in the trial court.

Generally, the application of statutory sentencing guidelines is reviewed de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score, *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), and thus this Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). In general, "[s]coring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

A. OV 4

Defendant first argues that the 10 points scored for, MCL 777.34, OV 4 was incorrect. He argues specifically that the score is erroneous because no support exists for it in the record. OV 4 deals with the degree of psychological injury suffered by a crime victim. MCL 777.34. Ten points are properly scored when serious psychological injury requiring professional treatment occurred to a victim. *People v Hicks*, 259 Mich App 518, 535; 675 NW2d 599 (2003); MCL 777.34. The fact that professional treatment was not sought is not conclusive when scoring the variable. *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005); MCL 777.34(2). The trial court stated as follows in regard to OV 4 during sentencing:

> It's quite clear, whether the victim has sought treatment for the injury is not conclusive and it simply says may require professional treatment. After hearing the testimony, after seeing their demeanor, after witnessing not only their testimony but also the taped statements made by them, I am confident that it would be illogical to assume that they did not suffer some type of psychological trauma and that they will continue to do so.

Defendant's argument that there is no support in the record for the scoring of 10 points is belied by the record. K testified that defendant had been a friend and a father figure to him and that defendant exploited that relationship to sexually abuse him and that he was "pretty angry" about what happened to him. K's mother also indicated that K was angry and that he had tried to block out memory of the abuse. On the basis of the testimony and the trial court's observations, the trial court reasonably concluded that the victims suffered serious psychological injury as a result of defendant's abuse and properly scored defendant at 10 points for OV 4.

B. OV 9

Defendant argues that no points should have been scored for OV 9, MCL 777.39, because only one victim was placed in danger on the dates in question in this case. Defendant claims that the events involving K are alleged to have occurred on August 23, 2001, and there are no photos of P or M with that date. Further, defendant claims that the events involving P are alleged to have occurred on March 1, 2000, and there are no photos of K or M from that date. And finally, defendant asserts that the events involving M are alleged to have occurred on June 15, 2001, and there are no photos of K or P from that date. He states that on these dates there was only one victim and that no others were present and thus no others could have been "placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a).

MCL 777.39 provides, in pertinent part:

> (1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (c) There were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss.....10 points
>
> * * *
>
> (2) All of the following apply to scoring offense variable 9:
>
> (a) Count each person who was placed in danger of physical injury or loss of life or property as a victim.

In *People v Sargent*, 481 Mich 346, 351; 750 NW2d 161 (2008), our Supreme Court found that it was

improper for a trial court to score OV 9 at 10 points where the alleged second victim claimed that the defendant had sexually molested her in a separate, uncharged offense. During its discussion, the Court stated, "[W]hen scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." *Id*. at 350. The Court noted situations where scoring for multiple victims would be appropriate even where only one conviction resulted, stating, "For example, in a robbery, the defendant may have robbed only one victim, but scoring OV 9 for multiple victims may nevertheless be appropriate if there were other individuals present at the scene of the robbery who were placed in danger of injury or loss of life." *Id*. at 350 n 2. This language was consistent with the holding in *People v Morson*, 471 Mich 248, 253, 261-262; 685 NW2d 203 (2004), where the Court held that 10 points were properly assessed under OV 9 when the defendant, who waited in a car while her friend robbed a person using a gun provided by the defendant, endangered two victims during the armed robbery, the woman who was robbed and another man standing nearby who was shot by the perpetrator. See also *id*. at 277 (YOUNG, J., concurring in part and dissenting in part).

Here, the trial court found in the instant case as follows in regard to OV 9:

> [I]t's clear to me that is [sic] doesn't matter whether the person was actually a victim, as long as there were more than one person placed in danger. At any point in time, from what I recall throughout the testimony, there was more than one person placed in danger because more than one person spent the night in the home.

While defendant attempts to make an argument that piggybacks our Supreme Court's holding in *Sargent*, *supra*, the facts here are substantially different from those in *Sargent*. Here, there was significant evidence that both M and P would sometimes spend the night at defendant's home with K. Simply because there are no pictures of M and P on the night that K was assaulted does not mean that they were not present and the same goes for the other victims. On the basis of the testimony, it seems more reasonable that the other boys were sleeping while defendant was assaulting his chosen victim. There was even testimony from P that he woke up one night and saw defendant kneeling down by K's bed. Clearly the record demonstrates that defendant had a choice of victims when K and his friends would stay the night at his house while sometimes watching pornography and drinking alcohol provided by defendant, and also supports the conclusion that defendant would choose a victim while the other boys were present. We conclude that the trial court properly scored defendant 10 points for OV 9 because the record supports the inference that at least two other victims were placed in danger of physical injury when the sentencing offenses were committed.

C. OV 10

Defendant next argues regarding OV 10, MCL 777.40, that the record does not establish by a preponderance of the evidence that there was predatory conduct within the meaning of OV 10 and thus the trial court erred when it scored defendant at 15 points for exploitation of victim vulnerability because "predatory conduct" was involved.

Offense variable 10 is exploitation of a vulnerable victim. It provides for the following scoring:

> (a) Predatory conduct was involved.....15 points
>
> (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status .....10 points
>
> (c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious..... 5 points
>
> (d) The offender did not exploit a victim's vulnerability ..... 0 points

"[T]o be considered predatory, the conduct must have occurred before the commission of the offense." *People v Cannon*, 481 Mich 152, 160; 749 NW2d 257 (2008). "In addition, preoffense conduct must have been directed at a victim 'for the primary purpose of victimization.' " *Id*. at 161, quoting MCL 777.40(3)(a). Our Supreme Court set forth the following analytical questions to determine whether the conduct in question was predatory:

> (1) Did the offender engage in conduct before the commission of the offense?
>
> (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
>
> (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct? [*Id*. at 162.]

"If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 . . . ." *Id*.

The trial court stated as follows when it found predatory conduct and assessed defendant the maximum of 15 points:

> Predatory conduct is an offender's pre-offense conduct directed at a victim for the primary purpose of victimiza-

> tion [MCL 777.40(3)(a)]. As indicated by the Prosecutor, this trial transcript is replete with Defendant's continued predatory conduct in establishing a long-term relationship with these young men, a relationship wherein they looked at him as kind of a big brother, kind of like the mature adult, somebody that they could go to, somebody that allowed them to behave in whatever manner they wanted to while they were in him home, because he didn't have any restrictions while they were in his home. They were allowed, even though they testified they didn't overindulge, they were allowed to drink, they were allowed to smoke, they were allowed to do whatever they wanted to. Hence, he established a predatory conduct as defined by the statute.

We completely agree with the trial court's assessment of the evidence showing predatory conduct. We further point out that defendant befriended the victims and became a confidant to them so he could easily lure the victims to his home. Then while there, he further engaged in preoffense conduct by providing a place with completely no restrictions, including providing them with video games, alcohol, cigarettes, and pornography. Defendant engaged in this course of conduct with the specific nefarious intent of being able to be alone with the victims so he could molest or victimize them without the fear of another adult discovering his behavior. The record supports the trial court's scoring of OV 10 at 15 points.

D. OV 12

Defendant argues regarding OV 12, MCL 777.42, that he should have been scored at zero because the prosecutor made no showing that three or more contemporaneous felonious criminal acts involving crimes against a person were committed within the date of the highest offense for which defendant was convicted, the

first-degree CSC against K. The trial court may score points, from a minimum of one to a maximum of 25, for OV 12 if the defendant committed felonious criminal acts contemporaneously with the sentencing offense. MCL 777.42(1). A contemporaneous criminal act is one that occurred within 24 hours of the sentencing offense and "has not and will not result in a separate conviction." MCL 777.42(2)(a)(*ii*). If three or more contemporaneous felonious criminal acts involving crimes against a person were committed, the trial court properly scores 25 points. MCL 777.42(1)(a).

Defendant argues that OV 12 was incorrectly scored because there was no evidence that he committed three or more crimes against a person within 24 hours of his sexually penetrating K. But, as the prosecutor argued below and on appeal, the evidence demonstrates that defendant took numerous sexually explicit pictures of victims K, M, and P, and that he took those pictures around the same time that he sexually penetrated K. Critically important is the fact that defendant was in possession of those child sexually explicit materials at the time and place where he committed CSC-I against K. In order to have created those pictures, he had to have possessed them and he was never charged as a result of the possession. There was ample evidence to support scoring 25 points.

E. ALLEGED UPWARD DEPARTURE

In his brief on appeal, defendant argues exactly as follows:

> Assuming (for the sake of argument only) that Mr. Waclawski's Prior Record Variables and Offense Variables would have been scored as set forth [in his argument,] his sentences on those counts amount to an upward departure.

Because we have found no scoring error, defendant's argument here is wholly without merit because no upward departure occurred.

VII

Defendant argues that he is entitled to jail credit for the time served in an Illinois jail from April 2006 through October 2006 because of the excessive delay in returning him to Michigan. He claims that he was incarcerated pursuant to the IAD while awaiting extradition. The question whether defendant is entitled to sentence credit pursuant to MCL 769.11b for time served in jail before sentencing is an issue of law that we review de novo. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). MCL 769.11b provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

Defendant's argument fails because the sentencing credit statute specifically provides that a defendant is entitled to credit for time served "for the offense of which he is convicted . . . ." MCL 769.11b; see *People v Adkins*, 433 Mich 732, 750; 449 NW2d 400 (1989). While defendant characterizes his time spent in the Illinois jail as time awaiting extradition on the Michigan charges, he ignores the fact that he was actually serving time in Illinois because he was convicted of a felony in Illinois and was serving his term of incarceration for that felony. The statute is plain and he is not entitled to relief.

VIII

Defendant argues that he is entitled to have his presentence investigation report (PSIR) amended because the trial court did not adequately resolve his challenges at sentencing. Defendant objected to the probation agent's reference to defendant's being "uncooperative" and statement that defendant refused to answer questions that he did not find relevant in light of his appeal. Defendant also objected to the PSIR's inclusion of "victim" impact statements from the mothers of the complaining witnesses. The trial court's response to a claim of inaccuracies in the presentence investigation report is reviewed for an abuse of discretion. *Uphaus (On Remand)*, *supra* at 181. A court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes. *Id*.

Because the Department of Corrections makes critical decisions concerning a defendant's status on the basis of information contained in the PSIR, the PSIR should accurately reflect any determination the sentencing judge has made regarding the accuracy or relevance of its information. *Uphaus (On Remand)*, *supra* at 182. At sentencing, either party may challenge the accuracy or relevancy of any information contained in the presentence report. MCL 771.14(6); MCR 6.425(E)(1)(b); *People v Lloyd*, 284 Mich App 703, 705-706; 774 NW2d 347 (2009). The information is presumed to be accurate, and the defendant has the burden of going forward with an effective challenge, but upon assertion of a challenge to the factual accuracy of information, a court has a duty to resolve the challenge. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997); *Lloyd*, *supra* at 705. When the accuracy of the presentence report is challenged, the trial court must allow the parties to be heard and must make a finding

as to the challenge or determine that the finding is unnecessary because the court will not consider it during sentencing. MCR 6.425(E)(2). It may adjourn sentencing to permit the parties to prepare for or respond to a challenge. MCL 771.14(6); *Lloyd*, *supra* at 705. The grant of an additional hearing is in the sentencing court's discretion. *People v Harvey*, 146 Mich App 631, 636; 381 NW2d 779 (1985). Once a defendant effectively challenges a factual assertion, the prosecutor has the burden to prove the fact by a preponderance of the evidence. *Lloyd*, *supra* at 705.

Although the Michigan Rules of Evidence do not apply at a sentencing proceeding, the defendant must be afforded an adequate opportunity to rebut any matter he or she believes to be inaccurate. *Uphaus (On Remand)*, *supra* at 183-184. If the court finds that challenged information is inaccurate or irrelevant, that finding must be made part of the record and the information must be corrected or stricken from the report. MCL 771.14(6); MCR 6.425(E)(2)(a); *Lloyd*, *supra* at 705. When a sentencing court disregards information challenged as inaccurate, the court effectively determines that the information is irrelevant and the defendant is entitled to have the information stricken from the report. *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003). The failure to strike disregarded information can be harmless error. *People v Fisher*, 442 Mich 560, 567 n 4; 503 NW2d 50 (1993).

The sentencing record reveals that defendant objected to a statement in his PSIR that he was "uncooperative and refused to answer questions" during the PSIR interview with the probation department. At sentencing, defendant's counsel explained that defendant is a former attorney and understood his right to refuse to answer questions based on the Fifth Amend-

ment, thus he was exercising that right and was not being uncooperative. The trial court found that the statement in the PSIR was accurate because it reflected the interviewer's "genuine opinion as to how [defendant] projected himself to her in answering the questions." The trial court then stated that the "guideline range is set by the scoring, not by [the interviewer's] opinion. Her recommendation might be reflected in her opinion, but the guideline range is set by statute." Clearly the trial court allowed defendant an opportunity to challenge the accuracy of the information in the PSIR, considered it, and then rejected it because the narrative of the exchange between defendant and the probation interviewer was accurate with regard to the interviewer's impression of what transpired during the interview. The trial court further made clear that the "opinion" of the probation interviewer would not be used in the calculation of the sentences because the guideline range is what sets the sentences. The trial court did not abuse its discretion by concluding that the PSIR was accurate.

Defendant also argues that the trial court abused its discretion when it allowed the mothers of K, P, and M to give victim's impact statements and to allow references to them to be included in the PSIR. MCL 780.764 and 780.765 grant individuals who suffer direct or threatened harm as a result of a convicted individual's crime the right to submit an impact statement both at the sentencing hearing and for inclusion in the PSIR; however, the right is not limited exclusively to the defendant's direct victims. Instead, "a sentencing court is afforded broad discretion in the sources and types of information to be considered when imposing a sentence . . . ." *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994). Moreover, this broad discretion does not infringe on a convicted individual's due process

rights, because the evidence was not taken into consideration in determining the defendant's guilt. See *Williams v New York*, 337 US 241, 246-247; 69 S Ct 1079; 93 L Ed 1337 (1949).

Here the trial court stated as follows in regard to defendant's objection at sentencing:

> Certainly is [sic] would have been nice to have heard from the young men themselves, but I can't find any quarrel with listening to their parents and how it has affected them, how it affected them upon their knowledge of the allegations and how it continues to affect them insofar as they may be embarrassed to come back. I have no objection or I have no problem with what is contained within the impact statement as provided by the mothers, the mother, I'm sorry. So it's going to stay.

Plainly, the law does not limit victim's impact statements to direct victims. As the trial court stated, the victims are now young men who likely suffered great embarrassment as a result of defendant's victimization of them as children. The three victims did not attend sentencing or submit victim impact statements. However, this is much more likely the result of humiliation and shame rather than, as defendant intimates, because they did not suffer injury. The decision to allow the mothers to give victim impact statements was within the trial court's discretion and the trial court did not abuse that discretion when it allowed references to the mothers' statements in the PSIR. *Albert*, *supra* at 74-75.

IX

Defendant next argues *in propria persona* that this Court must reverse defendant's convictions and suppress all the evidence because the search warrants yielding the evidence were overbroad and lacked the

particularity required for searches of an attorney's computer and computer storage media, because there was a failure to minimize the risk of intercepting evidence of unrelated noncriminal activity, and because there was a failure to incorporate search methods to protect the attorney-client privilege and attorney work product. A trial court's findings on a motion to suppress evidence as illegally seized will not be reversed on appeal unless clearly erroneous, *People v Jones*, 249 Mich App 131, 135; 640 NW2d 898 (2002); *People v Toodle*, 155 Mich App 539, 543; 400 NW2d 670 (1986), while questions of law and the decision on the motion are reviewed de novo, *Jones*, *supra* at 135. A finding is clearly erroneous when it leaves this Court with a definite and firm conviction that the trial court made a mistake. *People v Hahn*, 183 Mich App 465, 469; 455 NW2d 310 (1989), vacated in part and remanded 437 Mich 867 (1990); *Toodle*, *supra* at 543.

While defendant presents a long and circuitous argument regarding many aspects of the government's search of his computers and computer storage media that is based on the allegation that because he is an attorney and those items contained files that were clearly attorney work product they could not be searched, this issue boils down into a simple matter. This Court explained in *Ravary v Reed*, 163 Mich App 447, 453; 415 NW2d 240 (1987):

> The attorney-client privilege attaches to communications made by a client to his or her attorney acting as a legal adviser and made for the purpose of obtaining legal advice on some right or obligation. *Alderman v The People*, 4 Mich 414, 422 (1857), *Kubiak v Hurr*, 143 Mich App 465, 472-473; 372 NW2d 341 (1985). The purpose of the privilege is to allow a client to confide in his or her attorney secure in the knowledge that the communication will not be disclosed. *Id*., 473. The privilege is personal to the client,

> who alone can waive it. *Passmore v Passmore's Estate*, 50 Mich 626, 627; 16 NW 170 (1883).

And furthermore, "[i]t is well settled that the attorney-client privilege belongs to the client and not the attorney." *People v Bortnik*, 28 Mich App 198, 201; 184 NW2d 275 (1970). As such, defendant may not assert a privilege that is not his to assert. The privilege belonged only to his former clients and not to defendant.

In any event, defendant presents no evidence that the government even reviewed any work-related documents that he claims are on his computers (including the digital camera) and computer storage media. At the hearing on this matter, the trial court asked the prosecutor if she acquired any information from defendant's computers or computer storage media that was not directly relevant to the charges in the complaint against defendant. The prosecutor responded in the negative and stated that defendant had "an opportunity to review all of the materials that are considered evidentiary in this case." She further stated that the materials did not include anything relating to an attorney/client privilege. The prosecutor also stated that the forensic examination of defendant's computers and computer storage materials "would have to be very specific and very careful according to the keyword searches of the relevant evidence in this case. And again there's no indication that [the forensic examiner's search] in this case did, in fact[,] touch upon any attorney/client product or work product." The prosecutor further elaborated:

> [T]he search warrants in this case were, were not applied for by me, I did review them and they were adequately specific in this case in that the search warrants, the property to be seized were documents and records pertaining to child sexually abusive material. Not an over-

> all, open search of every [sic] filed on Defendant's computer. That's not what was granted here, that's not what was conducted here. And based upon my conversations with Sergeant [Rebecca] MacArthur and the fact that she is an experienced computer forensic examiner and, and experienced in the search and seizure of computers, she was well aware too of the potential impact of the Defendant being a, and [sic] attorney in this case. And based upon those facts, that's why she conducted a limited review of the material, related only to the property to be seized in this case, which [were] documents or records relating to child sexually abusive material.

The trial court also stated that it would not "allow anything about any client that he may have represented to come out during this trial."

At trial, nothing from defendant's computers or computer storage media was used in evidence other than child pornography that was found by the Michigan State Police (MSP) computer forensic examiner, Detective Rebecca MacArthur. Detective MacArthur testified at trial that she has had over 800 hours training in computer forensics. She testified that she used specialized forensic software programs ("Forensic Tool Kit" and "Encase") through an approved computer forensics protocol to analyze defendant's computers and computer storage media. She stated that she searched defendant's computers and storage media only for evidence relevant to the investigation, specifically files containing child pornography. She stated that there is a graphics viewer feature in both programs that allowed her to view any pictures present and then she scrolled through the pictures and bookmarked child pornography images she found. Detective MacArthur found several thousand images of child pornography but only flagged several hundred of them because their data indicated that they may have been taken with a digital camera. Then she narrowed down the pool to 32 images

because their raw data indicated that they were taken with defendant's digital camera with embedded dates and times in the image data.

Defendant has not pointed to, and we have not found, an instance where a single file unrelated to child pornography was revealed to the jury or was used in any way at trial. Further, defendant has not provided any evidence that the MSP or the prosecutor examined or acquired any file from his computers or computer storage media that was unrelated to the prosecution of this case to indicate that their search was in error or overbroad. And finally, to the extent that defendant argues that any files present on his computers or computer storage media are protected by the attorney-client privilege, that argument also fails because the privilege is not his to assert. Defendant has not established error.

X

Defendant's next argument *in propria persona* is that this Court must reverse his convictions and suppress all evidence because the search warrants yielding the evidence failed to set standards by which the government could distinguish between relevant and nonrelevant files, because there were no measures to reduce the interception of evidence of noncriminal activity unrelated to the investigation, and because the government conducted a general, exploratory search of the computers and storage media.

This issue basically reargues the same issues defendant raised in the previous issue. Defendant urges this Court to believe that the government engaged in an overbroad and unfettered search of his personal and work files on his computers and computer storage media that were intermingled with files relevant to his

prosecution. Defendant continues to assert that he has special privileges as an attorney who possessed computer files that were subject to the attorney-client privilege. For these reasons, defendant asserts that the search of his computers and computer storage media was improper and that all evidence seized must be suppressed.

But as we outlined in our discussion of the previous issue, defendant has presented no evidence that the police or prosecutor engaged in an unlawful overbroad search of his computer materials. Instead, the evidence shows that the government, through an MSP computer forensic examiner, engaged in a very specific, limited search of defendant's computers and computer storage media utilizing specialized search tools to identify only those files relevant to the criminal charges brought against defendant. In fact, at trial, testimony showed that only those files that contained images of child pornography were even viewed by the forensic examiner. Because defendant has presented no evidence to the contrary, defendant has not shown that this matter should be remanded for an evidentiary hearing as defendant requests, or that the search was improper and the evidence seized should be suppressed.

XI

Defendant argues *in propria persona* that the search warrants dated March 20, 2006, March 31, 2006, May 12, 2006, and February 5, 2007, must be quashed and the fruits of the searches suppressed. A search warrant may not be issued unless probable cause exists to justify the search. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651; *People v Sloan*, 450 Mich 160, 166-167; 538 NW2d 380 (1995), overruled in part on other grounds in *People v Wager*, 460 Mich 118; 123-124

(1999), and overruled in part on other grounds in *People v Hawkins*, 468 Mich 488; 502 (2003); *Martin*, *supra* at 298. Probable cause exists when the facts and circumstances would allow a reasonable person to believe that the evidence of a crime or contraband sought is in the stated place. *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000); *People v Osantowski*, 274 Mich App 593, 615; 736 NW2d 289 (2007), rev'd in part and remanded on other grounds 481 Mich 103 (2008).

Probable cause must be based on facts presented to the issuing magistrate by oath or affirmation. *Sloan*, *supra* at 167-168; *People v Mitchell*, 428 Mich 364, 367; 408 NW2d 798 (1987). When probable cause is averred in an affidavit, the affidavit must contain facts within the knowledge of the affiant rather than mere conclusions or beliefs. The affiant may not draw his or her own inferences, but must state the matters that justify the drawing of inferences. *Sloan*, *supra* at 168-169; *Martin*, *supra* at 298. However, the affiant's experience is relevant to the establishment of probable cause. *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997). The affidavit should be signed by the affiant. A warrant based upon an unsigned affidavit is presumed to be invalid, but the prosecutor may rebut the presumption by showing that the affidavit was made on oath to a magistrate. *Mitchell*, *supra* at 369; *People v Tice*, 220 Mich App 47, 52; 558 NW2d 245 (1996).

Defendant asserts that this Court must quash the March 20, 2006, search warrant, and suppress all fruits of the search, because the search warrant was obtained with impermissible police hearsay and was obtained with an invalid, unsigned affidavit, and because the invalid, unsigned affidavit was not before the court issuing the search warrant, and, therefore, the search

warrant was issued without probable cause. We conclude that all these challenges are baseless.

In *People v Sellars*, 153 Mich App 22, 27; 394 NW2d 133 (1986), this Court observed:

> [A] warrant may issue on probable cause if the police have conducted an independent investigation to confirm the accuracy and reliability of the information regardless of the knowledge and reliability of the source. This rule is clearly set forth in both federal and state Supreme Court decisions.

See also *People v Harris*, 191 Mich App 422, 425-426; 479 NW2d 6 (1991) (recognizing that a search warrant may be issued on the basis of an affidavit that contains hearsay as long as the police have conducted an independent investigation to verify the information).

In this case, defendant has not demonstrated error with regard to police hearsay. The record clearly establishes that the facts stated in the affidavit were confirmed by independent police investigation. *Sellars*, *supra* at 27. Detective Elizabeth Egerer stated that she received a complaint from the Illinois Crimes Against Children Unit. Detective Egerer communicated personally with Illinois Detective Andrew Uhlir, confirming the information in the complaint regarding defendant's trip to Illinois and his admission to the police that the reason for the trip was to engage in sexual activities with a perceived minor named "Coty" whom he had been chatting with on the Internet. Moreover, viewing the affidavit in a common-sensical and realistic manner, a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause to issue a search warrant. *People v Keller*, 479 Mich 467, 477; 739 NW2d 505 (2007); *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000). Further, the record reveals that Detective Egerer appeared be-

fore the magistrate on March 20, 2006, and swore or affirmed the accuracy of her affidavit. Police officers are presumptively reliable, and self-authenticating details also establish reliability. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001); *People v Powell*, 201 Mich App 516, 523; 506 NW2d 894 (1993).

Defendant next argues with regard to the March 20, 2006, affidavit that it must be deemed invalid because there was no "search warrant from Illinois" in existence on March 20, 2006, because the Illinois search warrant was not in existence until it was signed by a judge on March 23, 2006. This Court cannot confirm this assertion in the lower court record. However, the record does reveal that on the Affidavit for Search Warrant, at item 2, Detective Egerer, the affiant, represents that an Illinois search warrant is attached to her affidavit. At item 2, it states, in part, "See attachment 1, the search warrant from Illinois, for more details." The copy of the affidavit we used for review of this issue is attached to defendant's Standard 4 brief on appeal. This exhibit does not have an "attachment 1." However, we find no error because even if the attachment was not present on March 20, 2006, when Detective Egerer went before the magistrate, the magistrate stated specifically on the record that "[b]ased on the Affidavit for the search warrant, pages one through three, the Court will find probable cause to issue . . . the search warrant based on the Affidavit." Clearly, the magistrate considered only the three-page affidavit before it and found probable cause without the attachment. Again, when viewing the three-page affidavit alone in a common-sensical and realistic manner, a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause to issue a search warrant. *Keller*, *supra* at 477; *Whitfield*, *supra* at 446. Defendant has not shown error.

Defendant asserts that this is not a situation where Detective Egerer inadvertently failed to attach Detective Uhlir's Illinois search warrant to her March 20, 2006, affidavit for a search warrant, instead, she did not have the Illinois search warrant and misrepresented herself. A defendant has the right to challenge the truthfulness of an affidavit's factual statements, but under a difficult standard:

> "There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant." [*People v Turner*, 155 Mich App 222, 226-227; 399 NW2d 477 (1986), quoting *Franks v Delaware*, 438 US 154, 171; 98 S Ct 2674, 2684; 57 L Ed 2d 667 (1978).]

The defendant has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause. *People v Williams*, 240 Mich App 316, 319-320; 614 NW2d 647 (2000). On this record, defendant has not made this showing and, as such, has not established error with regard to the March 20, 2006, affidavit or search warrant.

Defendant's sole argument regarding the March 31, 2006, and May 12, 2006, search warrants is that they must be quashed and the fruit of the searches suppressed because they were issued following the illegal searches of defendant's home and home office on March 20, 2006. Because defendant has not established error with regard to the March 20, 2006, search, this argument fails.

Defendant also argues that the February 5, 2007, search warrant must be quashed and the fruit of its search suppressed because the February 5, 2007, search warrant was issued following illegal searches of defendant's home and home office on March 20, 2006, and March 31, 2006. Again, this argument fails because defendant has not established error with regard to the March 20, 2006, search.

Defendant also argues that the evidence revealed as a result of the search of his digital camera should have been suppressed because it was obtained by the government in violation of two court orders. Defendant contends that the Illinois court issued two orders both dated July 23, 2006. He asserts that the first order indicated that "Evidence shall be preserved until further order of the court." And he states that the second order pertained to defendant's personal property then in Illinois and required that any property not being held as evidence was to be returned to defendant's attorney. He urges this Court that an evidentiary hearing would have shown that the camera was in Illinois and that Detective Uhlir brought the digital camera from Illinois and gave it to Detective MacArthur in Michigan and that no Michigan magistrate would have issued the February 5, 2007, search warrant had the government revealed that the property to be seized was then in Illinois and under the jurisdiction of an Illinois court.

We find no substance to this argument. The February 5, 2007, search warrant pertaining to defendant's Kodak DC3400 Digital Camera, his suitcase, and other personal items including a shaving kit, a Samsung/Verizon cellular phone, clothes, and a personal planner clearly shows that the property was located at the "Wheaton Police Department, 900 W. Liberty Drive, Wheaton, IL, 60187." The search warrant was plain that the items to be searched were located in Illinois and were presumably there as a result of defendant's Illinois arrest, conviction, and incarceration. Defendant has not shown error.

XII

Defendant next contends in his Standard 4 brief on appeal that this Court must dismiss the charges against defendant on the basis that jurisdiction was lost because of the failure of the prosecutor to timely file an information and because the IAD mandates dismissal with prejudice of untried charges. Interpretation of a court rule presents a question of law that we review de novo. *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582, 586; 584 NW2d 372 (1998).

At a hearing a little over a week before trial, defendant's attorney informed the trial court and the prosecutor that he had looked over the court docket entries the night before and noticed that an original felony information apparently had not been filed with the circuit court. The trial court had recently ordered the prosecutor to file an amended felony information with the circuit court and therefore, defendant's attorney argued twofold: (1) that the circuit court did not have jurisdiction over defendant as a result of the alleged nonfiling and (2) that the prosecutor should not be allowed to file an amended information without an original first being filed. The trial

court heard argument on the issues, inspected the court file, inspected the docket entries, spoke with the court clerk, and discussed the issues with counsel. The prosecutor stated that she had an information dated December 18, 2006, but it was not time-stamped as having been received by the circuit court. The trial court stated that there was no information dated December 18, 2006, in the trial court file. The trial court then made observations that it could have been lost between the district court and the circuit court or it could have been lost between the circuit court and the Court of Appeals during the interlocutory appeal. The trial court reviewed the file and determined that defendant had clearly been arraigned on the charges in circuit court and that at defendant's arraignment he waived the reading of the information. The trial court found that that being the case, defendant had waived any assignment of error in regard to the information. The trial court then accepted the prosecutor's amended information into the court record on that date. On appeal, defendant points out that although he waived reading of the information at the arraignment, he did not waive the actual filing of an information.

The purpose of an arraignment is to provide formal notice of the charge against the accused. *People v Thomason*, 173 Mich App 812, 815; 434 NW2d 456 (1988), citing *People v Killebrew*, 16 Mich App 624, 627; 168 NW2d 423 (1969). At an arraignment, the information is read to the accused and the accused may enter a plea to those charges. *Thomason*, *supra* at 815, citing former MCR 6.101(D)(1). The accused may waive the reading of the formal charges at the arraignment. *Id*. The record is clear that defendant waived formal reading of the charges at his arraignment and stood mute. The circuit court entered a plea of not guilty on defendant's behalf.

From the discussion that took place on the record on April 29, 2008, it appears to this Court that an original felony information was not filed by the prosecutor in this case. There was no record of it in the lower court file and the docket entries did not indicate that one had ever been filed. MCR 6.112 governs the information or indictment and provides as follows:

> (A) Informations and Indictments; Similar Treatment. Except as otherwise provided in these rules or elsewhere, the law and rules that apply to informations and prosecutions on informations apply to indictments and prosecutions on indictments.
>
> (B) Use of Information or Indictment. A prosecution must be based on an information or an indictment. Unless the defendant is a fugitive from justice, the prosecutor may not file an information until the defendant has had or waives a preliminary examination. An indictment is returned and filed without a preliminary examination. When this occurs, the indictment shall commence judicial proceedings.
>
> (C) Time of Filing Information or Indictment. The prosecutor must file the information or indictment on or before the date set for the arraignment.
>
> (D) Information; Nature and Contents; Attachments. The information must set forth the substance of the accusation against the defendant and the name, statutory citation, and penalty of the offense allegedly committed. If applicable, the information must also set forth the notice required by MCL 767.45, and the defendant's Michigan driver's license number. To the extent possible, the information should specify the time and place of the alleged offense. Allegations relating to conduct, the method of committing the offense, mental state, and the consequences of conduct may be stated in the alternative. A list of all witnesses known to the prosecutor who may be called at trial and all res gestae witnesses known to the prosecutor or investigating law enforcement officers must be attached to the information. A prosecutor must sign the information.

(E) Bill of Particulars. The court, on motion, may order the prosecutor to provide the defendant a bill of particulars describing the essential facts of the alleged offense.

(F) Notice of Intent to Seek Enhanced Sentence. 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, within 21 days after the filing of the information charging the underlying offense.

(G) Harmless Error. Absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense. This provision does not apply to the untimely filing of a notice of intent to seek an enhanced sentence.

(H) Amendment of Information. The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. On motion, the court must strike unnecessary allegations from the information.

The information duly notifies a defendant of the charges instituted against the defendant and further eradicates double jeopardy issues in the event of a retrial. *People v Traughber*, 432 Mich 208, 215; 439 NW2d 231 (1989). The dispositive question in determining whether a defendant was prejudiced by a defect in the information is whether the defendant knew the acts for which he or she was being tried so that he or she could adequately put forth a defense. *Id*. Given that it appears the prosecution violated MCR 6.112(C), the

issue is whether the harmless error provision of MCR 6.112(G) requires dismissal.

MCR 6.112(G) places the burden on defendant to demonstrate prejudice and thus establish that the error was not harmless. In this case defendant cannot show that he was prejudiced because he clearly knew the charges against him and, as an attorney, heavily participated in his own defense including preparing his case for trial. The file contains a felony complaint dated May 23, 2006, as well as a bindover dated December 11, 2006, that clearly set out the charges against defendant. Defendant does not claim that he did not have access to the felony complaint or bindover form or that he was not aware or able to defend against the charges against him. Further, there was argument before the circuit court where defendant was successful in getting three CSC-I charges he was facing reduced to one charge of CSC-I before trial. Defendant did not raise this issue until about one week before trial. There is absolutely no indication that defendant was not aware of the charges upon which he would stand trial. Because MCR 6.112(G) precludes dismissal "[a]bsent . . . a showing of prejudice," and defendant has not made that initial showing, the trial court did not err by failing to dismiss the case.

While defendant characterizes this issue as one of jurisdiction, in order to attempt to invoke the protections of the IAD and have all the charges against him dropped as a result of the IAD, he ignores the proper analysis under MCR 6.112(G) regarding whether he was prejudiced. He was not. The prosecutor did file an information on the date she became aware of the issue and there was no error in the court's accepting it because this Court has held that time is not of the essence, nor is it a material element, in a criminal

sexual conduct case, at least where the victim is a child. *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987). To the extent defendant argues that he received ineffective assistance of counsel because his first two attorneys failed to point out this issue, defendant's argument fails because he has not shown prejudice pursuant to MCR 6.112(G). Thus, defendant is not entitled to relief.

XIII

In his final argument *in propria persona*, defendant argues that this Court must reverse his convictions and bar retrial because a police witness interjected irrelevant and extremely inflammatory testimony, the interjection was not innocent and was within the control of the prosecution, and the trial court failed to immediately strike the testimony and issue a cautionary instruction to the jury. This Court reviews for an abuse of discretion a trial court's ruling whether to grant a mistrial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). A mistrial is warranted only when an error or irregularity in the proceedings prejudices the defendant "and impairs his ability to get a fair trial." *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005) (quotation marks and citation omitted). "A trial court abuses its discretion when it fails to select a principled outcome." *People v Horn*, 279 Mich App 31, 35 n 1; 755 NW2d 212 (2008).

At the time the police searched defendant's home on March 20, 2006, they found and seized a small amount of suspected marijuana. Defendant brought a pretrial motion to suppress the evidence and the trial court ruled that a complainant must first testify that he was given marijuana by defendant before a police officer would be permitted to testify with regard to the search

results at trial. At trial, while discussing the search of defendant's home, the following exchange occurred between the prosecutor and Detective Egerer:

> *The Prosecutor*: Okay, and once you seized those CDs, was there anything else of evidentiary value that you found in the house?
>
> *Detective Egerer*: We did also seize a small baggy of suspected marijuana out of the Defendant's bedroom.

Defendant immediately asked for the jury to be removed from the courtroom. The trial court then excused the jury and defendant moved for a mistrial. The trial court denied the motion, instead finding that a curative instruction at the end of trial would be sufficient to cure any error. The trial court admonished the prosecutor for failing to properly prepare the witness not to mention the marijuana and instructed the prosecutor not to mention it again before the jury. The trial court instructed defense counsel to prepare a curative instruction for its review. The jury returned and there was no further mention of the suspected marijuana. After the close of the proofs, the trial court instructed the jury and did provide an instruction regarding the suspected marijuana testimony. It was as follows:

> The Prosecution presented evidence that suspected marijuana was found in the home of the Defendant. Mr. Waclawski is not charged with possession of marijuana in this case. You must not consider this evidence in any way in arriving at your verdict.

Although the challenged portion of Detective Egerer's testimony went beyond the scope of the prosecutor's questioning, it constituted an isolated comment that was not repeated or explored further. In *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), overruled in part on other grounds by *People v Thompson*,

477 Mich 146, 148 (2007), this Court discussed unresponsive testimony, stating, in relevant part:

> [N]ot every instance of mention before a jury of some inappropriate subject matter warrants a mistrial. Specifically, an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial. [Quotation marks and citation omitted.]

As such, Detective Egerer's "unresponsive, volunteered" testimony did not constitute error that impaired defendant's ability to get a fair trial. *Bauder*, *supra* at 195. Furthermore, the trial court provided a comprehensive curative instruction to the jury. Because jurors are presumed to follow the instructions given, *People v Rodgers*, 248 Mich App 702, 717; 645 NW2d 294 (2001), the curative instruction alleviated any possible prejudice to defendant. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). Thus, the trial court did not abuse its discretion when it denied defendant's request for a mistrial.

Affirmed.

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not actionable, may, in appropriate cases, be used as background evidence to establish a pattern of discrimination to support a claim for discrimination occurring within the limitations period; such evidence is subject to the rules of evidence and applicable governing law and may be admitted under the sound discretion of the trial court. *Campbell v Human Services Dep't*, 286 Mich App 230.

require district courts of the second class to hold court full-time in each city and unincorporated village within the district having a population of 3,250 or more; the court generally is not required to sit in the political subdivision where a criminal violation or civil infraction occurred and venue is proper in most instances in the district where the violation took place unless provided otherwise by statute (MCL 600.8212). *City of Rockford v 63rd Dist Court*, 286 Mich App 624.

2. Each judge of a district court shall sit at places within the district as designated by the presiding judge or chief judge of the district (MCL 600.8251[4]). *City of Rockford v 63rd Dist Court*, 286 Mich App 624.

CRIME VICTIM'S RIGHTS ACT—*See*

CRIMINAL LAW 11

CRIMINAL LAW

See, also, EVIDENCE 1

CONSTITUTIONAL LAW

1. The Court of Appeals applies a four-part balancing test in determining whether a criminal defendant has been denied the right to a speedy trial; the four factors include the length of the delay, the reason for the delay, the defendant's assertion of the right, and the prejudice to the defendant; the burden is on the defendant to show that he or she suffered prejudice where the delay from the date of the defendant's arrest until the time that the trial commences is under 18 months; prejudice is presumed and the burden is on the prosecution to rebut the presumption where the delay is over 18 months (US Const, Am VI; Const 1963, art 1, §20). *People v Waclawski*, 286 Mich App 634.
2. Although delays inherent in the court system, like docket congestion, are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant has been denied a speedy trial. *People v Waclawski*, 286 Mich App 634.
3. The time taken by the prosecution to successfully pursue an interlocutory appeal is taken out of the calculation when determining whether the defendant has been denied the right to a speedy trial. *People v Waclawski*, 286 Mich App 634.

4. Two types of prejudice, prejudice to the person and prejudice to the defense, may occur as a result of a delay between the date of a defendant's arrest and the date of the defendant's trial; the most significant concern is whether the defendant's ability to defend himself or herself has been prejudiced. *People v Waclawski*, 286 Mich App 634.

CRIMINAL SEXUAL CONDUCT

5. *People v Dipiazza*, 286 Mich App 137.

DEFECTIVE INFORMATIONS

6. The dispositive question in determining whether a defendant was prejudiced by a defect in the information is whether the defendant knew the acts for which the defendant was being tried so that the defendant could adequately put forth a defense; the burden is on the defendant to demonstrate prejudice and thus establish that the error was not harmless (MCR 6.112). *People v Waclawski*, 286 Mich App 634.

EVIDENCE

7. A prosecutor may present rebuttal evidence concerning specific instances of conduct to prove a defendant's character, notwithstanding the limitations imposed under MRE 405, when all the following are true: the defendant places his or her character at issue through testimony on direct examination; the prosecution cross-examines the defendant about specific instances of conduct tending to show that the defendant did not have the character trait he or she asserted on direct examination; the defendant denies the specific instances raised by the prosecution in whole or in part during the cross-examination; and the prosecution's rebuttal evidence is limited to contradicting the defendant's testimony on cross-examination. *People v Roper*, 286 Mich App 77.

8. A four-part test is employed to show logical relevance where evidence of similar acts is offered to show a defendant's identification through modus operandi: the test requires that there is substantial evidence that the defendant committed the similar act, that there is some special quality of the act that tends to prove the defendant's identity, that the evidence is material to the defendant's guilt, and that the probative value of the evidence sought to be introduced is not substantially

outweighed by the danger of unfair prejudice (MRE 404([b]). *People v Waclawski*, 286 Mich App 634.

INTERSTATE AGREEMENT ON DETAINERS

9. A "detainer" under the Interstate Agreement on Detainers is a written notification filed with the institution in which a prisoner is serving a sentence advising that the prisoner is wanted to face pending charges in the notifying state; once a detainer is filed, the Interstate Agreement on Detainers is triggered and compliance with the provisions of the agreement is required (MCL 780.601). *People v Waclawski*, 286 Mich App 634.

10. A prisoner transferred to Michigan under article IV(c) of the Interstate Agreement on Detainers must be tried within 120 days of the prisoner's arrival in Michigan; the 120-day time limit may be tolled for any period that is the result of any necessary or reasonable continuance for good cause shown in open court with the defendant or the defendant's counsel present, including any period of delay caused by the defendant's request or ordered to accommodate the defendant; an order of the Court of Appeals granting an application by the prosecution to bring an interlocutory appeal and staying the lower court proceedings may be a necessary and reasonable continuance granted for good cause shown although it was entered without the physical presence of the defendant or the defendant's counsel (MCL 780.601). *People v Waclawski*, 286 Mich App 634.

JURY INSTRUCTIONS

11. A criminal defendant has a right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement. *People v Waclawski*, 286 Mich App 634.

RESTITUTION

12. A court may not reduce the amount of restitution a defendant is ordered to pay a crime victim by the amount of an unpaid civil judgment the victim obtained against the defendant (MCL 780.766). *People v Dimoski*, 286 Mich App 474.

SENTENCES

13. Ten points are properly scored under offense variable 4 when serious psychological injury requiring professional treatment occurred to a crime victim; the fact that professional treatment was not sought is not

similar cases both within the state and in other jurisdictions. *Freed v Salas*, 286 Mich App 300.

DEEDS

See, also, STATUTE OF FRAUDS 1

CONSIDERATION

1. The general rule that a complete or substantial failure of consideration may justify the rescission of a written instrument is not strictly applicable in the context of property transfers between a parent and a child; a deed from a parent to a child that expresses valuable consideration is valid although no actual consideration passed, where there are no outstanding claims against the property by creditors of the parent's estate. *In re Rudell Estate*, 286 Mich App 391.

GIFTS

2. Although the filing of a gift tax return may tend to show that a gift has been made, the absence of such a return is not conclusive evidence that a conveyance by a deed was a sale rather than a gift; the presence of a gift tax return is not conclusive evidence that a gift was made. *In re Rudell Estate*, 286 Mich App 391.
3. A recital of valuable consideration in a deed is not conclusive proof that the property was actually sold for value but rather is prima facie evidence of a sale; the consideration recited in a deed is not conclusive and can be inquired into afterwards for the purpose of establishing that the conveyance was actually made as a gift; parol evidence may be used for such purposes. *In re Rudell Estate*, 286 Mich App 391.

DEFECTIVE INFORMATIONS—*See*

CRIMINAL LAW 6

DEFECTS IN HIGHWAYS—*See*

GOVERNMENTAL IMMUNITY 1, 2

DEFENSES—*See*

PRODUCTS LIABILITY 2

DETAINERS—*See*

CRIMINAL LAW 9, 10

ELECTIONS

MICHIGAN CAMPAIGN FINANCE ACT

1. The Michigan Campaign Finance Act creates a framework for remedying and punishing campaign finance law violations and empowers the Secretary of State to investigate, enforce, and endeavor to prevent election campaign finance improprieties and to assess civil fines and enter into conciliation agreements; the act does not delegate to the Secretary of State the sole discretion whether violators should face criminal prosecution or supplant the traditional criminal law enforcement powers of county prosecuting attorneys or the Attorney General to prosecute crimes (MCL 169.201 *et seq*.). *In re Investigative Subpoenas*, 286 Mich App 201.
2. The Secretary of State may enter into a conciliation agreement with a person believed to have violated provisions of the Michigan Campaign Finance Act and, unless the agreement is violated, the agreement is a complete bar to any further action with respect to matters covered in the agreement; the Secretary of State is not authorized to address criminal liability in a conciliation agreement (MCL 169.215). *In re Investigative Subpoenas*, 286 Mich App 201.

EMPLOYEE RETIREMENT INCOME SECURITY ACT—*See*

PENSIONS 1

EMPLOYMENT DISCRIMINATION—*See*

CIVIL RIGHTS 1

EVIDENCE

See, also, CIVIL RIGHTS 1
CRIMINAL LAW 7, 8
DEEDS 3
NEGLIGENCE 1
SEARCHES AND SEIZURES 1
STATUTE OF FRAUD 1

CRIMINAL LAW

1. Testimonial hearsay evidence is inadmissible against a criminal defendant unless the declarant is unavailable at trial and the defendant had a prior opportu-

5. The language employed by the Legislature in MCL 500.3174 to extend the period of limitations contained in MCL 500.3145(1) for the commencement of an action to recover personal protection insurance benefits by a person claiming through the assigned claims facility does not apply to the one-year-back recovery limitation period contained in MCL 500.3145(1), and the recovery of benefits remains subject to the one-year-back limitation. *Bronson Methodist Hospital v Allstate Ins Co*, 286 Mich App 219.

POLLUTION EXCLUSIONS

6. A "pollutant," for purposes of a pollution exclusion clause in a commercial general liability insurance policy that defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste" and that does not define an "irritant" or "contaminant," is any solid, liquid, gaseous, or thermal substance that, because of its nature and under the particular circumstances, is generally expected to cause injurious or harmful effects to people, property, or the environment, or is not generally supposed to be where it is located and causes injurious or harmful effects to people, property, or the environment. *Hastings Mutual Ins Co v Safety King, Inc*, 286 Mich App 287.

INTERLOCUTORY APPEALS—*See*

CRIMINAL LAW 3

INTERSTATE AGREEMENT ON DETAINERS—*See*

CRIMINAL LAW 9, 10

JOINT TENANCIES—*See*

TAXATION 2

JUDGES

See, also, COURTS 2

DISQUALIFICATION OF JUDGES

1. A motion to disqualify a trial court judge must be filed within 14 days after the moving party discovers the ground for disqualification; untimeliness is a factor in deciding whether the motion should be granted (MCR 2.003[D][1]). *In re MKK*, 286 Mich App 546.

the governmental entity's attention; a court should construe the notice requirements liberally to avoid penalizing an inexpert layperson for a technical defect; a court should not find a notice ineffective when it is in substantial compliance with the law; some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects. *Plunkett v Department of Transportation*, 286 Mich App 168.

NOTICE OF INTENT TO FILE CLAIM—*See*
ACTIONS 1

OFFENSE VARIABLE 4—*See*
CRIMINAL LAW 13
SENTENCES 1

OFFENSE VARIABLE 10—*See*
CRIMINAL LAW 14

OFFENSE VARIABLE 12—*See*
CRIMINAL LAW 15
SENTENCES 2

OFFENSE VARIABLE 13—*See*
SENTENCES 2

OFFER-OF-JUDGMENT SANCTIONS—*See*
JUDGMENTS 1

OPEN AND OBVIOUS DANGERS—*See*
NEGLIGENCE 5

OPINION ON ULTIMATE ISSUES—*See*
WITNESSES 1

OPINION TESTIMONY—*See*
WITNESSES 1

OPPORTUNITY TO BE HEARD—*See*
CONSTITUTIONAL LAW 3

OWNERS LIABILITY—*See*
MOTOR VEHICLES 1

PARENT AND CHILD

See, also, DEEDS 1

CHILD PROTECTIVE PROCEEDINGS

1. A court may not deny appointed counsel to a respondent in child protective proceedings by imputing to the respondent income earned by people who bear no legal responsibility to contribute to the respondent's legal expenses; mere cohabitants, even if parents of an adult respondent, possess no obligation to pay a respondent's attorney fees; a court may not prohibit a respondent from exercising the right to appointed counsel on the basis of a calculation that imputes income from sources unavailable to the respondent (MCL 712A.17c[4] and [5]; MCR 3.915[B][1]). *In re Williams*, 286 Mich App 253.
2. The respondent in a child protective proceeding does not have standing to challenge the effectiveness of the child's attorney. *In re HRC*, 286 Mich App 444.

TERMINATION OF PARENTAL RIGHTS

3. *In re Jones*, 286 Mich App 126.
4. The United States Constitution guarantees a right to counsel in parental rights termination cases; the constitutional concepts of due process and equal protection grant respondents in termination proceedings the right to counsel; the constitutional right of due process confers on indigent parents the right to appointed counsel at hearings that may involve the termination of their parental rights. *In re Williams*, 286 Mich App 253.
5. When a child is removed from the parents' custody, the petitioner must make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan; the petitioner is not required to provide reunification services when termination of parental rights is the agency's goal. *In re HRC*, 286 Mich App 444.

PAROL EVIDENCE—*See*

DEEDS 3

STATUTE OF FRAUDS 1

PATERNITY ACTIONS—*See*

ADOPTION 1

property a permanent accession to the realty. *Granger v Department of Treasury*, 286 Mich App 601.

STATE TAX COMMISSION

4. The State Tax Commission's decision on a property classification appeal is not reviewable by the circuit court; the State Tax Commission's review of a decision of a local board of review in a property classification dispute does not involve a contested case subject to review under the Administrative Procedures Act; no right of review of the State Tax Commission's decision by the circuit court exists under MCR 7.101 (MCL 24.301, 211.34c[6]). *Iron Mountain Information Mgt, Inc v State Tax Comm*, 286 Mich App 616.

TAX TRIBUNAL

5. The Tax Tribunal has exclusive and original jurisdiction over proceedings for review of agency actions relating to property tax assessments; a direct challenge to the validity of a tax assessment that is based on a claim that the property is exempt from property tax falls within the Tax Tribunal's exclusive jurisdiction (MCL 205.731[a]). *In re Petition for Foreclosure*, 286 Mich App 108.

USE TAX ACT

6. The industrial processing exemption from taxation under the Use Tax Act for personal property used or consumed during industrial processing does not apply to tangible personal property that both is permanently affixed to and becomes a structural part of real estate, even if the personal property is otherwise used in industrial processing (MCL 205.94o[4][d] and [5][a]). *Granger v Department of Treasury*, 286 Mich App 601.

7. Personal property used or consumed in the design, engineering, construction, or maintenance of real property does not fall within the exemption from taxation under the Use Tax Act applicable to personal property used or consumed during industrial processing (MCL 205.94o[6][d]). *Granger v Department of Treasury*, 286 Mich App 601.

TAXPAYERS—*See*

TAXATION 1

TERMINATION OF PARENTAL RIGHTS—*See*

PARENT AND CHILD 3, 4, 5

WITNESSES

See, also, EVIDENCE 4

EXPERT WITNESSES

1. Expert testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be determined by the trier of fact such as fault and ordinary negligence (MRE 704). *Freed v Salas*, 286 Mich App 300.

WORDS AND PHRASES—*See*

CRIMINAL LAW 9

INSURANCE 2, 6

PRODUCTS LIABILITY 2

TAXATION 1