MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

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COURT OF APPEALS

FROM

January 17, 2019 through April 25, 2019

KATHRYN L. LOOMIS
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[1] From January 28, 2019.

[2] From January 28, 2019.

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TOWNSHIP OF FRASER v HANEY

Docket No. 337842. Submitted December 12, 2018, at Lansing. Decided December 20, 2018. Approved for publication January 17, 2019, at 9:00 a.m. Vacated and remanded 504 Mich 968 (2019).

Fraser Township filed a complaint in the Bay Circuit Court against Harvey and Ruth Ann Haney in 2016, seeking injunctive relief to abate a public nuisance. The complaint alleged that the Haneys were raising hogs on their property, which violated the township zoning ordinance. The Haneys moved for summary disposition under MCR 2.116(C)(7), arguing that because they began raising hogs on the property in 2006, the township's 2016 complaint was barred by the general six-year period of limitations in MCL 600.5813. The trial court, Harry P. Gill, J., denied the motion, concluding that because the case was an action in rem, the statute of limitations did not apply. The Haneys sought leave to appeal, and the Court of Appeals granted the application.

The Court of Appeals *held*:

1. MCR 2.111(F)(3) requires a party to raise affirmative defenses in its responsive pleading. The running of the statute of limitations is an affirmative defense. But MCR 2.118(C)(1) allows a court to treat an issue as having been raised by the pleadings if it is tried with the parties' express or implied consent. An issue is tried for purposes of MCR 2.118(C)(1) if the trial court addresses the issue on its merits. The trial court here tried the statute-of-limitations issue at the motion hearing. A party may give implied consent by failing to object to the trial court's adjudication of the issue. Here, the parties' briefed and argued the issue in the trial court; the township did not raise in the trial court the Haneys' failure to include the defense in their responsive pleading. When an issue not raised in the pleadings is tried with the parties' express or implied consent, the party who failed to raise the issue may move at any time, even after judgment, to amend the pleading to include the omitted issue. The trial court should freely grant such a motion unless the amendment would be futile or unless the motion should be denied on other grounds, such as bad faith or undue prejudice to

the other party. Although the Haneys did not raise the statute-of-limitations defense in their responsive pleading, a motion to amend their responsive pleadings would not be futile. There is no evidence of bad faith, and because the parties fully briefed and argued the issue in the trial court, the township would not be prejudiced by remanding the case to allow the Haneys to move to amend their responsive pleading.

2. An action to abate a public nuisance is subject to the six-year general period of limitations under MCL 600.5813. Under MCL 600.5827, a period of limitations runs from the time the claim accrues, which is defined in this case as the time the wrong was done. Here, the undisputed evidence shows that the wrong was done in 2006 when the Haneys began keeping hogs on the property. The continuing-wrongs doctrine on which the township sought to rely was abrogated by *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264 (2009), and neither party here presented evidence that the Haneys were adding new swine to the property. Accordingly, the claim accrued in 2006, so the township's 2016 suit was time-barred by the six-year period of limitations.

3. No Michigan court has held that a claim seeking the abatement of a public nuisance is an action in rem. The complaint here was an action seeking injunctive relief against a person, not an action to determine the disposition of the property itself. Therefore, the trial court erred by granting summary disposition on the basis that the case was an action in rem not subject to a statute-of-limitations defense.

4. The doctrine of *quod nullum tempus occurrit regi* exempts the government from the operation of statutes of limitations absent express statutory authority stating otherwise. The six-year general period of limitations under MCL 600.5813 applies when a government plaintiff seeks an injunction to abate a public nuisance. So *quod nullum tempus occurrit regi* does not exempt the township here from the statute of limitations.

5. The Michigan Zoning Enabling Act, MCL 125.3101 *et seq.*, allows local governments to regulate nonconforming use of zoned land and to abate violations of zoning ordinances as nuisances, but there is no provision in the act that supersedes the six-year period of limitations in MCL 600.5813.

Reversed and remanded.

Birchler, Fitzhugh, Purtell, & Brissette, PLC (by *Mark Brissette*) for Fraser Township.

Outside Legal Counsel, PLC (by *Phillip L. Ellison*) for Harvey Haney and Ruth Ann Haney.

Amicus Curiae:

Bauckham, Sparks, Thall, Seeber & Kaufman, PC (by *Robert E. Thall* and *T. Seth Koches*) for the Michigan Townships Association.

Before: SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM. Plaintiff filed this suit seeking injunctive relief to abate a public nuisance. Plaintiff claimed that defendants' piggery violated the zoning ordinance applicable to defendants' property (the land was zoned as commercial and not agricultural). Defendants filed a motion for summary disposition under MCR 2.116(C)(7) (claim barred by statute of limitations). The trial court denied defendants' motion, holding that this was an action in rem and that therefore the statute of limitations did not apply. Defendants appeal by leave granted.[1] We reverse the decision of the trial court and remand the case to allow defendants to amend their responsive pleading to include the statute of limitations as an affirmative defense.

I. FACTS

On May 3, 2016, plaintiff filed this action against defendants, alleging that defendants were raising approximately 20 domestic hogs on their property in violation of plaintiff's zoning laws and that defendants were creating a nuisance due to the stench and flies

[1] *Fraser Twp v Haney*, unpublished order of the Court of Appeals, entered September 18, 2017 (Docket No. 337842).

drawn by deer[2] and hog waste. Defendant Harvey Haney testified that privately owned deer or elk were no longer on the subject property, but he admitted that he began raising hogs on the property in 2006. Plaintiff offered no evidence that defendants continued to bring new hogs onto the property after 2006 or that defendants had actually begun to raise hogs on the property after 2006. Plaintiff sought an injunction precluding defendants from continuing to raise hogs (or other animals that would violate plaintiff's zoning ordinance) on the subject property.

Defendants filed a motion for summary disposition, arguing that plaintiff's claim was time-barred by the six-year general period of limitations set forth in MCL 600.5813. The trial court denied defendants' motion, reasoning that the statute of limitations did not bar plaintiff's complaint because the case constituted an action in rem.

II. STANDARD OF REVIEW

This Court reviews de novo motions for summary disposition under MCR 2.116(C)(7), the applicability of a statute of limitations to a cause of action, and questions

[2] Defendant Harvey Haney was previously sued by the Michigan Department of Natural Resources (DNR) in 2015 under the Privately Owned Cervidae Producers Marketing Act (POC Act), MCL 287.951 *et seq*., when it was discovered that he improperly registered his private cervidae (deer) facility—which was apparently located at the same address as the hog-raising operation at issue in the instant case—by incorrectly identifying the zoning of the property as agricultural instead of commercial. Defendant failed to seek a variance, and his registration was ultimately revoked. The DNR sought to permanently enjoin defendant Harvey from possessing cervidae or operating a cervidae livestock operation without a permit and to require him to submit his animals for disease testing. However, the case was ultimately dismissed pursuant to a settlement agreement.

of statutory interpretation. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007).

III. ANALYSIS

A motion for summary disposition under MCR 2.116(C)(7) may be raised on the ground that a claim is barred by the statute of limitations. In support of a motion under Subrule (C)(7), a party may provide affidavits, pleadings, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Unlike a motion brought under Subrule (C)(10), "a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). However, the substance of this material, if provided, must be admissible in evidence. *Id*. When reviewing motions under Subrule (C)(7),

> this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [*Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010) (citations omitted).]

"[O]nly factual allegations, not legal conclusions, are to be taken as true under MCR 2.116(C)(7) . . . ." *Davis v Detroit*, 269 Mich App 376, 379 n 1; 711 NW2d 462 (2006).

A. WAIVER OF THE STATUTE-OF-LIMITATIONS DEFENSE

Plaintiff argues that defendants cannot prevail on any statute-of-limitations defense because defendants failed to assert a limitations-period defense in their first responsive pleading. However, this case presents the unusual situation in which the trial court made an express holding with respect to the applicability of the asserted statute-of-limitations defense notwithstanding defendants' untimely invocation. The parties briefed and presented their arguments concerning the applicability of the statute of limitations to plaintiff's claim, though plaintiff did not argue until after this appeal was filed that defendants failed to properly assert the statute-of-limitations defense in their responsive pleading. Under these circumstances, we hold that the trial court tried the merits of defendants' statute-of-limitations defense with plaintiff's implied consent. The issue may therefore be treated as if it had been raised in defendants' pleadings, and it is appropriate to remand the case to allow defendants to move to amend their responsive pleading accordingly.

" '[T]he running of the statute of limitations is an affirmative defense.' " *Dell v Citizens Ins Co of America*, 312 Mich App 734, 752; 880 NW2d 280 (2015) (citation omitted). "Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." MCR 2.111(F)(3). Pursuant to MCR 2.118(C)(1),

> [w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

In order for an issue to be "tried" for purposes of MCR 2.118(C)(1), it must be analyzed on its merits by the trial court. *Amburgey v Sauder*, 238 Mich App 228, 247-248; 605 NW2d 84 (1999). The trial court in this case clearly addressed the merits of defendants' untimely assertion of their statute-of-limitations defense, and the parties were given ample opportunity to brief and argue the issue. The issue of the statute of limitations' applicability was therefore "tried." Moreover, a party may give implied consent to the adjudication of an issue by failing to object to the issue before the trial court. *Zdrojewski v Murphy*, 254 Mich App 50, 61; 657 NW2d 721 (2002); *Grebner v Clinton Charter Twp*, 216 Mich App 736, 744; 550 NW2d 265 (1996). In this case, plaintiff did not object until after this appeal was filed to defendants' failure to allege a statute-of-limitations defense in their responsive pleading. Plaintiff briefed arguments against the applicability of the statute of limitations and presented its case to the trial court. Ergo, plaintiff impliedly consented to the adjudication of the issue. See *Zdrojewski*, 254 Mich App at 61.

MCR 2.118(C)(1) is "liberal and permissive . . . . The only requirement is that the party seeking amendment move to have the court amend the pleadings . . . ." *Zdrojewski*, 254 Mich App at 61. In this case, defendants have not moved to amend their affirmative defenses. Typically, this would constitute a binding waiver of the defense. *Geisland v Csutoras*, 78 Mich App 624, 630; 261 NW2d 537 (1977). Importantly, however, the text of MCR 2.118(C)(1) expressly allows for motions to amend the pleadings to be made by a party "at any time, *even after judgment*." (Emphasis added.) This Court, in *Geisland*, 78 Mich App at 630, held that when one defendant properly asserted a statute-of-limitations defense, the plaintiff was not misled or prejudiced when the other defendants as-

serted the same defense, and it was appropriate to allow the other defendants to seek leave to amend their answers to include the affirmative defense on remand. This Court in *Jesperson v Auto Club Ins Ass'n*, 306 Mich App 632, 647; 858 NW2d 105 (2014), rev'd on other grounds 499 Mich 29 (2016), held that when the trial court could have granted a defendant leave to amend its pleading to include a statute-of-limitations defense not previously asserted and the defense would have barred the plaintiff's claim, the Court's interest in judicial efficiency enabled the Court to forgo remand and simply determine that the statute-of-limitations defense was not waived. *Id*. Consequently, it does not matter that defendants have so far failed to move to amend their affirmative defenses, as long as a proper amendment ultimately occurs. See *id*.

Notably, if defendants had moved to amend their responsive pleading, the trial court would have been within its discretion to grant such a motion. The *Jesperson* Court stated that "leave to amend pleadings should be freely granted to a nonprevailing party at summary disposition, unless amendment would be futile or otherwise unjustified." *Id*. See also MCR 2.118(A)(2). Aside from futility, other reasons to disallow leave to amend include "undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, [and] undue prejudice to the opposing party by virtue of allowance of the amendment . . . ." *Amburgey*, 238 Mich App at 247. Critically,

> [d]elay, alone, does not warrant denial of a motion to amend. However, a motion may be properly denied if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. Prejudice to a defendant that will justify denial of leave to amend is the prejudice that arises when the amendment would prevent the defendant

> from having a fair trial; the prejudice must stem from the fact that the new allegations are offered late and not from the fact that they might cause the defendant to lose on the merits. [*Id*. (citations omitted).]

Defendants' assertion of the statute-of-limitations defense would not be futile. Further, because plaintiff was given the opportunity to brief and argue before the trial court its position against defendants' assertion of the statute of limitations, it can hardly be said that plaintiff would suffer prejudice were we to allow defendants to amend their responsive pleading. "The mere fact that an amendment might cause a party to lose on the merits is not sufficient to establish prejudice." *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 5; 687 NW2d 309 (2004).

This Court's decision in *Ostroth* is perhaps most instructive. In that case, this Court considered whether a trial court erred by allowing a defendant to amend its affirmative defenses to include the statute of limitations. *Id*. The defendant failed to assert the defense in its responsive pleading and did not move to amend its affirmative defenses to include the defense until after it was raised in the defendant's motion for summary disposition. *Id*. Because the defendant's untimely action was not the result of bad faith or undue delay and did not prejudice the plaintiff's ability to respond to the issue, this Court affirmed the trial court's grant of the defendant's motion to amend. *Id*. Accordingly, because there is no indication that defendants in this case asserted the statute-of-limitations defense in bad faith, the delay in filing a motion to amend defendants' affirmative defenses would not be sufficient to warrant denying such an amendment. See *id*.; *Amburgey*, 238 Mich App at 247.

B. THE APPLICABLE PERIOD OF LIMITATIONS

Having determined that defendants' attempted assertion of the statute-of-limitations defense is proper, it becomes necessary to determine the period of limitations applicable to plaintiff's claim. Plaintiff's claim is for the abatement of a public nuisance.[3] In *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346, 383; 760 NW2d 856 (2008), this Court held that a claim for the abatement of a public nuisance filed by a governmental entity seeking injunctive relief was subject to the six-year general period of limitations under MCL 600.5813. Ergo, the applicable period of limitations in this case is six years.

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[3] Michigan has historically recognized public nuisance and private nuisance as two distinct violations. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. It evolved as a doctrine to resolve conflicts between neighboring land uses." *Id*. at 302-303 (citation omitted). "[T]he gist of a private nuisance action is an interference with the occupation or use of land or an interference with servitudes relating to land." *Id*. at 303. A public nuisance, in contrast, "involves the unreasonable interference with a right common to all members of the general public." *Id*. at 304 n 8. Plaintiff, a governmental entity, did not specify which type of nuisance it was claiming against defendants in its complaint. Notably, the mere fact that a condition violates a local ordinance does not render that condition a public nuisance. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 277-278; 761 NW2d 761 (2008). However, plaintiff's language regarding the stench and flies drawn by deer and hog waste suggests that plaintiff was suing defendants because defendants' piggery interfered with the general public's "health, safety, peace, comfort, or convenience[.]" See *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). The distinction is material, as an action for the abatement of a private nuisance is subject to the three-year statute of limitations under MCL 600.5805(10). *Terlecki v Stewart*, 278 Mich App 644, 652-654; 754 NW2d 899 (2008) (rejecting the application of the 15-year period of limitations under MCL 600.5801(4) to a claim of private nuisance).

Under MCL 600.5827, "the period of limitations runs from the time the claim accrues." Because there is no statutory provision holding otherwise, this claim "accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." *Id*. Plaintiff's suit is for the abatement of a public nuisance that stemmed from the piggery kept on the subject property in violation of a local ordinance. Thus, the wrong alleged for purposes of accrual occurred when defendants first began to keep hogs on the subject property, regardless of when the wrong began to result in recoverable damage. Defendants presented undisputed evidence that they had kept hogs on the property since 2006. Plaintiff filed this suit in 2016, and therefore plaintiff's case was time-barred. See MCL 600.5813.

Importantly, the accrual of plaintiff's claim is not subject to tolling simply because plaintiff may have been unaware that defendants were keeping pigs on the subject property in violation of plaintiff's ordinance. The Michigan Supreme Court, in *Trentadue*, 479 Mich at 391-392, held that the common-law discovery rule was not available as a means of tolling the accrual period prescribed by MCL 600.5827. What is relevant, then, is not when plaintiff learned of defendants' violation, but when the violation first took place.

Plaintiff additionally argues that each day that defendants have continued to keep pigs on the property constitutes a separate violation for which the accrual period begins anew. The Fraser Code of Ordinances, § 1-10(a), codifies this assertion by stating that "[e]ach act of violation [of the code] and every day upon which any such violation shall occur shall constitute a separate offense." However, this Court has "completely and retroactively abrogated" the continuing-wrongs doc-

trine[4] in Michigan, including in nuisance cases. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 288; 769 NW2d 234 (2009) (holding that the Michigan Supreme Court's decision in *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005), and its progeny rendered the common-law continuing-wrongs doctrine inapplicable in all cases within the state). Further, neither party presented evidence suggesting that defendants were adding new swine to the subject property. Therefore, no new wrongs established a newly accrued cause of action that could salvage plaintiff's argument. Accordingly, plaintiff's contention in this regard is meritless.[5]

Plaintiff next argues that its claim requesting the abatement of a public nuisance is an action in rem and, therefore, the six-year period of limitations is not applicable. This Court, in *Detroit v 19675 Hasse*, 258 Mich App 438, 448; 671 NW2d 150 (2003), outlined the distinction between actions in personam and actions in rem:

> [A]ctions in personam differ from actions in rem in that actions or proceedings in personam are directed against a specific person, and seek the recovery of a personal judg-

[4] This is sometimes also referred to as the "continuing-violations doctrine," "continuing-wrongful-acts doctrine," and "continuing-tort doctrine." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 282; 769 NW2d 234 (2009).

[5] Amicus curiae, the Michigan Townships Association, cites *Joy Mgt Co v Detroit*, 183 Mich App 334, 342; 455 NW2d 55 (1990), for the proposition that the continuing-wrongs doctrine has been applied in the context of local ordinance violations. However, *Joy Mgt* was published years before *Garg* or *Marilyn Froling Revocable Living Trust*, and so its holding—to the extent that it applied the continuing-wrongs doctrine—is no longer valid.

> ment, while actions or proceedings in rem are directed against the thing or property itself, the object of which is to subject it directly to the power of the state, to establish the status or condition thereof, or determine its disposition, and procure a judgment which shall be binding and conclusive against the world. The distinguishing characteristics of an action in rem is [sic] its local rather than transitory nature, and its power to adjudicate the rights of all persons in the thing. [Quotation marks and citation omitted; alterations in original.]

No Michigan court has ever held that a claim seeking the abatement of a public nuisance constitutes an action in rem. This is not an action against the subject property itself to determine its fate. Rather, it is an action seeking injunctive relief against specific, natural persons to force those persons—and only those persons—to come into compliance with a local zoning ordinance. Ergo, plaintiff's claim is an action in personam subject to the statute of limitations.

Plaintiff next argues that if statutes of limitations apply to actions for the abatement of a public nuisance arising from the violation of a local zoning ordinance, this Court would have stated as much in *Jerome Twp v Melchi*, 184 Mich App 228; 457 NW2d 52 (1990). The fact that a court does not discuss a potentially relevant argument in a written opinion does not bear on the merit of the argument. As previously discussed, that a claim is barred by the statute of limitations is an affirmative defense that must be raised in a defendant's responsive pleading. MCR 2.111(F)(3)(a). It is entirely possible that the statute-of-limitations was simply not raised before the trial court in *Jerome Twp*, or that the issue was not pursued on appeal. In either situation, the statute-of-limitations defense—though it may have been meritorious or, at least, applicable—would not have been analyzed by this Court. Plaintiff

cannot prevail based on the fact that an argument was not raised in another case, especially when it is unclear whether such an argument had any bearing on its outcome.

Defendants also contend that the trial court improperly relied on *19675 Hasse*, 258 Mich App 438, to apply the doctrine of *quod nullum tempus occurrit regi* against the six-year period of limitations. As an initial note, the trial court did not appear to rely on this doctrine in any meaningful way when outlining its reasons for ruling against defendants. Regardless, *19675 Hasse* is the only published decision of any Michigan court to discuss this doctrine. It merely stands for the notion that the sovereign is exempt from the operation of statutes of limitations absent express statutory authority stating otherwise. *Id*. at 445-446. As discussed earlier, the Legislature enacted MCL 600.5813, which applies to claims by government plaintiffs seeking injunctive abatement of a public nuisance. See *Dep't of Environmental Quality*, 279 Mich App at 383. Accordingly, the government plaintiff in this case is no longer exempt from the statute of limitations under *quod nullum tempus occurrit regi*. See *19675 Hasse*, 258 Mich App at 445-446.

C. EFFECT ON THE MICHIGAN ZONING ENABLING ACT

Amicus curiae Michigan Townships Association argues that if defendants are allowed to continue to keep and raise hogs on the subject property because the applicable statute of limitations has barred plaintiff's complaint, it would effectively render null the government's power to regulate nonconforming uses of zoned land, MCL 125.3208, and its authority to abate violations of zoning ordinances as nuisances, MCL 125.3407. This logic is flawed. The preceding authori-

ties do not indicate that defendants may engage in further willful violations of plaintiff's zoning ordinances with impunity. They merely stand for the notion that if plaintiff is to file a cause of action against these—or any—defendants, it must do so within the prescribed period of limitations. While it may appear that plaintiff has a good claim against defendants for violating a local ordinance, the legislation of statutes of limitations represents "a public policy about the privilege to litigate." *Chase Securities Corp v Donaldson*, 325 US 304, 314; 65 S Ct 1137; 89 L Ed 1628 (1945). These statutes exist as a matter of necessity, pragmatism, and convenience. *Id*. "They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay." *Id*. Additionally, contrary to amicus curiae's contention, there is no provision in MCL 125.3208 that time-bars claims against any defendant. Any implication that the six-year period of limitations under MCL 600.5813 conflicts with a limitations period prescribed by MCL 125.3208 is therefore meritless.

We reverse the trial court's denial of defendants' motion for summary disposition and remand the case to allow defendants to move to amend their responsive pleading to include the statute of limitations in their affirmative defenses in accordance with MCR 2.118(C)(1). We do not retain jurisdiction.

SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ., concurred.

PICCIONE v GILLETTE

Docket No. 342826. Submitted January 8, 2019, at Grand Rapids. Decided January 17, 2019, at 9:05 a.m.

Mario Piccione, as next friend of his minor son Gavino Piccione, filed an action under Michigan's no-fault act, MCL 500.3101 *et seq*., in the Kent Circuit Court against Lyle Gillette and Plumber's Portable Toilet Service, alleging that Gavino suffered a serious impairment of body function as a result of a motor vehicle accident involving a vehicle driven by Gillette and owned by Plumber's. Defendants moved for summary disposition, arguing that Gavino's injury did not constitute a serious impairment of body function under MCL 500.3135(1) and (5) because the injury required minimal treatment and only minimally restricted Gavino's lifestyle for three to four months. The court, J. Joseph Rossi, J., granted summary disposition for defendants, and plaintiff appealed.

In an opinion by M. J. KELLY, J., and a concurring opinion by MARKEY, P.J., and SWARTZLE, J., the Court of Appeals *held*:

The trial court's order granting summary disposition had to be reversed and the case remanded for further proceedings.

Reversed and remanded.

M. J. KELLY, J., writing the lead opinion, stated that reversal and remand was required. Under MCL 500.3135(1), the owner or operator of a motor vehicle is subject to tort liability for the noneconomic losses of a plaintiff who has suffered death, serious impairment of body function, or permanent serious disfigurement. Under MCL 500.3135(5), serious impairment of body function requires, among other elements, that the injury have affected the plaintiff's general ability to lead his or her normal life. A person's life need only be affected, not destroyed, for an injury to constitute a serious impairment of body function. The trial court granted summary disposition on the basis of the temporary nature of the plaintiff's injuries, but Michigan's no-fault act does not require that an injury be permanent to constitute a serious impairment of body function. Because its order was based on an erroneous interpretation of the no-fault act, and because the facts surrounding the nature and extent of the plaintiff's injuries were in dispute, the trial court erred by granting summary disposition.

MARKEY, P.J., and SWARTZLE, J., concurring, agreed with M. J. KELLY, J., for reasons similar to those expressed by YOUNG, J., in his concurring opinion in *Neci v Steel*, 488 Mich 971 (2010).

West Michigan Injury Lawyers PLC (by *Matthew G. Swartz*) for plaintiff.

Straub, Seaman & Allen, PC (by *Kerr L. Moyer* and *Joseph R. Enslen*) for defendants.

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

M. J. KELLY, J. In this third-party automobile negligence claim, Gavino Piccione (by and through his next friend, plaintiff Mario Piccione) appeals as of right the trial court order granting summary disposition in favor of defendants Lyle A. Gillette and Plumber's Portable Toilet Service. We reverse the court's order and remand for further proceedings.

I. BASIC FACTS

This case arises out of a motor vehicle accident that occurred on December 5, 2016. It is undisputed that Gavino, who was three years old at the time, sustained injuries in the accident and was transported by ambulance to the hospital. Two days later, he returned because of pain in his left shoulder when he tried to lift his arm over his head. A CT scan showed that Gavino had an "[o]blique fracture of the mid diaphysis of the left clavicle." He was prescribed a sling, told to use ibuprofen and ice as needed for discomfort, and told to follow up with his primary care physician for a checkup in one week. Gavino's pediatrician later prescribed a clavicle strap. Gavino's parents testified regarding how Gavino's life differed after the injury, but they also

testified that after three or four months, he was physically recovered from his injury and was able to resume his normal life.

Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that Gavino's injury did not constitute a serious impairment of a body function because his injury required minimal treatment and only minimally restricted his lifestyle for a short period of time. At oral argument, defendants clarified that they were specifically arguing that plaintiff could not demonstrate that Gavino's injury affected his general ability to lead his normal life because after a three- or four-month period, he was no longer physically restricted.

The trial court noted that "certainly when Gavino was in the sling he missed, you know, three to four-months of his normal life," adding that it is "obvious that a sling is going to slow down anyone that wears it for four-months." Yet, the court concluded that because Gavino had returned to "his probably very happy normal life as a four-year old," his injury did not rise to the level of a serious impairment of a body function. The court concluded that Gavino's normal life was "running around and playing and focusing on his toys and other kids that might be around," and given that he was able to resume almost entirely his preaccident normal life, the injury did not constitute a serious impairment of body function. Accordingly, the court granted summary disposition in favor of defendants.

This appeal followed.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Plaintiff argues that the trial court erred by granting summary disposition. We review de novo a trial court's

decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Under MCR 2.116(C)(10), summary disposition is appropriate "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018) (quotation marks and citation omitted). When considering such a motion, the reviewing court must review the "pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Patrick*, 322 Mich App at 605 (quotation marks and citation omitted). A court may not "make findings of fact; *if the evidence before it is conflicting*, summary disposition is improper." *Id*. at 605-606 (quotation marks and citation omitted).

B. ANALYSIS

Under Michigan's no-fault act, MCL 500.3101 *et seq*., tort liability is limited. *McCormick v Carrier*, 487 Mich 180, 189; 795 NW2d 517 (2010). However, "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1).

Serious impairment of a body function "means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(5).

To prove a serious impairment of a body function, a plaintiff must establish:

> (1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects the person's general ability to lead his or her normal life (influences some of the plaintiff's capacity to live in his or her normal manner of living). [*McCormick*, 487 Mich at 215.]

In making that determination, "there is no bright-line rule or checklist to follow[.]" *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011). Instead, "[w]hether someone has suffered a serious impairment is 'inherently fact- and circumstance-specific and [the analysis] must be conducted on a case-by-case basis.' " *Id.*, quoting *McCormick*, 487 Mich at 215 (brackets in original).

In this case, the only question is whether the fracture to Gavino's clavicle affected his general ability to lead his normal life. In *Patrick*, this Court reiterated that an "impairment to an important body function affects a person's general ability to lead a normal life if it has 'an influence on some of the person's capacity to live in his or her normal manner of living.' " *Patrick*, 322 Mich App at 607, quoting *McCormick*, 487 Mich at 202. Because no two people are alike, "the extent to which a person's general ability to live his or her normal life is affected by an impairment is undoubtedly related to what the person's normal manner of living is . . . ." *McCormick*, 487 Mich at 202-203. In

other words, the inquiry is subjective. *Patrick*, 322 Mich App at 607. To show that the impaired person's ability to lead his or her normal life has been affected, we compare the person's life before and after the injury. *Nelson v Dubose*, 291 Mich App 496, 499; 806 NW2d 333 (2011). Important to making this comparison is the fact that "the statute merely requires that a person's general ability to lead his or her normal life has been *affected*, not destroyed." *McCormick*, 487 Mich at 202. Therefore, "courts should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether, although a person is able to lead his or her pre-incident normal life, the person's general ability to do so was nonetheless affected." *Id*. Additionally, "the statute only requires that some of the person's *ability* to live in his or her normal manner of living has been affected, not that some of the person's normal manner of living has itself been affected." *Id*. Lastly, as our Supreme Court explained in *McCormick*, "[w]hile the Legislature required that a 'serious disfigurement' be 'permanent,' it did not impose the same restriction on a 'serious impairment of body function.' " *Id*. at 203, quoting MCL 500.3135(1). Thus, there is no "express temporal requirement as to how long an impairment must last in order to have an effect on the person's general ability to live his or her normal life." *McCormick*, 487 Mich at 203 (quotation marks omitted).

In this case, Gavino was a three-year-old child at the time he suffered the impairment. His parents testified that as a result of the impairment, he was unable to go to school for approximately two weeks and that when he did return to school he was unable to use the play equipment. Additionally, they testified that after the accident they had to help him go to the bathroom,

including by carrying him to the bathroom. His father testified that before the accident, Gavino could dress himself, but afterward he could not. There was also testimony that Gavino needed help going up and down stairs because his balance was negatively affected by his impairment. Further, at times, his ability to sleep without pain was also compromised; his father testified that on occasion Gavino would wake up complaining about shoulder pain. The record also reflects that before the accident Gavino liked to color, but after the accident he did not want to do so. And before the accident he rode his bicycle, played soccer, and played with his scooter in the basement, but after he was injured he was unable to do so. His mother testified that, generally, Gavino was "cautious" about physical activities after the accident. Viewing these facts in the light most favorable to plaintiff, a jury could conclude that Gavino's general ability to lead his normal life was affected by the impairment.

Still, defendants direct our attention to facts in the record showing that Gavino's impairment did not last the entire three- to four-month period he was in a sling/clavicle strap, and there is also evidence that Gavino's inability to go to school was only limited for two weeks. Although certainly relevant, that evidence suggests that there is a factual conflict with regard to the nature and extent of his injury. In such cases, summary disposition is not appropriate. See *Nelson*, 291 Mich App at 499 ("The question whether there is a serious impairment of body function is a question of law if there is no factual dispute about the injuries, or if any factual dispute is immaterial to the question.").

Defendants also contend that Gavino's impairment eventually healed and he was able to return, unaffected, to his normal life. The trial court agreed,

finding that although there was evidence that Gavino's general ability to lead his normal life was affected by the fracture to his clavicle, he was presently unaffected by the impairment, so he could not satisfy the third prong of the *McCormick* test. Yet, a person's ability to lead his or her general life does not have to be destroyed in order to constitute a threshold injury; it only needs to have been affected, and here the evidence allows for an inference that Gavino's general ability to lead his normal life was affected even though it was not completely destroyed. See *McCormick*, 487 Mich at 202. Moreover, a serious impairment of body function—unlike a permanent serious disfigurement—does not have to be permanent, so the fact that the impairment to Gavino's important body function only lasted three or four months has no bearing on the question at hand. See *id*. Therefore, given that there is a genuine issue of material fact with regard to the third prong of the *McCormick* test, and given that the trial court erred in its application of the statute, summary disposition was not appropriate.

Reversed and remanded for further proceedings. Plaintiff may tax costs as the prevailing party. MCR 7.219(A). We do not retain jurisdiction.

MARKEY, P.J., and SWARTZLE, J. (*concurring*). We concur with the lead opinion. This case is factually analogous to *Neci v Steel*, 488 Mich 971 (2010). For reasons similar to those set out by Justice YOUNG in his concurring opinion in *Neci*, we conclude that binding precedent compels reversal and remand in this case.

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

PEOPLE v ANTHONY

Docket No. 337793. Submitted March 13, 2018, at Detroit. Decided January 22, 2019, at 9:00 a.m.

Robert E. Anthony was charged in the Wayne Circuit Court, Paul J. Cusick, J., with unlawful possession of a firearm by a convicted felon and possession of ammunition by a convicted felon, MCL 750.224f; carrying a concealed weapon in a vehicle, MCL 750.227(2); and possession of a firearm during the commission of a felony, MCL 750.227b, after police officers searched defendant's car. Officer Richard Billingslea, the sole witness at the evidentiary hearing, testified that while on routine patrol with his partner, the officers had observed defendant's pickup truck "impeding" traffic because it was parked "in the middle of the street." The officers decided to investigate the alleged traffic offense and drove to where defendant's car was parked, pulling up alongside it. Billingslea testified that one of the truck's windows was partially down and that he could smell a strong odor of burned marijuana emanating from the truck. The officers exited the police vehicle and approached defendant's truck on foot, ordered defendant out of the truck, and searched the truck, finding a firearm and residue of smoked marijuana inside. A videorecording of the event was introduced at the hearing and was made part of the record. After watching the video, the court determined that Billingslea's testimony that the truck was parked "in the middle of the street" was false and was "pretext" for the stop. The court determined that because no reasonable suspicion existed for the officers to approach the vehicle, a violation of the Fourth Amendment had occurred and the evidence had to be suppressed. The court dismissed the case without prejudice. The prosecution appealed.

The Court of Appeals *held*:

1. A trial court's findings of fact in a suppression hearing are reviewed for clear error, and a trial court's ultimate decision on a motion to suppress is reviewed de novo. The Fourth Amendment of both the federal and state Constitutions provides that the people have a right to be secure against unreasonable searches and seizures. However, law enforcement officers do not violate the

Fourth Amendment by merely approaching an individual on the street or in another public place and asking if he or she is willing to answer questions. If there is no seizure, then no constitutional rights have been infringed. A seizure occurs for Fourth Amendment purposes when police conduct communicates to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. A court considers the totality of the circumstances when determining whether a seizure occurred. For a search to be constitutionally permissible, police generally require a warrant; however, no warrant is required to search an automobile when the police have probable cause to believe that the vehicle contains contraband. In this case, the trial court's analysis that officers violated the Fourth Amendment hinged entirely on what it called "pretext" and was premised on the trial court's finding that no traffic offense had occurred. It was undisputed that officers seized defendant; the issue was when and how that seizure occurred. There were three possible points at which the seizure occurred: when the officers drove down the street to investigate the truck; when the officers arrived in the police car at the location where the truck was parked; or when the officers got out of the police car and removed defendant from his car. None of those three alternatives supported a finding that the officers' actions were anything other than the consensual approach of officers to an individual in a public place. First, the officers' decision to drive down the street did not implicate the Fourth Amendment. The trial court found that the truck was not in violation of traffic laws, leaving as the only logical alternative that it was lawfully and properly parked. If so, then there was no Fourth Amendment implication at all for officers to approach the car and to observe whatever could be discerned from outside it. By merely driving down the street, for whatever reason, the officers did not effectuate a seizure. Therefore, evidence gathered by officers in that situation was admissible. Second, the officers' action in pulling up alongside the truck did not, without more, constitute a "traffic stop" because the truck was parked and thus not moving. Therefore, no seizure occurred simply by virtue of driving up and parking alongside the truck. By characterizing the encounter as a "traffic stop," the trial court necessarily precluded the possibility that the encounter was consensual, because every traffic stop constitutes a "seizure." Accordingly, that analytical approach was erroneous as a matter of law. Moreover, the parking of the police car alongside defendant's truck did not constitute a seizure of the truck because it did not block the truck's path of egress. A photograph taken from the videorecording of this event showed that defendant could have

driven forward or in reverse to leave, with little maneuvering. Therefore, the manner in which the police car was parked did not constitute a seizure. Third and finally, because the encounter was consensual until Billingslea smelled marijuana and decided to search the vehicle on that basis, the officers had probable cause to search the vehicle before any seizure under the Fourth Amendment occurred. The officers were not required to obtain a search warrant under the motor vehicle exception to the search warrant requirement. Accordingly, because there was probable cause to search the truck, the items seized in the search were properly found and there was no basis for suppressing the results of the search at defendant's trial. The officers' subjective reasons for stopping alongside the truck were irrelevant because regardless of intent, the police could do so in the manner in which they did without offending the Fourth Amendment.

2. The Court of Appeals is bound to follow decisions by the Supreme Court except when those decisions have clearly been overruled or superseded. The Court of Appeals is not authorized to anticipatorily ignore a Supreme Court decision when it determines that the foundations of that decision have been undermined. In this case, defendant argued that the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq*., changed the law and thereby undermined the basis for the Supreme Court's holding in *Kazmierczak*, 461 Mich 411 (2000), which allows the odor of marijuana alone to establish probable cause if smelled by a qualified person. However, defendant's argument was not persuasive because MCL 333.26427(b)(3)(B) of the MMMA provides that its limited license for qualifying patients to use marijuana does not extend to activity occurring in "any public place." A person using marijuana in a parked car in a parking lot open to the public is in a "public place" within the meaning of the MMMA. Because the MMMA does not apply to a parked vehicle in a parking lot open to the public, it likewise could not apply to a parked vehicle on a public street. Accordingly, because defendant used marijuana in his truck on a public street, the protections of the MMMA did not apply to defendant and *Kazmierczak* applied with full force to supply probable cause for the officers to search his vehicle.

Trial court order suppressing the firearm reversed; trial court order of dismissal vacated; case remanded for further proceedings.

GLEICHER, P.J., dissenting, would have affirmed the trial court's decision that the seizure was pretextual and that the search was unconstitutional because the record supported the trial court's findings. The trial court's analytical approach was not erroneous as a matter of law; rather, it was consistent with governing Fourth

Amendment principles. The officers had neither reasonable suspicion nor probable cause to seize and then search defendant or his truck. Billingslea repeatedly testified that he detained the truck because it was impeding traffic; however, the trial court did not believe that the truck was illegally parked and found that Billingslea restrained defendant's freedom of movement without reasonable suspicion that a traffic offense had been committed. Read fairly and in context, the trial court ruled that the marijuana smell entered into the equation only after the seizure had been accomplished. Moreover, the majority ignored the trial court's factual finding that defendant's vehicle was seized when the officers pulled alongside to investigate the "impeding" violation. The trial court did not clearly or legally err by finding that the officers' conduct would have communicated to a reasonable person that defendant was constrained from leaving at that point. Billingslea specifically and repeatedly asserted that defendant was illegally parked, that the officers were stopping in order to investigate the violation, and that defendant was not free to leave when the officers approached the vehicle. The trial court's determination was not clearly erroneous because the videorecording of the event and Billingslea's testimony backed it up. The majority's version of what happened could not be reconciled with the testimony or the factual determinations actually made by the trial court. Moreover, the majority ignored the trial court's explicit finding that Billingslea, who was the only witness to testify at the hearing, was not a credible witness. Finally, the majority improperly assumed the role of fact-finder. Had the trial court omitted a necessary finding concerning exactly when Billingslea smelled the marijuana—before or after seizing defendant and the truck—a remand would be required. Fact-finding is solely the province of the trial court, and Billingslea's credibility was at the center of this case. Therefore, rather than crediting one version of Billingslea's testimony, Judge GLEICHER would have remanded the case to allow the trial court to perform its fact-finding function on that matter.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Jon P. Wojtala*, Assistant Prosecuting Attorney, for the people.

Lawrence S. Katz for defendant.

Before: GLEICHER, P.J., and BOONSTRA and TUKEL, JJ.

TUKEL, J. Defendant was charged with unlawful possession of a firearm by a convicted felon and possession of ammunition by a convicted felon, MCL 750.224f. He also was charged with carrying a concealed weapon in a vehicle, MCL 750.227(2), and with possession of a firearm during the commission of a felony, MCL 750.227b. The charges arose from a search of defendant's car on August 30, 2016, during which police found a .45 caliber semiautomatic pistol on the floorboard of the car.

Following an evidentiary hearing, the trial court suppressed the firearm, finding that the justification for the search was pretextual, and then dismissed the case without prejudice. The prosecution appeals as of right. Because we find that the search complied fully with the Fourth Amendment and was supported by probable cause, we reverse the order suppressing the gun, vacate the order dismissing the case, and remand for further proceedings.

I. BASIC FACTS

On August 30, 2016, Detroit Police Department Officer Richard Billingslea was on routine patrol with his partner, Hakim Patterson, in a fully marked scout car. The officers were in the area of 6304 Bluehill Street in Detroit when Officer Billingslea observed defendant's parked Ford F-150 pickup truck farther up the street, facing in the direction from which the officers' car was coming. Officer Billingslea, who was the sole witness at the evidentiary hearing, testified that the F-150 was "parked in the middle of the street," by which, he testified, he meant that it was impeding traffic. The officers decided to investigate the alleged

traffic offense and drove to where defendant's car was parked, pulling up alongside it. As they drove down the street to where the F-150 was located, they did not have their overhead lights activated. As discussed later, the trial court expressly found that the officer's testimony that the F-150 was "parked in the middle of the street" was false, finding instead that "[i]t looks to me like it's on the other side of the street. It certainly is not in the video in the middle of the street. The police car is in the middle of the street."[1]

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[1] The trial court's factual findings are sparse. Where the trial court did not make express findings as to a particular point that is pertinent to our decision, we rely on testimony by the officer and refer to those aspects of his testimony that are corroborated by video evidence. In doing so, we are not making our own factual findings but are merely describing the circumstances as reflected in the undisputed evidentiary record.

We accept the trial court's findings because they are not clearly erroneous. See MCR 2.613(C). Our analysis that the trial court erred by suppressing the gun turns on issues of law, not fact. Nevertheless, the dissent suggests that the trial court found Billingslea not credible with respect to his smelling marijuana. The trial court made no such finding, and in fact its ruling suggests the opposite. As discussed later, Officer Billingslea testified that he smelled marijuana coming from defendant's car—which the trial court recounted with no qualifications ("He approached the vehicle, and there was a strong odor of marijuana.")—and found ashes and residue inside the car, although he did not seize that evidence relating to marijuana use. In reviewing the officer's testimony regarding the ashes, the trial court stated, "That's not really relevant for the purposes of this case." Yet, because it was the marijuana that the prosecution contended provided probable cause for the search, and no marijuana had been seized or offered as evidence at the evidentiary hearing, it is difficult to imagine that if the trial court did not believe Officer Billingslea's testimony regarding marijuana use, it would have failed to express its disbelief, even if it also believed that the evidence was not otherwise "really relevant for the purposes of this case." The dissent erroneously attributes the trial court's statement about the evidence being "not really relevant for the purposes of this case" to the marijuana *smell*. Instead, it is clear that the court only was referring to the *ashes and residue* that reportedly were found after a search of defendant's truck.

The officer testified that on that August evening, before dark, the windows of the police car were down; the F-150 had tinted windows, and at least one of them was partially down. The officer's testimony regarding the windows of both vehicles is confirmed by the videotape, which is discussed later in this opinion. As the police car approached the area where defendant's car was parked, Officer Billingslea, while still inside the police car, immediately smelled a strong odor of burned marijuana. Officer Billingslea determined that he had probable cause to investigate possible offenses involving marijuana, and he and his partner then got out of the police car. They approached defendant's pickup on foot, determined that defendant was in the driver's seat, ordered him to roll his window down the rest of the way, and ordered him out of the truck. The officers handcuffed defendant and placed him in the backseat of the police car. A second individual who had been in the back seat of the F-150 also was ordered out of the truck, was investigated, and ultimately was released without charges. After the two men had been removed, the officers searched and found residue of smoked marijuana in a cupholder inside the truck. The police then continued their search, during which Officer Billingslea found the .45 caliber pistol. After arriving at the police station, the officer also wrote defendant a ticket for impeding traffic.

At some point after the occupants of the F-150 had been removed from it and the search had taken place, unidentified citizens began videotaping the events with their phones. One of the videotapes was introduced at the hearing and made part of the record.[2]

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[2] The prosecution also attempted to admit the dashcam video from the officers' vehicle, but both the prosecution and defense counsel agreed

The trial court's ruling as to the legality of the search was as follows:

> Now, the officer says specifically -- he said on a number of occasions the vehicle was in the middle of the street and he implicated [sic] that it was impeding traffic, and that would have to be the basis for the detention that occurred.
>
> The officer did indicate that there was residue of marijuana in the cup holder. He said it was 100 percent marijuana. That's not really relevant for the purposes of this case. What I -- when I look at the video in People's Exhibit 1, that vehicle is not in the middle of the street. It looks to me like it's on the other side of the street. It certainly is not in the video in the middle of the street. The police car is in the middle of the street.
>
> Based on what this Court's already indicated, that would be pretext for the stop if the car would be in the middle of the street. In the video in People's Exhibit 1, it does not indicate that in the Court's opinion. So as a result, I believe that there was a violation of the Fourth Amendment pursuant to [*Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968)]. *There was not a reasonable suspicion to approach the vehicle* and the evidence garnered from that vehicle will be suppressed. [Emphasis added.]

II. STANDARD OF REVIEW

"We review for clear error a trial court's findings of fact in a suppression hearing, but we review de novo its ultimate decision on a motion to suppress." *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). "A finding of fact is clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake has been made." *People v Everard*, 225 Mich App 455, 458; 571 NW2d 536 (1997).

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that this particular video did not have "evidentiary value" for purposes of the hearing, so the trial court declined to admit it.

"We review de novo whether the Fourth Amendment was violated and whether an exclusionary rule applies." *Hyde*, 285 Mich App at 436.

III. ANALYSIS

A. FOURTH AMENDMENT PRINCIPLES

"The Fourth Amendment [of the United States Constitution] provides that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .' " *Terry*, 392 US at 8. The Michigan Constitution provides the same protection as the United States Constitution. *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999).

> "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. . . . Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification." [*People v Sinistaj*, 184 Mich App 191, 196; 457 NW2d 36 (1990), quoting *Florida v Royer*, 460 US 491, 497; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion by WHITE, J.).]

The reason that officers may freely approach citizens on the street without implicating the Fourth Amendment is because "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' " *United States v Mendenhall*, 446 US 544, 553-554; 100 S Ct

1870; 64 L Ed 2d 497 (1980), quoting *United States v Martinez-Fuerte*, 428 US 543, 554; 96 S Ct 3074; 49 L Ed 2d 1116 (1976). "If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed." *Royer*, 460 US at 498 (opinion by WHITE, J.).

In general, a "seizure" occurs for Fourth Amendment purposes when a reasonable person would have believed that he or she was not free to leave. *Mendenhall*, 446 US at 554. However, there are circumstances in which a person will not wish to leave, not because of actions by police but for the individual's own reasons; such a person is not "seized." See *Florida v Bostick*, 501 US 429, 436; 111 S Ct 2382; 115 L Ed 2d 389 (1991). Thus, a more precise definition of a seizure is "whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus." *Id*. at 439-440; see also *People v Shabaz*, 424 Mich 42, 66; 378 NW2d 451 (1985). "[W]hat constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs," *Michigan v Chesternut*, 486 US 567, 573; 108 S Ct 1975; 100 L Ed 2d 565 (1988), which is why in determining whether a seizure occurred, a court must consider the totality of the circumstances.

Further, while the Michigan and United States Constitutions' protections against unreasonable searches and seizures generally require a warrant to search, see *Horton v California*, 496 US 128, 133 n 4; 110 S Ct 2301; 110 L Ed 2d 112 (1990); *In re Forfeiture*

of $176,598, 443 Mich 261, 265; 505 NW2d 201 (1993), several exceptions exist such that a warrant is not always required. Relevant for the circumstances here, no warrant is required to search an automobile when the police have probable cause to believe that the vehicle contains contraband. *California v Acevedo*, 500 US 565, 569; 111 S Ct 1982; 114 L Ed 2d 619 (1991).

B. APPLICATION

In the present case, the trial court's analysis that officers violated the Fourth Amendment hinged entirely on what it called "pretext" and was premised on the trial court's finding that no traffic offense had occurred. The crucial constitutional issue in this case, as it is undisputed that the officers *at some point* seized defendant, is when and how that seizure occurred. There are three possible points for that: when the officers drove down the street to investigate the F-150; when the officers arrived in the police car at the location where the F-150 was parked; or when the officers got out of the police car and removed defendant from his car. The trial court never explicitly reached a conclusion on this critical point, referring only to "pretext" for "the stop" and stating that "[t]here was not a reasonable suspicion to approach the vehicle."[3] Because we review the decision whether to suppress evidence de novo, we consider each of the possibilities. None of the three alternatives would support a finding that the officers' actions were anything other than the consensual approach of officers to an individual in a public place.

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[3] The trial court stated that "[t]here was not a reasonable suspicion to approach the vehicle and the evidence garnered from that vehicle will be suppressed," but as noted, officers approached the F-150 in two phases: first by driving to it, and then on foot from where they parked the police car. Either of those actions could be deemed an "approach."

1. DRIVING DOWN THE STREET TO WHERE THE F-150 WAS LOCATED

The officers' decision to drive down the street did not implicate the Fourth Amendment. An officer does not need any level of justification to approach an individual on a public street. Instead, reasonable suspicion is only needed to *detain* an individual for an investigative stop.[4] *Terry*, 392 US at 30-31; *People v Oliver*, 464 Mich 184, 193; 627 NW2d 297 (2001).

The trial court found that the F-150 was not in violation of traffic laws, leaving as the only logical alternative that it was lawfully and properly parked. If so, then there was no Fourth Amendment implication at all for officers to approach the car and to observe whatever could be discerned from outside it. See *People v Barbee*, 325 Mich App 1, 10; 923 NW2d 601 (2018) (stating that because the defendant did not have a reasonable expectation of privacy in a parked vehicle on a public street, "the Fourth Amendment was not implicated and there was no search when the police pulled alongside the parked car and observed defendant's movements therein"). The officers needed no justification whatsoever to drive on a public street to where defendant's car was parked, and their doing so did not implicate the Fourth Amendment. *Id*. Because the officers needed no justification whatsoever to drive down the street, their individual motivation for going there can be of no constitutional significance. Simply put, by merely driving down the street, for whatever reason, the officers could not effectuate a seizure.[5] As

[4] An investigative stop occurs when the police briefly detain an individual, on the basis of reasonable suspicion of criminal activity, to confirm or dispel that suspicion. *People v Barbarich*, 291 Mich App 468, 473; 807 NW2d 56 (2011).

[5] This is so even if one assumes that by using the word "pretext," the trial court was implying that Officer Billingslea's testimony was know-

the Supreme Court has held, evidence gathered by officers in such a situation is admissible absent their performing an action that constitutes a seizure. See *Royer*, 460 US at 497-498 (opinion by WHITE, J.) (stating that absent a seizure, evidence gathered by approaching an individual on the street may be "offer[ed] in evidence in a criminal prosecution" without offending the Fourth Amendment).

2. PARKING OF THE POLICE CAR IN PROXIMITY TO THE F-150

Because no seizure occurred when the officers drove down the street toward defendant's F-150, this means defendant was seized sometime afterward. See *People v Jenkins*, 472 Mich 26, 33-34; 691 NW2d 759 (2005) (noting that Fourth Amendment implications do not arise until "the earliest [point] at which a reasonable person might have concluded that he was not free to

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ingly false in some respects. Certainly, nothing in our opinion should be taken as countenancing perjurious testimony by a law enforcement officer, and we note that any such witness in any case is subject to a range of criminal and administrative actions. However, a criminal defendant does not have the right to the suppression of physical evidence under the exclusionary rule if the testimony in question does not ultimately bear on the constitutional issue of whether the officer's actions were unreasonable. See *Davis v United States*, 564 US 229, 231; 131 S Ct 2419; 180 L Ed 2d 285 (2011) (stating that the exclusionary rule bars the introduction of evidence that was "obtained by way of a Fourth Amendment violation"); *People v Hawkins*, 468 Mich 488, 498-499; 668 NW2d 602 (2003) ("The exclusionary rule . . . generally bars the introduction into evidence of materials seized and observations made during an unconstitutional search."). Indeed, our Supreme Court has stated:

> "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." [*People v Arterberry*, 431 Mich 381, 384; 429 NW2d 574 (1988), quoting *Scott v United States*, 436 US 128, 138; 98 S Ct 1717; 56 L Ed 2d 168 (1978).]

leave”). One such possibility is when the officers’ vehicle arrived and parked at the location where the F-150 was parked.

Pulling up alongside the F-150 did not, without more, constitute a “traffic stop” because the F-150 was parked and thus not moving. “A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road.” *Brendlin v California*, 551 US 249, 257; 127 S Ct 2400; 168 L Ed 2d 132 (2007); see also *id*. at 263 (stating that the defendant “was seized from the moment [the] car came to a halt on the side of the road”). Therefore, no seizure occurred simply by virtue of driving up and parking alongside the F-150.

Moreover, if the F-150 was lawfully parked, as the trial court found and as the dissent emphasizes, defendant’s expectation of privacy inside it, parked on a public street, was no greater than if he had been driving on a public street, as pedestrians and police officers could approach and look into his vehicle. *Barbee*, 325 Mich App at 10; see also *United States v Gooch*, 499 F3d 596, 603 (CA 6, 2007). “One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.” *United States v Knotts*, 460 US 276, 281-282; 103 S Ct 1081; 75 L Ed 2d 55 (1983) (quotation marks and citation omitted). “There is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers.” *Texas v Brown*,

460 US 730, 740; 103 S Ct 1535; 75 L Ed 2d 502 (1983) (citation omitted); see also *Knotts*, 460 US at 281 ("A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.").

Whatever else he did or did not do, Officer Billingslea did not interfere with or impede any ongoing driving by defendant; at most, his actions could have affected future driving by defendant, necessitating a different analysis. Simply referring to what took place as a "traffic stop," as if Officer Billingslea had pulled defendant over, is incorrect. The error is significant because "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of this provision." *Whren v United States*, 517 US 806, 809-810; 116 S Ct 1769; 135 L Ed 2d 89 (1996). Thus, by characterizing the encounter as a "traffic stop," the trial court and the dissent necessarily preclude the possibility that the encounter was consensual, as every traffic stop constitutes a "seizure." That analytical approach is erroneous as a matter of law. See, e.g., *Bostick*, 501 US at 439-440.[6]

That brings us to the manner in which the officers parked their car. It is undisputed, and the trial court found, that the police car was parked alongside the F-150. Again, however, the parking of the police car in such a manner does not constitute a seizure of the F-150 unless it blocked the F-150's path of egress. *United States v Carr*, 674 F3d 570, 572-573 (CA 6, 2012).

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[6] Focusing on this error is not "nit-pick[ing] the trial court's opinion," as the dissent would have it, because that focus, although brief in its opinion, led directly to the trial court using an erroneous legal standard.

The dissent nonetheless claims that, although the officers pulled alongside defendant's vehicle, defendant objectively would have understood that he was not free to leave based solely on the proximity (within five feet of and parallel to defendant's F-150) of the police car. Again, the dissent's position is incorrect as a matter of law. The standard for determining whether an individual would have felt free to leave under such circumstances, as the United States Sixth Circuit Court of Appeals has repeatedly held, is whether the person's parked car was "blocked" in:

> As a threshold matter, the stop was consensual at the point where the officers parked their unmarked police car near Carr's Tahoe. A "consensual encounter" occurs when "a reasonable person would feel free to terminate the encounter." *United States v. Drayton*, 536 U.S. 194, 201, 122 S.Ct 2105, 153 L.Ed.2d 242 (2002). This court has analyzed similar civilian-police encounters by determining whether the police vehicle *blocked* the defendant's egress. *See, e.g.*, *United States v. See*, 574 F.3d 309, 313 (6th Cir.2009); *United States v. Gross*, 662 F.3d 393, 399-400 (6th Cir.2011). As the concurrence in *See* suggested, *unless there is other coercive behavior, a police officer can initiate a consensual encounter by parking his police vehicle in a manner that allows the defendant to leave*. *See*, 574 F.3d at 315 (Gilman, J., concurring). Here, the police officers parked their unmarked, black Ford Explorer at an angle in front of Carr's Tahoe. The angle of the police vehicle gave Carr sufficient room to drive either forward or backward out of the carwash bay. Although pulling forward would have required "some maneuvering" for Carr to get around the Explorer, "there was enough room that [Carr] could have just merely steered around [the Explorer]." As one of the officers testified, Carr had "ample room to steer and maneuver around our vehicle." Because the police vehicle allowed Carr to exit the carwash, albeit with "some maneuvering," Carr's car was not blocked for Fourth Amendment purposes. *To conclude otherwise would be an endorsement of a "simplistic, bright-*

> *line rule" that a detention occurs "any time the police approach a vehicle and park in a way that allows the driver to merely drive straight ahead in order to leave."* [*Carr*, 674 F3d at 572-573 (emphasis added).]

In fact, *Carr* held that notwithstanding the manner in which the police car was parked *and* even though, unlike in this case, the officers had activated their overhead lights, the encounter nevertheless was consensual for Fourth Amendment purposes: "The officers' use of blue lights was not sufficiently coercive to transform this encounter into a compulsory stop." *Id*. at 573. Instead, only if officers completely block a person's parked vehicle with a police vehicle is the person seized. *Id*. Thus, the dissent errs as a matter of law by relying on the manner in which the police car was parked as somehow conveying the message that defendant was not free to pull away, despite the fact that defendant's vehicle was not blocked in. The photograph on which the dissent relies, taken from the video, shows that defendant could have driven forward or in reverse to leave, with little maneuvering, let alone "with 'some maneuvering.' " *Id*. Defendant's vehicle was not blocked in; the police car was parked beside it. Thus, the manner in which the police car was parked did not constitute a seizure.

The dissent appears to endorse the "simplistic, bright-line rule" that *Carr* rejected and further errs by eliding objective evidence—whether defendant's car was blocked in—with what officers subjectively might have thought or done under different circumstances, which is an improper consideration.

Finally, whether defendant had broken any laws in parking his truck—regardless of Billingslea's subjective thoughts—is irrelevant in light of the fact that the

encounter never lost its consensual character.[7] The issue whether defendant had broken traffic laws, or at least whether there was reasonable suspicion to believe that he had done so, might be relevant if necessary to justify a *Terry* stop; but the actions here never rose to that level. Because we accept the trial court's finding that defendant was lawfully parked, as that finding was not clearly erroneous, the analysis here demonstrates that the encounter never lost its consensual character and thus was lawful.

3. APPROACH ON FOOT AND REMOVAL OF DEFENDANT FROM THE F-150

The undisputed evidence reflects that upon arriving in their police car in the vicinity of defendant's F-150, Officer Billingslea immediately smelled the strong odor of marijuana and at that point decided to search the vehicle on that basis.[8] Given our conclusion that the encounter was consensual up to that point, the officers

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[7] While basing its analysis on those facts, the dissent nevertheless stresses subjective factors, which properly have no role here, stating that "Billingslea specifically and repeatedly asserted that Anthony was illegally parked and that the officers were stopping in order to investigate the violation." However, Fourth Amendment principles are judged on the basis of objective evidence, not an officer's subjective motivations. See *Whren*, 517 US at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); see also *California v Hodari D*, 499 US 621, 627-628; 111 S Ct 1547; 113 L Ed 2d 690 (1991) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.") (quotation marks and citation omitted); *id*. at 628 ("*Mendenhall* establishes that the test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.").

[8] The trial court did not question that the officers smelled marijuana. See note 1 of this opinion.

thus had probable cause to search defendant's vehicle *before* any seizure under the Fourth Amendment occurred.[9] See *People v Kazmierczak*, 461 Mich 411, 421; 605 NW2d 667 (2000) (stating that odor of contraband, standing alone, can be sufficient to justify a finding of probable cause if smelled by a qualified person). Additionally, as previously stated, because of the motor vehicle exception to the search warrant requirement, the officer was not required to obtain a search warrant. *Id*. at 422. Accordingly, we hold that because there was probable cause to search the F-150, the items seized in the search were properly found and there is no basis for suppressing the results of the search at defendant's trial.

The Michigan Supreme Court's opinion in *People v Freeman*, 413 Mich 492; 320 NW2d 878 (1982), further illustrates why suppression was erroneous in the present case. In *Freeman*, in the middle of the night, two officers saw a parked car with its engine running. *Id*. at 493. The officers "approached the car and asked the defendant, who was alone and occupied the driver's seat, to leave the vehicle and to produce identification and a registration." *Id*. at 493-494. By ordering him out of the car, the officers thus "detained him," which constituted "a seizure which led to discovery of the pistol." *Id*. at 493. The search in *Freeman* thus was unlawful because the officers seized the defendant in an investigative stop *before* having reasonable suspi-

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[9] According to the undisputed testimony, Officer Billingslea smelled marijuana from inside the police car, and he then ordered defendant out of the F-150. Ordering defendant out of the F-150 constituted the seizure, but at that point, as the officer correctly noted, probable cause to search the vehicle existed. That analysis would not change even if the officer had not smelled the marijuana until he approached on foot because, as noted, merely approaching a parked vehicle does not constitute a seizure.

cion that criminal activity was afoot. *Id*. at 496. Here, as in *Freeman*, the officers approached the car and ordered defendant out; of course, just as in *Freeman*, ordering defendant out constituted a seizure. The difference between this case and *Freeman* is that prior to ordering defendant out of his car, officers here had probable cause to search (and reasonable suspicion to detain) based on the smell of marijuana; in *Freeman*, there was no reasonable suspicion of any criminal activity, and the discovery of evidence justifying a search took place *after* the defendant had been seized, necessarily invalidating any search based on that evidence.

In sum, the trial court erroneously disregarded the fact that the officers' approach to defendant did not implicate the Fourth Amendment, and it erroneously disregarded the basis that Officer Billingslea gave for conducting the actual search of the vehicle, which was the evidence of the smell of marijuana emanating from defendant's vehicle. The officers' subjective reasons for stopping alongside the F-150 are irrelevant because regardless of intent, the police could do so in the manner in which they did without offending the Fourth Amendment. Further, while at that lawful vantage point, the officer smelled marijuana—all before any seizure occurred—which gave the officers probable cause to search the F-150 without a warrant. Consequently, the trial court erred when it excluded the evidence seized during the search on the basis that the officers needed to have a valid justification to stop next to defendant's vehicle on a public street, and we reverse the trial court's order suppressing the evidence seized.

C. THE MICHIGAN MEDICAL MARIHUANA ACT

Defendant advances an alternate reason to affirm the trial court. Defendant claims that in light of the passage of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., the smell of burned marijuana cannot justify criminal investigation. Defendant maintains that the more recent passage of the MMMA calls into question the Michigan Supreme Court's prior holding in *Kazmierczak*, which allows the smell of marijuana alone to establish probable cause. See *Kazmierczak*, 461 Mich at 421.

Before we decide the merits of defendant's argument, we must first determine whether we even have authority, were we to agree with defendant, to rule in the manner he asks, i.e., to not follow a decision of our Supreme Court. It is assuredly the case that "[t]he Court of Appeals is bound to follow decisions by [the Supreme] Court except where those decisions have clearly been overruled or superseded and is not authorized to anticipatorily ignore [Supreme Court] decisions where it determines that the foundations of a Supreme Court decision have been undermined." *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016) (emphasis omitted). It is clear that in the context in which our Supreme Court used the word "superseded," it was including legislative actions that change the state of the law. See *id*. at 192 ("The Court of Appeals erred, however, by disregarding precedent from this Court that has not been clearly overruled by the Court or *superseded by subsequent legislation* or constitutional amendment.") (emphasis added). Thus, we do have authority to consider not adhering to *Kazmierczak*'s holding if the MMMA changed the law and thereby undermined the basis for *Kazmierczak*. Defendant argues that the MMMA did

change what constitutes a marijuana offense, or at least what constitutes a defense to a charge involving marijuana, such that *Kazmierczak*, which was based on earlier law defining marijuana offenses, consequently is no longer fully applicable.

However, defendant's argument is not persuasive because the MMMA provides that its limited license for qualifying patients to use marijuana does not extend to activity occurring in "any public place." MCL 333.26427(b)(3)(B). This Court has held that a person using marijuana in a parked car in a parking lot open to the public[10] is in a "public place" within the meaning of the MMMA. *People v Carlton*, 313 Mich App 339, 347-349; 880 NW2d 803 (2015). Accordingly, if the MMMA does not apply to a parked vehicle in a parking lot open to the public, then it likewise could not apply to a parked vehicle on a public street. Thus, because defendant used marijuana in his truck on a public street, the protections of the MMMA did not apply to defendant and *Kazmierczak* applied with full force to supply probable cause for the officers to search his vehicle.[11]

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[10] The Court noted that even private property qualifies as long as it was open for use by the general public.

[11] We need not determine to what extent the passage of the MMMA might have undercut *Kazmierczak*'s holding with respect to any nonpublic places and offer no opinion on that issue. For similar reasons, the recently enacted Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq*., would not apply to defendant. See MCL 333.27954(1). Moreover, "[u]sually in appellate review, we look to the law as it was at the time of the judicial or administrative action from which appeal is taken," *Ann Arbor Bank & Trust Co v Comm'r Fin Institutions Bureau*, 85 Mich App 131, 136; 270 NW2d 725 (1978), and statutory or constitutional amendments are presumed to apply prospectively only absent clear language in them to the contrary, *Brewer v A D Transp Express, Inc*, 486 Mich 50, 55-56; 782 NW2d 475 (2010). Thus, we also need not determine and therefore express no opinion on whether

We reverse the order suppressing the firearm. And because the order of dismissal was predicated on the suppression of the evidence, we vacate the order of dismissal and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

BOONSTRA, J., concurred with TUKEL, J.

GLEICHER, P.J. (*dissenting*). The trial court held an evidentiary hearing to determine whether the police constitutionally searched defendant Robert Anthony's vehicle. One witness testified: Detroit Police Officer Richard Billingslea. Billingslea insisted that he initiated a *Terry* stop of Anthony's parked pickup truck because it was impeding traffic. A videorecording made by Anthony's neighbor showed a legally parked truck. The trial court believed what it saw in the recording, not Billingslea. It ruled the seizure pretextual and the search unconstitutional.

The majority holds that the police actually seized the truck based on Billingslea's back-up explanation that he smelled "burned marijuana" emanating from the vehicle. This was just a routine, "consensual" street encounter, the majority maintains, until the marijuana odor transformed it into a police investigation. I respectfully disagree for three reasons.

First, Billingslea repeatedly reaffirmed that he detained the truck because it was impeding traffic. The trial court did not believe that the truck was illegally parked and found that Billingslea restrained Anthony's freedom of movement without reasonable suspicion that a traffic offense had been committed. Read

the MRTMA has retroactive application or to what extent the passage of the MRTMA might have undercut *Kazmierczak*'s holding with respect to any nonpublic places.

fairly and in context, the trial court ruled that the marijuana smell entered into the equation only after the seizure had been accomplished. The court suppressed evidence of the weapon found in the vehicle because the officers had neither reasonable suspicion nor probable cause to seize and then search Anthony or his truck.

Second, the majority ignores the trial court's factual finding that Anthony's vehicle was seized when the officers pulled alongside to investigate the "impeding" violation. The court did not clearly or legally err by finding that the officers' conduct would have communicated to a reasonable person that he was constrained from leaving at that point. The majority holds that Anthony was seized at a different time. But the majority's version of what happened cannot be reconciled with the testimony or the factual determinations actually made by the trial court.

Third, if the trial court omitted a necessary finding concerning exactly when Billingslea smelled the marijuana—before or after seizing Anthony and the truck—a remand is required. Fact-finding is solely the province of the trial court, and Billingslea's credibility is at the center of this case. Rather than crediting one version of Billingslea's testimony, if the trial court omitted a necessary finding, a remand is required.

I

Billingslea testified at a suppression hearing that he initiated a criminal investigation when he spotted a Ford pickup truck parked "in the middle" of a residential street, "impeding vehicular traffic." That the allegedly improper parking triggered the seizure is beyond dispute:

The Court: If I may ask you a couple questions. How was it impeding traffic? When you say it was impeding traffic, where was—

The Witness: It was in the middle of the street.

The Court: Okay. And then it was investigated. While he was being investigated, he was taken out of the vehicle. Did the vehicle right [sic] in the middle of the street?

The Witness: Yes.

The Court: Until he was arrested?

The Witness: Yes.

The Court: Then the vehicle was impounded?

The Witness: That's correct.

The Court: And that was the initial reason you approached the vehicle, correct?

The Witness: Yes.

The Court: *At that point, was it your opinion that it was a ticket-able offense and the Defendant at that time was not free to leave?*

The Witness: *Yes*. [Emphasis added.]

Billingslea repeated his claim that the Ford was illegally parked at least six times during the hearing, even after viewing the video evidence refuting it:

Q. And what . . . was [sic] your duties that day that brought you to that particular area?

A. I was just [on] routine patrol. I observed a vehicle impeding vehicular traffic.

* * *

Q. And when you say you see [sic] a vehicle, what did you say it was doing?

A. Impeding vehicular traffic in the middle of the street.

* * *

Q. When you approached the vehicle itself, what was the first reason you were investigating that blue F150?

A. For the civil infraction, being in the street, the middle of the street.

Q. And that progressed into—is that how it progressed into the smelling of the marijuana?

A. Right, further investigation.

* * *

Q. But you're sure the vehicle was in the middle of the street?

A. Yes.

* * *

The Court: Sir, is it your testimony that the car was in the middle of the street?

The Witness: Yes.

* * *

Q. And it is your testimony, that's your definition of parked in the middle of the street, that picture we're seeing?

A. Yes, sir.

Billingslea described that he pulled up close to the truck ("[n]o more than five feet") and admitted that he effectuated a "traffic stop" due to the "impeding." Billingslea further admitted that at that point, Anthony "was not free to leave." Billingslea agreed that he told Anthony, "I'm stopping you for impeding traffic[.]"

These facts and admissions answer the legal question at the center of this case: when were Anthony and the vehicle seized? Billingslea testified and the trial court found that the seizure occurred when Billingslea

initiated his investigation of the phantom traffic violation. The majority conjures a trio of "possible points" for the seizure, spilling copious ink discussing each. The majority's ruminations are both unnecessary and disingenuous. We have the answer. Billingslea testified at least twice that he launched his *Terry* stop and approached the vehicle because it was impeding traffic. And it should go without saying that all such stops must be justified at their inception. If they aren't, their fruits are inadmissible. See *People v Shabaz*, 424 Mich 42, 65; 378 NW2d 451 (1985) ("Because the seizure of the defendant was unreasonable, in not meeting the requirements of a *Terry* stop, any evidence derived from that seizure must be suppressed as fruit of the poisonous tree.").

The trial court summarized that the purpose of the hearing was to determine whether the stop was pretextual. It found that it was, ruling that the police conducted an "investigative stop" despite that the truck was parked legally and not in the "middle of the street." Here is a photo from the recording:

Remember, the truck is the vehicle that Billingslea consistently maintained was parked "in the middle of the street," despite that another car is parked across the street and the police car evidently had no difficulty

navigating between them. The police car had dashcam footage available that might have clarified this picture, but it was not introduced based on the prosecutor's representation that it possessed no "evidentiary value."

Billingslea recounted that after encountering the truck blocking the street, his partner pulled their police car right next to the truck to further investigate this "civil infraction." The cars faced in opposite directions, as the photo shows. Billingslea offered conflicting versions of what happened next. He averred that he smelled the "burnt odor of marijuana" emanating from a "cracked" window of the pickup after seizing the vehicle and approaching it. He alternatively claimed that he smelled the marijuana from his seat in the patrol car, which was separated from the pickup by the body of his partner seated on the driver's side.

The majority characterizes Billingslea's testimony regarding the marijuana smell as "undisputed" and insists that it has made no factual findings but "merely describ[ed] the circumstances as reflected in the undisputed evidentiary record." Billingslea was the only witness who testified at the hearing, and in one sense his testimony was "undisputed." But the majority ignores the trial court's explicit finding that Billingslea was not a credible witness. The trial court disbelieved Billingslea's testimony and rendered factual findings that directly contradicted it.

The pickup truck's location was not Billingslea's only truth challenge. Billingslea changed the details of his story whenever he needed to. He testified at the preliminary examination that he was 10 feet from the pickup when he smelled the marijuana; at the suppression hearing, he revised that to five feet. When this discrepancy was pointed out to him, he opted for five

feet. He testified that he approached the truck only because of the parking violation and not because of any smell, but he altered that testimony, too, when prodded by the prosecutor. Confronted with video showing that the truck's tinted driver's window was fully closed, Billingslea offered that he "could have possibly rolled the windows up" when the vehicle was towed. And counsel highlighted that although Billingslea allegedly smelled "burning" marijuana, there was no marijuana burning in the truck—just some ashes "and like a roach" in a cup holder that the police never bothered to test.

In short, Billingslea's testimony was all over the place.

Judge Cusick's bench opinion encapsulates a core finding that Billingslea had not accurately described what happened at the scene and that the police lacked reasonable suspicion to seize the truck. I quote it in full because it reflects that the court carefully reviewed the evidence and, contrary to the aspersions cast by the majority, knew exactly what it was doing when it suppressed the fruit of the search:

> Okay. Thank you. The Court heard testimony today in the evidentiary hearing in this case, in People v. Robert Elijah Anthony. The Court heard from one witness, Richard Billingslea, an officer in the Detroit Police Department. He indicated that on August 30th of 2016, in the area of 6304 Bluehill in the city of Detroit, he saw a vehicle that was in the middle of the street impeding traffic. He indicated this was a ticket-able offense.
>
> He said that there was a window that was cracked. The windows were tinted. He approached the vehicle, and there was a strong odor of marijuana. He ordered the Defendant out of the vehicle and placed—the Defendant was arrested after a search of the vehicle showed that there was a firearm under the driver's seat floorboard of the car.

There was also a passenger in the backseat of the car. The Defendant was in the front driver's seat of the car.

The statement is an interest in the prevention and detection of a crime. In securing that interest, a police officer may, in order to investigate circumstances which give him or her reason to suspect that a criminal activity might be afloat [sic] forcibly detain an individual for a brief period of time and may direct questions to that individual, although answers may not be compelled.

The level of cause for an investigative encounter is a reasonable suspicion. That's [*People v Tooks*, 403 Mich 568; 271 NW2d 503 (1978)], and this is based on the orginal case, [*Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968)] as well as [*People v Parisi*, 393 Mich 31; 222 NW2d 757 (1974)].

For an investigative stop, there needs to be reasonable suspicion that criminal activity is afoot. A detention for Fourth Amendment purposes occurs when an individual's freedom to walk away has been restrained by a governmental official. In determining whether a force-able stop occurred, a Court must gauge the surrounding circumstances using the following measure: A seizure occurred if a reasonable person innocent of any crime would have believed that he or she was not free to leave. That's [*Terry*] along with [*Brower v Inyo Co*, 489 US 593; 109 S Ct 1378; 103 L Ed 2d 628 (1989)]. A seizure occurs if a reasonable person innocent of any crime would have believed that he or she was not guilty.

The Fourth Amendment is not implicated when an officer simply approaches an individual and directs questions to that person; that is a traditional police/citizen encounter.

The Court has heard the testimony of the officer. He indicated the cause of the stop. The cause of the intention [sic] was impeding traffic. At that time, it is clear that based on what the officer testified to that the—he believed that it is a ticket-able offense for impeding traffic, and at that point, a reasonable person would not feel free to leave

> at that point. And so Fourth Amendment activity, the Court finds did occur when the officer approached the vehicle.
>
> Now, the officer says specifically—he said on a number of occasions the vehicle was in the middle of the street and he implicated that it was impeding traffic, and that would have to be the basis for the detention that occurred.
>
> The officer did indicate that there was residue of marijuana in the cup holder. He said it was 100 percent marijuana. That's not really relevant for the purposes of this case. What I—when I look at the video in People's Exhibit 1, that vehicle is not in the middle of the street. It looks to me like it's on the other side of the street. It certainly is not in the video in the middle of the street. The police car is in the middle of the street.
>
> Based on what this Court's already indicated, that would be pretext for the stop if the car would be in the middle of the street. In the video in People's Exhibit 1, it does not indicate that in the Court's opinion. So as a result, I believe that there was a violation of the Fourth Amendment pursuant to [*Terry*]. There was not a reasonable suspicion to approach the vehicle and the evidence garnered from that vehicle will be suppressed.

This brief opinion incorporates: (1) a full and fair summary of Billingslea's testimony; (2) an accurate summary of the central rule of *Terry*: "The level of cause for an investigative encounter is a reasonable suspicion"; (3) an accurate summary of the law regarding seizures of a person; (4) an accurate observation that "[t]he Fourth Amendment is not implicated when an officer simply approaches an individual and directs questions to that person; that is a traditional police/citizen encounter"; (5) a factual finding that the "cause" of the stop was "impeding traffic"; (6) a mixed finding of fact and law that Anthony was seized when the officer approached the vehicle; (7) a legal conclusion that the presence of marijuana was not "relevant";

(8) a factual finding that Anthony's car "certainly is not in the video in the middle of the street"; and (9) a legal conclusion that the officers had no reasonable suspicion justifying an approach (and seizure) of the vehicle. Contrary to the majority's opinion, the trial court's analytical approach was not "erroneous as a matter of law," but consistent with governing Fourth Amendment principles.

The majority nitpicks the trial court's opinion, finding minor faults in the court's articulation of the governing law. For example, the majority criticizes the trial court's statement that the marijuana smell was "not really relevant for the purposes of this case." The reason the smell was not relevant to the trial court was because the court—as the finder of fact—determined that the reason for the stop was pretextual, and not the smell of marijuana. The majority labors to overcome this finding, insisting that if the truck was legally parked, as the trial court found, then the officers approached it consensually, just as they could approach any properly parked vehicle on a public street. Therefore, the majority reasons, it must have been the marijuana smell that triggered the stop.

But as an appellate court we do not find facts. We do not invent them, either. When it comes to facts, our role is limited to reviewing whether the trial court's view was supported by sufficient credible evidence. When a key fact is missing, we send the case back to the trial court for supplementation. Under no circumstances do we postulate varying scenarios so that we can decide which we like best.

Here, the trial court found Billingslea to be a liar. The trial court—not the majority—saw Billingslea testify. The trial court—not the majority—observed Billingslea's demeanor and the way in which he an-

swered questions. It was the trial court's prerogative to decide whether Billingslea told the truth, not the majority's.

Perhaps the best example of appellate court fact-finding is the majority's holding that Billingslea smelled marijuana *before* getting out of his vehicle, which the majority interprets as probable cause to search Anthony's vehicle regardless of Billingslea's claim that the truck was impeding traffic. The trial court did not make the marijuana finding manufactured by the majority. The trial judge was not required to believe any of Billingslea's inconsistent claims about when he smelled the marijuana, and the court's skeptical questioning of Billingslea supports that he did not. Moreover, even though the trial court did not *explicitly* state that the marijuana smell was a fact acquired after the stop and seizure that could not be used to justify it, it is reasonable to assume that the court so found. It is unreasonable to assume, as does the majority, that the trial court found that the smell preceded the stop, given the trial court's ultimate finding that the stop was pretextual.[1]

The majority's version of events—a legally parked car and two officers who just happened by before smelling marijuana—is even more unreasonable, as it cannot be reconciled with Billingslea's testimony. Rather than accepting that the seizure occurred because of a parking violation as testified to by the only witness and found by the court, the majority reinvents

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[1] The Texas Court of Criminal Appeals provides helpful guidance for cases such as this: "[W]e afford almost total deference to a trial judge's determination of the historical facts that the record supports, especially when his implicit factfinding is based on an evaluation of credibility and demeanor." *State v Garcia-Cantu*, 253 SW3d 236, 241 (Tex Crim App, 2008).

what happened. In the majority's reconstructed replay, this was just a "consensual approach of officers to an individual in a public place."[2] The totality of the circumstances supports the trial court's factual findings to the contrary, as does the law.

II

We have a rule that applies in situations like this: MCR 2.613(C). The rule provides that a trial court's factual findings "may not be set aside unless clearly erroneous" and that "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." A fair reading of the judge's bench opinion demonstrates that the judge did not believe Billingslea's asserted reasons for the stop and excluded the evidence on that ground.

Sitting as fact-finders, the majority first expresses doubts about Billingslea's concession and the trial court's conclusion that the truck was unlawfully seized when Billingslea stopped next to it and began his approach, determining instead that Billingslea's smell-

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[2] Puzzlingly, the majority draws support for its "consensual approach" theory from *People v Barbee*, 325 Mich App 1; 923 NW2d 601 (2018), asserting that *Barbee* instructs that Anthony "did not have a reasonable expectation of privacy in a parked vehicle on a public street" because "there was no Fourth Amendment implication at all for officers to approach the car and to observe whatever could be discerned from outside it." In *Barbee*, the police looked into a parked car; before doing so, they had not seized the vehicle. Indeed, this Court held that there was not even a *search* of Barbee's car. We explained, "[T]he Fourth Amendment was not implicated and there was no search when the police pulled alongside the parked car and observed defendant's movements therein." *Barbee*, 325 Mich App at 10. Here, the seizure of the vehicle preceded its search, and the truck had tinted windows, preventing the officers from seeing inside. How or why *Barbee* advances the majority's argument remains opaque.

ing of marijuana justified the search. The majority ignores that the trial court specifically found that the "cause" of the stop was "impeding traffic," that Billingslea admitted to initiating a stop to investigate "impeding," and that a reasonable person would not have felt free to leave at that point. Read in a common-sense rather than a hypertechnical manner, the trial court expressed its disbelief of Billingslea's reasons for seizing Anthony's truck. It termed those explanations "pretext." A pretext is a phony or made-up reason. In applying that term to Billingslea's acts, the trial court found that the officer had no legally justifiable ground for the search, including a scent of marijuana detected before the detention.

I recapitulate here the critical parts of the court's opinion because the majority utterly ignores these findings:

> The Court has heard the testimony of the officer. He indicated the cause of the stop. The cause of the intention [sic] was impeding traffic. At that time, it is clear that based on what the officer testified to that the—he believed that it is a ticket-able offense for impeding traffic, and at that point, a reasonable person would not feel free to leave at that point. And so Fourth Amendment activity, the Court finds did occur when the officer approached the vehicle.

Contrary to this clear articulation of a factual finding, the majority determines that the officers were "merely driving down the street" and did not seize Anthony until after they approached on foot and smelled the marijuana. Perhaps the majority has advanced a reasonable view of the evidence. But when there are two permissible views, and one belongs to the trial court, the trial court's interpretation wins. See *People v Anderson*, 501 Mich 175, 189-190; 912 NW2d 503 (2018).

The majority overreaches again by holding that the trial court failed to "explicitly reach[] a conclusion" about "when" Anthony was seized, permitting the majority to fill in the blanks. The trial court was not as clueless as the majority claims. Here is the trial court's ruling recapped:

> The Fourth Amendment is not implicated when an officer simply approaches an individual and directs questions to that person; that is a traditional police/citizen encounter.
>
> The Court has heard the testimony of the officer. He indicated the cause of the stop. The cause of the intention [sic] was impeding traffic. At that time, it is clear that based on what the officer testified to that the—he believed that it is a ticket-able offense for impeding traffic, and at that point, a reasonable person would not feel free to leave at that point. And so Fourth Amendment activity, the Court finds did occur when the officer approached the vehicle.

The trial court found that Anthony was not free to leave when the officer initiated the stop. At that point, Anthony was "seized" and "Fourth Amendment activity" commenced. The majority ignores these inconvenient—but found—facts, substituting its own version on de novo review.[3]

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[3] At bottom, the majority's "consensual approach" theory conflates facts with law. The majority's error derives from its confusion about the standard of review. Although the majority correctly recites the standard initially, it predicates its legal analysis of when a seizure occurred on a false premise: that "[b]ecause we review the decision whether to suppress evidence de novo, we consider each of the [factual] possibilities." We review de novo the trial court's ultimate ruling as to whether the Fourth Amendment was violated. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). But the *facts* underlying that ruling are subject to review for clear error, and the facts have already been found. Here, the officer testified that he initiated a stop based on "impeding," not marijuana, and the court so found. Billingslea testified that at the point he approached the vehicle to ticket it for impeding traffic, Anthony was not

The rules that govern our review in this case should be well known. We review for clear error the trial court's underlying factual findings, giving deference to the trial court's resolution. *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993) (opinion by GRIFFIN, J.). In reviewing the lower court's factual findings, we may not "overstep our review function" and "substitute our judgment for that of the trial court and make independent findings." *Frohriep*, 247 Mich App at 702. As highlighted in *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999):

> Resolution of facts about which there is conflicting testimony is a decision to be made initially by the trial court. The trial judge's resolution of a factual issue is entitled to deference. This is particularly true where a factual issue involves the credibility of the witnesses whose testimony is in conflict. [Quotation marks and citation omitted.]

Our Supreme Court has said it over and over again: as appellate judges, we are not empowered to make factual findings. See, e.g., *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997) ("An appellate court will defer to the trial court's resolution of factual issues, especially where it involves the credibility of witnesses."); *People v Reese*, 491 Mich 127, 159; 815 NW2d 85 (2012) ("[I]t is difficult to escape the conclusion that the [Court of Appeals] panel simply substituted its interpretation of the testimony for the trial court's. This is inappropriate when the standard of review requires an appellate court to accept the trial

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free to leave. Until the majority embarked on its mission to rewrite the facts, no one ever challenged that Anthony's freedom of movement was restrained at the outset of the "investigation."

court's findings of fact unless they are *clearly erroneous*."). Citing favorably a quotation from *Zenith Radio Corp v Hazeltine Research, Inc*, 395 US 100, 123; 89 S Ct 1562; 23 L Ed 2d 129 (1969), the Michigan Supreme Court observed:

> "In applying the clearly erroneous standard . . . appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence." [*Beason v Beason*, 435 Mich 791, 803 n 5; 460 NW2d 207 (1990).]

I find no factual gaps in the trial court's opinion. But if one or more exists concerning marijuana (whether Billingslea actually smelled it and, if so, at what point in the encounter), we should ask the trial court to resolve any unresolved fact questions instead of making our own findings. The majority's approach is unprecedented and dangerous. It opens the door to casting aside the thoughtful and well-reasoned opinions of jurists who heard and saw witness testimony in favor of this Court's opinion about the facts the trial judge *should* have found. It allows for fact-finding on a cold record, without the benefit of an opportunity to evaluate credibility. The majority's ruling reflects the opposite of deference and contravenes the rules regulating our review.

III

The majority compounds its improper usurpation of the trial court's role by likening the officers' conduct to a simple visit made in passing on a public street. Of course officers may "freely approach citizens on the

street without implicating the Fourth Amendment," as the majority points out. But that is a far cry from what happened here.

The officers were neither on foot nor simply passing by when the events at issue occurred. Rather, Billingslea and his partner deliberately pulled up closely alongside Anthony's pickup truck, impeding the truck's ability to move. First, there was a garbage can behind the truck, as the video depicts. Second, Billingslea testified that the officers were there to investigate an infraction. Third, Billingslea admitted that Anthony was not free to leave when he approached the vehicle. It borders on ludicrous to conclude that Anthony could have driven away when the police vehicle pulled up next to him and two uniformed officers got out. Given that Billingslea had decided that the truck was illegally blocking traffic, that he had exited his marked car to investigate the "impeding," and that the officers had positioned the car as shown in the video, what is the likelihood that the officers would have permitted Anthony to simply turn on his ignition, wave goodbye, and leave the scene?

This was not a routine encounter. The police parked as they did because they intended to prevent Anthony from moving the truck. They effectuated this goal by positioning their cruiser in a manner that made Anthony's escape from the situation perilous at best, and impossible at worst. This was a "seizure" from the moment the police stopped right next to the pickup. And that is exactly what the trial court found.

The majority's sweeping pronouncement that there was no traffic stop because "the F-150 was parked and thus not moving" also merits a response. First, Billingslea himself used the term "stop," stating, "The cause for the stop was initially [impeding traffic]." The

United States Court of Appeals for the Third Circuit has cogently refuted the majority's analysis:

> The District Court expressed incredulity at the idea that a police officer can conduct a "traffic stop" of a parked car. However, the court seems to conflate a "stop" for Fourth Amendment purposes with a stop in common parlance. But this concern is of no moment, as even the common, non-legal definition of the verb "to stop" describes the transitive verb as, *inter alia*, "to hinder or prevent the passage of[,]" "to get in the way of[,]" "to close up or block off[,]" and the intransitive verb as, *inter alia*, "to cease to move on[.]" *See Stop*, Merriam Webster, https://www.merriam-webster.com/dictionary/stop.
>
> Here, the officers requested that the engine be turned off, thereby preventing it from re-entering the roadway. Simply because officers did not pursue the vehicle or pull the vehicle over does not render that vehicle incapable of being "stopped," in common parlance, or from seizure for Fourth Amendment purposes. [*United States v Hester*, 910 F3d 78, 85 n 4 (CA 3, 2018).]

And so has the Sixth Circuit. See *United States v Carr*, 674 F3d 570, 572 (CA 6, 2012) ("Carr's encounter with the officers occurred in three stages: the parking of the police vehicle, the officers' approach on foot, and Carr's exit from his vehicle."). As does the Ninth. See *United States v Choudhry*, 461 F3d 1097, 1098 (CA 9, 2006) ("[W]e conclude that the parking violation provided the officers with reasonable suspicion to conduct an investigatory stop of the vehicle.").[4]

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[4] The majority's invocation of *Carr* for the proposition that Anthony's car was not truly seized is both perplexing and misguided. In *Carr*, three officers in an unmarked police car parked 12 feet away from the defendant's vehicle, which was parked in a stall of a coin-operated car wash. The Court found it particularly significant that the defendant could have driven forward past the police car or backed out of the car-wash bay, quoting an officer's statement that there was " 'ample room to steer and maneuver around our vehicle.' " *Carr*, 674 F3d at 572.

"[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v Bostick*, 501 US 429, 439; 111 S Ct 2382; 115 L Ed 2d 389 (1991). This is, inherently, a fact-based test. *Michigan v Chesternut*, 486 US 567, 573; 108 S Ct 1975; 100 L Ed 2d 565 (1988). "Stopping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of the Fourth Amendment, even if the purpose of the stop is limited and the resulting detention is brief." *People v Williams*, 236 Mich App 610, 612 n 1; 601 NW2d 138 (1999), citing *Delaware v Prouse*, 440 US 648, 653; 99 S Ct 1391; 59 L Ed 2d 660 (1979). "A seizure which triggers the protections of the Fourth Amendment occurs when, under the circumstances, a reasonable person would have believed that he was not free to leave." *People v Sinistaj*, 184 Mich App 191, 195; 457 NW2d 36 (1990), citing *United States v Mendenhall*, 446 US 544; 100 S Ct 1870; 64 L Ed 2d 497 (1980), and *People v Shabaz*, 424 Mich 42, 66; 378 NW2d 451 (1985).

There is no record indication that the officers were "merely approaching an individual" in public to "ask[] him if he [was] willing to answer some questions . . . ." *Florida v Royer*, 460 US 491, 497; 103 S Ct 1319; 75 L

Two other Sixth Circuit cases supply more apt comparisons: *United States v See*, 574 F3d 309, 312-313 (CA 6, 2009), and *United States v Gross*, 662 F3d 393, 399-400 (CA 6, 2011). In both cases, the police positioned their vehicles so as to curtail a suspect's ability to drive away. The trial court here found that in light of the circumstances, when Billingslea initiated the stop "a reasonable person would not feel free to leave at that point."

Ed 2d 229 (1983). While the officers had a right to be there, as the majority contends, this was an investigatory stop to pursue Anthony's "crime": parking his truck in a manner that impeded traffic. Billingslea never claimed that he intended only to ask Anthony to move his truck or to explain his activities. Rather, Billingslea specifically and repeatedly asserted that Anthony was illegally parked and that the officers were stopping in order to investigate the violation. The trial court found that they initiated a seizure, as "a reasonable person would not feel free to leave at that point." That determination was not clearly erroneous; the video and Billingslea's testimony back it up. The majority's effort to paint a different picture defies the law and the evidence.

Whether a police officer has reasonable suspicion to detain a citizen depends on the totality of circumstances, "the whole picture." *United States v Cortez*, 449 US 411, 417; 101 S Ct 690; 66 L Ed 2d 621 (1981). The trial court saw part of "the whole picture" on the video and heard Billingslea describe the rest. After viewing images that directly contradicted the testimony, the trial court decided that it simply did not buy what Billingslea was selling and ruled the stop a pretext. I would hold that the record supports the trial court's findings and ruling and therefore would affirm.

ADR CONSULTANTS, LLC v MICHIGAN LAND BANK FAST TRACK AUTHORITY

Docket No. 341903. Submitted January 15, 2019, at Lansing. Decided January 24, 2019, at 9:00 a.m.

ADR Consultants, LLC, brought an action in the Court of Claims against the Michigan Land Bank Fast Track Authority (MLB) and the Michigan State Housing Development Authority (MSHDA), alleging a number of claims pertaining to work that ADR had performed for MLB's blight demolition program. The parties disputed whether ADR was to receive additional compensation for managing the program. ADR filed its notice of intention to file a claim on July 31, 2015, and filed its original complaint on August 14, 2015. In its original complaint, ADR alleged that it had agreed to manage the program "at no cost in recognition of both its own desire to benefit the City as well as in recognition of, according to MLB, the funding mechanism that the [program] would generate for MLB." Defendants moved for summary disposition, and the Court of Claims, STEPHEN L. BORRELLO, J., issued an opinion and order granting defendants' motion in part and denying it in part. On July 10, 2017, ADR moved to amend the complaint to add a claim for $420,000 in future inspection services. In its amended complaint, ADR alleged that it had agreed to manage the program "in consideration of Defendants' agreement that ADR would continue to manage the blight demolition program, including additional demolitions within the [program] to which ADR was to be paid for its in-process inspections." Defendants argued that ADR was disingenuously seeking to add the $420,000 claim because ADR had admitted in its original complaint that it had agreed to provide the services at no cost. In both complaints, ADR alleged that the MLB advised ADR that the program would pay the MLB $100 per home, that there were approximately 4,200 such homes, and that this sum would therefore total $420,000. ADR further alleged that this $100 per property totaling $420,000 was intended to pay for subsequent blight removal efforts managed by ADR, but ADR never received the $420,000. On July 25, 2017, the Court of Claims granted ADR's motion to amend the complaint, and on August 7, 2017, ADR filed its amended complaint that added the $420,000 claim. Defendants moved for summary disposition, argu-

ing that the $420,000 claim was untimely under MCL 600.6431(1) because it had not been filed within one year of the claim's accrual. Before the Court of Claims ruled on this motion, defendants brought a second motion for summary disposition, arguing that the testimony of the executive director of the MLB demonstrated that ADR had known about the $420,000 claim since 2013. The Court of Claims concluded that the notice requirement in MCL 600.6431(1) did not bar ADR's amended breach-of-contract claim and therefore issued an opinion and order denying both motions. Defendants appealed.

The Court of Appeals *held*:

MCL 600.6431(1) provides that no claim may be maintained against the state unless the claimant, within one year after such claim has accrued, files in the office of the clerk of the Court of Claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths. A plaintiff must adhere to the conditions precedent in MCL 600.6431(1) to successfully expose state agencies to liability, and the failure to strictly comply warrants dismissal of the claim. Under MCR 2.118(D), an amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. In this case, the issue turned on whether a claim raised in an amended complaint after the one-year limitations period had elapsed may nonetheless comply with MCL 600.6431(1) because the amended claim related back to an original complaint properly filed within the one-year limitations period. ADR's initial complaint complied with MCL 600.6431(1): the complaint was signed and verified, informed defendants of the claims against them, and was timely filed. Thus, there was a valid complaint that could be amended under MCR 2.118. Furthermore, the complaint could be amended to add the breach-of-contract claim for the $420,000 because the amended complaint arose out of the contractual arrangement between ADR and defendants; specifically, the claim arose from the contract calling for ADR to provide blight removal services on behalf of the MLB. Accordingly, the Court of Claims did not err by allowing ADR to amend the complaint and by denying defendants' motions for summary disposition.

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Eric M. Jamison*, *Kyla L. Barranco*, and *Adam R. de Bear*, Assistant Attorneys General, for the Michigan Land Bank Fast Track Authority and the Michigan State Housing Development Authority.

Sugameli Attorneys & Counselors, PLC (by *J. Paul Sugameli*) for ADR Consultants, LLC.

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

CAMERON, P.J. In this contract dispute, defendants, the Michigan Land Bank Fast Track Authority (MLB) and the Michigan State Housing Development Authority (MSHDA), appeal the Court of Claims' November 29, 2017 opinion and order denying defendants' motion for summary disposition under MCR 2.116(C)(7). Two years after the initial complaint was filed in the Court of Claims, plaintiff, ADR Consultants, LLC (ADR), filed an amended complaint adding a breach-of-contract claim for $420,000. The Court of Claims concluded that ADR's amended claim did not violate the one-year notice requirement for claims filed in the Court of Claims as set forth in MCL 600.6431(1). Because the statutory language in MCL 600.6431(1) allows ADR's amended claim to relate back to the original complaint, we affirm.

I. BACKGROUND

On August 29, 2012, ADR and the MLB entered into a contract wherein ADR would provide inspection demolition services in connection with the city of Detroit's Hardest Hit Blight Program (the Program). The MLB was tasked with "blight elimination" within the city of Detroit and across Michigan, which included

demolition work. Additionally, the MLB was to manage and dispose "of public property in a coordinated manner to foster the development of that property." The MLB contracted with ADR to act as an MLB contractor for this blight elimination. ADR's role was to "assist the MLB and the Department of Technology, Management and Budget . . . in organizational, procurement, and management tasks . . . ." ADR would "provide technical assistance and project management services to the MLB" and help the MLB manage the demolition of various sites. However, other contractors or subcontractors would conduct the actual demolition work.

After giving 90 days' notice, the MLB could terminate the contract for convenience "if the State determine[d] that a termination [was] in the State's best interest." Upon termination for convenience, however, the MLB was required to "pay [ADR] all charges due for Deliverable(s) provided before the date of termination and, if applicable, as a separate item of payment, for work-in-progress, based on a percentage of completion determined by the State." Deliverables were included in those services performed by ADR. In other words, if the MLB terminated for convenience, it would be required to make all outstanding payments to ADR for the work it had provided up until termination.

After the contract was signed, the MLB requested that ADR perform additional services outside the contract's scope, including new demolition project management and "in-process demolition inspections." The parties disputed whether these additional services were to be paid at a rate of $55 per hour, and this term was never written into the contract. However, the Executive Director at the MLB claimed that the

parties verbally agreed to this price. ADR began work on these out-of-scope services on September 11, 2012.

In 2013, MSHDA tasked the Detroit Land Bank Authority (DLBA) with oversight of the Program. In November 2013, the DLBA and the MLB signed an intergovernmental agreement (IGA) in which the MLB agreed to provide project management assistance to the DLBA for carrying out the Program. The DLBA agreed to pay the MLB $100 for each property subject to its demolition project management services. To accomplish its duties under the IGA, the MLB hired ADR as project manager to help administer the Program. The DLBA would notify the MLB and request that ADR perform services, i.e., inspection work and blight certifications. The MLB would then notify ADR of the DLBA's request and engage ADR's services.

By September 2014, the MLB was allegedly $50,000 behind in its payments to ADR for both "management of blight program pursuant to the Contract, and . . . the in-process hourly rate demolition inspections." ADR claimed that it had not been paid for these services since January 2014. Additionally, by December 2014, ADR allegedly had not been paid for the Program inspections it had performed. James Wright of the DLBA allegedly informed ADR that the DLBA was experiencing financial issues and that ADR could not be paid until February 2015. However, on January 30, 2015, the DLBA allegedly informed ADR that the DLBA would not pay ADR. Moreover, the MLB reportedly refused to pay for the Program inspections. ADR halted its Program inspections on February 9, 2015, but continued to manage the Program. On April 15, 2015, ADR received a notice of termination for convenience and a stop-work order from the MLB. This terminated the original contract between ADR and the MLB.

The parties dispute whether ADR was to receive additional compensation for managing the Program. In its original complaint, ADR alleged that it had agreed to manage the Program "at no cost in recognition of both its own desire to benefit the City as well as in recognition of, according to MLB, the funding mechanism that the [Program] would generate for MLB." However, in its amended complaint, ADR alleged that it had agreed to manage the Program "in consideration of Defendants' agreement that ADR would continue to manage the blight demolition program, including additional demolitions within the [Program] . . . to which ADR was to be paid for its in-process inspections." In both complaints, however, ADR alleged that the MLB advised ADR that the Program would pay the MLB $100 for each home, that there were approximately 4,200 such homes, and that this sum would therefore total $420,000. ADR further alleged that this $100 per property totaling $420,000 was intended to pay for subsequent blight removal efforts managed by ADR, but ADR never received the $420,000. In other words, in exchange for its work in the Program, ADR expected to receive future demolition work within the blight elimination program for which it would be paid by the MLB. ADR valued this future work at $420,000, the same amount that the MLB received from the DLBA for the Program.

According to the MLB, however, it informed ADR at the outset that it would not receive any further compensation from the MLB for the work ADR performed in the Program. MLB denied that the $100 per home amount was ever intended to go to ADR, whether directly or indirectly. ADR's $420,000 claim is at the heart of this appeal.

On July 31, 2015, ADR filed its Notice of Intention to File a Claim with the Court of Claims. The original

complaint was filed on August 14, 2015, and the $420,000 claim was neither raised nor addressed. Defendants first moved for summary disposition on January 5, 2016, contending, *inter alia*, that MCL 600.6431 barred ADR's claims because notice of those claims had not been provided within one year of accrual. On April 26, 2016, the Court of Claims issued an opinion and order granting defendants' motion in part and denying it in part. Rejecting defendants' MCL 600.6431 argument, the Court of Claims stated that

> the only example defendants' [sic] offer in support of their position is an allegation in the complaint that February 2014 was the last time ADR received payment for in-process demolition inspections. However, this statement does not exclude the possibility that ADR performed in-process demolition inspections after July 31, 2014 for which it was not paid. Defendants have not substantiated their assertion that plaintiff is seeking to recover for claims that accrued prior to July 31, 2014.

On July 10, 2017, ADR moved to amend its complaint to add the claim for $420,000 in future inspection services. According to defendants, ADR was disingenuously seeking to add the $420,000 claim because ADR had admitted in its original complaint that it had agreed to provide the services at no cost. Defendants also argued that leave to amend should be denied because amendment was futile—the Court of Claims Act barred the claim anyway because the original notice of intent was filed in July 2015 and ADR never mentioned the $420,000 claim. Because ADR failed to state the $420,000 claim in July 2015, defendants argued that the claim was barred by the statute. However, on July 25, 2017, the Court of Claims granted ADR's motion to amend the complaint. On August 7, 2017, ADR filed its amended complaint and added the $420,000 claim.

On August 25, 2017, defendants moved for summary disposition under MCR 2.116(C)(7) or for partial summary disposition under MCR 2.116(C)(7), (8), and (10). Defendants again argued that the $420,000 claim was untimely under MCL 600.6431(1) because it was not filed within one year of the claim's accrual. On September 29, 2017, before the Court of Claims had ruled on defendants' August 25, 2017 motion for summary disposition, defendants again moved for summary disposition. In addition to their untimeliness arguments, defendants brought forth new deposition information from Kim Homan, the Executive Director of the MLB. According to defendants, Homan's testimony demonstrated that ADR had known about the $420,000 claim since 2013. Defendants maintained that ADR's knowledge of the claim bolstered their untimeliness argument under MCL 600.6431(1).

On November 29, 2017, the Court of Claims issued an opinion and order on both of defendants' summary-disposition motions. Regarding the timeliness requirement under MCL 600.6431(1) for the $420,000 claim, the Court of Claims held that

> defendants raised these same arguments in their July 24, 2017 brief in response to plaintiff's motion for leave to file an amended complaint. By way of its July 24, 2017 order, the Court rejected those arguments. Defendants' second (and third) attempts to raise the same arguments read more like an untimely motion for reconsideration, and the Court rejects the same.

The Court of Claims denied defendants' motions for summary disposition. On appeal, defendants argue that the Court of Claims erred because ADR failed to provide notice of the claim for $420,000 within one year of the claim's accrual in violation of MCL 600.6431(1).

II. STANDARD OF REVIEW

A decision on a motion for summary disposition and the interpretation of a statute are reviewed de novo. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). When reviewing a motion brought pursuant to MCR 2.116(C)(7) for a claim "barred because of immunity granted by law," "this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Id*. at 428. "If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact." *Id*. at 429. "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court." *Id*. "However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate." *Id*.

III. ANALYSIS

Defendants argue that the Court of Claims erred when it concluded that the notice requirement in MCL 600.6431(1) did not bar ADR's amended breach-of-contract claim. We disagree.

"[A] state cannot be sued without its consent, granted by legislative enactment." *Greenfield Constr Co, Inc v Dep't of State Hwys*, 402 Mich 172, 193; 261 NW2d 718 (1978) (opinion by RYAN, J.). "However, because the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed." *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012). The Court of Claims Act, MCL 600.6401 *et seq*., imposes one such condition. MCL 600.6431(1) states:

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

This statute "details the notice requirements that must be met in order to pursue a claim against the state, including a general deadline of one year after accrual of the claim." *McCahan*, 492 Mich at 744-745. "[A plaintiff] must adhere to the conditions precedent in MCL 600.6431(1) to successfully expose . . . state agencies to liability," *Fairley v Dep't of Corrections*, 497 Mich 290, 298; 871 NW2d 129 (2015), and the "failure to strictly comply warrants dismissal of the claim," *Mays v Governor*, 323 Mich App 1, 27; 916 NW2d 227 (2018). "The purpose of MCL 600.6431 is to establish those conditions precedent to pursuing a claim against the state." *Fairley*, 497 Mich at 292. "[S]tatutory notice requirements must be interpreted and enforced as plainly written and . . . no judicially created saving construction is permitted to avoid a clear statutory mandate." *McCahan*, 492 Mich at 733. Moreover, this Court "may not engraft an actual prejudice requirement or otherwise reduce the obligation to comply fully with statutory notice requirements." *Id*. at 746-747. With that said, the purpose of the one-year requirement is to provide notice of a claim, while the longer three-year statute of limitations under MCL 600.6452(1) is to make the claim specific. *Oak Constr Co v Dep't of State Hwys*, 33 Mich App 561, 564; 190 NW2d 296 (1971).

The parties do not dispute that the original complaint was filed within the one-year notice period under MCL 600.6431(1). They also agree that the motion to amend the complaint was filed after the one-year period. Thus, the issue turns on whether a claim raised in an amended complaint after the one-year limitations period has elapsed may nonetheless be timely under MCL 600.6431(1) if the amended claim relates back to an original complaint properly filed within the one-year limitations period. We conclude that such an amendment is possible.

"MCR 2.118(A)(2) provides that leave to amend a pleading 'shall be freely given when justice so requires.' " *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). For that reason, a motion to amend should ordinarily be granted. *Id*. Under MCR 2.118(D), "[a]n amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading." "It does not matter whether the proposed amendment introduces new facts, a different cause of action, or a new theory, so long as the amendment springs from the same transactional setting as that pleaded originally." *Kostadinovski v Harrington*, 321 Mich App 736, 744; 909 NW2d 907 (2017).

To determine the interplay between the relation-back doctrine and MCL 600.6431(1), we find guidance from our recent decision in *Progress Mich v Attorney General*, 324 Mich App 659; 922 NW2d 654 (2018), which involved a claim under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., against the Michigan Attorney General. In that case, the plaintiff filed its original complaint in the Court of Claims on April 11, 2017, but it failed to sign and verify the complaint as required under MCL 600.6431(1). *Progress Mich*, 324

Mich App at 663. On May 26, 2017, the plaintiff filed an amended complaint that included the same allegations as in the original complaint but was signed and verified. *Id*. While the amended complaint was filed within one year of the claim's accrual, it was outside of FOIA's 180-day statute of limitations, MCL 15.240(1)(b). *Id*. Therefore, the amended complaint "could only be deemed valid if it related back to the filing date of the original complaint." *Id*. at 664.

This Court in *Progress Mich* concluded that because the original complaint was neither signed nor verified, it was invalid because it did not satisfy the requirements under MCL 600.6431(1). *Id*. at 671. Thus, "because the claim was not verified in plaintiff's initial complaint, the claim could not be asserted and thus lacked legal validity from its inception." *Id*. at 673. "Because plaintiff's complaint was invalid from its inception, there was nothing pending that could be amended. Therefore, any attempt by plaintiff to amend under MCR 2.118 was ineffectual." *Id*.

In this case, unlike in *Progress Mich*, ADR's initial complaint complied with the Court of Claims Act under MCL 600.6431(1). The complaint was signed and verified, informed defendants of the claims against them, and was timely filed. Thus, there was a valid complaint that could be amended under MCR 2.118. The question, then, is whether the complaint could be amended to add the $420,000 breach-of-contract claim.

As stated previously, in order for an amended complaint to relate back, it must "spring[] from the same transactional setting as that pleaded originally." *Kostadinovski*, 321 Mich App at 744. In this case, the amended claim did spring from the contractual arrangement between ADR and defendants, specifically the contract calling for ADR to provide blight removal services on behalf of the MLB.

As a final point, we note that in *Progress Mich*, this Court held that the plaintiffs could not amend their complaints to comply with the verification requirement under MCL 600.6431(1) because to do so would "effectively repeal[] the statutory requirement. Under plaintiff's view, plaintiffs could routinely file their complaints without having the claims verified and then amend the complaint at a later date after the period of limitations had passed." *Progress Mich*, 324 Mich App at 672 (quotation marks and citation omitted). In this case, unlike in *Progress Mich*, ADR's original complaint satisfied all the requirements in MCL 600.6431(1). Thus, the concern in *Progress Mich*—that a party could effectively avoid the statutory notice requirements of MCL 600.6431 by amending a complaint—is not present here. These requirements are meant to simply put the government on notice of a potential lawsuit, and ADR had three years from accrual of the claim to file a more specific claim. See MCL 600.6452(1); *Oak Constr Co*, 33 Mich App at 564. Thus, the Court of Claims did not err when it allowed ADR to amend the complaint and denied defendants' motions for summary disposition.[1]

Affirmed.

BECKERING and RONAYNE KRAUSE, JJ., concurred with CAMERON, P.J.

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[1] ADR also argues that defendants appealed the wrong order. Rather than appeal the November 29, 2017 opinion and order denying defendants' motion for summary disposition, ADR claims that defendants should have appealed the July 25, 2017 order granting ADR's motion to amend its complaint. However, the July 25, 2017 order was simply a grant to amend a complaint. Such an order does not comport with the requirements listed in MCR 7.202(6)(a) and is not considered a final order. See MCR 7.202(6)(a). Thus, the November 29, 2017 opinion and order denying defendants governmental immunity was the appealable final order, and ADR's assertion is without merit.

PEOPLE v JAMES

Docket No. 339504. Submitted December 12, 2018, at Lansing. Decided January 3, 2019. Approved for publication February 5, 2019, at 9:00 a.m.

Javaan M. James was convicted following a jury trial in the Calhoun Circuit Court of two counts of animal fighting, MCL 750.49(2)(a), and one count of possessing animal-fighting equipment, MCL 750.49(2)(h). After the police received information from a confidential informant, the informant executed a controlled purchase of heroin from defendant, and on the basis of those facts, the police obtained a warrant to search defendant's home. During the search, the police found five dogs: one dog was in a kennel, and the remaining four dogs were separated and tethered in the backyard by 15-pound chains attached to heavy collars. Defendant surrendered the dogs to animal control, and the police seized the four chains, a treadmill, a flirt pole (a pole or stick that holds an item desirable to a dog), and dog-related ribbons, awards, and trophies. Although three of the dogs were extremely aggressive with other dogs, the dogs were not aggressive with the police officers or the veterinary technician and veterinarian who examined them. Two of the dogs had severe injuries, and four of the dogs had older injuries on their faces, front legs, chests, or shoulders. According to the prosecution's experts, the dogs' injuries and the equipment and dog-show ribbons were consistent with dog fighting or baiting. Defendant appealed.

The Court of Appeals *held*:

1. Under MCL 750.49(2)(a), to establish the offense of animal fighting, the prosecution must establish beyond a reasonable doubt that the defendant (1) owned, possessed, used, bought, sold, offered to buy or sell, imported, or exported (2) an animal (3) for fighting or baiting and (4) did so knowingly. In this case, there was no dispute that defendant owned the dogs and that the dogs were "animals" for purposes of MCL 750.49(2)(a). Given the expert testimony regarding the indices of dog fighting in tandem with the equipment seized, there was sufficient evidence to establish that defendant knowingly used some of the dogs for

fighting or baiting because (1) the dogs' respective injuries were concentrated on their faces and front legs, (2) all the dogs were friendly with people but three of the dogs were extremely aggressive with other dogs, (3) the dogs were tethered separately in defendant's backyard with heavy chains and heavy, tight collars, and (4) a treadmill and flirt pole were found in defendant's home; collectively, the facts were consistent with dogs being used for fighting or baiting. Accordingly, there was sufficient evidence for the jury to find defendant guilty of two counts of animal fighting.

2. MCL 750.49(2)(h) provides that a person shall not (1) knowingly (2) own, possess, use, buy, sell, offer to buy or sell, transport, or deliver (3) any device or equipment (4) intended (5) for use in the fighting or baiting (6) of an animal. Given the dictionary definition of the undefined term "intended," a defendant must expect the devices or equipment to be used for dog fighting or baiting in the future. The devices and equipment may be capable of being used in more than one capacity; in other words, a defendant may be guilty of violating MCL 750.49(2)(h) even though the devices and equipment are capable of being used for something other than dog fighting or baiting. In this case, although defendant could have used the treadmill and flirt pole to prepare his dogs for shows, expert testimony at trial established that those items could also have been used to train the dogs for fighting. Given that testimony and the other evidence that defendant actually used the dogs for fighting, there was sufficient evidence for the jury to find defendant guilty of possessing animal-fighting equipment.

3. Defendant's argument that the police entered his house without a warrant and that the entry was therefore invalid was without merit; although the police entered defendant's house with the address listed incorrectly on both documents, the error was merely typographical, and the police therefore entered defendant's house pursuant to a warrant. Nonetheless, the police did not seize anything until after they had received the corrected affidavit and search warrant. Because there was probable cause for the magistrate to issue the warrant, the trial court correctly denied defendant's motion to suppress the evidence seized during the search.

Judgment affirmed; case remanded for correction of the judgment of sentence.

1. CRIMES — ANIMAL FIGHTING — ELEMENTS OF THE OFFENSE.

To establish the offense of animal fighting, the prosecution must establish beyond a reasonable doubt that the defendant (1)

owned, possessed, used, bought, sold, offered to buy or sell, imported, or exported (2) an animal (3) for fighting or baiting and (4) did so knowingly (MCL 750.49(2)(a)).

2. CRIMES — ANIMAL-FIGHTING EQUIPMENT — ELEMENTS OF THE OFFENSE.

MCL 750.49(2)(h) provides that a person shall not (1) knowingly (2) own, possess, use, buy, sell, offer to buy or sell, transport, or deliver (3) any device or equipment (4) intended (5) for use in the fighting or baiting (6) of an animal; a defendant must expect the devices or equipment to be used for dog fighting or baiting in the future, but the devices and equipment may be used in more than one capacity; in other words, a defendant may be guilty of violating MCL 750.49(2)(h) even though the devices and equipment are capable of being used for something other than fighting or baiting.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *David E. Gilbert*, Prosecuting Attorney, and *Jennifer S. Raucci*, Assistant Prosecuting Attorney, for the people.

Law Offices of Suzanna Kostovski (by *Suzanna Kostovski*) for defendant.

Before: SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM. A jury convicted defendant of two counts of animal fighting, MCL 750.49(2)(a), and one count of possessing animal-fighting equipment, MCL 750.49(2)(h).[1] The trial court sentenced defendant as a

[1] The original charging document and judgment of sentence cite MCL 750.49(2)(c) for the offense of possessing animal-fighting equipment. However, MCL 750.49(2)(c) is not the charge discussed throughout the trial. Rather, the applicable statute is MCL 750.49(2)(h). Therefore, we remand for the correction of MCL 750.49(2)(c) to MCL 750.49(2)(h) in the judgment of sentence. See *People v Katt*, 248 Mich App 282, 312; 639 NW2d 815 (2001) (explaining that if a judgment of sentence contains an error, it is appropriate to remand the matter for the ministerial task of correcting the error).

third-offense habitual offender, MCL 769.11, to concurrent terms of 24 months to 8 years' imprisonment. We affirm defendant's convictions but remand for correction of the judgment of sentence.

This case arises from defendant's ownership of five dogs: Chico, Chopper, Daisy, China, and Mayweather. On July 13, 2016, at roughly 3:00 p.m., Sergeant Kurt Roth of the Battle Creek Police Department arrived at a residence in the city to assist with the execution of a search warrant. Not long after Sergeant Roth arrived, he noticed that there were dogs in the backyard, and after seeing that two of them were injured, he contacted Officer Mike Ehart, the Animal Control Officer of the Battle Creek Police Department, to investigate the situation.

In the backyard, Chico was in a kennel, while the other dogs were separated and tethered by roughly 15-pound chains attached to tight, heavy collars. When Officer Ehart walked in the yard, none of the dogs was aggressive with him, and he could touch each one. China and Daisy had severe injuries, and because China could not walk on her right front leg, Officer Ehart carried her in order to transport the dogs to the Calhoun County Animal Shelter. Before leaving the residence, Officer Ehart advised defendant that he was taking the dogs to the animal shelter and that there would be a fee. In turn, defendant, as the dogs' owner, surrendered the animals to animal control. Defendant also informed Officer Ehart that Daisy and China had been in a fight and were injured the previous night.

While Officer Ehart was at the animal shelter, Corporal Andrew Olsen remained at the residence to take pictures and collect items of evidence related to the dogs. Among the items that Corporal Olsen collected were the four chains used to tether Chopper,

Daisy, China, and Mayweather in the yard; a treadmill; a "flirt" pole;[2] and ribbons, awards, and trophies related to the dogs.

Tory Haywood, a veterinary technician at the Calhoun County Animal Shelter, recalled that China, Daisy, and Chopper were extremely aggressive with the other dogs at the shelter, although—as with Ehart—the dogs showed no aggression toward Haywood. Dr. Dale Borders, a veterinarian who served as an expert in veterinary medicine at defendant's trial, examined the dogs at the shelter not long after their arrival. Again, the dogs were not aggressive toward Dr. Borders. Dr. Borders first examined China and Daisy. China's right front leg was "badly bitten," and Daisy had puncture wounds and bite wounds around her face. According to Dr. Borders, "whoever [Daisy] was fighting with concentrated on her front end, right on her head." Dr. Borders noted that Daisy, China, Mayweather, and Chopper all had older injuries on the fronts of their bodies—their faces, front legs, chests, or shoulders.[3]

Janette Reever, of the Humane Society of the United States, testified as an expert in animal welfare and dog fighting. Reever testified that dog owners preparing their dogs for a fight often use a flirt pole and treadmill. Both items are used to condition the dogs and build up their physical stamina. The flirt pole is also used to develop the dogs' eye coordination. Reever—who had been to two dog shows—explained how these shows related to dog fighting. Reever stated that owners of fighting dogs created the shows for the purpose of legitimizing their possession of items in-

[2] A flirt pole is a pole or stick holding at its end an item desirable to a dog, such as a piece of rawhide.

[3] Dr. Borders did not examine Chico.

dicative of dog fighting, such as treadmills and flirt poles. According to Reever, a dog can be both a fighting dog and a show dog.

Defendant testified on his own behalf at trial. Defendant explained that the reason he owned his dogs was to enter them in dog shows. According to defendant, he owned the treadmill for the purpose of training the dogs for upcoming shows. However, he used the flirt pole for simple positive interaction with his dogs. Defendant denied having ever seen any old wounds on his dogs, having ever participated in a dog fight, having attended a dog fight, or having provided any dog or equipment that he knew was going to be used in dog fighting.

Defense witness Dennis Michael Norrod, a semiretired judge and sponsor of pit bull terrier shows, testified that a dog-fighting training program would involve equipment such as weight scales, food supplements, and cortisone steroids in addition to other equipment. Norrod confirmed that he had seen defendant present dogs at six or more shows.

Defendant argues that there was insufficient evidence to convict him of two counts of animal fighting. We disagree.

On appeal, a claim of insufficient evidence is reviewed de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). This Court must review "the evidence in the light most favorable to the prosecution" and determine "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Id*. at 428. "This Court

will not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses." *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

The animal-fighting statute, MCL 750.49(2)(a), provides, in pertinent part, that a person shall not knowingly "[o]wn, possess, use, buy, sell, offer to buy or sell, import, or export an animal for fighting or baiting . . . ."[4] In reaching its verdict, the jury found sufficient evidence, with respect to two of defendant's dogs, to establish beyond a reasonable doubt that defendant: (1) owned, possessed, used, bought, sold, offered to buy or sell, imported, or exported (2) an animal (3) for fighting or baiting, and (4) did so knowingly.

As an initial matter, there is no dispute that defendant owned the dogs; nor is there a dispute that the dogs were "animals" within the meaning of the statute.[5] Accordingly, there was sufficient evidence to establish the first two elements of the offense.

There was also sufficient evidence to establish the third element of the offense—that defendant owned and used at least two of the dogs for fighting or baiting. Although the prosecution's evidence was largely circumstantial, "circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

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[4] "Baiting" is not defined in the statute. However, according to Reever's testimony, "bait dogs" are used to teach younger dogs and to provide insight into whether the younger dogs have the fighting style and drive to fight desired by the dog owner. Bait dogs are typically fighting dogs that have done well in the pit but are too old to keep fighting there.

[5] Under MCL 750.49(1), an "animal" is a vertebrate other than a human.

First, the injuries and location of the injuries to the dogs were consistent with fighting dogs. According to Reever, because fighting dogs fight face-to-face, most of their injuries are concentrated around the face and front legs. When the officers discovered defendant's dogs in his backyard on July 13, 2016, Daisy and China had severe fresh wounds. Daisy's injuries were to her face and neck area—her face was swollen and was surrounded by puncture wounds. As would have been the case if Daisy had been in a dog fight, Dr. Borders testified that "whoever she was fighting with concentrated on her front end, right on her head." Also like a fighting dog, both of China's front legs were injured, and she was unable to bear any weight on her right leg. Dr. Borders described China's right leg as "badly bitten." Furthermore, China and Daisy exhibited signs of old wounds, primarily on their faces and front legs. Reever testified: "[B]oth dogs had injuries that were consistent with dog fighting. Extensive both scarring and injuries to the face, the front legs, and also elsewhere on the body." Chico and Chopper also had scarring primarily on the front of their bodies.

Additionally, three of defendant's dogs—China, Daisy, and Chopper—exhibited the temperament of a fighting dog. Dr. Borders, Haywood, and Officer Ehart all testified that the dogs were not aggressive with them and that they were able to touch the dogs. However, the three dogs were extremely aggressive with other dogs, to the extent that after spending a few months at the Calhoun County Animal Shelter, China, Daisy, and Chopper had to be euthanized. Mayweather and Chico, in contrast, were fearful when other dogs showed aggression toward them. Thus, of the five dogs, only China, Daisy, and Chopper had the trait of "gameness"—i.e., the desire to fight—that defines a fighting dog.

In addition to this evidence, the way that defendant secured the dogs in his yard and the equipment at defendant's residence also assisted in establishing that defendant owned and used the dogs for fighting or baiting. Reever explained that fighting dogs are kept separate from each other, secured by heavy chains attached to heavy, tight collars. Reever further explained that the purpose of keeping dogs in this manner is to avoid a "yard accident"—when a dog breaks free and attacks another dog. Defendant secured the dogs in his yard the same way. Defendant also had a flirt pole and treadmill at his residence. Although these items can be used for training dogs for dog shows, they are also commonly used to prepare a dog for a dog fight. For these reasons, and viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to establish element three of the offense: defendant owned and used Chico, Chopper, Daisy, and China—Daisy and China in particular—for fighting or baiting.[6]

Lastly, given the facts and evidence presented, there was sufficient evidence to establish that defendant knowingly owned and used Daisy, China, Chopper, and Chico for fighting or baiting.

"Even in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." *Hardiman*, 466 Mich at 423-424 (quotation marks and citation omitted). In this case, there was sufficient evidence for the

[6] Daisy and China had fresh injuries and were two of the three dogs that showed aggression toward other dogs.

jury to find defendant guilty of two counts of animal fighting under MCL 750.49(2)(a). See *Lee*, 243 Mich App at 167-168.

Next, defendant argues that insufficient evidence existed for a reasonable jury to convict him of possessing animal-fighting equipment under MCL 750.49(2)(h). We disagree.

MCL 750.49(2)(h) provides, in pertinent part, that a person shall not knowingly "[o]wn, possess, use, buy, sell, offer to buy or sell, transport, or deliver any device or equipment intended for use in the fighting [or] baiting . . . of an animal . . . ." Accordingly, in finding defendant guilty of possessing animal-fighting equipment, the jury found sufficient evidence to establish the following elements beyond a reasonable doubt: (1) defendant knowingly (2) owned, possessed, used, bought, sold, offered to buy or sell, transported, or delivered (3) any device or equipment (4) intended (5) for use in the fighting or baiting (6) of an animal.

As an initial consideration, there was no dispute that defendant's dogs were animals as defined under the statute. There was also no dispute that defendant owned and used the treadmill and the flirt pole, which the parties agreed were the only pieces of equipment present in this case. Thus, there was sufficient evidence to establish elements two, three, and six of the offense described in MCL 750.49(2)(h).

Turning to the fourth and fifth elements of the offense, there was also sufficient evidence to establish that defendant owned equipment intended for use in the fighting of dogs. "Intended" is not defined within the statute. However, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "intended" as "expected to be such in the future[.]" Applying this definition, the treadmill and flirt pole were intended for more than

one use. Defendant and Reever agreed that the treadmill and flirt pole develop physical stamina and eye coordination. Thus, they are used in dog training in general and, more specifically, in training dogs for dog fighting as well as dog shows.

Defendant asserts that the flirt pole and treadmill can be explained by his preparation for dog shows. However, in light of the circumstances discussed in relation to the animal-fighting convictions and viewing the evidence in the light most favorable to the prosecution, the jury could reasonably infer that defendant owned this equipment to prepare his dogs for dog fights. See *Lee*, 243 Mich App at 167-168 (providing that "circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime"). Additionally, "the prosecution need not disprove all theories consistent with defendant's innocence; it need only introduce sufficient evidence to convince a reasonable jury of its theory of guilt despite the contradictory theory or evidence a defendant may offer." *People v Solmonson*, 261 Mich App 657, 662-663; 683 NW2d 761 (2004). For these reasons, there was sufficient evidence to establish elements four and five of the offense: defendant owned and used equipment intended for use in the fighting of dogs.

Lastly, from the evidence already discussed, a rational juror could find beyond a reasonable doubt that defendant *knowingly* owned and used the treadmill and flirt pole intended for use in the fighting of his dogs. Consequently, there was sufficient evidence for the jury to find beyond a reasonable doubt that defendant committed the offense of possessing animal-fighting equipment.

Defendant also argues that the trial court erred by denying his motion to quash because the police initially entered his residence on July 13, 2016, without a warrant and the July 12, 2016 and July 13, 2016 warrants were not supported by probable cause. We disagree.

"A trial court's findings on a motion to suppress evidence as illegally seized will not be reversed on appeal unless clearly erroneous, while questions of law and the decision on the motion are reviewed de novo." *People v Waclawski*, 286 Mich App 634, 693; 780 NW2d 321 (2009) (citations omitted). A finding is clearly erroneous if this Court is left with a definite and firm conviction that the trial court made a mistake. *Id*.

A search warrant cannot be issued unless it is supported by probable cause, which exists when "there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). When reviewing a magistrate's decision that probable cause existed, this Court considers "whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). "[A] magistrate's decision regarding probable cause should be paid great deference." *People v Martin*, 271 Mich App 280, 297; 721 NW2d 815 (2006).

Probable cause may be based, in part, on information supplied by a confidential informant, provided that the affidavit included "affirmative allegations from which the judge or district magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable."

MCL 780.653(b). "If the search warrant is supported by an affidavit, the affidavit must contain facts within the knowledge of the affiant and not mere conclusions or beliefs." *Martin*, 271 Mich App at 298. "Personal knowledge can be inferred from the stated facts." *Id.* at 302. "[T]he fact that the police previously had utilized information provided by [a particular] informant in other warrant requests with successful results provide[s] . . . support for the magistrate to conclude that the informant [i]s credible and reliable." *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992).

As an initial matter, we note that defendant's first argument is factually inaccurate and, as such, is without merit. Defendant alleges that the police entered his home without a warrant on July 13, 2016, and that the prosecution therefore had to demonstrate an exigent circumstance to validate the entry. However, according to the affidavits and search warrants for July 12, 2016, and July 13, 2016, as well as the trial court's ruling on the motion to suppress, the officers entered defendant's residence pursuant to a warrant that had a mere typographical error. Thus, the officers entered defendant's residence pursuant to a warrant. Nonetheless, upon catching the error, the officers waited until a corrected warrant was obtained before seizing any evidence. Defendant's argument therefore fails because it is based on an inaccurate factual premise. See *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (explaining that it is the responsibility of the defendant, not the Court, to search for facts underlying the defendant's argument).

Defendant also asserts that the trial court erred by denying his motion to suppress, arguing that the search warrants were not based on probable cause

because the affidavits provided insufficient information as well as unreliable information from the confidential informant. We disagree.

The confidential informant in this case, X, spoke with personal knowledge of the information that he provided to the affiant, Officer Kelson Gettel. X performed a controlled hand-to-hand buy at a prearranged location, defendant's house. Officer Gettel observed the buy and searched X before and after the transaction. X provided Officer Gettel with defendant's name, informed Officer Gettel that defendant owned the house, and provided Officer Gettel with a bag of what X suspected was heroin, a fact that Officer Gettel later confirmed. These facts demonstrate X's reliability and personal knowledge as required by MCL 780.653(b). Furthermore, that Officer Gettel observed the transaction and verified the substance as heroin established that the affidavit contained facts within the knowledge of the affiant. See *Martin*, 271 Mich App at 298 (explaining that "[i]f the search warrant is supported by an affidavit, the affidavit must contain facts within the knowledge of the affiant and not mere conclusions or beliefs"). Additionally, Officer Gettel's statement in the affidavit—" 'X' has proven credible in the past by purchasing heroin for the Battle Creek Police Special Investigation Unit which has resulted in the seizure of controlled substances"—further undermines defendant's argument that probable cause did not exist because the affidavit relied on information provided by an informant. See *Stumpf*, 196 Mich App at 223 (stating that "the fact that the police previously had utilized information provided by [a particular] informant in other warrant requests with successful results provided . . . support for the magistrate to conclude that the informant was credible and reliable").

Given the foregoing and because this Court has stated in another case that "[t]he controlled purchases of cocaine were sufficient to establish probable cause to permit the magistrate to issue the warrant," it stands to reason that there was probable cause for the warrants in this case. See *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995); see also *Martin*, 271 Mich App at 297 (providing that "a magistrate's decision regarding probable cause should be paid great deference"). Accordingly, the trial court did not err by denying defendant's motion to suppress the evidence.

Defendant's convictions are affirmed. However, we remand for the ministerial task of correcting the judgment of sentence. We do not retain jurisdiction.

SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ., concurred.

PEOPLE v BRINKEY

Docket No. 342419. Submitted February 6, 2019, at Lansing. Decided February 14, 2019, at 9:00 a.m.

In January 2017, Peter T. Brinkey pleaded guilty in the Macomb Circuit Court, Diane M. Druzinski, J., to operating while intoxicated (OWI), third offense, MCL 257.625(1); driving while license suspended (DWLS), second offense, MCL 257.904(1); and unlawful use of a license plate, MCL 257.256. After informing defendant that it would not comply with the sentence recommendation in defendant's presentence investigation report (PSIR) of 365 days' incarceration, the court allowed defendant to withdraw his plea. At a May 2017 pretrial hearing, a *Cobbs* agreement[1] was discussed, and the trial court agreed to cap defendant's minimum sentence at two years' imprisonment. At a June 2017 plea hearing, the court asked defendant if he wanted to reinstate his "prior plea," and defendant agreed, with the understanding that an updated PSIR would be submitted. At the sentencing hearing, the trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 2 to 25 years' imprisonment for the OWI conviction and to one day, time served, for the DWLS and unlawful-use-of-a-license-plate convictions. Defendant immediately sought to withdraw his plea, stating that he had not agreed to the sentencing terms. The trial court rejected defendant's request. Defendant sought leave to appeal, and the Court of Appeals granted the application.

The Court of Appeals *held*:

Under MCR 6.310(C), a defendant may move to withdraw a plea after sentencing if an error in the plea proceeding prevented the plea from being understandingly, knowingly, voluntarily, and accurately made. A plea is not understandingly made if the defendant is not fully informed about the penalties to be imposed. When the trial court asked defendant if he wished to reinstate his prior plea, the court failed to differentiate between the first plea agreement and the *Cobbs* agreement. The trial court also failed to inform defendant of the consequences of reinstating the plea.

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[1] *People v Cobbs*, 443 Mich 276 (1993).

Because these errors interfered with defendant's understanding of the plea he purportedly made, the trial court abused its discretion when it denied defendant's motion to withdraw the plea.

Reversed and remanded.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *John Paul Hunt*, Assistant Prosecuting Attorney, for the people.

Melissa Krauskopf for defendant.

Before: SWARTZLE, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

SWARTZLE, P.J. For a valid plea agreement, it is axiomatic that there must be an actual agreement on the essential features of the plea. When there are multiple proposed plea agreements and hearings, as here, reference to a "prior plea" will likely be ambiguous and require some clarification on the record, unlike as here. Defendant, Peter Thomas Brinkey, pleaded guilty to several driving-related offenses, but the record confirms a lack of clarity with regard to essential sentencing features. As explained below, we reverse and remand for further proceedings.

I. BACKGROUND

Defendant appeals by leave granted[1] his guilty-plea convictions of operating while intoxicated (OWI), third offense, MCL 257.625(1); driving while license suspended (DWLS), second offense, MCL 257.904(1); and

[1] *People v Brinkey*, unpublished order of the Court of Appeals, entered April 9, 2018 (Docket No. 342419).

unlawful use of a license plate, MCL 257.256. The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to 2 to 25 years of imprisonment for the OWI conviction and one day, time served, for the DWLS and unlawful use of a license plate convictions.

Defendant does not contest any aspect of his first guilty plea on January 4, 2017, and at the first plea hearing both defendant's attorney and the prosecution stated that they believed all the requirements of MCR 6.302 had been met. At the first plea hearing, defendant pleaded guilty and the trial court told defendant that if the court was not going to comply with the sentence recommendation in his presentence investigation report (PSIR), the court would permit defendant to withdraw his guilty plea (the original agreement). After informing defendant that it would not comply with the sentence recommendation in his PSIR, the trial court permitted defendant to withdraw his guilty plea at the first sentencing hearing on April 20, 2017.

At the May 10, 2017 pretrial hearing, the trial court stated that the parties and the trial court had agreed to a *Cobbs*[2] agreement, which the trial court referred to as a "*Cobbs* cap." The trial court informed defendant that the *Cobbs* cap would prevent defendant's minimum sentence from exceeding two years. Defendant then pleaded guilty at the second plea hearing on June 7, 2017. At the second plea hearing, however, the trial court simply asked defendant if he "want[ed] to reinstate [his] prior plea." Defendant responded, "Yes, with the understanding that I could get an updated PSI" and the trial court agreed that defendant could get a new PSIR. At no point after the first plea hearing did

[2] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

the trial court ever inform defendant of his rights again and, importantly, at the second plea hearing the phrase "prior plea" was never defined. There was also no discussion at the second plea hearing about the *Cobbs* cap.

At the second sentencing hearing on June 27, 2017, as soon as the trial court issued defendant's sentence, defendant stated that he wanted to withdraw his plea because the trial court "didn't agree with the sentence, with the recommendation." When the trial court stated that defendant requested a two-year *Cobbs* agreement, defendant replied that he "never pled guilty to this." The trial court disagreed and denied defendant's subsequent motion to withdraw. This appeal followed.

II. ANALYSIS

On appeal, defendant argues that the trial court abused its discretion by denying his motion to withdraw his guilty plea. This Court reviews for abuse of discretion a trial court's ruling on a motion to withdraw a plea. *People v Pointer-Bey*, 321 Mich App 609, 615; 909 NW2d 523 (2017). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id*. (cleaned up). Furthermore, this Court reviews de novo the interpretation of court rules. *People v Blanton*, 317 Mich App 107, 117; 894 NW2d 613 (2016).

A. PLEA AGREEMENTS

While there is "no absolute right to withdraw a guilty plea once the trial court has accepted it," a defendant "may move to have his or her plea set aside on the basis of an error in the plea proceedings." *Pointer-Bey*, 321 Mich App at 615 (cleaned up). "[A]

motion to withdraw a guilty plea after sentencing is governed by MCR 6.310(C)." *Blanton*, 317 Mich App at 118. In relevant part, MCR 6.310(C)(4) states:

> If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.

"In other words, under MCR 6.310(C), a defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process." *Blanton*, 317 Mich App at 118 (cleaned up).

"Guilty- and no-contest-plea proceedings are governed by MCR 6.302." *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). Strict compliance with MCR 6.302 is not essential. *People v Plumaj*, 284 Mich App 645, 649; 773 NW2d 763 (2009). Our Supreme Court has adopted a doctrine of substantial compliance, and whether a particular departure from the requirements of MCR 6.302 justifies or requires reversal depends on the nature of the noncompliance. *Id*. Automatic invalidation of a plea due to a violation of MCR 6.302 is only required if the defendant establishes "that the waiver was neither understandingly nor voluntarily made, not merely that the trial court failed to strictly comply with MCR 6.402(B)." *Id*. at 651 (cleaned up).

> To ensure that a guilty plea is accurate, the trial court must establish a factual basis for the plea. In order for a plea to be voluntary and understanding, the defendant must be fully aware of the direct consequences of the plea. The penalty to be imposed is the most obvious direct

> consequence of a conviction. Therefore, MCR 6.302(B)(2) requires the trial court to advise a defendant, prior to the defendant's entering a plea, of the maximum possible sentence for the offense and any mandatory minimum sentence required by law. [*Pointer-Bey*, 321 Mich App at 616 (cleaned up).]

"[B]ecause the understanding, voluntary, and accurate components of MCR 6.302(A) are premised on the requirements of constitutional due process, a trial court may, in certain circumstances, be required to inform a defendant about facts not explicitly required by MCR 6.302." *Blanton*, 317 Mich App at 119 (cleaned up). Furthermore, "[w]hen a defendant is not fully informed about the penalties to be imposed, there is a clear defect in the plea proceedings because the defendant is unable to make an understanding plea under MCR 6.302(B)." *Id*. (cleaned up). Finally, "[a] plea that is not voluntary and understanding violates the state and federal Due Process Clauses." *Id*. (cleaned up).

Cobbs agreements, when made, are related to guilty pleas. A *Cobbs* agreement is an agreement in which a defendant agrees to plead guilty in reliance on the trial court's preliminary evaluation of the sentence to be imposed. *Cobbs*, 443 Mich at 283. Under a *Cobbs* agreement a defendant is permitted to withdraw his or her guilty plea "in the event that the trial court determines that it must exceed the preliminary evaluation." *People v Fonville*, 291 Mich App 363, 369 n 3; 804 NW2d 878 (2011). MCR 6.302 is silent on *Cobbs* agreements.

In *Plumaj*, 284 Mich App at 649, this Court established that strict compliance with MCR 6.302 is not essential. Specifically, *Plumaj* dealt with a defendant who pleaded guilty and nolo contendere to multiple offenses. *Id*. at 646-647. At the plea hearing, the trial court did not place the defendant under oath. Relying

on this error, the defendant moved to withdraw his pleas. *Id*. at 647. The trial court granted the defendant's motion and set aside his pleas because the defendant was not placed under oath at his plea hearing. *Id*. This Court reversed, holding that strict compliance with MCR 6.302 is not essential to ensure the validity of a plea and that, while the oath requirement is an aspect of MCR 6.302, the analysis of whether a plea should be set aside should instead hinge on "the nature of the noncompliance" and on whether the defendant's plea was "understandingly, knowingly, voluntarily, and accurately made." *Id*. at 649, 651-652. Thus, in *Plumaj*, this Court held that, although strict compliance with MCR 6.302 is not essential, a defendant's plea must always be understanding, knowing, voluntary, and accurate.

In *People v Kosecki*, 73 Mich App 293, 294; 251 NW2d 283 (1977), the defendant pleaded guilty on March 7, 1975, and was subsequently permitted to withdraw his guilty plea on the day of sentencing, March 21, 1975. The defendant withdrew his guilty plea because the defendant's attorney had doubts that a factual basis to support the defendant's plea had been established at the original plea-taking. *Id*. Later that same day, however, the defendant requested to reinstate his guilty plea. *Id*. On appeal, the defendant sought to withdraw his second guilty plea, arguing that he was not properly informed of his constitutional rights when he made his second guilty plea. *Id*. at 296. This Court noted, however, that the defendant admitted and the record confirmed that the defendant was properly informed of his constitutional rights when he made his first guilty plea on March 7, 1975. *Id*. at 297. Importantly, while the trial court "did not again go through the rights waived before accepting defendant's retendered plea, defendant's counsel stated, with de-

fendant's agreement, that he had gone over these rights a number of times with defendant." *Id*. Because only two weeks had passed between the defendant's first and second guilty pleas, there was "no indication that defendant offered his original plea in ignorance of its consequences." *Id*. at 297-298. Accordingly, this Court affirmed the defendant's plea-based conviction. *Id*.

B. CONFUSION APPARENT FROM THE RECORD

As in both *Plumaj* and *Kosecki*, defendant initially pleaded guilty before the trial court permitted him to withdraw his guilty plea. Unlike *Plumaj* and *Kosecki*, however, defendant's first guilty plea was controlled by the original plea agreement while, at least in the trial court's opinion, his second guilty plea was controlled by the *Cobbs* agreement. Although the trial court clarified the terms of the *Cobbs* agreement when defendant chose to reinstate his "prior plea" at the second plea hearing, what defendant and the trial court each meant by the phrase "prior plea" was never addressed. Furthermore, at the second plea hearing the trial court also failed to inform defendant of his rights, as it had properly done at the first plea hearing. Thus, like in *Plumaj*, the trial court failed to comply strictly with the requirements of MCR 6.302. Because strict compliance with MCR 6.302 is not essential, however, whether defendant's second guilty plea should be set aside hinges on the nature of the trial court's noncompliance with the requirements of the court rule and whether defendant's second guilty plea was understandingly, knowingly, voluntarily, and accurately made. See *Plumaj*, 284 Mich App at 649-652.

While *Kosecki* can provide guidance here, it differs in one crucial aspect from this case. In *Kosecki*, the

sentencing conditions to which the defendant agreed did not change between his first and second guilty pleas. In contrast, when defendant in this case initially pleaded guilty it was under the original agreement; when defendant pleaded guilty the second time, the trial court's understanding was that the original agreement had no effect on defendant's second guilty plea and that the *Cobbs* cap controlled the terms of defendant's second guilty plea. The trial court failed to ensure that defendant knew that the *Cobbs* cap, not the original agreement, controlled his sentence after his second guilty plea. Thus, this case differs from *Kosecki* because, while in *Kosecki* the defendant argued that he did not know the rights he was waiving by pleading guilty, here defendant argues that he did not know the conditions under which he pleaded guilty.

Defendant's confusion concerning the conditions under which he pleaded guilty is apparent from a review of the record. While the trial court clearly outlined the circumstances of the *Cobbs* cap at the pretrial hearing, no such clarity was provided at the second plea hearing. At the second plea hearing, the trial court simply asked defendant if he wished to reinstate his "prior plea." Although the trial court never explained what it meant by "prior plea," defendant's understanding of "prior plea" is apparent from his response. As soon as the trial court issued defendant's sentence, defendant stated that he wanted to withdraw his plea because the trial court "didn't agree with the sentence, with the recommendation." When the trial court stated that defendant requested the *Cobbs* cap, defendant replied that he "never pled guilty to this." Thus, it does not appear that defendant was fully aware of the direct consequences of his second guilty plea and, therefore, defendant's second guilty plea was not understandingly, knowingly, voluntarily, and accurately made. See

Plumaj, 284 Mich App at 652. Furthermore, the nature of the trial court's noncompliance is serious in nature in this case because it appears from the record before us that the trial court made no effort to ensure that defendant actually knew and understood that he was pleading guilty under the conditions established by the *Cobbs* cap instead of the conditions of the original agreement. See *id*. at 649. Because defendant's second guilty plea was not understandingly, knowingly, voluntarily, and accurately made, the trial court abused its discretion by denying defendant's motion to withdraw his guilty plea.

III. CONCLUSION

The record in this case shows a lack of clarity with respect to essential features of the plea agreement, specifically the sentencing parameters. The trial court abused its discretion by denying defendant's motion to withdraw and, accordingly, we reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

MARKEY and RONAYNE KRAUSE, JJ., concurred with SWARTZLE, P.J.

PEOPLE v LAMPE

Docket No. 342325. Submitted February 12, 2019, at Lansing. Decided February 21, 2019, at 9:00 a.m. Leave to appeal denied at 505 Mich 982 (2020).

Rogan E. Lampe was convicted after a jury trial in the Washtenaw Circuit Court of two counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(a), and one count of fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(a). At the age of 26, Lampe sexually assaulted a 13-year-old boy, WO, whom Lampe had befriended after Lampe began dating the boy's cousin. After falling asleep, WO woke to find Lampe assaulting him. Lampe was a registered sex offender at the time of the assault and had been dismissed from the military for wrongful sexual contact with a sleeping army officer. The court, Darlene A. O'Brien, J., initially sentenced Lampe in 2015 to concurrent terms of 10 to 15 years of imprisonment for each of his CSC-III convictions and 16 to 24 months of imprisonment for his CSC-IV conviction. Lampe appealed by right in the Court of Appeals. The Court of Appeals affirmed Lampe's convictions but remanded for resentencing on the basis of a scoring error involving Prior Record Variable (PRV) 5 that affected the applicable minimum sentence range under the guidelines. *People v Lampe*, unpublished per curiam opinion of the Court of Appeals, issued June 23, 2016 (Docket No. 326660). On remand, the trial court sentenced Lampe to concurrent terms of 9 to 15 years of imprisonment for his CSC-III convictions and 16 to 24 months of imprisonment for his CSC-IV conviction. Lampe appealed.

The Court of Appeals *held*:

1. The trial court, on remand, had authority to score Offense Variables (OVs) 3 and 10 even though the variables had not been scored at Lampe's original sentencing. Following a remand from the Court of Appeals, a lower court has the power to take such action as law and justice may require so long as the action is not inconsistent with the judgment of the Court of Appeals. Because the Court of Appeals ordered resentencing on remand, without any specific instructions or prohibitions on scoring OVs, the case was returned to the trial court in a presentence posture, allowing the trial court to consider de novo every aspect of Lampe's sentences.

The Court of Appeals' previous opinion did not address OV 3 or OV 10, and nothing in the trial court's assessment of OV 3 or OV 10 was inconsistent with the Court of Appeals' previous opinion.

2. Ten points are properly assessed under MCL 777.33(1)(d), OV 3, for physical injury to a victim when bodily injury requiring medical treatment occurred to a victim. WO had injuries to his ears and anus as a result of the assault. WO's injuries required overnight hospitalization and further treatment spanning a number of weeks to prevent WO from contracting any sexually transmitted diseases. Accordingly, the trial court did not err by assessing 10 points for OV 3.

3. Ten points are appropriately assessed under MCL 777.34(1)(a), OV 4, for psychological injury to a victim when a victim suffers serious psychological injury requiring professional treatment. WO and his father provided victim impact statements at both Lampe's original sentencing and at his resentencing. The trial court properly considered the statements, and they provided ample support for the trial court's assessment of 10 points. Both WO and his father reported changes in WO's personality—WO had become angry, afraid, distrustful, defensive, and hypervigilant. WO also suffered flashbacks and panic attacks when reminded of the assault. And although WO underwent psychological counseling, he still suffered the psychological effects of the assault when Lampe was resentenced more than three years after the crime.

4. Fifteen points are properly assessed under MCL 777.40(1)(a), OV 10, for exploitation of a vulnerable victim when predatory conduct was involved. Predatory conduct is preoffense conduct directed at a victim for the primary purpose of victimization. Preoffense conduct that is less intrusive, that involves less highly sexualized forms of touching, and that is done for the purpose of desensitizing a victim to future sexual contact is known as "grooming." Lampe groomed WO through Facebook and other personal and physical contact with him, including spending time with WO at WO's home, giving WO massages, and putting his arm around WO. Lampe befriended WO, earned his confidence, and gained an opportunity to be alone with WO while WO was relaxed and unguarded, which made it easier for Lampe to carry out the sexual assault. Lampe also engaged in predatory conduct by waiting to begin the assault until Lampe was alone with WO and WO was asleep. WO was vulnerable because of his youth and naiveté, and WO was asleep, and thus even more vulnerable, when Lampe assaulted him.

5. Fifty points are appropriately scored under MCL 777.41(1)(a), OV 11, for criminal sexual penetration when two or

more sexual penetrations arising out of the sentencing offense occurred. According to MCL 777.41(2)(c), points cannot be scored under OV 11 for the one penetration that forms the basis of a first-degree criminal sexual conduct (CSC-I) conviction or a CSC-III conviction. The three penetrations that occurred in this case on the same day, at the same place, and during the same course of conduct, all arose out of the sentencing offense for purposes of OV 11. One penetration was uncharged—when Lampe performed fellatio on WO—but points can be assessed under OV 11 based on uncharged sexual penetrations provided that the penetrations arise out of the sentencing offense. Of the three distinct penetrations in this case, the penetration that formed the basis of the sentencing offense was properly excluded, and Lampe's OV 11 score was based on the remaining two penetrations. Lampe's contention that no penetration resulting in a CSC-I or CSC-III conviction should be counted under OV 11 has been rejected by the Court of Appeals in the past. The Court of Appeals has concluded that OV 11 requires the trial court to exclude only the one penetration forming the basis of the sentencing offense when the sentencing offense itself is CSC-I or CSC-III. Other penetrations arising from the sentencing offense, including uncharged penetrations and penetrations resulting in separate CSC-I or CSC-III convictions, are properly counted under OV 11.

6. Information in a presentence investigation report (PSIR) is presumed accurate, but a defendant may challenge at sentencing the accuracy or relevancy of any information contained in a PSIR. Lampe objected to the inclusion in his PSIR of the phrase "defendant is deemed a predator" because he had not been diagnosed as a predator, and he asserted that the statement was merely an agent's subjective opinion. It was not necessary to strike the phrase, however, because given Lampe's predatory conduct as scored under OV 10, and in light of Lampe's pattern of sexually preying on sleeping victims, the term "predator" could not be considered inaccurate. And the lack of a predator diagnosis was irrelevant because the PSIR could not plausibly be read to suggest that Lampe was clinically diagnosed as a predator. Lampe's challenges to his first PSIR, which was incorporated into his updated PSIR for resentencing, were moot because the information had been corrected in the updated PSIR. Lampe's attempt to relitigate the factual underpinnings of his military convictions with self-serving assertions was wholly unsupported by the lower court record. Moreover, Lampe's contention that the victim impact statements should not have been included in his PSIR because there was no way to

rebut the statements was meritless. MCL 780.764 and MCL 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 at the individual's sentencing hearing and for inclusion in the individual's PSIR. Victim impact statements are subjective and are often disputed by defendants, but this does not necessitate exclusion of the statements. The court's knowledge that the statements are subjective and the standards for ensuring that the goals of sentencing are met are sufficient protections to ensure that a defendant is not sentenced in response to emotional pleas. Finally, Lampe provided no legal authority for the proposition that he had the right to prepare his own report for inclusion in the PSIR. The information contained in Lampe's defense-commissioned report was not, as Lampe claimed, "other pertinent data" that could be included in a PSIR. The report of more than 100 pages was far from the "brief" social history that is part of an overall succinct PSIR under MCR 6.425(A)(1)(d).

7. Sentences must be proportionate to the seriousness of the circumstances surrounding the offense and the offender, and a sentence is unreasonable if the trial court fails to adhere to this principle of proportionality. An out-of-guidelines sentence may be imposed when the trial court determines that the recommended range under the sentencing guidelines is disproportionate, in either direction, to the circumstances of the offense and the offender. Lampe argued that his sentences were unreasonable and disproportionate. The minimum sentences of 9 years imposed at resentencing were lower than the 10-year-minimum sentences imposed at Lampe's original sentencing, but they still exceeded by 13 months the 57- to 95-month range recommended by the guidelines. To facilitate appellate review, a trial court must justify an out-of-guidelines sentence by explaining why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been. The trial court identified two basic reasons for the sentences it imposed: (1) Lampe's grooming behavior, particularly in light of his failure to disclose his past sexual misconduct, and (2) the location and timing of the offense. Lampe argued that the reasons articulated by the trial court for the sentences were already accounted for by OVs 4 and 10, but OVs 4 and 10 did not adequately account for the circumstances of the offense. Although OV 10 accounted to some degree for Lampe's predatory conduct and grooming behavior, circumstances including Lampe's past sexual misconduct and status as a registered sex offender were not accounted for by OV 10; both facts made Lampe's conduct particularly egregious. Lampe's failure to inform WO and his family of Lampe's history of sexual misconduct allowed

Lampe to befriend WO and to gain a position of trust enabling him to be in WO's home at night. And although OV 4 accounted to some degree for WO's psychological injuries, OV 4 did not account for the timing and location of the assault. The assault robbed WO of a sense of security in his own home to the extent that he began sleeping with a knife under his bed.

8. The sentencing arguments in Lampe's Standard 4 brief were premised largely on federal sentencing rules as well as caselaw released before *People v Lockridge*, 498 Mich 358 (2015). Federal sentencing rules do not control the review of sentences imposed in Michigan, and pre-*Lockridge* standards involving the articulation of substantial and compelling reasons for departing from the range recommended by the sentencing guidelines do not govern a determination of whether a sentence is reasonable or proportionate. A trial court no longer needs to articulate substantial and compelling reasons for departing from a range recommended by the guidelines. A sentence that departs from the applicable guidelines range is reviewed for reasonableness, and reasonableness is judged on the basis of the principle-of-proportionality test in *People v Milbourn*, 435 Mich 630 (1990). In addition, Lampe was not entitled to lesser sentences on the basis of WO's "consent." A 13-year-old cannot legally consent to sex with an adult and, in any event, WO's description of the assault made it clear that he was not a willing participant. Finally, Lampe's contention that his sentences were vindictive failed because the sentences imposed at resentencing were lower—not higher—than those imposed at Lampe's original sentencing and thus did not give rise to a presumption of vindictiveness.

9. Retroactive application of *Lockridge* to cases that were pending on direct review when *Lockridge* was decided does not violate the prohibition against ex post facto laws, and Lampe's assertion that *Lockridge* is unconstitutional and should be overruled was without merit. The Court of Appeals has already rejected similar challenges to *Lockridge*, and the Court of Appeals is without authority to overrule *Lockridge*.

Affirmed.

BOONSTRA, J., concurring, fully agreed with the majority opinion but wrote separately to suggest that it is no longer appropriate to use the term "departure" when referring to minimum sentences not falling within the range recommended by the sentencing guidelines. He proposed that the more appropriate term for those sentences is "out-of-guidelines." Because the sentencing guidelines are no longer mandatory, a sentence that does not fall within the applicable guidelines range is no longer a divergence or deviation

> from a standard or rule. A trial court no longer needs to articulate substantial and compelling reasons for "departing" from the guidelines or to explain its reasons for the extent of the "departure." The elimination of those requirements does not diminish a trial court's obligation to consult the guidelines and take them into account when imposing a sentence. Nor does the elimination of those requirements diminish a trial court's continuing obligation to justify an out-of-guidelines sentence in order to facilitate appellate review of the sentence. Out-of-guidelines sentences are reviewed for reasonableness in accordance with the principle of proportionality, and an out-of-guidelines sentence does not give rise to any presumption of unreasonableness. The key test is whether the sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender, not whether it adheres to the range recommended by the guidelines.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *Mark Kneisel*, First Assistant Prosecuting Attorney, for the people.

Rogan E. Lampe, *in propria persona*, and *F. Mark Hugger* for defendant.

Before: M. J. KELLY, P.J., and SERVITTO and BOONSTRA, JJ.

BOONSTRA, J. Defendant appeals by right his sentences for two counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(a), and one count of fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(a). The trial court sentenced defendant to concurrent prison terms of 9 to 15 years' imprisonment for each of his CSC-III convictions and 16 to 24 months' imprisonment for his CSC-IV conviction. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant's convictions arose from his sexual assault of a 13-year-old boy, WO, in 2014. At the time of the

assault, defendant was 26 years old and dating WO's cousin, who introduced defendant to WO and his family. At that time, defendant was a registered sex offender who had been dismissed from the military for wrongful sexual conduct perpetrated on a sleeping army officer.

On the night of the assault, WO's mother invited defendant over for dinner. That night, when defendant was alone with WO, defendant offered to give him a massage after WO said his back hurt from lacrosse practice. During the massage, WO fell asleep. Defendant then removed his and WO's clothing. WO awoke to find defendant on top of him; defendant penetrated WO anally and orally.

Following his jury trial convictions, the trial court originally sentenced defendant in 2015 to sentences within the applicable guidelines ranges: 10 to 15 years' imprisonment for each of his CSC-III convictions and 16 to 24 months' imprisonment for his CSC-IV conviction. Defendant appealed by right in this Court. On appeal, we affirmed defendant's convictions, but we remanded for resentencing on the basis of a scoring error involving Prior Record Variable (PRV) 5 that affected the applicable minimum sentence guidelines range.[1] On remand, the trial court imposed the out-of-guidelines sentences detailed in the first paragraph of this opinion. This appeal followed.

II. OFFENSE VARIABLES

In his appellate and Standard 4 briefs,[2] defendant challenges the scoring of Offense Variables (OVs) 3, 4,

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[1] *People v Lampe*, unpublished per curiam opinion of the Court of Appeals, issued June 23, 2016 (Docket No. 326660).

[2] A Standard 4 brief is a supplemental appellate brief filed *in propria persona* by a criminal defendant under Standard 4 of Michigan Supreme Court Administrative Order 2004-6, 471 Mich c, cii (2004).

10, and 11. Defendant argues that the trial court lacked authority to assess points for OV 3 and OV 10 on remand because they were not scored at the original sentencing. Defendant also asserts that the trial court clearly erred in its assessment of OVs 3, 4, 10, and 11. We disagree.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Brooks*, 304 Mich App 318, 319-320; 848 NW2d 161 (2014) (quotation marks and citation omitted). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438. "Whether a trial court followed an appellate court's ruling on remand is a question of law that this Court reviews de novo." *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

A. AUTHORITY TO ASSESS POINTS FOR OVs 3 AND 10

We disagree with defendant's assertion that the trial court lacked authority to score OVs 3 and 10 at the resentencing. Following a remand from this Court, "[t]he power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." *People v Fisher*, 449 Mich 441, 446-447; 537 NW2d 577 (1995). "When an appellate court remands a case with specific instructions, it is improper for a

lower court to exceed the scope of the order." *People v Russell*, 297 Mich App 707, 714; 825 NW2d 623 (2012).

In our previous opinion, we found error in the scoring of PRV 5 and concluded that because this error affected the appropriate guidelines range, defendant was "entitled to resentencing."[3] By ordering "resentencing" without any specific instructions or any prohibitions on scoring OVs, this Court returned the case to the trial court in a presentence posture, allowing the trial court to consider every aspect of defendant's sentences de novo. See *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007); *People v Williams (After Second Remand)*, 208 Mich App 60, 65; 526 NW2d 614 (1994). The trial court could not take action inconsistent with this Court's previous opinion, *Fisher*, 449 Mich at 446-447, but this Court's previous opinion did not address OV 3 or OV 10, and nothing in the trial court's assessment of OV 3 or OV 10 was inconsistent with that opinion. The trial court's authority on remand extended to considering de novo the scoring of OV 3 and OV 10. See *Rosenberg*, 477 Mich at 1076; *Williams*, 208 Mich App at 65.

B. OV 3

The trial court did not clearly err by assessing 10 points for OV 3. Points are assessed under OV 3 for "physical injury to a victim," MCL 777.33(1), and a score of 10 points is warranted when "[b]odily injury requiring medical treatment occurred to a victim," MCL 777.33(1)(d). As defined by this Court, the term " 'bodily injury' encompasses anything that the victim would, under the circumstances, perceive as some unwanted

[3] *Lampe*, unpub op at 4.

physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011).

The trial court concluded that WO had injuries to his ears (caused by bites from defendant) and his anus and that WO received medical treatment for these injuries, which included overnight hospitalization and medical treatment spanning a number of weeks to prevent WO from contracting any sexually transmitted diseases. These factual findings are not clearly erroneous and are supported by a preponderance of the evidence. See *Hardy*, 494 Mich at 438. The evidence showed that WO's ears were "cut," red, swollen, and bruised. Following the sexual assault, WO reported pain in his "butt," and WO's anus was described by his mother as red, "hemorrhoidal," bloody, and sore. As a result of these bodily injuries, WO sought medical treatment and was hospitalized overnight. The fact that WO was hospitalized as a result of his bodily injuries supports the trial court's scoring of OV 3. *People v Bosca*, 310 Mich App 1, 50-51; 871 NW2d 307 (2015). In addition, after leaving the hospital, WO underwent a series of treatments to prevent sexually transmitted diseases. On the whole, given WO's bodily injuries resulting in his hospitalization, as well as subsequent treatments related to the assault, the trial court did not err by assessing 10 points for OV 3 for bodily injury requiring medical treatment. See MCL 777.33(1)(d); see also *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011); *Hardy*, 494 Mich at 438.

C. OV 4

The trial court also did not clearly err by assessing 10 points for OV 4. OV 4 addresses "psychological injury to a victim." MCL 777.34(1). OV 4 should be assigned 10 points when "[s]erious psychological injury

requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(a). For example, "[t]he trial court may assess 10 points for OV 4 if the victim suffers, among other possible psychological effects, personality changes, anger, fright, or feelings of being hurt, unsafe, or violated." *People v Armstrong*, 305 Mich App 230, 247; 851 NW2d 856 (2014). While actual treatment is not required for scoring OV 4, evidence that a victim sought counseling may be considered. *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009). However, the scoring of OV 4 cannot be based on the assumption that people *typically* suffer psychological injury when they are victims of the type of crime in question; and while relevant, a victim's fear *during* the crime does not by itself justify the scoring of OV 4. *People v White*, 501 Mich 160, 163-165 & n 3; 905 NW2d 228 (2017).

In this case, WO and his father provided victim impact statements, both at the original sentencing and at resentencing. These statements were properly considered by the trial court when assessing points for OV 4, see *People v Drohan*, 264 Mich App 77, 90; 689 NW2d 750 (2004), and provided ample support for the trial court's assessment. Both WO and his father reported a change in WO's personality; WO became angry, afraid, distrustful, defensive, and hypervigilant. WO was so fearful as a result of the attack that he slept with a knife under his bed for a time. WO suffered flashbacks and panic attacks when reminded of the assault by sights, sounds, or even smells. As a result of the attack, WO sought psychological counseling. He was in counseling for 1½ years and attended therapy as often as twice a week. At the time of resentencing, more than three years after the assault, WO still suffered the psychological effects of defendant's con-

duct. The trial court did not err by assessing 10 points for OV 4.[4] See *Hardy*, 494 Mich at 438.

D. OV 10

The trial court also did not err by assessing 15 points for OV 10. OV 10 addresses the "exploitation of a vulnerable victim," and it is properly assessed at 15 points when "[p]redatory conduct was involved[.]" MCL 777.40(1)(a). The term "predatory conduct" means "preoffense conduct directed at a victim . . . for the primary purpose of victimization." MCL 777.40(3)(a). In other words, " '[p]redatory conduct' under the statute is behavior that precedes the offense, directed at a person for the primary purpose of causing that person to suffer from an injurious action or to be deceived." *People v Cannon*, 481 Mich 152, 161; 749 NW2d 257 (2008). To aid trial courts in determining if predatory conduct occurred under OV 10, the Michigan Supreme Court has set forth the following inquiries:

> (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.]

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[4] In disputing the scoring of OV 4, defendant relies heavily on Judge GLEICHER's concurring opinion in *People v McChester*, 310 Mich App 354, 360-369; 873 NW2d 646 (2015) (GLEICHER, J., concurring), and argues that under Judge GLEICHER's interpretation, OV 4 should not be scored in this case. However, as a concurring opinion, Judge's GLEICHER's opinion is nonbinding. See *People v Armstrong*, 207 Mich App 211, 214-215; 523 NW2d 878 (1994). In any event, we are not persuaded that the result in this case would be different even under Judge GLEICHER's interpretation of OV 4.

"If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40." *Id*.

In this case, the trial court explained its assessment of 15 points for OV 10 as follows:

> We're dealing with a boy who was 13 years old at the time in the safety, he thought, of his own home with the defendant who had groomed him through Facebook and prior contacts. This was a boy who was youthful and vulnerable because of his naivete, with the timing and the location in his home waiting until he was asleep. That's predatory conduct and I'm scoring 15 points on OV 10.

The trial court's reasoning is sound. Defendant engaged in preoffense conduct, including Facebook exchanges and other contacts with WO, visiting WO's home, spending leisure time with WO, and discussing personal topics. This conduct led WO to trust defendant and feel comfortable alone with him, thereby making it easier for defendant to carry out his sexual assault. See *People v Waclawski*, 286 Mich App 634, 686; 780 NW2d 321 (2009). Indeed, defendant's conduct, especially his preoffense physical contact with WO in the form of massages, putting his arm around WO, et cetera, could be termed "grooming." "Grooming refers to less intrusive and less highly sexualized forms of sexual touching, done for the purpose of desensitizing the victim to future sexual contact." *People v Steele*, 283 Mich App 472, 491-492; 769 NW2d 256 (2009). Additionally, as the trial court noted, defendant waited to begin his assault until he was alone with WO and WO was asleep. See *People v Ackah-Essien*, 311 Mich App 13, 37; 874 NW2d 172 (2015) ("The timing and location of an offense—waiting until a victim is alone and isolated—is evidence of predatory conduct.").

Defendant directed these various preoffense behaviors toward WO, who the trial court concluded was vulnerable because of his youth and naiveté. Moreover, this vulnerability would have been readily apparent because it is well recognized that a youthful victim "may be susceptible to physical restraint or temptation by an adult." *People v Johnson*, 298 Mich App 128, 133; 826 NW2d 170 (2012). Finally, the record supports the trial court's conclusion that defendant's preoffense behavior was done for the purpose of victimization. Defendant befriended WO, earning his confidence and gaining an opportunity to be alone with WO while he was relaxed and unguarded. Defendant then waited until WO was sleeping, and thus even more vulnerable, before carrying out his assault. The trial court properly assessed 15 points for OV 10. See *Hardy*, 494 Mich at 438.

E. OV 11

The trial court also did not clearly err by assessing 50 points for OV 11. OV 11 is scored for "criminal sexual penetration," and it is properly assigned 50 points when "[t]wo or more criminal sexual penetrations occurred[.]" MCL 777.41(1)(a). To score a sexual penetration under OV 11, the sexual penetration must arise out of the sentencing offense. MCL 777.41(2)(a). Notably, points cannot be scored under OV 11 "for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." MCL 777.41(2)(c).

In this case, the trial court concluded that there were three penetrations and, excluding the penetration that formed the basis of the sentencing offense, assessed 50 points for OV 11 on the basis of the remaining two sexual penetrations. These three dis-

tinct acts of sexual penetration—which all occurred on the same day, at the same place, during the same course of conduct—arose out of the sentencing offense for purposes of OV 11. MCL 777.41(2)(a); *People v Mutchie*, 251 Mich App 273, 277; 650 NW2d 733 (2002). Nevertheless, defendant argues that OV 11 should not be scored for two reasons.

First, defendant argues that because he received two convictions for CSC-III, neither of the two penetrations resulting in conviction could be considered when assessing points for OV 11. However, this Court has repeatedly rejected this argument. *People v Cox*, 268 Mich App 440, 455-456; 709 NW2d 152 (2005); *People v McLaughlin*, 258 Mich App 635, 672-678; 672 NW2d 860 (2003); *Mutchie*, 251 Mich App at 279-281. In particular, this Court has concluded that "OV 11 requires the trial court to exclude *the one penetration* forming the basis of the offense when the sentencing offense itself is first-degree or third-degree CSC." *McLaughlin*, 258 Mich App at 676 (emphasis added). All other sexual penetrations arising from the sentencing offense, including penetrations resulting in separate CSC-I or CSC-III convictions, are properly considered under OV 11. *Cox*, 268 Mich App at 455-456; *McLaughlin*, 258 Mich App at 676; *Mutchie*, 251 Mich App at 280-281.[5]

Second, defendant argues that while WO described a third, uncharged sexual penetration (when defendant performed fellatio on WO), there is insufficient evi-

[5] Defendant also briefly suggests that OV 11 cannot be scored because his second CSC-III conviction was taken into account when scoring PRV 7, which involves subsequent or concurrent felony convictions. See MCL 777.57(1). This "double counting" argument lacks merit because PRV 7 and OV 11 involve "two separate categories addressing two different situations." See *People v Jarvi*, 216 Mich App 161, 163-164; 548 NW2d 676 (1996) (analyzing PRV 7 and OV 5).

dence that this penetration occurred. However, points can be assessed under OV 11 on the basis of uncharged sexual penetrations provided that, as in this case, they arise out of the sentencing offense. *People v Wilkens*, 267 Mich App 728, 743; 705 NW2d 728 (2005). Further, contrary to defendant's claim that the jury must have found that the third penetration occurred, judicial fact-finding is entirely proper at sentencing when, as in this case, the trial court treated the guidelines as advisory only. *People v Biddles*, 316 Mich App 148, 159-161; 896 NW2d 461 (2016). Given WO's testimony that three penetrations occurred during the same course of conduct, the trial court did not clearly err by assessing 50 points for OV 11 because, excluding the sentencing offense, two or more criminal sexual penetrations occurred. See MCL 777.41(1)(a); *Hardy*, 494 Mich at 438.

III. CONTENTS OF THE PSIR

In his appellate and Standard 4 briefs, defendant raises a variety of challenges relating to the contents of his presentence investigation report (PSIR), and he argues that inaccuracies entitle him to resentencing or, at a minimum, a remand for correction of clerical errors. More specifically, defendant argues that the trial court abused its discretion by refusing to strike from the PSIR the phrase "deemed a predator." Defendant also challenges the accuracy of personal information contained in the PSIR, as well as the presentation of his military history and past criminal convictions. Additionally, defendant contends that victim impact statements should have been stricken from the PSIR. Finally, defendant argues that the trial court abused its discretion by refusing to attach to the PSIR a separate, defense-commissioned report. We disagree.

We review for an abuse of discretion the trial court's decisions regarding the information in a defendant's PSIR. *Waclawski*, 286 Mich App at 689.

"The presentence investigation report is an information-gathering tool for use by the sentencing court." *Morales v Parole Bd*, 260 Mich App 29, 45; 676 NW2d 221 (2003). It is "intended to insure that the punishment is tailored not only to the offense, but also to the offender." *People v Miles*, 454 Mich 90, 97; 559 NW2d 299 (1997). The PSIR is used by the trial court at sentencing, but it also "follows the defendant to prison[.]" *People v Maben*, 313 Mich App 545, 553; 884 NW2d 314 (2015) (quotation marks and citation omitted). That is, the PSIR must be provided to the Department of Corrections, MCL 771.14(9) and MCR 6.425(A)(3), and it can have ramifications related to security classification or parole, *Maben*, 313 Mich App at 553.

"At sentencing, either party may challenge the accuracy or relevancy of any information contained in the presentence report." *Waclawski*, 286 Mich App at 689. "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." *Id*. "[T]he 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." *Id*. at 689-690. "Once a defendant effectively challenges a factual assertion, the prosecutor has the burden to prove the fact by a preponderance of the evidence." *Id*. at 690. "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." *Id*.

At resentencing, defendant objected to the phrase "defendant is deemed a predator" found in the "Evaluation and Plan" section of the PSIR. Defendant asserts that this descriptor was inappropriate because defendant had never been diagnosed as a predator and the statement is nothing but an agent's subjective opinion. After considering the parties' arguments, the trial court refused to strike the comment from the PSIR. Given defendant's predatory conduct in this case as scored under OV 10, particularly when considered in light of his pattern of sexually preying on sleeping victims, the term "predator" cannot be considered inaccurate.[6] See *People v Lucey*, 287 Mich App 267, 276; 787 NW2d 133 (2010). Consequently, the trial court did not abuse its discretion by refusing to strike this statement from the PSIR. *Id*.

The majority of defendant's other challenges relate to the original PSIR, which was incorporated into the updated PSIR for the resentencing with the caveat that "[a]ny additions or corrections are contained herein," i.e., in the updated PSIR. Accordingly, defendant's complaints regarding his level of education, his number of military convictions, and OV 13 and OV 19 are without merit because his education is correctly reflected in the updated PSIR, his past criminal convictions were updated to reflect the status of his military convictions following his military appeal, and OV 13 and OV 19 were not scored. To the extent that

[6] Although defendant asserts that there is no evidence that he has been diagnosed as a predator, the lack of a diagnosis is irrelevant because the PSIR cannot plausibly be read to suggest that defendant was clinically diagnosed as a predator. See *People v Uphaus (On Remand)*, 278 Mich App 174, 182; 748 NW2d 899 (2008) (finding no error in the use of the term "paranoia" in a PSIR when "it [was] clear that no reasonable reader of the PSIR could mistake [that] statement for a clinical diagnosis").

defendant disputes the contents of the original PSIR that were altered by the updated PSIR, his arguments are moot.

Regarding the remainder of defendant's other challenges to the information contained in the PSIR, the trial court gave defense counsel every opportunity to speak and to consult with defendant at resentencing, but defendant failed to make an effective challenge in the trial court, and thus, he is not entitled to relief on appeal. See *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Even if we were to review these challenges for plain error affecting substantial rights, we would find no such error. See *People v Earl*, 297 Mich App 104, 111; 822 NW2d 271 (2012). For instance, defendant claims that his most recent employer was "Real Big Marketing," but he is serving multiyear prison terms, and there is no evidence that he has retained his employment while incarcerated; accordingly, there is no plain error in the PSIR's description of him as "unemployed." At his initial sentencing, defendant also challenged the words "groped" and "fondled" as they related to his military convictions, asserting that the PSIR should simply say that he "touched" his military victims. This semantical argument is without merit, particularly given that defendant's military victim testified in the current case as an other-acts witness, describing how he awoke to find defendant's hand "rubbing" and "stroking" his penis "like if someone was masturbating." Defendant claims that the PSIR should report a "discharge other than honorable" from the military, but he has not explained what is inaccurate about reporting that defendant was dismissed from the service as a result of a court-martial as set forth in the PSIR. Absent an effective challenge by defendant, the PSIR is presumed to be accurate, and defendant is not entitled to correction of

any information in the PSIR. *Callon*, 256 Mich App at 334. Defendant also argues that statements in the PSIR indicating that this Court approved the assessment of costs during his prior appeal are inaccurate. While this Court remanded to establish a factual basis for the amount of costs imposed, this Court did note that the costs imposed were authorized by MCL 769.1k(1)(b)(*iii*) and that the trial court did not err by imposing court costs on defendant. The trial court did not plainly err by failing to sua sponte order this statement stricken from the PSIR.

Additionally, defendant challenges the factual underpinnings of his military convictions, offering a long explanation for his conduct and asserting that he was wrongfully convicted on the basis of some sort of vindictive persecution by the victim in the military case. Defendant's self-serving assertions are wholly unsupported by the lower court record, and his appeal before this Court is not a proper vehicle through which to relitigate his military convictions.

Defendant also asserts that victim impact statements should not have been included in the PSIR because "[t]here is no way to rebut" the statements. Defendant's argument is without merit, and the trial court did not abuse its discretion by including statements from WO and his parents. "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[.]" *Waclawski*, 286 Mich App at 691. See also MCL 771.14(2)(b); MCR 6.425(A)(1)(g). "[T]he right is not limited exclusively to the defendant's direct victims" but may also include others, such as family members. *Waclawski*, 286 Mich App at 691-692. Although victim

impact statements are subjective and often disputed by defendants, this does not necessitate exclusion of the statements from the PSIR. *Maben*, 313 Mich App at 555; *Lucey*, 287 Mich App at 275-276. "[T]he sentencing standards for ensuring that the goals of sentencing are met, along with the court's knowledge that victim impact statements are the subjective opinions of victims, are sufficient protections to ensure that a defendant is not sentenced in response to emotional pleas." *Maben*, 313 Mich App at 555. Accordingly, contrary to defendant's arguments, the trial court acted well within its discretion by allowing WO and his parents to offer victim impact statements and by including those statements in the PSIR. See *Waclawski*, 286 Mich App at 691-692.

Further, the trial court did not abuse its discretion by declining to attach to the PSIR a defense-commissioned report of more than 100 pages. This proposed report is neither included in the lower court record nor provided by defendant on appeal, and defendant provides no legal authority for the proposition that a defendant has the right to prepare his own report for inclusion in the PSIR. Absent factual and legal support for his argument, defendant has abandoned his assertion that the defense-commissioned report should have been included. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).[7]

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[7] In his Standard 4 brief, defendant suggests that his defense-commissioned report could be considered "other pertinent data" within the meaning of MCR 6.425(A)(1)(d). However, MCR 6.425(A)(1)(d) calls for a "brief social history" that is part of an overall "succinct" PSIR. The defense-commissioned report is more than 100 pages, far from a succinct report or a brief social history. Further, from the available record it appears that the defense-commissioned report includes information that cannot plausibly be considered "pertinent," such as certificates of defendant's graduation from prekindergarten and kindergarten. Defendant's reliance on MCR 6.425(A)(1)(d) is misplaced.

Ultimately, defendant's presentence report complied with the statutory requirements, and he was sentenced based on accurate information. See *People v Young*, 183 Mich App 146, 147; 454 NW2d 182 (1990). Defendant has not shown that the trial court abused its discretion in evaluating the information contained in the PSIR.

IV. OUT-OF-GUIDELINES SENTENCE

Next, defendant argues that he is entitled to resentencing because his sentences are unreasonable and disproportionate. Specifically, defendant asserts that the reasons articulated by the trial court for imposing the out-of-guidelines sentences did not justify the sentences imposed because those reasons were already accounted for by OV 4 and OV 10. In his Standard 4 brief, defendant also offers a variety of challenges to the proportionality of his sentences. We disagree.

This Court reviews an out-of-guidelines sentence for reasonableness. *People v Lockridge*, 498 Mich 358, 365; 870 NW2d 502 (2015). "[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion." *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017); see also *People v Dixon-Bey*, 321 Mich App 490, 520; 909 NW2d 458 (2017), oral argument ordered on the application 501 Mich 1066 (2018). A sentence is unreasonable—and therefore an abuse of discretion—if the trial court failed to adhere to the principle of proportionality in imposing its sentence on a defendant. *Steanhouse*, 500 Mich at 477, citing *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). That is, sentences imposed by a trial court must "be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636. The trial court's fact-finding at

sentencing is reviewed for clear error. See *People v Garay*, 320 Mich App 29, 43; 903 NW2d 883 (2017) (citation omitted).

"[A] sentence is reasonable under *Lockridge* if it adheres to the principle of proportionality set forth in *Milbourn*." *People v Walden*, 319 Mich App 344, 351; 901 NW2d 142 (2017). *Milbourn*'s "principle of proportionality . . . requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id*. at 352 (quotation marks and citation omitted). An out-of-guidelines sentence "may be imposed when the trial court determines that 'the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime.' " *People v Steanhouse (On Remand)*, 322 Mich App 233, 238; 911 NW2d 253 (2017).

> Factors that may be considered by a trial court under the proportionality standard include, but are not limited to:
>
> > (1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. [*Walden*, 319 Mich App at 352-353 (citation omitted).]

The legislative guidelines remain a "useful tool" that must be taken into account when sentencing a defendant, and "a trial court must justify the [out-of-guidelines] sentence imposed in order to facilitate appellate review, which includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence

would have been." *Dixon-Bey*, 321 Mich App at 524-525 (quotation marks and citation omitted).

In this case, when resentencing defendant, the trial court imposed lower minimum sentences than had been originally imposed for defendant's CSC-III convictions. Nonetheless, the sentences imposed were above the 57- to 95-month range recommended by the guidelines. The trial court provided the following explanation for the sentences imposed:

> Okay. Well, I am appreciative of the facts [sic] that it seems as if you're gaining insight and it does appear from the submission packet that was prepared by the defense that you're taking advantage of all the programs and opportunities in the Michigan Department of Corrections. So hopefully, when you're released, you're going to be in a lot better position than when you went in.
>
> However, it is shameful that you took advantage of this 13-year-old and robbed him of his innocence and his childhood. The—I understand that the sentence—the charges reflect criminal sexual conduct of a person between the ages of 13 to 15. This child was at the young end of that. He was 13 at the time. He was groomed and taken advantage of in ways that I don't think are appropriately considered or fully considered by the guidelines.
>
> The defendant was on the sex offender registry and although he befriended the victim and his family, he didn't disclose that he was on the sex offender registry, that he was kicked out of the military for behavior unbecoming an officer and the sexual contact with the others when they were asleep. And the fact that this happened when this boy was asleep, in his own home, makes it all worse because as his father referenced, he was afraid to even go to sleep at night, to be in his own home.
>
> People should be able to feel safe in their homes and when you rob a child of the safety of his home so that he feels like he has to have a knife under his bed to go to sleep, I don't think the guidelines fully reflect that at a range of 57 to 95. So, for criminal sexual conduct count

> one, third degree, person age 13 through 15 as well as count two, criminal sexual conduct, third degree, a person between age 13 and 15, I believe a sentence that would be proportionate to this offense and to this offender is a sentence of nine years to fifteen years . . . .

Considering the reasons articulated by the trial court, we conclude that the trial court did not abuse its discretion by imposing the sentences it imposed. The trial court identified two basic reasons for the departure: (1) defendant's grooming behavior, particularly defendant's grooming behavior in the context of his failure to disclose past sexual misconduct, and (2) the location and timing of the offense, which resulted in WO feeling unsafe in his own home. Defendant contends that these facts were already accounted for by OV 10 and OV 4, respectively. We disagree.

First, although OV 10 accounts to some degree for defendant's predatory conduct and grooming behavior, the trial court identified circumstances—namely, defendant's past sexual misconduct and status as a registered sex offender—that made his grooming of WO particularly egregious. By withholding information about his past sexual misconduct and status as a registered sex offender until he had already befriended WO and his family,[8] defendant was in a position of trust that enabled him to be in WO's home at night and

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[8] In his Standard 4 brief, defendant asserts that he did inform WO's mother and cousin of his past sexual misconduct and discharge from the military. However, defendant fails to cite the record in support of his factual assertions, see MCR 7.212(C)(7), and thus he has abandoned this claim, see *Kelly*, 231 Mich App at 640-641. In any event, although there was evidence that defendant told WO's mother that he had been accused of sexual impropriety and discharged from the military, this disclosure did not come until the night of the assault, *after* defendant had already befriended WO and his family and had begun to groom WO. There is also no indication that WO was ever made aware of defendant's history before defendant assaulted him.

to commit the sexual assault in this case. WO had no warning that sleeping in defendant's presence would place him at risk of sexual assault. Withholding this pertinent information from WO and his family enabled defendant to groom the 13-year-old and to initiate the assault, and these circumstances are not adequately accounted for in the scoring of OV 10. Thus, the trial court did not err by considering these facts when sentencing defendant.

Second, while defendant was assessed points for OV 4, the trial court did not err by concluding that the guidelines did not adequately account for the extent to which the timing and location of the assault resulted in WO's loss of security. It is true that to some extent, OV 4 accounted for WO's serious psychological injury requiring professional treatment. However, as discussed, WO experienced numerous psychological injuries as a result of the assault, including panic attacks, flashbacks, hypervigilance, anger, and personality changes, which necessitated 1½ years of counseling and which continued to some degree at the time of resentencing, three years after the assault. On their own, these serious psychological injuries resulting from the sexual assault merit a score of 10 points for OV 4. See *Armstrong*, 305 Mich App at 247-248. But because of the timing and location of the sexual assault—defendant initiated the assault while WO slept in his own home—WO was also robbed of a sense of security while in his own home, to the extent that he began sleeping with a knife under his bed. WO's response—to not only the violation of his person but also the violation of his home—is not adequately accounted for by the scoring of OV 4. Accordingly, the trial court did not err by finding that OV 4 did not adequately account for the circumstances of the offense.

With regard to the length of the sentences, the out-of-guidelines sentences were 13 months above the high end of the guidelines range, a relatively modest length of time. See *Walden*, 319 Mich App at 353. Further, defendant's 9-year minimum sentences were less than defendant's original sentences and less than the 10-year sentences sought by the prosecution at resentencing, see *id*. at 354-355 (comparing the extent to which the trial court exceeded the guidelines to the sentence requested by the prosecution when determining whether the out-of-guidelines sentence imposed violated the principle of proportionality). There is nothing in the length of the sentences imposed by the trial court that leads us to conclude that they were unreasonable.

The additional arguments raised by defendant in his Standard 4 brief regarding the reasonableness and proportionality of his sentences are also without merit. Defendant's arguments regarding the proportionality of his sentences are premised largely on federal sentencing rules as well as pre-*Lockridge* caselaw regarding substantial and compelling reasons for departing from the mandatory sentencing guidelines, but these pre-*Lockridge* standards do not now govern a determination whether his sentences were reasonable or proportionate in Michigan. That is, under *Lockridge*, "the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so," and "[a] sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *Lockridge*, 498 Mich at 392. Further, "reasonableness" is judged on the basis of *Milbourn*'s principle-of-proportionality test and the jurisprudence of this state; federal sentencing rules do not control. See *Steanhouse*, 500 Mich at 471-472.

Additionally, defendant argues that the trial court's sentences are disproportionate because the trial court failed to consider mitigating factors, but he has not shown that the trial court was required to consider any of the specific factors raised by defendant on appeal. See *People v Johnson*, 309 Mich App 22, 34; 866 NW2d 883 (2015), vacated in part on other grounds 497 Mich 1042 (2015). And, in any event, the record demonstrates that the trial court reviewed and considered all the information submitted by defendant, including information regarding his family support and conduct while in prison.

Defendant also appears to argue that he is entitled to lesser sentences because WO "consented." Legally, the 13-year-old victim could not consent. *People v Starks*, 473 Mich 227, 235; 701 NW2d 136 (2005). In any event, WO's description of the assault makes it clear that he was not a willing participant. Defendant's "consent" arguments are legally and factually meritless, and he has not demonstrated that the sentences imposed were unreasonable in light of the seriousness of the circumstances surrounding his sexual assault of a 13-year-old boy.

Defendant further asserts that the sentences imposed were "vindictive." This cursory assertion, made without citation to relevant authority, is abandoned. See *Kelly*, 231 Mich App at 640-641. In any event, the sentences imposed at defendant's resentencing were less severe than defendant's original sentences, and defendant points to nothing in these reduced sentences to suggest vindictiveness. See generally *People v Lyons (After Remand)*, 222 Mich App 319, 323; 564 NW2d 114 (1997) ("When a defendant is resentenced by the same judge and the second sentence is *longer* than the first, there is a presumption of vindictiveness.") (emphasis added).

Overall, considering the seriousness of the circumstances surrounding the offense and the offender, the trial court's out-of-guidelines sentences did not violate the principle of proportionality and were reasonable. See *Lockridge*, 498 Mich at 392; *Dixon-Bey*, 321 Mich App at 520-521.

V. CONSTITUTIONALITY OF *LOCKRIDGE*

Finally, in his Standard 4 brief, defendant argues that *Lockridge* is unconstitutional and should be overruled. According to defendant, contrary to *Lockridge*'s holding, a jury should find any facts used to score offense variables. Additionally, defendant asserts that retroactive application of *Lockridge* violates the prohibition against ex post facto laws. These arguments are without merit.

To the extent that defendant asks us to overrule *Lockridge*, this Court is without authority to declare *Lockridge* unconstitutional or to refuse to apply *Lockridge* to the facts of this case. See *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987). With regard to defendant's ex post facto challenge, this Court has already rejected similar challenges to *Lockridge*, concluding that retroactive application of *Lockridge* to cases like this one, cases that were pending on direct review when *Lockridge* was decided, " 'does not violate ex post facto-type due process rights of defendants.' " *People v Richards*, 315 Mich App 564, 587-588; 891 NW2d 911 (2016), rev'd in part on other grounds 501 Mich 921 (2017), quoting *United States v Barton*, 455 F3d 649, 657 (CA 6, 2006). Defendant's ex post facto argument is therefore without merit.

Affirmed.

M. J. KELLY, P.J., and SERVITTO, J., concurred with BOONSTRA, J.

BOONSTRA, J. (*concurring*). I concur fully with the majority opinion. I write separately to elaborate on the majority opinion's use of the term "out-of-guidelines sentence" rather than the more commonly used term, "departure."

The term "departure" derives from an earlier time when the sentencing guidelines were mandatory, such that substantial and compelling reasons were required before a sentencing court could deviate from them.[1] Although the term "departure" has multiple definitions, principal among them is that a "departure" is a "divergence or deviation, as from a standard or rule." See *Random House Webster's College Dictionary* (2005). Because our Supreme Court has held that the sentencing guidelines are now "advisory only," *People v Lockridge*, 498 Mich 358, 365, 399; 870 NW2d 502 (2015), or "merely advisory," *id*. at 395 n 31,[2] and has struck down the substantial-and-compelling-reason standard, *id*. at 391, I find the "departure" nomenclature to be of questionable continuing utility and suggest that sentences such as defendant's are more accurately referred to as "out-of-guidelines sentences."

This is not a mere semantic quibble; my reading of *Lockridge* and its progeny leads me to conclude that some of the caselaw regarding "departure" sentences, which continues often to be cited by litigants and this Court, is no longer applicable. Most notably, I believe

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[1] *People v Lockridge*, 498 Mich 358, 364-365; 870 NW2d 502 (2015), "[struck] down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure."

[2] Our Supreme Court has subsequently reiterated those descriptions and has additionally referred to the sentencing guidelines as "fully advisory," "purely advisory," "advisory *in all applications*," and "advisory in all cases." *People v Steanhouse*, 500 Mich 453, 459, 466, 469, 470; 902 NW2d 327 (2017).

that our Supreme Court's dictate that we review an out-of-guidelines sentence for "reasonableness," *Lockridge*, 498 Mich at 392, in accordance with the principle of proportionality, *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017), has eliminated not only the requirement that a trial court articulate substantial and compelling reasons for "departing" from the sentencing guidelines, but has also eliminated the requirement that the trial court articulate its reasons for the "extent of the departure." See *People v Smith*, 482 Mich 292, 313-314; 754 NW2d 284 (2008).

This does not diminish a trial court's continuing obligation to "justify the [out-of-guidelines] sentence imposed in order to facilitate appellate review, which includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *People v Dixon-Bey*, 321 Mich App 490, 525; 909 NW2d 458 (2017) (quotation marks and citation omitted), oral argument ordered on the application 501 Mich 1066 (2018). Nor does it diminish a trial court's obligation to consult the guidelines and to take them into account when imposing a sentence. See *Steanhouse*, 500 Mich at 474-475 ("We repeat our directive from *Lockridge* that the guidelines 'remain a highly relevant consideration in a trial court's exercise of sentencing discretion' that trial courts ' "must consult" ' and ' "take . . . into account when sentencing . . . ." ' "), quoting *Lockridge*, 498 Mich at 391, in turn quoting *United States v Booker*, 543 US 220, 264; 125 S Ct 738; 160 L Ed 2d 621 (2005). But " 'the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range.' " *Steanhouse*, 500 Mich at 475, quoting *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). Indeed, "[r]ather than impermissibly measuring propor-

tionality by reference to deviations from the guidelines, our principle of proportionality requires 'sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *Steanhouse*, 500 Mich at 474, quoting *Milbourn*, 435 Mich at 636. And an out-of-guidelines sentence does not give rise to any presumption of unreasonableness. *Steanhouse*, 500 Mich at 474.

Consequently, I would propose that we simply consider whether the sentence imposed by the trial court was reasonable, in accordance with the dictates of *Lockridge* and *Steanhouse*, and that we jettison the now-antiquated references to "departures" or "the extent of the departure."[3]

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[3] I note that even our Supreme Court has continued to refer to "departures." See, e.g., *Steanhouse*, 500 Mich at 460-462; *People v Skinner*, 502 Mich 89, 134 n 25; 917 NW2d 292 (2018) (in dicta). Old habits are hard to break.

In re PETITION OF ATTORNEY GENERAL FOR SUBPOENAS

Docket Nos. 342086 and 342680. Submitted February 12, 2019, at Lansing. Decided February 6, 2019, at 9:00 a.m. Leave to appeal sought in Docket No. 342680.

In Docket No. 342086, the Attorney General filed a petition in Ingham Circuit Court on behalf of the Department of Licensing and Regulatory Affairs (LARA), Bureau of Professional Licensing, seeking to obtain a subpoena for medical records pertaining to MG, a former patient of Mark R. Mortiere, M.S., D.D.S. The court, Joyce Draganchuk, J., granted the petition and authorized the subpoena. Dr. Mortiere moved to quash the subpoena, but the court denied the motion. Dr. Mortiere applied for leave to appeal. Because Dr. Mortiere had not sought a stay in the circuit court, the Attorney General filed a show-cause motion, requesting that Dr. Mortiere be found in civil contempt and be ordered to comply with the subpoena. In response to the show-cause motion, Dr. Mortiere moved to stay the proceedings. The circuit court denied the motion. Rather than holding Dr. Mortiere in contempt, the court ordered him to comply with the subpoena within 7 days. Dr. Mortiere sought a stay of proceedings in the Court of Appeals. The Court denied both the stay motion and the leave application. Dr. Mortiere then filed a claim of appeal of the order compelling him to comply with the subpoena.

In Docket No. 342680, the Attorney General filed a petition in Ingham Circuit Court on behalf of LARA's Bureau of Professional Licensing, seeking records, reports, and other documentation pertaining to 11 patients of Vernon E. Proctor, M.D., as well as all employment records pertaining to Dr. Proctor. The circuit court, Joyce Draganchuk, J., ordered Dr. Proctor to produce the records. Dr. Proctor moved to vacate the order, arguing that the patients might be subject to specific confidentiality protections under federal law, that improper disclosure could result in criminal penalties, and that the court had not complied with federal regulations pertaining to notice and mandatory findings of fact. The court denied the motion, and Dr. Proctor appealed. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Although an order finding a party in civil contempt of court is not a final order for purposes of appellate review, the lower court expressly declined to find Dr. Mortiere in contempt. Accordingly, the Attorney General's argument that the Court of Appeals lacked jurisdiction to hear Dr. Mortiere's appeal as an appeal of right failed.

2. A party may not use a second proceeding to attack a tribunal's decision in a previous proceeding. But a court's interlocutory, nonsubstantive disposition in a matter that was not immediately appealable by right may be challenged in a later appeal by right. Because the Court of Appeals denied Dr. Mortiere's interlocutory appeal for failure to persuade the court of the need for immediate appellate review, and not on the merits of the application, the doctor's challenge to the denial of his motion to quash was not an improper collateral attack on the Court's denial of the earlier, interlocutory appeal.

3. A matter before the Court of Appeals is moot if the Court's decision cannot have a practical legal effect on the existing controversy. The Attorney General sought records from Dr. Mortiere's practice on the basis of their relevance to an ongoing Bureau of Professional Licensing complaint against the doctor. So even though Dr. Mortiere subsequently complied with the subpoena, the case was not moot because the Court of Appeals' decision could still have a practical legal effect on the underlying complaint.

4. MCL 333.16221 grants LARA discretion to investigate health-profession licensees in certain circumstances and requires LARA to conduct such an investigation in other circumstances. Under MCL 333.16231(2)(a), a panel of board members may authorize LARA to investigate a licensee if the panel has a reasonable basis to believe that the licensee violated the Public Health Code. Because the investigation of Dr. Mortiere is authorized under MCL 333.16231(2)(a), it was irrelevant whether he could be investigated under other provisions of MCL 333.16221.

5. Patients' substance abuse treatment records are protected from disclosure by 42 USC 290dd-2, except under expressly defined circumstances. Relevant to the disclosures sought in Dr. Proctor's case, 42 USC 290dd-2(b)(2)(C) allows a court to order disclosure in response to an application demonstrating good cause, including the need to avert a substantial risk of death or serious bodily harm. Under 42 CFR 2.64(d)(1) (2017), good cause requires a finding that other ways of obtaining the information are either unavailable or will be ineffective. Before a court may

authorize a subpoena requiring disclosure, both 42 USC 290dd-2(b)(2)(C) and 42 CFR 2.64(d) and (e) (2017) require the court to weigh the public interest and the need for disclosure against potential injury to the patient, the physician-patient relationship, and treatment services; to appropriately limit the scope of disclosure; and to impose safeguards against unauthorized disclosure. In authorizing the subpoenas sought in Dr. Proctor's case, the court took measures to limit the disclosures but made no findings relevant to good cause. Because the court failed to make these mandatory findings, failed to consider other ways of obtaining the necessary information, and failed to weigh the mandatory factors before authorizing disclosure, the subpoenas were improperly granted.

6. 42 CFR 2.64 (2017) requires a court to hold a hearing before ordering the release of a substance abuse patient's confidential records. Because the court failed to hold a hearing before granting the Attorney General's application, the subpoenas were improperly issued.

7. When a court orders disclosure of medical records, 42 CFR 2.63 (2017) requires the court to order redaction of confidential communications between a patient and doctor. An exception exists if "[t]he disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties." The word "including" indicates that "an existing threat to life or of serious bodily injury" is limited to threats that are of the same type as child abuse and neglect and verbal threats against third parties. Because the national opioid crisis is not the same type of threat, the circuit court erred by failing to ensure that confidential communications be redacted from the ordered disclosures.

Docket No. 342086 affirmed. Docket No. 342680 reversed and remanded to the circuit court for further proceedings.

1. LICENSES — INVESTIGATIONS.

MCL 333.16221 includes four provisions under which the Department of Licensing and Regulatory Affairs may investigate licensed health professionals; if one statutory provision is met, it is irrelevant whether other provisions are also met.

2. SUBPOENAS — DISCLOSURE OF CONFIDENTIAL RECORDS — MANDATORY CONSIDERATIONS.

A court may not order disclosure of patients' substance abuse treatment records absent limitations on the scope of disclosure;

safeguards against unauthorized disclosure; a finding that other means of obtaining the information are either unavailable or will be ineffective; and a finding that the public interest and need for disclosure outweigh the potential injury to the patient, the physician-patient relationship, and treatment services (42 USC 290dd-2).

3. SUBPOENAS — DISCLOSURE OF CONFIDENTIAL RECORDS — HEARINGS.

Under 42 CFR 2.64 (2017), a court must hold a hearing before authorizing a subpoena ordering the release of a substance abuse patient's confidential records.

4. STATUTORY INTERPRETATION — *EJUSDEM GENERIS*.

The national opioid crisis does not justify disclosure of confidential doctor-patient communications under 42 CFR 2.63 (2017) because it is not the same type of threat to life or serious bodily injury as "suspected child abuse and neglect and verbal threats against third parties."

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Michele M. Wagner-Gutkowski* and *M. Catherine Waskiewicz*, Assistant Attorneys General, for petitioner in Docket Nos. 342086 and 342680.

Merry, Farnen & Ryan, P.C. (by *John J. Schutza*) for respondent in Docket No. 342086.

J. Nicholas Bostic for respondent in Docket No. 342680.

Before: M. J. KELLY, P.J., and SERVITTO and BOONSTRA, JJ.

PER CURIAM. In Docket No. 342086, respondent, Mark R. Mortiere, M.S., D.D.S., appeals by right the circuit court order granting the request of petitioner, Attorney General, for a subpoena to access Dr. Mortiere's medical records. In Docket No. 342680, respondent, Vernon E. Proctor, M.D., appeals by right

the circuit court order denying his motion to vacate the court's December 13, 2017 order granting the Attorney General's request for subpoenas to access the medical records of 11 of his patients. In Docket No. 342086, we affirm. In Docket No. 342680, we reverse and remand for further proceedings.

I. BASIC FACTS

With regard to Docket No. 342086, in September 2017, the Attorney General, on behalf of the Department of Licensing and Regulatory Affairs, Bureau of Professional Licensing (the Department), filed a petition for subpoenas,[1] indicating that it had "initiated investigations of licensees . . . or scheduled hearings in contested cases . . . to determine whether disciplinary action should be taken against licensees." Regarding Dr. Mortiere, the Department sought all unredacted records, reports, and other documentation related to Dr. Mortiere's treatment of MG, a former patient. The record reflects that in November 2016, MG had sent Dr. Mortiere an amended notice of intent to file a claim of professional negligence against him, but that she ultimately settled the case before commencing a lawsuit. The settlement was for less than $200,000.

The circuit court authorized a subpoena requiring Dr. Mortiere to produce MG's medical records by October 4, 2017. Dr. Mortiere filed a motion to quash the subpoena, which the circuit court denied on November 8, 2017. In the order denying the motion to quash, the court ordered Dr. Mortiere to comply with

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[1] We note that the lower court and the parties refer to the Department as the petitioner in both cases. However, the petitioner in each case is the Attorney General, who filed the petitions on the Department's behalf pursuant to MCL 333.16235 for the purpose of seeking the subpoenas at issue.

the subpoena "no later than November 30, 2017." Thereafter, Dr. Mortiere filed an application with this Court for leave to appeal the circuit court's denial of his motion to quash the subpoena. He did not, however, seek to stay the circuit court proceedings. Thus, on December 21, 2017, the Department filed a motion to show cause against Dr. Mortiere. In response, Dr. Mortiere sought a stay of the lower court proceedings, which the circuit court denied. On January 10, 2018, rather than holding Dr. Mortiere in contempt, the circuit court gave him 7 days to comply with its November 8, 2017 order. Dr. Mortiere also sought a stay in this Court; however, we denied his motion for a stay pending appeal. *In re Petition of Attorney General for Subpoenas*, unpublished order of the Court of Appeals, entered January 17, 2018 (Docket No. 341250). Further, this Court denied Dr. Mortiere's application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review." *Id*. Dr. Mortiere complied with the circuit court's January 10, 2018 order by turning over the records but immediately filed this claim of appeal.

With regard to Docket No. 342680, the Attorney General filed a petition for subpoenas on December 12, 2017, on the Department's behalf. Relevant to Dr. Proctor's appeal, the Department indicated that it was investigating Dr. Proctor's "treatment of patients and/or controlled substance prescribing practices . . . ." The Department sought all records, reports, and other documentation pertaining to 11 John and Jane Doe patients, as well as "[a]ll employment records including any medical (non-substance abuse) records pertaining to Vernon Proctor M.D." The record reflects that Dr. Proctor provided substance abuse treatment to 11 patients from June 1, 2015, to June 1, 2016. The Department stated that it sought the limited disclo-

sure of information under 42 CFR 2.66, that limited disclosure "is the most effective means to investigate the matter at hand," and that "this petition is the most effective means to investigate the matter at hand." The Department also indicated that it was seeking information "necessary to the investigation" and that "all unique identifiers may be deleted from the records of the licensee's patients."

The circuit court ordered Dr. Proctor to produce the records, and it ordered that the subpoenas could only be used to investigate Dr. Proctor's treatment of the patients or his controlled substance prescribing practices and "shall not be used for the purposes of investigating or prosecuting the patients themselves." The court further directed that "all unique identifiers of patients shall be deleted or blocked out from all documents" before any disclosure to the public and that disclosure was to be limited "to those persons whose need for the information is related to the investigation of the licensee or any following administrative licensing action." The court stated that patients need not be expressly notified that their records were being disclosed, but any patient would be given the opportunity to seek revocation or amendment of the order under 42 CFR 2.66(b). Accordingly, the court issued a subpoena that sought the listed patients' treatment information from June 1, 2015, to June 1, 2016, and Dr. Proctor's employment records. The subpoena provided a list of fictitious names and the corresponding patient names and dates of birth.

Dr. Proctor filed a motion to vacate the circuit court's order authorizing the subpoenas. In pertinent part, Dr. Proctor argued that the patients "may be addiction patients" subject to special confidentiality protections under 42 USC 290dd-2 and that there was a criminal penalty for improperly disclosing patient records. Dr.

Proctor argued that 42 CFR 2.64(b) required both the record holder and patients to be given the opportunity to file a written response to the application to compel disclosure of information, which had not occurred in this case. Finally, Dr. Proctor argued that the court's order was insufficient under 42 CFR 2.64(d) because it did not provide that good cause existed to obtain the order, including that other ways to obtain the information were unavailable or ineffective, or that the public interest and need for disclosure outweighed the potential injury to the patient.

The Department responded that on November 30, 2017, it had issued an order limiting Dr. Proctor's medical license to preclude him from prescribing "schedules 2-3 controlled substances for a minimum one year," and on January 2, 2018, it had suspended Dr. Proctor's controlled substances license for six months and one day. The Department argued that without access to review the patients' charts, it was "unsure if Dr. Proctor is providing substance abuse treatment to the patients in question." Additionally, the Department denied that patients must be notified and given an opportunity to respond to disclosures of their records because this case concerned an administrative proceeding under 42 CFR 2.66 and not a civil proceeding under 42 CFR 2.64. The Department denied that the regulations required a hearing on the application for an order when the application was sought under 42 CFR 2.66. Finally, the Department argued that its application set forth good cause for seeking the disclosures and that the court's order properly limited the disclosures.

Following a hearing on the motion, the circuit court concluded that the applicable section of regulations was 42 CFR 2.66 because it applies to investigations initiated by administrative or regulatory agencies, such as

the Department. The court determined that 42 CFR 2.66 provides its own notice provisions and only incorporates portions of 42 CFR 2.64. The court reasoned that the incorporated portions—42 CFR 2.64(d) and (e)—only required the court to limit the disclosures, which it had done. The court further determined that any prohibition against disclosing confidential patient communications was subject to the "unless" provision in 42 CFR 2.63, which provided that disclosure could occur if " 'the disclosure is necessary to protect against an existing threat to life or of serious bodily injury.' " The court held that the national opioid epidemic was such a threat, so it denied Dr. Proctor's motion to vacate the subpoena.

II. DOCKET NO. 342086

A. JURISDICTION

The Department argues that this Court lacks jurisdiction over Dr. Mortiere's appeal as an appeal of right. Specifically, the Department contends that the January 10, 2018 "show cause order" appealed from is a civil order of contempt, which is not a final judgment appealable as of right. In support, the Department directs this Court to *In re Moroun*, 295 Mich App 312; 814 NW2d 319 (2012) (opinion by K. F. KELLY, J.). In that case, this Court stated that "an order finding a party in civil contempt of court is not a final order for purposes of appellate review." *Id*. at 329. Yet contrary to the Department's assertion on appeal, the January 10, 2018 order is not an order holding Dr. Mortiere in civil contempt. Rather, that order states the court granted the Department's motion to show cause, and it directed Dr. Mortiere to fully comply with the September 27, 2017 subpoena and the court's November 8, 2017 order no later than January 17, 2018. There is simply nothing

in the order stating that the court was holding Dr. Mortiere in civil contempt. Moreover, the court expressly stated that it did not want to do so. Accordingly, the Department has not established that the order appealed from is not appealable of right on the ground that it is a civil contempt order.[2]

B. COLLATERAL ATTACK

Next, the Department argues that Dr. Mortiere's appeal of the circuit court's January 10, 2018 order is an improper collateral attack of the court's November 8, 2017 decision on his motion to quash the subpoena. "It is well established in Michigan that, assuming competent jurisdiction, a party cannot use a second proceeding to attack a tribunal's decision in a previous proceeding[.]" *Workers' Compensation Agency Dir v MacDonald's Indus Prods, Inc (On Reconsideration)*, 305 Mich App 460, 474; 853 NW2d 467 (2014). As explained by our Supreme Court:

> The final decree of a court of competent jurisdiction made and entered in a proceeding of which all parties in interest have due and legal notice and from which no appeal is taken cannot be set aside and held for naught by the decree of another court in a collateral proceeding commenced years subsequent to the date of such final decree. [*Dow v Scully*, 376 Mich 84, 88-89; 135 NW2d 360 (1965) (quotation marks and citation omitted).]

In this case, however, Dr. Mortiere is not challenging the court's decision in a previous proceeding in a second or subsequent proceeding. The record reflects instead

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[2] Even if this Court does not have jurisdiction to hear an appeal as of right, this Court may exercise its discretion by treating a party's appeal as an application for leave to appeal, granting leave, and addressing the issues presented on their merits. See *Wardell v Hincka*, 297 Mich App 127, 133 n 1; 822 NW2d 278 (2012).

that he is challenging an earlier order entered in the same proceeding, namely, the November 8, 2017 order denying his motion to quash the subpoena. Dr. Mortiere applied for leave to appeal the November 8, 2017 order, but this Court denied leave "for failure to persuade the Court of the need for immediate appellate review." *In re Petition of Attorney General for Subpoenas*, unpublished order of the Court of Appeals, entered January 17, 2018 (Docket No. 341250). Thus, given the nonsubstantive disposition, no appellate court has yet weighed in on the merits of Dr. Mortiere's claim. See *People v Willis*, 182 Mich App 706, 708; 452 NW2d 888 (1990) (stating that when this Court denies leave "for failure to persuade the Court of the need for immediate appellate review," the order is a nonsubstantive disposition). Moreover, interlocutory decisions of a court that were not appealable as of right can be challenged in a subsequent appeal by right. See *In re KMN*, 309 Mich App 274, 279 n 1; 870 NW2d 75 (2015). Thus, we discern no impropriety in reviewing the merits of the November 8, 2017 order denying the motion to quash the subpoena.

C. MOOTNESS

The Department next argues that this Court should dismiss this appeal as moot because Dr. Mortiere has turned over the records sought. "Michigan courts exist to decide actual cases and controversies, and thus will not decide moot issues." *Cooley Law Sch v Doe 1*, 300 Mich App 245, 254; 833 NW2d 331 (2013). "A matter is moot if this Court's ruling 'cannot for any reason have a practical legal effect on the existing controversy.' " *Id*., quoting *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). However, the disclosure of information sought through a subpoena does not necessarily render an issue moot if this Court's ruling can still have a practical legal effect on an

existing controversy. *Cooley Law Sch*, 300 Mich App at 254.

In this case, the Department sought to subpoena MG's records on the basis that they were required in the case of "Complaint No. 147796," which was "Bureau of Professional Licensing v. Mark Mortiere D.D.S." There is no indication in the record that the licensing controversy between the parties has ended. And were this Court to conclude that the circuit court improperly issued the subpoena, Dr. Mortiere could argue that the information that the Department improperly obtained should not be used against him in the licensing controversy. Accordingly, even though previously unknown facts have been disclosed, this Court's decision can have a practical effect on the controversy between the parties.

D. MERITS

Dr. Mortiere argues that the circuit court improperly issued a subpoena for MG's medical records because the Department had no authority to seek a subpoena where MG's settlement was his only settlement within the last five years and was for an amount less than $200,000. When interpreting a statute, this Court's goal is to give effect to the intent of the Legislature. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009). The language of the statute itself is the primary indication of the Legislature's intent. *Id*. This Court should read phrases "in the context of the entire legislative scheme." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012). This Court reads subsections of cohesive statutory provisions together. *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). Additional language should not be read into an

unambiguous statute. *McCormick v Carrier*, 487 Mich 180, 209; 795 NW2d 517 (2010).

MCL 333.16221 provides that the Department has the ability to investigate health-profession licensees under certain circumstances. MCL 333.16231 lists several circumstances under which the Department may initiate an investigation. At issue in this case, subject to an exception that does not apply here, MCL 333.16231(2)(a) provides that a panel of board members may review an allegation regarding a licensee's file under MCL 333.16211(4) and, if it determines that there is a reasonable basis to believe that the licensee violated the Public Health Code, it may authorize the Department to investigate. MCL 333.16231(4) provides that the Department *shall* initiate an investigation if it receives information reported under MCL 333.16243(2) that indicates a licensee has three or more malpractice settlements, awards, or judgments within a five-year period, or one or more malpractice settlements that total more than $200,000 in a five-year period.

Additionally, MCL 333.16231(2)(b), which is not at issue in this case, provides that the Department shall initiate an investigation if it receives one substantiated allegation or two or more investigated allegations in a four-year period from persons or governmental entities who believe that the licensee violated the Public Health Code. MCL 333.16231(3), which is also not at issue, provides that if the Department receives a written allegation from a governmental entity more than four years after an incident, the Department *may* initiate an investigation "in the manner described in" MCL 333.16231(2)(a) or (b), but it is not required to do so.

Reading these provisions in their contexts, MCL 333.16231 provides four means by which an investigation into a licensee's conduct may commence: the Board

may authorize an investigation if it receives an allegation and determines there is a reasonable basis to investigate; the Department shall investigate if it receives a specific number of substantiated or investigated allegations from persons or governmental entities in a four-year period; the Department may investigate if it receives a written allegation from a governmental entity that is more than four years old; and the Department shall investigate if it receives information that the licensee has three or more malpractice settlements or any number of settlements totaling more than $200,000 in a five-year period. Because these provisions are alternatives, it is irrelevant whether the Department met the requirements to investigate under § 16231(4) so long as it met the requirements to investigate under § 16231(2). Nothing in the statutory language conditions every investigation on first having met the requirements of § 16231(4), and from the context of these highly precise statutes, with their many cross-references, this Court will not read such a requirement into § 16231(2).

In sum, the circuit court did not err by failing to quash the subpoena because MCL 333.16231, when read in context, provides several alternative bases on which the Department may initiate an investigation, and it was sufficient for the Department to show that it met the requirements of § 16231(2).

III. DOCKET NO. 342680

Dr. Proctor argues that an addiction patient's records cannot be disclosed without a hearing and that the circuit court's order did not comply with the regulatory requirements necessary to authorize the release of those records.

42 USC 290dd-2 provides that patient treatment records

> which are maintained in connection with the performance of any program or activity relating to substance abuse . . . treatment . . . shall, except as provided in [42 USC 290dd-2(e)],[3] be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under [42 USC 290dd-2(b)].

In turn, 42 USC 290dd-2(b)(1) provides that patient records may be disclosed "with the prior written consent of the patient . . . ." 42 USC 290dd-2(b)(2) indicates that patient records may be disclosed under three other circumstances, with specific requirements for disclosure under each. Only 42 USC 290dd-2(b)(2)(C) is relevant to this case, and it provides as follows:

> If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

Next, 42 CFR 2.61(a) provides that "[a] subpoena or a similar legal mandate must be issued in order to compel disclosure. This mandate may be entered at the same time as and accompany an authorizing court order . . . ."[4] 42 CFR 2.62 provides that a court "may

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[3] This subsection exempts the interchange of records within the Uniformed Services and Department of Veterans Affairs.

[4] Quotations of the Code of Federal Regulations are to the 2017 versions of the relevant regulations.

authorize disclosure and use of records to investigate or prosecute qualified personnel holding the records" under 42 CFR 2.66. In turn, 42 CFR 2.66(a)(1) provides that a court may issue an order authorizing the disclosure of records "to investigate or prosecute . . . the person holding the records . . . in connection with a criminal or administrative matter . . . ."[5] To receive such a disclosure, "any administrative, regulatory, supervisory, investigative, law enforcement, or prosecutorial agency having jurisdiction over the program's or person's activities" may apply for the order. 42 CFR 2.66(a)(1). The application "must use a fictitious name" to refer to a patient and may not disclose patient identifying information unless the patient has provided written consent or the court has properly sealed the record. 42 CFR 2.66(a)(2).

"An application under this section may, in the discretion of the court, be granted without notice." 42 CFR 2.66(b). However,

> upon implementation of an order so granted any of the above persons must be afforded an opportunity to seek revocation or amendment of that order, limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order in accordance with § 2.66(c). [42 CFR 2.66(b).]

In turn, 42 CFR 2.66(c) provides that "[a]n order under this section must be entered in accordance with, and comply with the requirements of, paragraphs (d) and (e) of § 2.64."

42 CFR 2.64(d) provides the following criteria for entering an order:

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[5] In contrast, 42 CFR 2.64(a) provides that "any person having a legally recognized interest in the disclosure which is sought" may apply for an order authorizing the disclosure of patient records, either separately or as part of a civil proceeding.

> *Criteria for entry of order*. An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:
>
> (1) Other ways of obtaining the information are not available or would not be effective; and
>
> (2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

42 CFR 2.64(e) provides that an order authorizing disclosure must limit disclosure to "those parts of the patient's record which are essential to fulfill the objective of the order" and "to those persons whose need for information is the basis for the order" and that the order must provide for any measures necessary to protect the patient, physician-patient relationship, and treatment services, such as by "sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered."

In this case, Dr. Proctor averred that he was providing substance abuse treatment to the patients in question. 42 USC 290dd-2 applies to patients receiving substance abuse treatment. Accordingly, the information concerning Dr. Proctor's patients falls under this statutory and regulatory scheme. The Department argues that it was required to comply with § 2.66, not § 2.64. The Department's argument, while technically correct, is not determinative. However, 42 CFR 2.66 incorporates § 2.64(d) and (e), and it is these provisions that Dr. Proctor argues the circuit court did not adequately comply with.

We agree that the circuit court's order did not adequately comply with 42 CFR 2.66(d). 42 USC 290dd-2(b)(2)(C) provides that a court must assess good cause before authorizing an order that releases a

patient's substance abuse treatment records. 42 CFR 2.64(d)(1) requires the court to find that other ways of obtaining the information are not available or would not be effective, and 42 CFR 2.64(d)(2) requires the court to weigh the need for the information against the potential injury. 42 USC 290dd-2(b)(2)(C) specifies that when authorizing an order, "[i]n assessing good cause the court *shall* weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services." (Emphasis added.) The term "shall" is mandatory. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). Here, the court's order did not comply with 42 CFR 2.64(d)(1) because the court did not determine whether there were other ways of obtaining the necessary information.

Additionally, the court's orders did not comply with 42 USC 290dd-2(b)(2)(C) or 42 CFR 2.64(d)(2) because the court did not make any finding of good cause before it authorized release of the patients' records. The court's initial order contained no findings regarding good cause, and ultimately, both of the court's orders are devoid of any determination of good cause.[6] Finally, the order authorizing the subpoena did not comply with 42 USC 290dd-2(b)(2)(C) or 42 CFR 2.66(d)(2) because it did not weigh mandatory factors before authorizing a disclosure.

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[6] This error is not harmless. This Court will not modify a decision of the trial court on the basis of a harmless error. MCR 2.613(A). In this case, the court did not even find good cause *after* it issued its order. During the motion to quash the subpoena, the court addressed only one side of the equation—the public interest and need for disclosure—without addressing the other side—the injury to the patient, physician-patient relationship, and treatment services. Accordingly, the court never properly considered the issue of good cause.

We acknowledge that the order authorizing the subpoena partially complied with 42 CFR 2.64(e). It limited the disclosure of the patients' treatment records by providing that "all unique identifiers of patients shall be deleted or blocked out from all documents" before any disclosure to the public and that disclosure was to be limited "to those persons whose need for the information is related to the investigation of the licensee or any following administrative licensing action." However, 42 CFR 2.64(e)(3) also requires the court to protect the patient, physician-patient relationship, and treatment services by "other measures as are necessary to limit disclosure," such as by ordering that any proceedings at which the records are to be used are sealed from public scrutiny. The court did not order that the administrative proceedings were to be closed and sealed to protect the patient's records. Accordingly, we conclude that the trial court failed to follow the mandatory procedural safeguards before ordering the disclosure of records in this case.

Next, Dr. Proctor argues that the court erred by authorizing the release of records without holding a hearing. "The interpretation of a federal statute is a question of federal law." *Auto-Owners Ins Co v Corduroy Rubber Co*, 177 Mich App 600, 604; 443 NW2d 416 (1989). When there is no conflict among federal authorities, this Court is bound by the holding of a federal court on a federal question. *Schueler v Weintrob*, 360 Mich 621, 633-634; 105 NW2d 42 (1960). There are two federal decisions addressing these regulations—a criminal case from the United States Court of Appeals for the First Circuit, *United States v Shinderman*, 515 F3d 5 (CA 1, 2008) (holding that disclosure of the defendant's records under 42 CFR 2.66 without compliance with 42 CFR 2.64(d)

and (e) did not warrant suppression of the evidence where the defendant had not moved to revoke or amend the disclosure), and a civil case from the United States Court of Appeals for the Eleventh Circuit, *Hicks v Talbott Recovery Sys, Inc*, 196 F3d 1226 (CA 11, 1999) (concerning a treatment facility's negligent release of confidential information).

In *Hicks*, the Texas Board of State Medical Examiners obtained a subpoena of the patient's treatment records. *Hicks*, 196 F3d at 1230, 1234. The plaintiff's substance abuse treatment facility released those records to the Texas Board. *Id*. The patient later sued the treatment facility after he was disciplined, lost his job, and became unable to find employment. *Id*. at 1234-1236. The Eleventh Circuit noted that the subpoena from the Texas Board did not comply with 42 CFR 2.64[7] and that

> [t]hese stringent federal regulations include application for disclosure using a fictitious name, adequate notice to the patient, a closed judicial hearing, a judicial determination that good cause exists to order disclosure because no other feasible method is available for obtaining the information and the need for disclosure outweighs injury to the patient and the physician-patient relationship, and an order delineating the parts of the patient's records to be

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[7] 42 CFR 2.64(c) provides:

> *Review of evidence: Conduct of hearing*. Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record, unless the patient requests an open hearing in a manner which meets the written consent requirements of the regulations in this part. The proceeding may include an examination by the judge of the patient records referred to in the application.

> disclosed as well as limiting the persons to whom disclosure is made. [*Hicks*, 196 F3d at 1242 n 32.]

In this case, the court determined that no hearing was required before issuing the subpoena. However, at this time, the only available authority is that a closed judicial hearing is required before a court may order the release of a substance abuse patient's confidential medical records. *Id*. Thus, the court erred when it determined that no hearing was required and when it failed to hold a hearing.[8]

Finally, we note that the court erred by determining that redaction of the patients' confidential communications to Dr. Proctor was not required because there was a threat to life or of serious bodily injury. The court's reasoning and conclusion are not sound when the regulation is read in context. The full text of 42 CFR 2.63, concerning confidential communications, is as follows:

> (a) A court order under the regulations in this part may authorize disclosure of confidential communications made by a patient to a part 2 program in the course of diagnosis, treatment, or referral for treatment *only if*:
>
> (1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, *including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties*;
>
> (2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime allegedly committed by the patient, such as one which

[8] However, contrary to Dr. Proctor's arguments on appeal, there is no authority to support that *patients* must be notified before such a hearing. 42 CFR 2.66(b) provides that the court *may* grant an application for disclosure without notice, but that it must afford patients an opportunity to seek to revoke or amend its order. Thus, there is no legal support for Dr. Proctor's argument that patients must be given notice before the court authorizes the disclosure.

> directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or
>
> (3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications. [Emphasis added.]

The word "including" generally indicates a nonexhaustive list of examples. *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 651; 761 NW2d 414 (2008). However, when a general term is followed by specific examples, the general term is generally interpreted to include things of the same types or kinds as the specific examples. *Neal v Wilkes*, 470 Mich 661, 669; 685 NW2d 648 (2004) (relying on the doctrine of *ejusdem generis*).

Here, the court determined that redaction was not required because the national opioid epidemic was such a threat. A national epidemic does not fall within the same types or kinds of threats to life as child abuse and neglect or threats against third parties, which are personal threats of harm *by the patient*. A national epidemic is neither personal nor will it be found referred to in a patient communication. Accordingly, absent additional evidence, the court erred by concluding that it was not necessary to redact confidential communications from patients to Dr. Proctor. The general threat of an opioid epidemic is not specific enough to fall within the exception in § 2.63(a)(1).[9] To the extent that the patients' records contained commu-

[9] Additionally, of these sections, only 42 CFR 2.63(a)(3) is specific to administrative proceedings. In this case, there is no indication that the patients have testimony or other evidence pertaining to the extent of the communications, and thus there is no indication that 42 CFR 2.63 applies in this case to any confidential communications.

nications from the patients to Dr. Proctor, the court was required to order those records redacted unless the communications contained information necessary to protect against threats of circumstances similar to suspected child abuse or verbal threats against third parties.

In sum, because the court failed to follow mandatory procedural safeguards before ordering the disclosure of records in this case, we reverse the circuit court's order and remand for further proceedings. On remand, the trial court shall order the medical records returned to Dr. Proctor and shall not grant a new subpoena ordering the disclosure of the records to the Department without first making all the findings required by the statute. Before making those findings, the court must hold a closed hearing on the matter.

In Docket No. 342086, we affirm the circuit court's order. In Docket No. 342680, we reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

M. J. KELLY, P.J., and SERVITTO and BOONSTRA, JJ., concurred.

RADWAN v AMERIPRISE INSURANCE COMPANY

Docket No. 341500. Submitted December 12, 2018, at Detroit. Decided December 20, 2018. Approved for publication February 26, 2019, at 9:05 a.m. Leave to appeal denied 503 Mich 1037 (2019).

Rita Radwan brought a first-party lawsuit against Ameriprise Insurance Company and a third-party lawsuit against Thomas Penri Thomas in the Oakland Circuit Court following a motor vehicle accident involving Radwan and Thomas. Jagannathan Neurosurgical Institute, one of Radwan's medical providers, intervened in the action. A jury trial began on November 29, 2016. On that same day, Radwan and Ameriprise entered a stipulated order dismissing Ameriprise without prejudice and stating that the parties had agreed to arbitrate their dispute. The case proceeded to trial on Radwan's third-party lawsuit against Thomas. On December 2, 2016, the jury rendered a special verdict, finding that Thomas was negligent but that Radwan was not injured. Accordingly, the jury did not reach the questions regarding proximate cause, economic damages, serious impairment of a body function or permanent serious disfigurement, or noneconomic losses. On December 12, 2016, ten days after the jury's verdict, Radwan and Ameriprise entered into a binding arbitration agreement. However, on February 15, 2017, Ameriprise moved for relief from arbitration and for summary disposition. On February 22, 2017, Radwan and Thomas entered a stipulation and order of dismissal with prejudice. The circuit court entered an order finding that it lacked jurisdiction to rule on Ameriprise's motion, and the case proceeded to arbitration. On August 22, 2017, the arbitrator entered an award of $0 against Ameriprise and stated that collateral estoppel applied to the facts of this case. Radwan moved to vacate the arbitration award. Following a hearing, the court, Nanci J. Grant, J., agreed with the arbitrator's determination that collateral estoppel precluded Radwan from relitigating the issue whether she sustained injuries in the accident. Radwan moved for a rehearing, which the court denied. Radwan appealed, arguing that the court erred by refusing to vacate the arbitration award because the award improperly applied collateral estoppel to a consent judgment.

The Court of Appeals *held*:

1. Under MCL 691.1703(1)(d) of the Uniform Arbitration Act (UAA), MCL 691.1681 *et seq*., a court shall vacate an arbitration award if an arbitrator exceeded the arbitrator's powers. Arbitrators exceed their powers whenever they act beyond the material terms of the contract from which they draw their authority or in contravention of controlling law. In this case, Radwan asserted that the arbitrator misapplied the law of collateral estoppel. Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding. Generally, application of collateral estoppel requires (1) that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) that the same parties had a full and fair opportunity to litigate the issue, and (3) mutuality of estoppel. In this case, Radwan argued that the issue of her injuries was not determined by the stipulated order of dismissal because the order was not based on the jury's verdict. However, the stipulated order of dismissal did expressly mention the outcome of the trial, specifically the jury's finding of no cause of action. Moreover, the opportunities relinquished by the parties—Radwan's posttrial rights and Thomas's right to seek case-evaluation sanctions—both depended on the jury's verdict in favor of Thomas. Without the verdict in Thomas's favor, Radwan could not move for a new trial or appeal and Thomas could not seek case-evaluation sanctions. The fact that the agreement was entered into following the conclusion of the trial further suggested that it depended on the jury's verdict. Thus, the stipulated order of dismissal, which incorporated the jury's verdict, was sufficient to satisfy the first requirement for collateral estoppel. As to the second requirement, Radwan had a full and fair opportunity to litigate the issue of her injuries in the third-party trial against Thomas. While Radwan argued that her inability to appeal meant that she did not have a full and fair opportunity to litigate the issue, she made the tactical decision to relinquish her opportunity to appeal in consideration for Thomas's agreement to forgo case-evaluation sanctions. Radwan further argued that the issue to be decided in this first-party case was different than the issue in the third-party case because a higher standard regarding the injury was required in the third-party case. However, the jury did not reach the question of serious impairment of a body function or permanent serious disfigurement, instead finding that Radwan suffered no injury at all. The relevant question in the first-party suit was whether Radwan

suffered any accidental bodily injury, and that question was decided by the jury. Finally, Ameriprise asserted collateral estoppel defensively against Radwan; therefore, a showing of mutuality of estoppel was not required. The trial court did not err when it denied Radwan's motion to vacate the arbitration award on the basis of collateral estoppel.

2. Collateral estoppel does not apply to consent judgments when factual issues are neither tried nor conceded. However, in this case, the issue of Radwan's injury was actually tried and incorporated into the stipulated order of dismissal. Therefore, even if the stipulated order of dismissal was a consent judgment, collateral estoppel applied in this case.

3. Radwan argued that the jury verdict was clearly not dispositive given the fact that Ameriprise signed the arbitration agreement 10 days after the jury's verdict. Nonetheless, although the arbitration agreement was apparently not signed until December 2016, the record established that the stipulated order of dismissal regarding Ameriprise was entered on November 29, 2016, the day that trial began. That order expressly stated that "the parties have agreed to arbitrate their disputes pursuant to an Arbitration Agreement executed by and between the parties." Therefore, Radwan and Ameriprise agreed to arbitrate before the jury's verdict was rendered.

Affirmed.

Allan Falk, PC (by *Allan Falk*) and *Reifman Law Firm, PLLC* (by *Steven W. Reifman* and *Kate L. Kasperek*) for Rita Radwan.

Hewson & Van Hellemont, PC (by *Jerald Van Hellemont* and *Lynn B. Sholander*) for Ameriprise Insurance Company.

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

CAMERON, J. In this first-party no-fault action, plaintiff, Rita Radwan, appeals an order denying her motion to vacate an arbitration award, which relied upon the doctrine of collateral estoppel to award her $0 against defendant Ameriprise Insurance Company. We affirm.

This case arises from a motor vehicle accident involving Radwan and defendant Thomas Penri Thomas. Radwan filed a third-party lawsuit against Thomas and a first-party lawsuit against her no-fault insurer, Ameriprise. A jury trial began on November 29, 2016. On that same day, Radwan and Ameriprise entered a stipulated order dismissing Ameriprise without prejudice and stating that "the parties have agreed to arbitrate their disputes pursuant to an Arbitration Agreement executed by and between the parties."

The case proceeded to trial on Radwan's third-party lawsuit against Thomas. On December 2, 2016, the jury rendered a special verdict, finding that Thomas was negligent but that Radwan was not injured. Accordingly, the jury did not reach the questions regarding proximate cause, economic damages, serious impairment of a body function or permanent serious disfigurement, or noneconomic losses. On December 12, 2016, ten days after the jury's verdict, Radwan and Ameriprise entered into a binding arbitration agreement. However, on February 15, 2017, Ameriprise moved for relief from arbitration and for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). On February 22, 2017, Radwan and Thomas entered a "Stipulation and Order of Dismissal with Prejudice,"[1] which provided:

> The Plaintiff having filed the Complaint against the Defendant; a Trial having commenced on November 29, 2016, ending December 2, 2016; the Plaintiff and Defendant having had the opportunity to offer evidence; and, the jury finding in favor of the Defendant and against the Plaintiff resulting in a No Cause of Action in favor of the Defendant and against the Plaintiff;

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[1] Formatting altered.

> Post-verdict, the Plaintiff advising that the Plaintiff would file a Motion for New Trial and possible appeals; post-verdict the Defendant having advised the Plaintiff that the Defendant would file a Motion for case evaluation sanctions and to tax costs as the prevailing party Defendant; and, the Plaintiff and Defendant having resolved its post-verdict issues and entered into a resolution and settlement agreement and stipulating to the entry of this Order for dismissal with prejudice;
>
> IT IS HEREBY ORDERED that any and all claims of the Plaintiff, Rita Radwan, against the Defendant, Thomas Penri Thomas, shall be dismissed with prejudice and without any costs or fees to any party.
>
> THIS IS A FINAL ORDER AND DISPOSES OF THE ENTIRE CASE.

On March 23, 2017, the circuit court entered an order finding that it lacked jurisdiction to rule on Ameriprise's motion, and the case proceeded to arbitration. On August 22, 2017, the arbitrator entered an arbitration award of $0 against Ameriprise. In an opinion attached to the award, the arbitrator stated:

> The Arbitrator has read all materials submitted by the parties. I am in agreement with the defense position that there has been a factual finding, that the plaintiff Rita Radwan did not incur any injury from the motor vehicle accident of April 24, 2014.
>
> It is the arbitrators position [sic] that collateral estoppel would apply to the facts of this case. The case of Monant -v- State Farm Insurance Company, 469 Mich 679 (2004) appears to be directly on point.
>
> Plaintiff relies on the semantics of the entry of final judgement. It is clear that the matter was fully decided on its merits, subsequent to the jury findings, the case was dismissed by stipulation to avoid appeals along with case evaluation sanctions. To now indicate that there is no "final judgement" and avoiding the adverse verdict, plaintiff would simply be attempting to circumvent the rule of collateral estoppel.

> For the above stated reasons, the arbitrator grants the motion filed by defendant and grants summary disposition pursuant to MCR 2.116 (7), (8) and (10).

Subsequently, Radwan moved to vacate the arbitration award, arguing that the arbitrator exceeded his powers by failing to hear evidence, weigh damages, and render an arbitration award, and by erroneously deciding that collateral estoppel applied to this case. Ameriprise opposed the motion.

After a hearing, the circuit court agreed with the arbitrator's determination that the doctrine of collateral estoppel precluded Radwan from relitigating whether she sustained injuries in the motor vehicle accident. The circuit court found that the arbitrator did not commit an error of law or exceed his powers by refusing to hear evidence and denied Radwan's motion. The circuit court also denied Radwan's motion for rehearing. This appeal followed.

Radwan contends that the circuit court erred by refusing to vacate the arbitration award because the award improperly applied collateral estoppel to a consent judgment. We disagree.

"This Court reviews de novo a trial court's ruling on a motion to vacate or modify an arbitration award. This means that we review the legal issues presented without extending any deference to the trial court." *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009) (citations omitted). "Whether an arbitrator exceeded his or her authority is also reviewed de novo." *Id*. at 672. The application of collateral estoppel is a legal issue that is similarly reviewed de novo. *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 526; 866 NW2d 817 (2014).

Radwan moved to vacate the arbitration award under MCR 3.602(J)(2)(c), which requires the trial

court to vacate an award if the "arbitrator exceeded his or her powers[.]" However, the Uniform Arbitration Act (UAA), MCL 691.1681 *et seq.*, not the court rule, applies in this case. See *Fette v Peters Constr Co*, 310 Mich App 535, 542; 871 NW2d 877 (2015) (stating that the UAA became effective on July 1, 2013); MCL 691.1683(1) (stating that the UAA governs agreements to arbitrate made on or after July 1, 2013); MCR 3.602(A) (stating that the court rule applies to arbitrations not governed by the UAA). Nonetheless, the UAA similarly provides, under MCL 691.1703(1)(d), that a court shall vacate an arbitration award if "[a]n arbitrator exceeded the arbitrator's powers."

"Arbitrators exceed their powers whenever they act beyond the material terms of the contract from which they draw their authority or in contravention of controlling law." *Miller v Miller*, 474 Mich 27, 30; 707 NW2d 341 (2005). In *Washington*, 283 Mich App at 672, this Court stated:

> [A]ny error of law must be discernible on the face of the award itself. By "on its face" we mean that only a legal error that is evident without scrutiny of intermediate mental indicia will suffice to overturn an arbitration award. Courts will not engage in a review of an arbitrator's mental path leading to [the] award. Finally, in order to vacate an arbitration award, any error of law must be so substantial that, but for the error, the award would have been substantially different. [Citations and quotation marks omitted; alteration in original.]

Radwan asserts that the arbitrator misapplied the law of collateral estoppel. In *Rental Props Owners Ass'n of Kent Co*, 308 Mich App at 528-529, this Court stated:

> Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same

> parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding. Collateral estoppel is a flexible rule intended to relieve parties of multiple litigation, conserve judicial resources, and encourage reliance on adjudication.
>
> Generally, application of collateral estoppel requires (1) that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) that the same parties had a full and fair opportunity to litigate the issue, and (3) mutuality of estoppel. [Citations omitted.]

Our Supreme Court has analyzed the issue of collateral estoppel involving a set of circumstances similar to those in this case. In *Monat v State Farm Ins Co*, 469 Mich 679, 680-681, 695; 677 NW2d 843 (2004), our Supreme Court held that collateral estoppel barred a plaintiff's first-party claim after a no-cause-of-action jury verdict was reached on the third-party claim. In so ruling, the Court held that "where collateral estoppel is being asserted defensively against a party who has already had a full and fair opportunity to litigate the issue, mutuality is not required." *Id*. The plaintiff in *Monat* sued the driver of the other vehicle involved in an accident as well as her no-fault insurer that discontinued the payment of benefits. *Id*. at 681. Before the trial on the third-party action, the plaintiff and the driver entered an agreement to forgo their opportunity to appeal in lieu of the plaintiff agreeing to place a cap on damages and the driver agreeing to pay an undisclosed sum of damages regardless of the jury's verdict. *Id*. The jury found that the plaintiff was not injured and rendered a "no cause of action" verdict. Thereafter, the defendant insurer moved for summary disposition in the plaintiff's first-party action, arguing that "collateral estoppel precluded plaintiff's first-party claim

because plaintiff litigated and lost the issue of injury in the third-party action." *Id*. The trial court denied the motion. *Id*. This Court affirmed the trial court's decision, concluding that collateral estoppel could not apply because there was no mutuality of estoppel. *Id*. at 682.

Our Supreme Court reversed this holding, concluding that there was a final judgment, i.e., the jury verdict, the plaintiff had a full and fair opportunity to litigate the issue concerning his injury, and mutuality of estoppel was not required under the circumstances. *Monat*, 469 Mich at 685. The Court stated that "[w]hile the 'full and fair opportunity to litigate' normally encompasses the opportunity to both litigate and appeal, plaintiff here voluntarily relinquished the opportunity to pursue an appeal in return for consideration—the guaranteed receipt of a minimal sum of damages regardless of the jury's verdict." *Id*. The Court further reasoned that "to describe this type of agreement as anything other than 'full and fair' would be to encourage a plaintiff to negotiate away appeals with one defendant while keeping in suspense other lawsuits in the event that the plaintiff's first lawsuit proves unsuccessful." *Id*. at 686. The Court concluded that the exceptions to the requirement of mutuality of estoppel should be extended because "allowing the defensive use of collateral estoppel in these circumstances would enhance the efficient administration of justice and ensure more consistent judicial decisions." *Id*. at 688.

Radwan primarily focuses on the first requirement of collateral estoppel—"that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment." *Rental Props Owners Ass'n of Kent Co*, 308 Mich App at 529. Radwan argues

that a question of fact essential to the judgment was not determined by a valid and final judgment. Radwan does not appear to dispute that the stipulated order of dismissal was a "final judgment" or that the issue of her injuries was "actually litigated"; rather, she argues that the issue of her injuries was not determined by the stipulated order of dismissal because the order was not based on the jury's verdict.

In *Monat*, the Court applied collateral estoppel without analyzing whether the first requirement—a final judgment—existed. Nonetheless, the jury's verdict was a final judgment, and even though the jury found no cause of action, the plaintiff received a guarantee that damages would be capped pursuant to the pretrial agreement. *Monat*, 469 Mich at 681. In this case, following the jury's verdict of no cause of action, Radwan agreed to a dismissal of her claims. Unlike in *Monat*, the jury's verdict did not identify the amount of damages. However, the stipulated order of dismissal did expressly mention the outcome of the trial, specifically the jury's finding of no cause of action. Moreover, the opportunities relinquished by the parties—Radwan's posttrial rights and Thomas's right to seek case-evaluation sanctions—both depended on the jury's verdict in favor of Thomas. Without the verdict in Thomas's favor, Radwan could not move for a new trial or appeal and Thomas could not seek case-evaluation sanctions. The fact that the agreement was entered into following the conclusion of the trial further suggests that it depended on the jury's verdict. Thus, under *Monat*, the stipulated order of dismissal, which incorporated the jury's verdict, is sufficient to satisfy the first requirement for collateral estoppel.

This conclusion is consistent with 1 Restatement Judgments, 2d, § 13, p 132, which states:

> The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.

In this regard, the United States Court of Appeals for the Third Circuit has held that under Tennessee law, a judgment has preclusive effect even if it is vacated by settlement. *Sentinel Trust Co v Universal Bonding Ins Co*, 316 F3d 213, 221-223 (CA 3, 2003). Similarly, in *Hudson Ins Co v Chicago Hts*, 48 F3d 234, 236, 238 (CA 7, 1995), the Seventh Circuit concluded that a jury verdict had preclusive effect even though the case settled and judgment was never entered. The court stated:

> Moreover, a jury verdict need not be final to have collateral estoppel effect. The settlement disputed in this case arose from the jury verdict; it was designed to settle the very claims submitted to the jury. Logic counsels that those claims, and whatever ultimate facts would be necessary to prove them, should determine what the settlement settled. [*Id*. at 238 (citations omitted).]

Similarly, the supplemental authority relied upon by Ameriprise supports the applicability of collateral estoppel in this case. Ameriprise cites a recent Sixth Circuit decision concluding that the Michigan Supreme Court would adopt the teaching of *Sentinel* and other courts that have held that judgments can support issue preclusion even though they are set aside or vacated upon settlement. *Watermark Senior Living Retirement Communities, Inc v Morrison Mgt Specialists, Inc*, 905 F3d 421, 427 (CA 6, 2018). The court stated that "[a]lthough, as a formal matter, there is no judgment in these circumstances, a court's decision

may remain sufficiently firm to be given preclusive effect." *Id*. at 428. The court further stated:

> A decision that issue preclusion does not apply in the present circumstances similarly would be at odds with the purposes of the doctrine. It would incentivize losing parties to pay to settle adverse judgments in order to avoid their issue-preclusive effects. While such a rule might encourage settlement of the first action, it also would authorize losing parties to take another stab at litigating their claims, in the hope that they might garner a more favorable result the second time around. Permitting this litigation strategy therefore would increase the probability of inconsistent decisions and require the judicial system to expend its scarce resources readjudicating these issues. [*Id*. at 428.]

The court, however, stated that judgments that are vacated because a court has decided that the ruling is faulty and judgments that become moot through no fault of the party asserting issue preclusion should not be given preclusive effect. *Id*. at 428-429.

> But the equities are otherwise when a litigant elects to settle rather than appeal after receiving an adverse judgment. In such circumstances, the losing party acquiesces in the court's decision, even if he disagrees with it. The party has had his day in court and waived his right to an appeal. *See Monat*, 677 N.W.2d at 847 (applying issue preclusion when party negotiated away its right to appeal prior to judgment in first action). That is all that fairness requires: "One bite at the apple is enough." [*Id*. at 429 (citation omitted).]

Radwan attempts to distinguish *Sentinel* and *Watermark*, in which a judgment was vacated, by arguing that no judgment on the jury's verdict was ever entered in this case. For the reasons discussed earlier, this argument is without merit. Nonetheless, in *Hudson*, judgment was never entered and the court still found

that the jury verdict should be given preclusive effect.[2] As in that case, the stipulated order of dismissal in this case "arose from the jury verdict" and was designed to settle the claims submitted to the jury. *Hudson*, 48 F3d at 238. Likewise, in *Watermark*, although the judgment was set aside, the court stated that there was formally "no judgment" yet still applied collateral estoppel. *Watermark*, 905 F3d at 428. Thus, even if judgment was not entered on the jury's verdict, the verdict was sufficiently firm to be given preclusive effect.

Radwan further argues that collateral estoppel does not apply to consent judgments. This Court has held that "collateral estoppel does not apply to consent judgments where factual issues are neither tried nor conceded." *In re Bibi Guardianship*, 315 Mich App 323, 332; 890 NW2d 387 (2016) (citation and quotation marks omitted). But for the reasons discussed earlier, the issue of Radwan's injury was actually tried and incorporated into the stipulated order of dismissal. Therefore, even if the stipulated order of dismissal was a consent judgment, collateral estoppel applies in this case.

In support of her argument, Radwan also argues that the jury verdict was clearly not dispositive given the fact that Ameriprise signed the arbitration agreement 10 days after the jury's verdict. Radwan argues that if the verdict was dispositive, then there was nothing to arbitrate. Nonetheless, although the arbitration agreement was apparently not signed until

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[2] Plaintiff argues that *Hudson*'s finding of preclusive effect "was grounded upon an idiosyncrasy of Illinois law deriving from what happens when, after favorable verdict, a plaintiff dies." But the court also expressly stated that "a jury verdict need not be final to have collateral estoppel effect." *Hudson*, 48 F3d at 238.

December 2016, the record establishes that the stipulated order of dismissal regarding Ameriprise was entered on November 29, 2016, the day that trial began. That order expressly stated that "the parties have agreed to arbitrate their disputes pursuant to an Arbitration Agreement executed by and between the parties." Therefore, Radwan and Ameriprise agreed to arbitrate before the jury's verdict was rendered.

Finally, it is apparent that, in the circuit court, Radwan attempted to avoid the future application of collateral estoppel against her by entering the stipulated order of dismissal in order "to avoid any judgment." The words of the order, however, not Radwan's subjective intent, are dispositive. As discussed earlier, the stipulated order of dismissal was clearly based on the jury's verdict; thus, collateral estoppel applies under *Monat*. We agree with the arbitrator's assessment that Radwan's argument regarding the "semantics" of the order is an attempt to circumvent the application of collateral estoppel. Radwan's argument also flouts the purposes of collateral estoppel, which are "to relieve parties of multiple litigation, conserve judicial resources, and encourage reliance on adjudication." *Rental Props Owners Ass'n of Kent Co*, 308 Mich App at 529. In addition, Radwan's position would increase the probability of inconsistent decisions. *Watermark*, 905 F3d at 428. As the Sixth Circuit stated, Radwan had her day in court and waived her right to appeal; "[t]hat is all that fairness requires[.]" *Id*. at 429.

Because we conclude that there was a final judgment, the issue turns on whether the last two elements of collateral estoppel—a full and fair opportunity to litigate the issue and mutuality of estoppel—have been met. In this case, Radwan had a full and fair opportu-

nity to litigate the issue of her injuries in the third-party trial against Thomas. While Radwan argues that her inability to appeal means that she did not have a full and fair opportunity to litigate the issue, the fact remains that she made the tactical decision to relinquish her opportunity to appeal in consideration for Thomas's agreement to forgo case-evaluation sanctions. Thus, as in *Monat*, Radwan had a full and fair opportunity to litigate the issue of her injuries. *Monat*, 469 Mich at 685. Radwan further argues that the issue to be decided in this first-party case is different than the issue in the third-party case because a higher standard regarding the injury is required in the third-party case. However, the jury did not reach the question of serious impairment of a body function or permanent serious disfigurement, instead finding that Radwan suffered no injury at all. The relevant question in the first-party suit is whether Radwan suffered any accidental bodily injury. See MCL 500.3105(1). That question was decided by the jury. Finally, Ameriprise asserted collateral estoppel defensively against Radwan, and therefore, a showing of mutuality of estoppel is not required. See *Monat*, 469 Mich at 695. Accordingly, the trial court did not err when it denied Radwan's motion to vacate the arbitration award on the basis of collateral estoppel.

Affirmed.

CAVANAGH, P.J., and SERVITTO, J., concurred with CAMERON, J.

REIDENBACH v KALAMAZOO

Docket No. 340863. Submitted February 6, 2019, at Lansing. Decided February 26, 2019, at 9:10 a.m. Leave to appeal sought.

William M. Reidenbach suffered a work-related heart attack in December 2006 during his employment as a public safety officer for the city of Kalamazoo. He returned to work but continued to suffer heart problems and was taken off work permanently in May 2008. He received one year of his full wages according to his union contract, and he formally retired on April 1, 2009. The city initially disputed whether Reidenbach was entitled to workers' compensation benefits but ultimately agreed that he was entitled to wage-loss benefits beginning in April 2009. In September 2009, the city paid Reidenbach a lump sum for workers' compensation benefits for April through August 2009. Reidenbach also received a pension from the city. The city had begun the pension fund in 1942 and had contributed to it until 1997 when the fund was declared to be overfunded. The city claimed that it was authorized to coordinate Reidenbach's payments, which would reduce Reidenbach's weekly workers' compensation payment by a proportionate amount of Reidenbach's weekly pension payment. The amount of the reduction was to be calculated according to MCL 418.354(1)(e) and would ultimately be determined by application of a percentage derived from the ratio of the city's contributions to the pension plan and the total contributions to the plan. A trial was held before a magistrate. The city first contended that it could coordinate 82% of Reidenbach's pension benefits because Reidenbach had only contributed 18% of his pension total. That figure was eventually corrected to 20%. In contrast, Reidenbach contended that the city could only coordinate 28% of the after-tax value of his pension because the city had contributed 28% to the fund during Reidenbach's employment with the city. The magistrate agreed with Reidenbach. Both parties appealed to the Michigan Compensation Appellate Commission (MCAC). Although the MCAC adopted many of the magistrate's findings of fact and conclusions of law, the MCAC concluded that the magistrate had improperly calculated the after-tax amount of plaintiff's pension because the pension was not subject to FICA (the Federal Insurance Contributions Act, 26 USC 3101 *et seq.*) or

state income tax. The MCAC also concluded that the magistrate had erred in calculating the amount of coordination authorized under MCL 418.354(1)(e), ruling that the amount should have been calculated using the total of the city's contributions to the pension fund throughout the fund's existence, not only during the term of Reidenbach's employment with the city. Therefore, the MCAC remanded for recalculation of the amount of coordination to which the city was entitled. On remand, another magistrate added back in the amount of FICA and state income tax deducted in the rate table to arrive at a higher after-tax value of plaintiff's pension. The magistrate also determined that the city was entitled to coordinate 53% of Reidenbach's benefits because the city had contributed approximately 53% of the total contributions to the pension fund since the fund originated. Both parties again appealed. The MCAC determined that the magistrate on remand had correctly arrived at a coordination percentage of 53%, adopted the magistrate's calculations as its own, and affirmed the magistrate's decision. In Docket No. 340863, the Court of Appeals granted Reidenbach's application for leave to appeal the decision of the MCAC, and in Docket No. 340867, it denied the city's application for leave to appeal.

The Court of Appeals *held*:

1. An appellee is absolutely entitled to file a cross-appeal by virtue of being an appellee, even in an appeal by leave granted. An appellee that does not seek a cross-appeal cannot obtain a decision more favorable on appeal than was rendered by the lower tribunal. Here, the city's application for leave to appeal was denied, and Reidenbach's application was granted. Because the city failed to cross-appeal in Reidenbach's appeal, the city's status was limited to that of an appellee, and thus, it could not receive a more favorable decision than was rendered by the MCAC after remand. Had the city filed a cross-appeal, it could have presented arguments in support of greater relief than affirmance. Absent a cross-appeal, the Court entertained the city's arguments only to the extent that they could be construed as advancing an alternative basis to affirm the MCAC's decision.

2. MCL 418.354 was intended to prevent an employer from paying double compensation. It authorizes an employer to coordinate workers' compensation benefits with employer-funded pension plan payments. "Coordination" means that an employer paying workers' compensation obligations may set off a portion of certain other benefits, such as pensions, that are also received by the employee and financed by the employer. The MCAC correctly determined that MCL 418.354(1)(e) dictated the method of calcu-

lating the proportion of Reidenbach's pension that the city was authorized to coordinate, and the proportional amount must be based on the ratio of the employer's contributions to the total contributions to the plan or program. On remand, the magistrate correctly determined that the city had made 53% of the total contributions to the pension fund since the fund had been created, and the MCAC's conclusion that 53% was the proper coordination percentage was legally correct. The MCAC did not abuse its discretion by denying the city's untimely request to supplement the record with evidence of the amount it had contributed to the fund before 1974.

3. The plain language of MCL 418.354(1)(e) provides that coordination of benefits is determined by the after-tax amount of the pension received by the employee as reflected in the tables published pursuant to MCL 418.313(2), which is ultimately multiplied by a percentage determined by the ratio of the amount the employer contributed to the pension fund and the total amount contributed to the fund over the course of the fund's existence. MCL 418.354(13) defines "after-tax amount" as the gross amount of any wage-loss benefit reduced by the prorated weekly amount paid, if any, under FICA and state and federal income taxes calculated annually using as the number of exemptions the disabled employee's dependents plus the employee. The after-tax amounts published in the tables represent 80% of the gross amount minus taxes paid on the gross amount. The after-tax amount in the tables is then multiplied by 1.25 to arrive at the conclusive after-tax amount of benefits under MCL 418.354(1)(e). The MCAC correctly concluded that the after-tax value mandated by MCL 418.354(13) pertains to taxes for which the employee is actually legally liable. Reidenbach's pension was not subject to FICA or state income taxes, and those amounts were correctly added back in on remand. Therefore, the MCAC properly found that the magistrate had engaged in the correct calculations. The magistrate reviewed the applicable tables, determined that 80% of the after-tax value of Reidenbach's gross pension payments was $587.44, multiplied that amount by 1.25 pursuant to MCL 418.354(13), added back in the amounts of FICA and state income taxes for which Reidenbach was not liable, concluded that the true after-tax value of Reidenbach's pension for purposes of MCL 418.354(1)(e) was $843.64, multiplied this amount by 53%, and correctly determined that the city was entitled to coordinate $447.13 of Reidenbach's workers' compensation benefits.

4. MCL 418.354(8) prohibits an employer from reducing an employee's wage-loss benefits until a determination of the benefit

amount payable has been made and the employee has begun receiving wage-loss benefits. The parties initially disputed in good faith whether Reidenbach was entitled to workers' compensation benefits, and Reidenbach did not receive any wage-loss payments until September 2009, although he was eligible for wage-loss benefits beginning in April 2009. In September 2009, the city paid Reidenbach a coordinated lump sum for that period and then proceeded to make coordinated weekly payments, albeit based on an incorrect coordination formula. MCL 418.354(8) does not expressly address the retroactive coordination of benefits, but it implicitly provides for coordination whenever the employee begins receiving benefit payments, and MCL 418.354(1) explicitly applies to lump sums as well as weekly payments. To have permitted Reidenbach to receive an uncoordinated lump sum would have penalized the city for initially disputing Reidenbach's receipt of workers' compensation benefits, and MCL 418.354(8) does not indicate a legislative intent to penalize an employer who disputes an employee's claim for wage-loss benefits. Consequently, Reidenbach was not entitled to have the lump sum augmented to reflect the amount of uncoordinated workers' compensation benefits for that five-month period.

Affirmed.

Carey, Kirk, Webster & Kihm (by *Douglas G. Kirk*) for William M. Reidenbach.

Lennon, Miller, O'Connor & Bartosiewicz, PLC (by *Christopher D. Morris*) for the city of Kalamazoo.

Before: SWARTZLE, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Plaintiff, William Mark Reidenbach, appeals by leave granted the order of the Michigan Compensation Appellate Commission (MCAC) affirming its magistrate's rulings. Plaintiff is a retired public safety officer for defendant, the city of Kalamazoo (the City). Plaintiff is receiving both workers' compensation benefits and a pension. The City pays the workers' compensation benefits, and the City contributed part of the funding for plaintiff's pension.

Most of the facts in this matter were stipulated. At issue in this appeal is how the City may "coordinate" plaintiff's workers' compensation benefits with his pension, essentially a determination of how much money the City may deduct from plaintiff's workers' compensation benefits because it partially funded his pension. We affirm.

I. FACTUAL BACKGROUND

The City established a "defined benefit" pension plan in 1942, funded exclusively by contributions from employees, contributions from the City, and investment earnings. Plaintiff began working for the City in February 1992. Plaintiff's collective-bargaining unit exercised its right to be "exempt" from participation in Social Security. The City stopped making contributions to the pension fund in 1997 because the fund was deemed overfunded,[1] so the City was no longer legally required to contribute. Thereafter, the pension fund received only employee contributions and investment earnings. Over the course of his employment, plaintiff's gross contributions to the pension fund totaled $69,930.28, which represented approximately 20% of his pension benefits. During the same period, the City paid $10,773,767.00 into the fund, or approximately 28% of the fund's total contributions of $38,584,375.00. However, Magistrate Chris Slater found that the City provided approximately 53% of the total contributions to the fund over the course of the fund's existence since 1942.[2]

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[1] Magistrate David Merwin observed that the experts had implied that the "overfunded" nature of the City's pension fund was exceptional and perhaps unique.

[2] This percentage was not a stipulation, but as will be discussed, this factual finding was proper.

In December 2006, plaintiff suffered a work-related heart attack. At that time, he was treated and returned to work; however, he continued to suffer heart problems. Consequently, he was eventually taken off work permanently. Plaintiff's last day of work was May 3, 2008. Pursuant to his union contract, plaintiff received one year of his full wages. Plaintiff then formally retired on April 1, 2009. Because plaintiff's retirement was a "duty disability retirement," he received service credit for 25 years of employment. The parties initially disputed whether plaintiff was entitled to workers' compensation benefits. After four months, the City paid a "lump sum" for those months and proceeded to make weekly payments. Plaintiff's pension payments are $960.41 a week before taxes, and his uncoordinated workers' compensation rate is $706.00 a week. Plaintiff is not required to pay state income tax or Federal Insurance Contributions Act (FICA)[3] taxes on his pension; however, he *is* liable for federal income tax.

The City calculated that it should deduct $691.78 a week from plaintiff's workers' compensation benefits. The City based that calculation on its conclusion that plaintiff had funded 18% of his pension benefits, so the City could "coordinate" 82% of the after-tax value of plaintiff's pension payments. The parties later agreed that the City made an arithmetic error and should have used 20% instead of 18%. Plaintiff contended that the City's coordination should be based on the 28% contribution to the fund it made during the term of plaintiff's employment. A trial was held before Magistrate David Merwin, who subsequently issued a lengthy opinion reciting what he aptly described as "extensive stipulations" by the parties. In relevant

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[3] 26 USC 3101 *et seq*. FICA is essentially a payroll tax to fund Social Security and Medicare.

part, Merwin agreed that the City should only be permitted to coordinate 28% of the after-tax value of plaintiff's pension, which Merwin calculated to be $204.21.

The parties then appealed. The MCAC noted that plaintiff argued that the City should not be permitted to coordinate *any* benefits, and the City argued that it should be permitted to coordinate *all* the benefits. The MCAC found "absolutely no merit in the arguments that suggest that all or none of plaintiff's pension is coordinatable [sic]." It otherwise adopted many of Merwin's findings of fact and of law. The MCAC concluded, however, that Merwin had improperly calculated the after-tax amount of plaintiff's pension because the pension was not subject to FICA or state income taxes. It also concluded that Merwin improperly calculated the amount of coordination based on the City's contributions to the pension fund only during the term of plaintiff's employment, rather than the entirety of the City's contributions. It therefore remanded for recalculation of the amount of coordination to which the City was entitled.

On remand, as noted earlier in this opinion, Magistrate Slater determined that over the course of the pension fund's existence, the City had contributed approximately 53% of the total contributions. However, Slater noted that there was no evidence in the record regarding contributions before 1974, and in the absence of any such evidence, the City's "contributions for those years must be deemed zero." Slater arrived at a similar after-tax value for plaintiff's pension, but he added back in the amount of FICA and state income tax that plaintiff did not pay. He concluded that the City was entitled to coordinate 53% of that final amount, which Slater calculated to be $447.13. On

appeal, the MCAC again rejected arguments from plaintiff that no coordination should be permitted and from the City that no workers' compensation benefits should be paid. The MCAC concluded that Slater had not erred by refusing to reopen the record to take additional evidence and that Slater had properly "performed the appropriate calculations in this matter as directed by the Commission." The MCAC adopted Slater's calculations as its own and affirmed Slater's decision. We granted plaintiff leave to appeal.

II. SUMMARY OF ISSUES PRESENTED

We note initially that *both* parties have asked us to reverse the decision of the MCAC. The City is not permitted to do so under the present procedural posture of this matter. Plaintiff and the City each independently sought leave to appeal the decision of the MCAC in separate applications. In the instant appeal, this Court granted plaintiff's application as to three of the issues plaintiff requested. *Reidenbach v Kalamazoo*, unpublished order of the Court of Appeals, entered April 13, 2018 (Docket No. 340863). At the same time, this Court denied the City's application "for lack of merit in the grounds presented." *Reidenbach v Kalamazoo*, unpublished order of the Court of Appeals, entered April 13, 2018 (Docket No. 340867). Consequently, the City is only an appellee, not an appellant. "[A]n appellee that has not sought to cross appeal cannot obtain a decision more favorable than was rendered by the lower tribunal." *Ass'n of Businesses Advocating Tariff Equity v Pub Serv Comm*, 192 Mich App 19, 24; 480 NW2d 585 (1991).

We emphasize that the City was not without a remedy. An appellee is absolutely entitled to file a cross-appeal by virtue of being an appellee, even an

appellee in an appeal by leave granted. See MCR 7.207(A)(1); *Costa v Community Emergency Med Servs, Inc*, 263 Mich App 572, 583-584; 689 NW2d 712 (2004). Notwithstanding this Court's denial of the City's application for leave in Docket No. 340867, the City remained entitled to file a cross-appeal in *this* docket number, which would have permitted the City to assert arguments in support of greater relief than affirmance. The City elected not to do so. We will therefore only entertain the City's arguments to the extent they can be construed as advancing an alternative basis to affirm.[4]

Consequently, there are three issues before us. First, we must determine how the amount of coordination to which the City is entitled should be calculated. Second, we must determine how the after-tax value of plaintiff's pension benefit should be calculated. And third, we must decide whether the City is entitled to coordinate the pension and workers' compensation benefits for the five-month period during which it made no benefit payments. The MCAC did not decide the last issue, but plaintiff properly raised all these issues below and pursues them on appeal, so they are preserved for our review. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

III. SUMMARY OF APPLICABLE LAW

In 1981, the Legislature enacted MCL 418.354, "which provides for the coordination of wage-loss benefits" and was intended "to prevent duplicate wage-loss payments while maintaining suitable wage-loss benefits." *Drouillard v Stroh Brewery Co*, 449 Mich 293,

[4] In any event, to the extent that we can comprehend the City's arguments in support of greater relief, they do not appear obviously meritorious.

299-300; 536 NW2d 530 (1995). The legislative history of MCL 418.354 unambiguously displays a concern with the avoidance of double compensation. See *id*. at 300 n 1. Specifically, MCL 418.354 allows "coördination of workers' compensation benefits with employer-funded pension plan payments." *Romein v Gen Motors Corp*, 436 Mich 515, 521; 462 NW2d 555 (1990), aff'd sub nom *Gen Motors Corp v Romein*, 503 US 181; 112 S Ct 1105; 117 L Ed 2d 328 (1992). "Coordination" means that an employer paying workers' compensation obligations may set off a "portion of certain other benefits, such as pensions and social security payments, also received by the employee and financed by the employer." *Franks v White Pine Copper Div*, 422 Mich 636, 647; 375 NW2d 715 (1985), superseded in part by statute on other grounds, see *Romein*, 436 Mich at 523 n 3. Both parties accept, as they must, that the City is entitled to coordinate workers' compensation and pension payments, i.e., to deduct some amount of money from plaintiff's workers' compensation payments on the basis of the City's contributions to the pension fund. The dispute is only how to determine that amount.

We note that both parties' arguments are convoluted and difficult to comprehend, and it has not been easy for us to discern what relief they even desire. It appears plaintiff argues that Magistrate Merwin determined the correct formula in the first instance: first, the City may coordinate 28% of the after-tax value of plaintiff's pension because that represents the money provided by the City to the pension fund during the term of plaintiff's employment; and secondly, the coordination must be based on the after-tax value of plaintiff's pension calculated by reference to a statutory table that includes all taxes. In contrast, the City does not provide a coherent argument regarding how to

engage in coordination but vigorously argues that plaintiff's methodology is absurd and inequitable. The City also argues that the coordination must be based on the net portion of the pension payment plaintiff actually receives, which is the same as the gross payment because plaintiff pays no taxes. Plaintiff additionally argues that the City should not be permitted to coordinate any benefits for the five-month period during which it paid no workers' compensation benefits but later made a lump-sum payment.

IV. STANDARD OF REVIEW

In an appeal from the MCAC, we primarily review the decision of the MCAC, not any underlying decision by a magistrate. *Omian v Chrysler Group LLC*, 309 Mich App 297, 306; 869 NW2d 625 (2015). We will not disturb the MCAC's factual findings if the MCAC properly reviewed the magistrate's decision for "substantial evidence," and the MCAC's own findings are supported by "any evidence." *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709-710; 614 NW2d 607 (2000). However, we review de novo any questions of law, including the construction of statutes. *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 57; 658 NW2d 460 (2003). "Due deference should be given to the administrative expertise of the WCAC,[5] as well as to the administrative expertise of the magistrate." *Holden v Ford Motor Co*, 439 Mich 257, 268; 484 NW2d 227 (1992).

Notwithstanding that deference, "a decision of the WCAC is subject to reversal if it is based on erroneous

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[5] "WCAC" is the former Workers' Compensation Appellate Commission. "All authority, powers, duties, functions, and responsibilities" of the WCAC were transferred to the MCAC by Executive Order 2011-6, MCL 445.2032, effective August 1, 2011.

legal reasoning or the wrong legal framework." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000). We review de novo the interpretation and construction of statutes with the goal of discerning and giving effect to the intent of the Legislature. *Id*. at 402. If the words of a statute are plain and clear, it will be enforced as written; we will only engage in judicial interpretation if the statutory language is ambiguous. *Id*.

V. COORDINATION PERCENTAGE

Plaintiff argues that because the City made 28% of the contributions to the pension fund during the term of plaintiff's employment, the City should only be permitted to coordinate 28% of his pension. The City contends that it should be able to coordinate at least[6] 53% of plaintiff's pension, the percentage that represents its total contribution to the pension fund over the course of the fund's existence. We conclude that the MCAC correctly determined how the City may coordinate the benefits.

MCL 418.354 provides, in relevant part, as follows:

> (1) This section applies if either weekly or lump sum payments are made to an employee as a result of liability under section 301(7)[7] or (8),[8] 351,[9] or 835[10] with

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[6] The City's argument is not clear, but to the extent it seeks coordination of greater than 53%, any such argument would be impermissible in the absence of a cross-appeal, and we will not consider it.

[7] Personal injury arising out of the course of employment causing total disability and wage loss—MCL 418.301(7).

[8] Personal injury arising out of the course of employment causing partial disability and wage loss—MCL 418.301(8).

[9] Determination of payment for total incapacity resulting from a personal injury—MCL 418.351.

[10] Availability and requirements of a lump-sum payment for liability resulting from a personal injury—MCL 418.835.

> respect to the same time period for which the employee also received or is receiving . . . pension or retirement payments under a plan or program established or maintained by the employer. Except as otherwise provided in this section, the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under section 361(2)[11] and (3)[12] shall be reduced by these amounts:
>
> * * *
>
> (e) The proportional amount, based on the ratio of the employer's contributions to the total contributions to the plan or program, of the after-tax amount of the pension or retirement payments received or being received by the employee pursuant to a plan or program established or maintained by the same employer from whom benefits under section 301(7) or (8), 351, or 835 are received, if the employee did contribute directly to the pension or retirement plan or program. Subsequent increases in a pension or retirement program shall not affect the coordination of these benefits.

The parties stipulated that plaintiff suffered a personal injury arising out of his employment. That injury resulted in his total disability, causing him wage loss and forcing him to retire, thereby entitling him to the receipt of pension benefits. It was also established that both plaintiff and the City contributed to the pension fund. The MCAC properly determined that MCL 418.354(1)(e) applied and dictated the method of calculating the proportion of plaintiff's pension that the City was authorized to coordinate.

The plain language of MCL 418.354(1)(e) states that the proportional amount must be "based on the ratio of

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[11] Specifying period of disability for the loss of fingers, etc.—MCL 418.361(2).

[12] Specifying losses that qualify as total and permanent disabilities—MCL 418.361(3).

the employer's contributions to the total contributions to the plan or program . . . ." Importantly, that clause is a descriptive expression set off by commas. As a consequence, the following statutory language:

> The proportional amount, based on the ratio of the employer's contributions to the total contributions to the plan or program, of the after-tax amount of the pension or retirement payments received or being received by the employee . . .

is meaningfully indistinguishable from:

> The proportional amount of the after-tax amount of the pension or retirement payments received or being received by the employee . . . is based on the ratio of the employer's contributions to the total contributions to the plan or program.

Therefore, the Legislature requires "the proportional amount . . . of the after-tax amount of the pension" to be calculated "based on the ratio of the employer's contributions to the total contributions to the plan or program." That language can only be construed as requiring consideration of all of the City's contributions to the pension fund over the course of its entire existence. Plaintiff's interpretation requires us to insert the phrase "during the employee's employment" into the statutory language. We may not do so.

Plaintiff cites an unpublished case from this Court allegedly holding to the contrary. Unpublished cases are not binding on us pursuant to either stare decisis or the first-out rule. MCR 7.215(C)(1); MCR 7.215(J)(1); *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). In any event, in the case plaintiff cites, the panel concluded that the facts presented were unusual and not contemplated by the Legislature, so a literal interpretation of the statute would be unjust and

contrary to the statute's legislative purpose. *Bailey v ANR Freight Sys, Inc*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 1999 (Docket No. 205606), pp 3-4. In essence, the panel relied on the absurd-results doctrine, which may only be invoked when it is "quite impossible" that the Legislature could have intended the result. *Johnson v Recca*, 492 Mich 169, 192-195; 821 NW2d 520 (2012).

Here, as noted, the legislative purpose underlying the statute is the avoidance of double payments by the employer. The facts in this matter are apparently unusual in that the pension fund became overfunded during the term of plaintiff's employment, which is why the City stopped making contributions. The evidence indicated that the fund became overfunded at least in part because its investments yielded exceptionally good returns. The City's payments into the fund before plaintiff's term of employment consequently *did* affect the funding of plaintiff's entire pension. We are unpersuaded that a literal application of the language of the statute would either create an unjust result or depart from the statute's legislative purpose. We therefore decline to consider *Bailey* persuasive under the present circumstances. The MCAC correctly applied the statutory language and properly found that Magistrate Merwin failed to do so.

The City argues that the MCAC erred by determining that there was no evidence in the record showing how much money the City contributed to the pension fund before 1974 and consequently deeming that amount to be zero. More precisely, the City argues that it should have been permitted to supplement the record to provide evidence regarding its earlier contributions. Leaving aside whether the City may even ask for this relief, we disagree.

The parties properly agreed that at trial, the City bore the burden of proving its right to coordinate benefits and reduce plaintiff's workers' compensation. See *Brown v Beckwith Evans Co*, 192 Mich App 158, 167-169; 480 NW2d 311 (1991). In any event, agencies may allocate burdens of proof in a manner consistent with the legislative scheme being administered and properly impose the burden of producing evidence on a party having superior access to the relevant facts. *Mich Tool Co v Employment Security Comm*, 346 Mich 673, 679-680; 78 NW2d 571 (1956). The City declined to carry its burden, and it did not seek permission to supplement the record until after the MCAC had decided the parties' first appeal and had remanded the case to Magistrate Slater for recalculation. The MCAC had the discretion to order a magistrate to take further evidence, MCL 418.861a(12), but the MCAC was not required to do so. The City simply failed to submit evidence when it should have done so, and we do not find that the MCAC abused its discretion under the circumstances by declining to permit a last-minute addendum.

Magistrate Slater properly relied on the evidence in the record for his decision. On the basis of the financial data in the record, Slater determined that the City had made 53% of the total contributions to the pension fund. It appears that he therefore inferred that 53% represented an accurate estimated calculation of the coordination percentage. Magistrates and the MCAC may draw reasonable inferences from established facts. *Zytkewick v Ford Motor Co*, 340 Mich 309, 315; 65 NW2d 813 (1954). The plain language of MCL 418.354(1)(e) dictates that coordination must be based on the City's total contributions to the pension fund. Therefore, we conclude that the MCAC's decision is legally correct, and to the extent it implicitly or explic-

itly adopted its magistrates' factual findings, the MCAC properly concluded that those findings were supported by ample record evidence.

VI. AFTER-TAX VALUE

Having concluded that the MCAC properly determined that the City was entitled to coordinate 53% of plaintiff's pension, the correct value of that portion of the pension must also be determined. The plain language of MCL 418.354(1)(e) provides that coordination is of "the after-tax amount of the pension . . . received . . . by the employee . . . ." The "after-tax amount" is defined in MCL 418.354(13), which provides, in relevant part:

> As used in this section, "after-tax amount" means the gross amount of any benefit under subsection . . . (1)(e) reduced by the prorated weekly amount which would have been paid, if any, under the federal insurance contributions act, 26 USC 3101 to 3128 [FICA], and state income tax and federal income tax, calculated on an annual basis using as the number of exemptions the disabled employee's dependents plus the employee, and without excess itemized deductions. In determining the "after-tax amount" the tables provided for in [MCL 418.313(2)] shall be used. The gross amount of any benefit under subsection . . . (1)(e) shall be presumed to be the same as the average weekly wage for purposes of the table. The applicable 80% of after-tax amount as provided in the table will be multiplied by 1.25 which will be conclusive for determining the "after-tax amount" of benefits under subsection . . . (1)(e).

Consequently, the "after-tax amount" of plaintiff's pension depends on the applicable amounts of FICA and state and federal income taxes. The MCAC, in the parties' first appeal, noted that because plaintiff's pension is not subject to FICA or state income taxes,

"according to § 354(13), reduction by the § 313 tables is not necessary for those amounts."

The City argues that plaintiff paid *no* taxes, and therefore the "after-tax amount" of his pension should be exactly the same as the gross payment. Irrespective of the language of the statute, this is factually incorrect, because plaintiff *is* liable for federal income tax. Plaintiff argues that the plain language of the statute mandates that the "after-tax amount" of his pension must deduct FICA, state, and federal taxes even though he is only liable for the latter. We disagree with this contention as well.

Pursuant to the plain language of the statute, the "after-tax value" of plaintiff's pension means, in relevant part, a "reduc[tion] by the prorated weekly amount which would have been paid, if any, under [FICA], and state income tax and federal income tax . . . ." MCL 418.354(13). The determination of that amount is made by referring to the tables published yearly by the Bureau of Worker's Compensation pursuant to MCL 418.313. The "tables are consulted to compute the difference between the after-tax value of a . . . disabled employee's average weekly wage at the time of the injury and the after-tax value of subsequent wages." *Linton v Schafer Bakeries, Inc*, 252 Mich App 41, 43; 656 NW2d 185 (2002) (concerning partial-disability benefits to which the tables also apply). The MCAC determined that "[t]he tables include the specific amounts used to produce the general figure," but pursuant to MCL 418.354(13), if "any tax should not be applied, the tables allow for that amount to be excluded." The tables include deductions for FICA and state income taxes.

We agree with the MCAC's interpretation of MCL 418.354(13). The statute refers to taxes that "would

have been paid, if any." Plaintiff would not, however, have paid FICA or state income taxes, because by law he is exempt from doing so. The clause "if any" anticipates the possibility that any of the subsequently enumerated tax liabilities might not be present. Additionally, to the extent there may be any ambiguity in the meaning of MCL 418.354(13), an agency's construction of a statute it must administer and with which it has superior expertise "is always entitled to the most respectful consideration . . . ," see *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 98-111; 754 NW2d 259 (2008) (quotation marks and citation omitted), and we independently conclude that the MCAC's interpretation is the most consistent with the Legislature's goal of avoiding double recoveries. We conclude that the "after-tax value" mandated by MCL 418.354(13) pertains to taxes for which the employee is actually legally liable, and the clause "would have paid" signifies that it does not matter whether the employee actually paid those taxes.

Therefore, the MCAC properly found that Magistrate Slater engaged in the correct calculations. Slater reviewed the applicable tables, which determined that 80% of the after-tax value of plaintiff's $960.41 gross pension payments was $587.44. Because the tables calculate an 80% value, Slater then multiplied that amount by 1.25, pursuant to MCL 418.354(13), to arrive at an after-tax value of $734.30. Slater then correctly recognized that the tables included reductions for FICA and state income taxes for which plaintiff was not liable. Slater then properly added back $73.44 in FICA taxes and $35.90 in state income taxes, based on evidence in the record. He therefore correctly concluded that the true after-tax value of plaintiff's pension for purposes of MCL 418.354(1)(e) was $843.64. As discussed previously, Slater then correctly multiplied this amount by

53% and determined that the City was entitled to coordinate $447.13 of plaintiff's workers' compensation benefits.

VII. COORDINATION OF BENEFITS FROM APRIL TO SEPTEMBER 2009

As earlier noted, there was a five-month period, early in this matter, during which the City did not make any workers' compensation benefit payments to plaintiff. Following that period, the City paid a "lump sum" for those months and then proceeded to make weekly payments. Plaintiff argues that the City should not have been permitted to coordinate its payment representing those months on the theory that coordination requires the employee to actually receive benefit payments. We disagree with plaintiff's conclusion.

MCL 418.354(8) provides, in relevant part, that "a credit or reduction of benefits otherwise payable for any week shall not be taken under this section until there has been a determination of the benefit amount otherwise payable to the employee . . . and the employee has begun receiving the benefit payments." Thus, an employer may not reduce an employee's wage-loss benefits under MCL 418.354 until a determination of the benefit amount payable has been made and the employee has begun receiving wage-loss benefits. Although MCL 418.354(8) does not expressly address the retroactive coordination of benefits, it implicitly provides for coordination at the time the employee receives benefit payments, whenever they begin. Notably, MCL 418.354(1) explicitly applies to lump sums as well as weekly payments. MCL 418.354(8) does not indicate a legislative intent to penalize an employer who disputes an employee's claim for wage-loss benefits. As discussed, MCL 418.354 is intended to prevent employers from being

required to pay in excess of an employee's actual wage loss. See *Franks*, 422 Mich at 655-658.

Here, the parties did initially dispute plaintiff's entitlement to workers' compensation benefits, a dispute that Magistrate Merwin found to have been in good faith. The City commenced payment of workers' compensation benefits in September 2009. The parties stipulated that plaintiff's entitlement to those benefits began when his salary terminated on April 1, 2009. The City paid plaintiff a lump sum for the intervening period and then proceeded to make weekly payments, albeit based on its incorrect coordination formula. Plaintiff apparently contends that the "lump sum" should be augmented to reflect approximately five months of his uncoordinated workers' compensation benefits of $706.00 a week. However, we conclude that doing so would effectuate a penalty and contravene the statute's plainly stated applicability to lump sums. We conclude that it was proper for the City to coordinate the lump-sum payment. The MCAC properly adopted Merwin's directive to the City to coordinate that amount using the 53% figure as determined by Magistrate Slater.

VIII. CONCLUSION

We conclude that the MCAC's final decision and order is legally correct and factually supported. We therefore affirm. As discussed previously, because the City did not file a cross-appeal as it was entitled to do, we decline to consider the City's arguments seeking to obtain greater relief than affirmance. Because *both* parties asked us to reverse the MCAC and we decline to do so, we deem neither party to have "prevailed" and direct that they shall bear their own costs. MCR 7.219(A).

SWARTZLE, P.J., and MARKEY, J., concurred with RONAYNE KRAUSE, J.

TELFORD v STATE OF MICHIGAN

Docket No. 340929. Submitted January 16, 2019, at Lansing. Decided February 26, 2019, at 9:15 a.m.

John Telford, Helen Moore, and others filed an action in the Wayne Circuit Court against the state of Michigan, the Governor, and others, claiming that defendants had failed to provide funding for mandated educational services in violation of Const 1963, art 9, §§ 25 through 34, commonly known as the Headlee Amendment. Defendant had the case transferred to the Court of Claims under MCL 600.6404(3), and plaintiffs moved for the case to be transferred back to the circuit court. Relying on *Riverview v Michigan*, 292 Mich App 516 (2011)—which held that the Court of Claims lacked subject-matter jurisdiction over Headlee Amendment claims—the court, MICHAEL J. TALBOT, J., concluded that it did not have jurisdiction over plaintiffs' complaint and ordered the case transferred back to the circuit court. Defendants appealed.

The Court of Appeals *held*:

1. MCL 600.308a(1) provides that a Headlee Amendment action may be commenced in the Court of Appeals or in the circuit court in the county in which venue is proper, at the option of the party commencing the action. In 2011, when *Riverview* was decided, MCL 600.6419(1)(a) provided that the Court of Claims had jurisdiction to hear and determine all claims and demands against the state and any of its departments, commissions, boards, institutions, arms, or agencies. The *Riverview* Court concluded that the Court of Claims did not have subject-matter jurisdiction over the plaintiff's Headlee Amendment claim because although the MCL 600.6419(1)(a) version in effect at that time granted the Court of Claims a broad grant of jurisdiction, MCL 600.308a(1) controlled because that statute specifically delegated jurisdiction over Headlee Amendment actions to the Court of Appeals or to the circuit court in which venue was proper. MCL 600.6419(1)(a) was amended by 2013 PA 164, effective November 12, 2013, after the *Riverview* decision. The statute currently provides that the Court of Claims has jurisdiction to hear and determine any claim or demand against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in

the circuit court. Although MCR 7.215(C)(2) provides that a published opinion of the Court of Appeals has precedential effect under the rule of stare decisis, precedent may be set aside when the Legislature significantly alters the statutory law underlying the decision. 2013 PA 164 rewrote and broadened the jurisdiction of the Court of Claims when it removed the court from the Ingham Circuit Court and added the language "notwithstanding another law that confers jurisdiction" to MCL 600.6419(1)(a); the amended language evidenced that the Legislature intentionally and knowingly intended to expand the jurisdiction of the Court of Claims. Thus, the Legislature repealed MCL 600.308a(1) by implication when it enacted 2013 PA 164 even though (1) MCL 600.308a(1) is more specific in that it refers specifically to jurisdiction over Headlee Amendment claims and (2) jurisdiction over Headlee Amendment actions is not mentioned in 2013 PA 164. In this case, because 2013 PA 164 overturned the pertinent holding in *Riverview*, the Court of Claims had jurisdiction over plaintiffs' complaint under MCL 600.6419(1)(a); therefore, the Court of Claims erred by transferring plaintiffs' complaint back to the Wayne Circuit Court.

2. Const 1963, art 9, § 32 provides that any taxpayer of Michigan has standing to bring suit in the Court of Appeals to enforce provisions of the Headlee Amendment; the amendment's grant of jurisdiction to the Court of Appeals was not exclusive. Plaintiffs' argument that the case should be heard in the Wayne Circuit Court (and not the Court of Claims) because they were entitled to a jury trial of their Headlee Amendment claim was without merit. No statutory or constitutional provision establishes such a right; moreover, the Headlee Amendment does not contemplate the right to a jury trial because the amendment grants jurisdiction only to the Court of Appeals, which is not equipped to handle jury trials, and that fact would have been apparent when the Headlee Amendment was approved by Michigan's voters. Therefore, individuals do not have the right to a jury trial for Headlee Amendment claims.

Reversed and remanded to the Court of Claims.

1. CONSTITUTIONAL LAW — HEADLEE AMENDMENT — NO RIGHT TO JURY TRIAL.

Individuals do not have the right to a jury trial for claims brought under the Headlee Amendment (Const 1963, art 9, §§ 25 through 34).

2. COURTS — COURT OF CLAIMS — JURISDICTION — HEADLEE AMENDMENT CLAIMS.

MCL 600.308a(1) provides that an action brought under the Headlee Amendment may be commenced in the Court of Appeals or in

the circuit court in the county in which venue is proper, at the option of the party commencing the action; the Legislature repealed MCL 600.308a(1) by implication when it amended MCL 600.6419(1)(a); under MCL 600.6419(1)(a), the Court of Claims has jurisdiction over Headlee Amendment claims (2013 PA 164; Const 1963, art 9, §§ 25 through 34).

Thomas H. Bleakley, PLLC (by *Thomas H. Bleakley*) for plaintiffs.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Jonathan S. Ludwig*, Assistant Attorney General, for defendants.

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

RONAYNE KRAUSE, J. Plaintiffs are various taxpayers, residents, and parents of children in Detroit who generally contend that defendants have engaged in a longstanding practice of mandating certain educational services without providing funding for those services in violation of the Headlee Amendment, Const 1963, art 9, §§ 25 through 34. The dispute in this appeal concerns the division of jurisdiction between the Court of Claims and the circuit courts; specifically, which court has subject-matter jurisdiction over Headlee Amendment claims. The Court of Claims concluded that it lacked subject-matter jurisdiction and ordered the matter transferred back to the Wayne Circuit Court. Although the Court of Claims properly relied on binding caselaw, we reverse and remand.

This Court has previously and unambiguously held that the Court of Claims lacks subject-matter jurisdiction over Headlee Amendment claims. *Riverview v Michigan*, 292 Mich App 516; 808 NW2d 532 (2011). *Riverview* relied on MCL 600.308a(1), which provided,

and continues to provide, that a Headlee Amendment action "may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action." After *Riverview* was decided, the Legislature amended the Court of Claims Act, MCL 600.1401 *et seq.*, in 2013 PA 164, effective November 12, 2013. In relevant part, former MCL 600.6419(1)(a) provided:

> The [Court of Claims] has power and jurisdiction:
>
> (a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies.

The current version of MCL 600.6419(1)(a) provides:

> Except as otherwise provided in this section, the [Court of Claims] has the following power and jurisdiction:
>
> (a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers *notwithstanding another law that confers jurisdiction of the case in the circuit court*. [Emphasis added.]

There is no serious dispute that the rule of stare decisis, under which published opinions of this Court have precedential effect, see MCR 7.215(C)(2), may be inapplicable when the Legislature significantly alters the statutory law underlying the decision. See *People v Feezel*, 486 Mich 184, 212-213; 783 NW2d 67 (2010) (opinion by CAVANAGH, J.); *Lamp v Reynolds*, 249 Mich App 591, 604; 645 NW2d 311 (2002).

This Court has previously held that the current version of MCL 600.6419(1)(a) superseded MCL 600.4401(1). *O'Connell v Dir of Elections*, 316 Mich App

91, 108; 891 NW2d 240 (2016). This does not entirely resolve the issue before us. MCL 600.4401(1) addresses where mandamus actions against a state officer may be filed, which is not a matter addressed by Michigan's Constitution. See Const 1963, art 11, § 5. In contrast, MCL 600.308a(1) expanded the jurisdiction expressly conferred on the Court of Appeals by our Constitution. See Const 1963, art 9, § 32. Furthermore, this Court in *Riverview* held that despite the broad "statutory grant of jurisdiction to the Court of Claims" found in former MCL 600.6419(1)(a), MCL 600.308a(1) controlled because the latter statute was more specific and operated as an exclusion of jurisdiction to other tribunals. *Riverview*, 292 Mich App at 520, 524-525. In short, there are enough differences between MCL 600.308a(1) and MCL 600.4401(1) that we decline to extend the holding in *O'Connell* by rote.

Nevertheless, we find an ambiguity in the pertinent statutes because MCL 600.308a(1) and MCL 600.6419(1)(a) irreconcilably conflict. *People v Hall*, 499 Mich 446, 454; 884 NW2d 561 (2016). We note that there is also an irreconcilable conflict between two rules of statutory construction. All other things being equal, a more specific statutory provision controls over a more general statutory provision; however, again all other things being equal, a more recent statutory provision controls over an older statutory provision. See *Huron Twp v City Disposal Sys, Inc*, 448 Mich 362, 366; 531 NW2d 153 (1995); *Malcolm v East Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991). It appears to us that MCL 600.308a(1) is more specific with regard to the Court of Appeals' jurisdiction, whereas MCL 600.6419(1)(a), which addresses the Court of Claims' jurisdiction, is the more recent statutory provision. Finally, repeals by implication have long been disfavored and will only be found if no other intention by the

Legislature is possible. *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642, 651; 852 NW2d 865 (2014) (opinion by VIVIANO, J.). However, the fundamental goal of statutory interpretation is to discover and implement the intent of the Legislature, and to that end, the "rules of construction" are merely helpful guides. *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 611; 321 NW2d 668 (1982).

Therefore, we ultimately arrive at the same conclusion as the Court did in *O'Connell*. We are persuaded that the Legislature intended to repeal MCL 600.308a(1) by implication when it enacted 2013 PA 164, even though MCL 600.308a(1) is clearly more specific and the Headlee Amendment is not mentioned anywhere in 2013 PA 164. Legislative analyses are of minor value, but our Supreme Court has recognized that they may nevertheless be helpful in resolving a close question regarding an ambiguous statute. See *In re United States Court of Appeals for the Sixth Circuit Certified Question*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). We have reviewed the legislative analyses of 2013 PA 164, and we find no mention of the Headlee Amendment. However, the legislative analyses *do* show a clear intention to extensively rewrite the Court of Claims' jurisdiction in the process of removing it from the Ingham Circuit Court. In other words, there is a strong inference that expanding the scope of the Court of Claims' jurisdiction was intentional and knowing. The phrase "notwithstanding another law that confers jurisdiction," MCL 600.6419(1)(a), only occurs once in MCL 600.6419, and significantly, that language was added by 2013 PA 164. At the same time, the Legislature added two provisions making express exceptions to the new grant of jurisdiction. See MCL 600.6419(5) and (6).

We conclude that notwithstanding the specificity of MCL 600.308a(1), our reluctance to find a repeal by implication, and the lack of any mention of the Headlee Amendment in 2013 PA 164 or its legislative analyses, the Legislature did intend to repeal MCL 600.308a(1) when it amended MCL 600.6419(1)(a) in 2013. The pertinent rule of law in *Riverview* has therefore been overturned by the Legislature, and we are bound to follow the new rule. See *United States v Lee*, 106 US (16 Otto) 196, 220; 1 S Ct 240; 27 L Ed 171 (1882) (stating that government officers "are creatures of the law and are bound to obey it"); *Gleason v Kincaid*, 323 Mich App 308, 317; 917 NW2d 685 (2018) ("Courts are bound to follow statutes and must apply them as written."). The Court of Claims properly found itself bound by *Riverview*, but it nevertheless incorrectly determined that it lacked subject-matter jurisdiction over plaintiffs' Headlee Amendment claims on that basis.

Finally, plaintiffs argue that the Court of Claims lacked subject-matter jurisdiction because they are entitled to a trial by a jury. We disagree. No right to a jury trial for Headlee Amendment claims is specified in any statute or provision of the Michigan Constitution. See *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014) (stating that "[a] right to a jury trial can exist either statutorily or constitutionally"). The right to a jury trial may exist for claims "similar in character to" claims for which a right to a jury trial existed before the adoption of the Michigan Constitution. *Id*. at 704-705 (quotation marks and citation omitted). Nevertheless, we conclude that the Headlee Amendment itself precludes plaintiffs' argument because the act's initial grant of jurisdiction was only to this Court. Const 1963, art 9, § 32. *Riverview*, 292 Mich App at 521, 524, held that the Legislature was not precluded

from treating the constitutional grant of jurisdiction as nonexclusive, which remains a rule of law that we are bound to follow. MCR 7.215(J)(1). However, this Court is fundamentally not a trial court, and it is fundamentally ill-equipped to handle trials of any kind, let alone jury trials—a fact that would have been obvious when the Headlee Amendment was approved by Michigan voters. The grant of jurisdiction to this Court shows that no right to a jury trial was anticipated.

Reversed and remanded. We do not retain jurisdiction. We direct that the parties shall bear their own costs on appeal. MCR 7.219(A).

CAMERON, P.J., and BECKERING, J., concurred with RONAYNE KRAUSE, J.

BODNAR v ST JOHN PROVIDENCE, INC

Docket No. 337615. Submitted October 10, 2018, at Detroit. Decided March 5, 2019, at 9:00 a.m. Leave to appeal sought.

Colleen Bodnar, Greg Bozimowski, and others brought an action in the Oakland Circuit Court against St. John Providence, Inc., and Ascension Health, asserting claims of breach of contract, promissory estoppel, and statutory and common-law conversion. Plaintiffs were certified registered nurse anesthetists (CRNAs) who had been employed by St. John, and Ascension Health was the parent company of St. John. In 2014, in order to outsource its anesthesiology services, St. John began negotiating the formation of a separate entity, PSJ Anesthesia, PC, to provide those services. In May 2015, St. John revised two employee policy handbooks to address the transition: the reduction-in-force policy (the RIF policy) and the severance-pay policy. Under the policies, those employees who were given notice of position elimination were required to apply for vacant comparable jobs within St. John and were to receive priority consideration to interview for such jobs. In addition, eligible employees were to receive severance pay and benefits if their position were eliminated and no "comparable job"—that is, a position that paid at least 80% of the employee's "current pay rate" for which the employee had the ability and qualifications to perform—were available through St. John or Ascension; conversely, employees were ineligible to receive severance pay and benefits if they did not apply for a comparable job or rejected a comparable job offer. In October 2015, plaintiffs were notified of the transition plan and that they would cease being employed by St. John as of December 31, 2015. Thereafter, PSJ Anesthesia offered positions to plaintiffs, but the offered positions did not include many of the benefits and premiums plaintiffs had received when employed by St. John. Plaintiffs declined the positions, claiming that the proffered jobs were not comparable because the positions did not pay within 80% of plaintiffs' previous salaries including premiums and benefits. Defendants thereafter terminated plaintiffs' employment effective December 31, 2015, and refused to pay severance pay and benefits because plaintiffs had declined what defendants considered comparable job offers. Plaintiffs filed this action, and defendants moved separately for

summary disposition under MCR 2.116(C)(8) and (10). Ascension asserted the same summary-disposition arguments as St. John but also argued that dismissal was appropriate with regard to Ascension because Ascension was not a party to the alleged contract and did not make the alleged promises. Defendants also moved jointly to strike from the record certain documents pertaining to unemployment proceedings before Michigan's Unemployment Insurance Agency (the MUIA), arguing that the documents were inadmissible under MCL 421.11. The court, Wendy L. Potts, J., granted summary disposition in favor of defendants and dismissed each of plaintiffs' claims. The court also denied defendants' motion to strike, reasoning that it had accorded no weight to those materials in light of their minimal probative value. Plaintiffs appealed the trial court's order granting summary disposition in favor of defendants, and defendants cross-appealed the trial court's order denying their motion to strike the MUIA documents.

The Court of Appeals *held*:

1. In order for a contract to be formed, there must be an offer and acceptance, as well as mutual assent to all the essential terms. In certain circumstances, an employer's statement of policy contained in a manual or handbook can give rise to a contractual obligation under traditional principles of contract law. Under *Cain v Allen Electric Equip Co*, 346 Mich 568 (1956), although an employer reserves the right to change or amend its offer of separation pay to its employees, once an employee accepts the offer by meeting any conditions to the separation pay, a contract right is formed and the employer may not deny the contract right; the offer of separation pay is not a mere gratuity but, rather, an offer on which an employee can rely. In other words, an employer may not retroactively modify its policy in order to deny an employee a contractual right to which the employee was already entitled. Similarly, under *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579 (1980), in the context of wrongful termination, an employer's just-cause termination policy is enforceable under a theory of contract law when the employment manual and the employer's verbal assurances collectively permit a rational trier of fact to conclude that the assurances and the policy manual became part of the employee's express contract of employment. Alternatively, as a matter of public policy, an employee's legitimate expectations premised on his or her employer's written policy statement can give rise to enforceable contractual rights in the context of wrongful discharge; the legitimate-expectations theory may not be applied to

the arena of compensation policies. However, an employer may convey its intent not to be contractually bound by a severance-pay policy—thereby preventing a contractual offer from ever arising—through a disclaimer expressly stating that it is an at-will employer, that there is no guarantee of employment for any definite duration, and that the policy does not constitute a contract.

2. The RIF policy in this case outlined the specific procedures to be followed in the event of a reduction in force, and the policy contained the disclaimer that St. John was an at-will employer, that there was no guarantee of employment for any definite duration of time, and that the policy did not constitute a contract. The disclaimer applied to the entire policy, not just to the at-will-employer provision, and, unlike the policies in *Cain* and *Toussaint*, conveyed St. John's intent not to be contractually bound by either policy. Although the severance-pay policy did not independently incorporate the disclaimer, it was promulgated along with the RIF policy and specified that it was to be administered in conjunction with the RIF policy unless the two policies conflicted; thus, the disclaimer applied to both policies because the severance-pay policy did not contain a provision that conflicted with the disclaimer. The disclaimer was contained within the two policies that set forth reduction-in-force and severance-pay policies, and the disclaimer prevented a contractual offer from ever arising. Accordingly, the trial court correctly dismissed plaintiffs' breach-of-contract claim.

3. Even if the policies were contractually binding on defendants, plaintiffs were not entitled to severance pay or to continued employment or priority consideration during the six-month placement period. The unqualified phrase "current pay rate" encompassed an employee's then-current base rate of pay; it did not include other premiums or benefits such as overtime pay or disability-insurance premiums. It would have been virtually impossible to include premiums or benefits in the definition of "current pay rate" given the fluctuations in value of such items, and St. John would have specified the manner in which such calculations should be made had it intended "current pay rate" to include premiums and benefits. In accordance with the terms of the policies, defendants denied plaintiffs severance pay and benefits because plaintiffs rejected PSJ Anesthesia's offers of employment that were within 80% of their then-current base rate of pay. The RIF policy granted affected employees priority consideration to interview for comparable jobs during the six-month placement period; it did not guarantee continued employment or

compensation during that period, and plaintiffs were not entitled to continued priority consideration for interviews after they rejected comparable job offers. Accordingly, the trial court properly dismissed plaintiffs' breach-of-contract claim premised on both defendant's failure to pay severance and its failure to continue priority consideration and employment during the placement period.

4. The elements of promissory estoppel are (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. A promise giving rise to an actionable claim must be clear and definite. Plaintiffs were not entitled to severance pay or benefits under a theory of promissory estoppel because plaintiffs rejected comparable job offers, making plaintiffs ineligible to recover severance pay or benefits under the express terms of the policies. As with plaintiffs' contract claims, defendants did not promise in the policies to continue plaintiffs' employment, compensation, or priority consideration for the duration of the six-month placement period. Therefore, the trial court correctly dismissed plaintiffs' promissory-estoppel claim.

5. Defendants had no contractual or equitable obligation to disburse severance pay and benefits or to continue plaintiffs' employment for any period. Accordingly, the trial court correctly dismissed plaintiffs' conversion claims because plaintiffs had no ownership interest in severance proceeds, benefits, or continued compensation, a required element of any conversion claim.

6. Parent and subsidiary corporations are presumed to be separate and distinct entities absent some abuse of the corporate form. To pierce the corporate veil, a plaintiff must aver facts that demonstrate that (1) the corporate entity is a mere instrumentality of another entity or individual, (2) the corporate entity was used to commit fraud or a wrong, and (3) as a result, the plaintiff suffered an unjust injury or loss. Even if plaintiffs' claims had merit, Ascension was properly dismissed from the action because plaintiffs failed to plead facts asserting that St. John was an instrumentality of Ascension or that the corporate form was somehow abused to commit the wrongs alleged, and plaintiffs failed to demonstrate the likelihood that further discovery would yield support for their position.

7. MCL 421.11(b)(1)(*iii*) prohibits the use of information and determinations elicited during the course of an unemployment proceeding before the MUIA in a subsequent civil proceeding

unless the MUIA is a party to or a complainant in the action. However, MCL 421.11a provides that an individual who testifies voluntarily before another body concerning representations the individual made to the unemployment agency pursuant to the administration of the Michigan Employment Security Act waives any privilege under MCL 421.11 otherwise applying to the individual's representation to the unemployment agency. In this case, the trial court correctly admitted the MUIA hearing transcript; the privilege protecting information presented during a MUIA proceeding was waived under MCL 421.11a because the affidavit by St. John human resources manager Michelle Kosal, attached to defendants' motion for summary disposition, contained the same information to which she had testified during the MUIA proceeding.

Affirmed.

SHAPIRO, P.J., concurring in part and dissenting in part, agreed with the majority that the trial court correctly granted summary disposition of plaintiffs' conversion claims, that the trial court correctly admitted the MUIA hearing transcript into evidence at the summary disposition motion hearing, and that the RIF policy did not support plaintiffs' claim that they were entitled to continued employment for the six-month placement period. Judge SHAPIRO wrote separately because he disagreed with the majority's decision to affirm summary disposition of plaintiff's breach-of-contract claim. Under *Cain*, which broadly held that severance-pay policies are contractually binding, it was a question of fact for the jury whether St. John's highly detailed policies constituted an offer of severance pay that plaintiffs accepted by continuing to work at St. John's hospitals. There was adequate consideration to uphold the contract because the policies could prevent an exodus of the plaintiff CRNAs in the event rumors surfaced regarding the outsourcing. Moreover, the amount of severance pay was directly linked to the employee's years of service, evidence that the payment constituted deferred compensation. The scope of the disclaimer language and the meaning of the undefined term "current pay rate" in the policies were ambiguous and involved questions of fact to be decided by the jury. Because there were questions of fact regarding plaintiffs' breach-of-contract claim, the trial court erred by granting summary disposition of that claim. The trial court also erred by determining that Ascension was not a proper party to the action and by granting summary disposition in favor of Ascension on that basis; summary disposition was premature, and plaintiffs should have been allowed to engage in discovery before that

determination was made. The trial court also erred by granting summary disposition of plaintiffs' promissory-estoppel claim because a question of fact existed regarding the effect the RIF policy's no-contract disclaimer language had on the severance-pay policy. Finally, Ascension should not have been dismissed on the ground that it was not a proper party to the action because no discovery had occurred and summary disposition on the disputed issue was premature. Judge SHAPIRO would have reversed the trial court's grant of summary disposition of plaintiffs' breach-of-contract and promissory-estoppel claims and would have reversed the trial court's dismissal of Ascension as a party.

CONTRACTS — EMPLOYERS — SEVERANCE-PAY POLICIES — DISCLAIMERS.

Although an employer reserves the right to change or amend its offer of separation pay to its employees, once an employee accepts the offer by meeting any conditions to the separation pay, a contract right is formed and the employer may not deny the contract right; however, an employer may convey its intent not to be contractually bound by a severance-pay policy—thereby preventing a contractual offer from ever arising—through a disclaimer expressly stating that it is an at-will employer, that there is no guarantee of employment for any definite duration, and that the policy does not constitute a contract.

Shea Aiello, PLLC (by *David J. Shea* and *Frank T. Aiello*) for plaintiffs.

Hall, Render, Killian, Heath & Lyman, PLLC (by *Bruce M. Bagdady* and *Jonathon A. Rabin*) for defendants.

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

GADOLA, J. Plaintiffs appeal as of right the trial court's opinion and order granting summary disposition in favor of defendants St. John Providence, Inc. (St. John) and Ascension Health (Ascension). Defendants, in turn, cross-appeal the trial court's denial of their motion to strike certain evidence pertaining to proceedings before Michigan's Unemployment Insur-

ance Agency (the MUIA). We affirm the trial court's opinion and order in its entirety.

I. FACTS

Plaintiffs are certified registered nurse anesthetists (CRNAs) formerly employed by St. John at hospitals located in Southfield and Novi, Michigan. Ascension is the parent company of St. John. According to plaintiffs' complaint, because of alleged financial losses, defendants elected in late 2014 to outsource St. John's anesthesiology services and began to negotiate the formation of PSJ Anesthesia, PC (PSJ), a separate entity that would provide those services. Plaintiffs allege that in August 2015, defendants contracted with PSJ to transition the employment of St. John's CRNAs directly to PSJ. In October 2015, plaintiffs were notified of the transition plan and that all CRNAs would cease to be employed by St. John effective December 31, 2015. On or about October 30, 2015, PSJ extended employment offers to the St. John CRNAs, including plaintiffs; however, many of the benefits and premiums to which plaintiffs had been entitled while employed by St. John were either reduced or eliminated.

Plaintiffs declined PSJ's offers of employment on the ground that the offers did not constitute comparable jobs providing commensurate compensation and benefits. Under two employment policies revised and effectuated by St. John in May 2015—the "Staff Reduction In Force/Workforce Transition" policy (the RIF policy) and the "Severance Pay and Benefits for Staff (Non-Management) Associates" policy (the severance-pay policy)—employees who were given notice of position elimination would be required, over a six-month period, to apply for vacant comparable jobs within St. John and would receive priority consideration to inter-

view for such jobs. Eligible employees would be entitled to severance pay and benefits if their positions were eliminated and no comparable jobs were available throughout St. John or Ascension. However, failure to apply for a comparable job or rejection of a comparable job offer would render an employee ineligible to receive severance. The policies define the term "comparable jobs" as positions that paid at least 80% of the employee's current pay rate for which the employee had the ability and qualifications to perform. Under the terms of the policies, plaintiffs maintained that they had not been offered comparable jobs and that they were therefore entitled to severance pay and benefits, as well as to continued employment and compensation for a six-month period.

Maintaining that plaintiffs had declined PSJ's comparable job offers, defendants refused to pay severance and terminated plaintiffs' employment effective December 31, 2015. Plaintiffs subsequently initiated the present action, advancing claims for breach of contract, promissory estoppel, and statutory and common-law conversion. In lieu of an answer, defendants moved separately for summary disposition under MCR 2.116(C)(8) and (10). St. John argued that (1) the RIF and the severance-pay policies did not constitute binding contracts in light of certain disclaimer language, (2) the plaintiffs were not entitled to severance pay under the policies because they refused comparable job offers, (3) the policies did not set forth a clear and definite promise giving rise to a promissory-estoppel claim, and (4) plaintiffs had no vested right to severance, thereby undermining any conversion claim. Ascension asserted the same grounds but additionally maintained that it was not a proper party to the litigation because a corporate parent is generally not liable for the acts of its

subsidiary. Defendants also jointly moved to strike from the record certain documents pertaining to unemployment proceedings before the MUIA, arguing that the documents were inadmissible under MCL 421.11.

The trial court granted summary disposition in favor of defendants and dismissed each of plaintiffs' claims. The trial court denied defendants' motion to strike, reasoning that it had accorded those materials no weight in light of their minimal probative value. Plaintiffs now appeal the trial court's opinion and order granting defendants' motions for summary disposition, and defendants appeal the trial court's order denying their motion to strike.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Although not clearly specified in the opinion, the trial court appears to have granted summary disposition under MCR 2.116(C)(10) because it determined that plaintiffs failed to raise any material issues of fact. See *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). On appeal, however, we apply the standard of review applicable under MCR 2.116(C)(8). See *Detroit News, Inc v Policemen & Firemen Retirement Sys of the City of Detroit*, 252 Mich App 59, 66; 651 NW2d 127 (2002) ("If summary disposition is granted under one subpart of the court rule when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as

long as the record permits review under the correct subpart.") (quotation marks and citation omitted).

Summary disposition is appropriately granted under MCR 2.116(C)(8) when the opposing party has failed to state a claim upon which relief may be granted. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint on the basis of the pleadings alone. *Id*. All well-pleaded factual allegations are to be accepted as true and are to be construed in the light most favorable to the nonmoving party. *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012). A party may not support a motion under MCR 2.116(C)(8) with documentary evidence such as affidavits or depositions. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). However, when an action is premised on a written contract, the contract generally must be attached to the complaint and thus becomes part of the pleadings. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); see also MCR 2.113(C).

B. BREACH OF CONTRACT

1. EXISTENCE OF A CONTRACT

Whether a contract exists is a question of law to be reviewed de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). Fundamentally, a contract is a promise or a set of promises for which the law recognizes a remedy in the event of a breach of those promises. 1 Restatement Contracts, 2d, § 1, p 5. A promise, in turn, is "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." *Id*. at § 2, p 8. The

elements of a contract include: “parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation.” *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). In order for a contract to be formed, there must be an offer and acceptance, as well as a mutual assent to all essential terms. *Kloian*, 273 Mich App at 452-453. This required mutual assent on all material terms is judged by an objective standard based on the express words of the parties and not on their subjective state of mind. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992).

It is well settled under Michigan law that an employer’s statement of policy contained in a manual or handbook can give rise to contractual obligations in certain circumstances. See *Dumas v Auto Club Ins Ass’n*, 437 Mich 521, 529; 473 NW2d 652 (1991) (opinion by RILEY, J.). In one of the earliest “policy cases” concerning a severance-pay policy, *Cain v Allen Electric & Equip Co*, 346 Mich 568, 570-571; 78 NW2d 296 (1956), the employer instituted a “termination pay policy” providing that certain employees with 5 to 10 years of employment would be entitled to two months of pay should their employment be terminated. Two days after the plaintiff gave notice of his voluntary resignation, the employer terminated his employment, effective immediately. *Id*. at 571. Applying traditional principles of contract law, the Supreme Court considered the employer’s unequivocal announcement that it would conduct itself in a particular manner with respect to severance pay and determined that it was not a “mere gratuity” that could be withdrawn but, rather, amounted to an offer on which the plaintiff could reasonably rely. *Id*. at 579. The Supreme Court further reasoned that the plaintiff had accepted the offer by continuing his employment beyond the five-

year period specified in the policy. *Id*. at 580. Though the policy was subject to change or amendment, the Supreme Court stated that the employer nonetheless could not deny "contract rights gained through acceptance of an offer." *Id*.

Similarly, in the context of wrongful termination, in *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579, 597-598; 292 NW2d 880 (1980), the Michigan Supreme Court enforced a provision in the employer's personnel policy manual, which stated that employees could be discharged " 'for just cause only.' " The plaintiff, who had specifically inquired about job security when he was hired, was told he would have employment " 'as long as [he] did [his] job' " and was given a copy of an employment manual stating the company's just-cause termination policy. *Id*. at 597. Our Supreme Court held that the just-cause termination policy was enforceable under two theories. Under the first theory, grounded in contract law, the Supreme Court began its analysis by examining the content of the negotiations and the resulting express agreement. *Id*. at 612-613. The Court concluded that the plaintiff's testimony that he had specifically negotiated with the employer regarding job security, along with the employer's oral assurances, permitted a rational trier of fact to conclude that those assurances and the policy manual became part of the plaintiff's express contract of employment. *Id*. Under the second theory, grounded in public policy, the Supreme Court held that the employee's "legitimate expectations" premised on his employer's written policy statements gave rise to enforceable contractual rights. *Id*. at 615.

Our Supreme Court has expressly declined to extend the legitimate-expectations theory beyond the context of wrongful discharge and into the arena of compensa-

tion policies. *Dumas*, 437 Mich at 529. Although cases like *Cain* had enforced written policy statements as contractual obligations outside the wrongful-discharge context, the Supreme Court reasoned that they did so under traditional principles of contract law. *Dumas*, 437 Mich at 530. The court further noted that if the legitimate-expectations theory were to be broadly applied to all domains governed by employment policies, "then each time a policy change took place contract rights would be called into question. The fear of courting litigation would result in a substantial impairment of a company's operations and its ability to formulate policy." *Id*. at 531. Therefore, in light of this precedent, any obligations flowing from the policies presently at issue must derive from traditional principles of contract law rather than from plaintiffs' legitimate expectations based on the policies at issue.

In the present case, St. John effectuated the RIF and severance-pay policies in May 2015. According to the severance-pay policy, it superseded any conflicting policies or procedures but was to be "administered in conjunction with [the RIF policy]. Where differences exist, this policy takes priority for those eligible for coverage." The severance-pay policy set forth St. John's general intent to provide severance pay and benefits to associates "when a position is eliminated and a comparable job is not available" through St. John or Ascension, as well as a method for calculating severance pay and benefits.

The RIF policy outlined the specific procedures to be implemented in the event of a reduction in force, including notification of position elimination and the process for reassignment. Under the RIF policy, all affected associates were required to apply for vacant "comparable jobs" to become eligible for severance pay,

and rejection of a comparable job offer would render them ineligible for the severance pay. Affected associates would additionally be entitled to "priority consideration" for vacant comparable jobs for a six-month "placement period" from the date of notification of job elimination. However, the RIF policy also included the following disclaimer as part of its general "Policy Statement" near the beginning of the document:

> St. John Providence is an "at-will" employer. This means that *no associate has a guarantee of employment for any definite duration of time*. In addition, no associate is guaranteed that they will only be removed from employment if there is just cause for their removal. Any associate may be removed at any time and for any or no reason. *As such, this policy provides guidelines only and does not constitute a contract of any type, or guarantee of continued employment in any position for any duration*. [Emphasis added.]

The disclaimer language in the RIF policy plainly conveys St. John's intent not to be contractually bound by either the RIF policy or the severance-pay policy, and thus distinguishes the present case from the outcomes reached in *Cain* and *Toussaint*. Although the severance-pay policy did not independently incorporate a disclaimer of contractual intent, it was promulgated along with the RIF policy and specified that it was to be "administered in conjunction with" the RIF policy, except in instances when the two policies conflicted. Because the severance-pay policy does not contain any provision that conflicts with the disclaimer in the RIF policy, the disclaimer applies with equal force to both policies.

Our dissenting colleague contends that the RIF policy's disclaimer is limited in scope to a mere disavowal of a contractual guarantee of just-cause employment rather than a general disclaimer of any

contractual guarantees whatsoever. To the contrary, read in context, this provision is contained within a generalized "Policy Statement" that sets forth principles governing the entire document. Indeed, other provisions within this section include St. John's overall endeavor to "minimize the impact on associates," to "generally follow the procedures described in this policy," and to establish a "Policy Review Committee." A broader interpretation is also supported by the plain language of the disclaimer, which states, "[T]his *policy* provides guidelines only and does not constitute a contract *of any type* . . . ." (Emphasis added.) By its own terms, the disclaimer unambiguously applies to "this policy" rather than to "this provision" and specifies that it does not represent a contract "of any type." To limit the scope would be to nullify this plain language. See *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012) ("Every word, phrase, and clause in a contract must be given effect, and contract interpretation that would render any part of the contract surplusage or nugatory must be avoided."). The disclaimer therefore disavows the intent that any portion of the policies creates a contractual obligation.

Though not binding in the compensation-policy context, wrongful-discharge caselaw employing the legitimate-expectations analysis has reached the same result when a policy contained a disclaimer. In *Lytle v Malady (On Rehearing)*, 458 Mich 153, 162; 579 NW2d 906 (1998) (opinion by WEAVER, J.), the plaintiff sought to enforce a provision in an employee handbook stating that no employee would be terminated " 'without proper cause or reason . . . .' " The handbook, however, also incorporated a disclaimer, stating that it was " 'not intended to establish, and should not be interpreted to constitute any contract . . . .' " *Id*. (emphasis omitted).

The employer later revised the handbook by including an additional disclaimer, reserving the right to terminate employees without assigning cause. *Id*. In applying the legitimate-expectations analysis, our Supreme Court held:

> We find this policy is insufficient to overcome the strong presumption of employment at will, particularly where the original handbook also provided that "[t]he contents of this booklet are not intended to establish . . . any contract between . . . [the employer] and any employee, or group of employees." This contractual disclaimer clearly communicated to employees that the employer did not intend to be bound by the policies stated in the handbook. At the very least, we find the disclaimer renders the "proper cause" statement too vague and indefinite to constitute a promise. For this reason, we hold that the "proper cause" provision on which plaintiff relied did not constitute a promise that could form the basis of a legitimate-expectation claim. [*Id*. at 166 (alteration in *Lytle*).]

For that reason, the Supreme Court held that the employer had made no promise of just-cause employment and that the policy, as written, was not "reasonably capable of instilling a legitimate expectation of just-cause employment." *Id*.[1] Accord *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405; 550 NW2d 243 (1996) (holding in separate opinions that no enforceable rights were created by an employee handbook that contained a disclaimer stating that its provisions were not intended to be construed as a contract).

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[1] Independent from its analysis regarding the contractual disclaimer, the Supreme Court also held that the employer had changed its policy to at-will employment and that the plaintiff had actual notice of this change in accordance with *In re Certified Question*, 432 Mich 438, 455-457; 443 NW2d 112 (1989). *Lytle*, 458 Mich at 168-169 (opinion by WEAVER, J.).

Finally, to the extent plaintiffs interpret *Cain* as holding that an employee's acceptance of an offer made by an employer may not be defeated by referring to a disclaimer in a general personnel policy or handbook, this argument is unavailing. The "disclaimer" in *Cain*, 346 Mich at 570, was a personnel policy providing that its employment policies, including the termination-pay policy, were subject to change or amendment. With respect to this provision, the Supreme Court held that the employer's right to change or amend the policy "could not encompass denial of a contract right gained through acceptance of an offer." *Id*. at 580. That is, the employer could not retroactively modify its policy in order to deny the plaintiff a contractual right to which the employee was already entitled. Indeed, "a change in a compensation policy which affects vested rights already accrued may give rise to a cause of action in contract." *Dumas*, 437 Mich at 530, citing *In re Certified Question*, 432 Mich 438, 457 n 17; 443 NW2d 112 (1989). However, those are not the circumstances presented in the instant case. Here, the disclaimer was contained within the very pair of policies that set forth procedures concerning the reduction in force and severance pay. And unlike *Cain*, the disclaimer presently at issue prevented a contractual offer from ever arising. Accordingly, plaintiffs never attained any contract rights.

Because the disclaimer prevented any contractual obligation from arising under either the RIF policy or the severance-pay policy, we affirm the trial court's dismissal of plaintiffs' breach-of-contract claim.

2. CONTENT OF THE POLICIES

Plaintiffs' breach-of-contract claim is premised on two theories: that defendants failed to pay plaintiffs

severance and benefits and that defendants prematurely terminated plaintiffs' employment and priority consideration for vacant positions before expiration of the six-month placement period. Even if the RIF and severance-pay policies were contractually binding on defendants, which we conclude they were not, we further hold that the terms of those policies did not entitle plaintiffs either to severance pay or to continued employment or priority consideration during the six-month placement period.

A court's primary obligation when interpreting a contract is to determine the intent of the parties. *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). The parties' intent is discerned from the contractual language as a whole according to its plain and ordinary meaning. *Radenbaugh v Farm Bureau Gen Ins Co of Mich*, 240 Mich App 134, 138; 610 NW2d 272 (2000). When a contract is clear and unambiguous, the provisions reflect the parties' intent as a matter of law and courts are to construe and enforce the language as written. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). A contract is not open to judicial construction unless an ambiguity exists. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). A contract is ambiguous only when two provisions "irreconcilably conflict with each other" or "when [a term] is equally susceptible to more than a single meaning." *Coates*, 276 Mich at 503 (quotation marks and citations omitted; alteration in *Coates*). Whether a contract is ambiguous is a question of law, while determining the meaning of ambiguous contract language becomes a question of fact. *Id*. at 504 (quotation marks omitted).

a. SEVERANCE PAY

The severance-pay policy provides that it was intended to provide severance pay and benefits to associates "when a position is eliminated and a comparable job is not available throughout St John Providence (SJP), Ascension Health or any subsidiary of Ascension Health (AH), or with a transferred owner/employer." Both the severance-pay policy and the RIF policy define a "comparable job" as a "[p]osition within at least 80% of [an] associate's current pay rate and for which they have the ability and qualifications to perform." The RIF policy further provides that "[a]ny associate who rejects a Comparable job offer will be considered to have voluntarily resigned" and "will not be eligible for severance or further priority consideration."

In October 2015, PSJ offered plaintiffs positions as CRNAs at the same base rate of pay they had previously earned when employed by St. John. However, the offers reduced or eliminated other terms and benefits of employment, including overtime and other premium rates of pay, contributions to health savings accounts, short- and long-term disability insurance coverage, and life insurance coverage. Because plaintiffs rejected these offers, defendants denied plaintiffs severance pay and benefits, maintaining that under the RIF and severance-pay policies plaintiffs were rendered ineligible for severance. By contrast, plaintiffs contend that the positions offered were not "comparable jobs" within 80% of their "current pay rate" because they did not include many of the premiums and benefits plaintiffs had received when employed by St. John. In response, defendants argue that "current pay rate" refers only to an employee's base rate of pay and not to those additional fringe benefits and premiums enumerated by plaintiffs. The issue presented thus centers on the policies' use of the phrase "current pay rate."

Although the phrase "current pay rate" is not defined within either of the policies, the fact that a term is left undefined does not render that term ambiguous. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 515; 773 NW2d 758 (2009). Rather, as previously discussed, courts must construe the contract in accordance with the ordinary meaning of the terms. *Id*. A common understanding of the unqualified phrase "current pay rate" would encompass an employee's then-standing base rate of pay and would not include other premiums or benefits such as overtime pay or disability insurance coverage. The policies do not define a comparable job as one within 80% of an associate's "total compensation package," "current pay rate, including premiums and benefits," or "current pay rate, terms, and conditions." To apply the interpretation advocated by plaintiffs would add terms not expressed in the policies' plain language and would effectively rewrite the terms. See *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008) ("[I]t has long been the law in this state that courts are not to rewrite the express terms of contracts."); *Northline Excavating, Inc v Livingston Co*, 302 Mich App 621, 628; 839 NW2d 693 (2013) ("We cannot read words into the plain language of a contract.").

Plaintiffs argue that the portion of the severance-pay policy setting forth the method of calculating severance uses the phrases "current base hourly rate," "base rate of pay," and "base rate," thus implying that the term "current pay rate" must be distinguished from the concept of base rate of pay. But this argument undermines plaintiffs' position. The severance-pay policy's use of the three different iterations of "base rate of pay" demonstrates that the terms are used interchangeably and that there is more than one acceptable way of referring to this nontechnical term. Further, an employ-

ee's entitlement to severance pay is contingent on receiving no comparable job offers within 80% of the employee's "current pay rate." If the employee receives no such offers, the employee instead receives severance payments in an amount to be determined by referring to the employee's "base hourly rate." It is only logical that these provisions concerning entitlement to severance and the calculation of that severance be interpreted consistently in terms of the employee's pay rate.

On a practical level, applying plaintiffs' interpretation of "current pay rate" would prove virtually impossible. If premiums and fringe benefits were included in the calculation of an employee's "current pay rate," that figure would fluctuate constantly, depending, for example, on the number of overtime or premium hours that an employee worked within a given pay period. As a result of this constant fluctuation, the policies would necessarily have to define what point in time is "current" for purposes of the calculation, whether it be the last day of a biweekly pay period or a yearly or monthly average. Additionally, under such a measure, it would become necessary to make separate calculations for each employee, taking into consideration the amount of overtime each had worked, the amount of reimbursements each had received, and the fringe benefits in which each had enrolled. It would be further necessary to quantify the value of certain fringe benefits such as medical-expense accounts or life insurance buy-up coverage. Had St. John intended the calculation of "current pay rate" to include premiums and benefits, it surely would have made that intention clear and provided a method in the policies for resolving these resulting complications. Because courts avoid interpreting contracts in a manner that would impose unreasonable conditions or absurd results, *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 297;

778 NW2d 275 (2009), we decline to adopt the interpretation advanced by plaintiffs.[2]

Accordingly, the plain language of the policies clearly and unambiguously provides that a "comparable job" is defined by reference to an employee's base rate of pay and not to any additional benefits, premiums, terms, or conditions. Because plaintiffs rejected PSJ's offers of employment within 80% of their current base rates of pay, defendants thereafter denied them severance pay and benefits in accordance with the policies. The trial court therefore properly dismissed plaintiffs' breach-of-contract claim premised on defendants' failure to pay severance.[3]

b. PLACEMENT PERIOD

Plaintiffs additionally assert that they were contractually entitled under the policies to receive continued employment, compensation, and priority consideration for vacant positions throughout the six-month place-

[2] Although the dissent asserts that summary disposition would be premature given the lack of discovery into the difficulties of computation, no amount of discovery could rebut the unreasonable complications that would ensue from applying plaintiffs' interpretation. See *Oliver v Smith*, 269 Mich App 560, 567; 715 NW2d 314 (2006) (stating that summary disposition is appropriate if there is no reasonable chance that further discovery will reveal factual support for the opposing party's position).

[3] Although we affirm the trial court's conclusion that plaintiffs are not entitled to severance pay under the policies, we find no merit in the court's rationale that plaintiffs presented no evidence that they signed a Confidential Severance, Waiver and General Release Agreement as required under the policies. There is no evidence that plaintiffs were ever presented with the release agreement, and plaintiffs likely would have received the agreement for signature only after they had been determined eligible for severance pay and benefits. However, "[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

ment period. They claim defendants breached this obligation when they prematurely terminated plaintiffs' employment before the six-month period had elapsed. Although the trial court did not reach the merits of this breach-of-contract theory beyond holding that no contract existed, the claim may nevertheless be reviewed on appeal. See *Loutts v Loutts*, 298 Mich App 21, 23-24; 826 NW2d 152 (2012) (holding that a claim raised before the trial court and pursued on appeal is preserved for appellate review).

With respect to the procedures governing a reduction in force, the RIF policy provides that for a six-month "placement period" beginning on the date an associate is notified of job elimination, that associate "will be given priority consideration for interviews for vacant positions for which they are qualified." The RIF policy further states:

> 1. During the placement period, affected associates will be required to apply for available Comparable Jobs within [St. John] for which they qualify or they will be ineligible for severance. . . . *Employment will end for those associates unable to be placed in any job within [St. John] on their job elimination date*.
>
> 2. Affected associates on [St. John]'s position elimination list will receive priority consideration to interview for approved vacant, Comparable Jobs within [St. John] for up to six months (including the notification period). . . .
>
> * * *
>
> 5. *Any associate who rejects a Comparable job offer* will be considered to have voluntarily resigned effective two weeks from the date of the rejection of the offer or on the last day of the notification period, whichever is earlier. Such associates *will not be eligible for severance or further priority consideration*.

> 6. Associates who reject an offer that is not Comparable will continue in the placement period and will remain eligible for priority consideration and/or severance. [Emphasis added.]

Though the RIF policy states that during the six-month placement period, affected associates would be granted priority consideration to *interview* for vacant positions in a comparable job, nothing within the terms can be construed as an offer of continued employment during this period. Indeed, the RIF policy expressly states that employment was at-will, that associates could be "removed at any time and for any or no reason," and that the policy was not to be construed as a "guarantee of continued employment in any position for any duration." It is possible that the six-month placement period could extend priority consideration to associates even after their employment ended. However, the policy clearly states that employment would end on the job-elimination date for associates who had been unable to find alternate placement. Finally, because plaintiffs rejected comparable job offers, they became ineligible for continued priority consideration.

Thus, the terms of the RIF policy do not support plaintiffs' claims that they were entitled to continued employment, compensation, or priority consideration, and the trial court's dismissal of plaintiffs' breach-of-contract claim premised on the placement period was appropriate.

C. PROMISSORY ESTOPPEL

Plaintiffs' promissory-estoppel claim rests on the same bases underlying their breach-of-contract claim: that defendants failed to pay severance and that defendants prematurely terminated their employment and priority consideration. To successfully assert a claim for

promissory estoppel, a plaintiff must establish the following elements: "(1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999). A promise giving rise to an actionable claim must be "clear and definite," while statements that are "indefinite, equivocal, or not specifically demonstrative of an intention respecting future conduct, cannot serve as the foundation for an actionable reliance." *State Bank of Standish v Curry*, 442 Mich 76, 85-86; 500 NW2d 104 (1993). To determine whether a promise existed, courts must objectively evaluate the circumstances of the transaction, including the parties' words, actions, and relationship. *Novak*, 235 Mich App at 687. The doctrine of promissory estoppel must be cautiously applied "only where the facts are unquestionable and the wrong to be prevented undoubted." *Id*.

Plaintiffs' claim that defendants promised to pay severance and benefits is unavailing for the same reasons the terms of the policies do not support a breach-of-contract claim. Under the policies, payment of severance was contingent on certain circumstances, namely that an associate's position was eliminated and that a comparable job within 80% of the associate's current pay rate was not available. The RIF policy further stated that an associate would be ineligible for severance if he or she rejected a comparable job offer. In accordance with the conclusions already reached, the definition of a "comparable job" set forth in the policies was premised on an employee's base rate of pay and did not include premium pay

rates or benefits. Accordingly, because plaintiffs rejected comparable job offers, the policies set forth no promise to pay severance or benefits under the circumstances presently at issue. Nor could plaintiffs have reasonably relied on the policies as extending a promise to pay severance under these circumstances. See *Curry*, 442 Mich at 84 ("[T]he reliance interest protected by [1 Restatement Contracts, 2d, § 90, p 242] is *reasonable reliance* . . . .").

Likewise, for the reasons discussed in this opinion with respect to breach of contract, the terms of the RIF policy do not support plaintiffs' claim that defendants promised to continue plaintiffs' employment, compensation, or priority consideration for the duration of the six-month placement period. With respect to continued employment, the RIF policy contained a disclaimer expressly stating that the document did not guarantee "continued employment in any position for any duration." While affected associates would receive priority consideration for interviews for six months, the RIF policy also stated that employment would end for associates who had not yet obtained alternate placement on the job-elimination date. Defendants therefore made no promise whatsoever of continued employment. With respect to priority consideration, entitlement is again qualified, as the RIF policy states that rejection of a comparable job offer renders an associate ineligible for continued priority consideration. Under the circumstances currently at issue, defendants made no promise of continued employment or of continued priority consideration, and plaintiffs could not have been reasonably justified in so relying.

On these grounds, we affirm the trial court's dismissal of plaintiffs' promissory-estoppel claim.

D. CONVERSION CLAIMS

Plaintiffs assert both statutory and common-law conversion claims, alleging that defendants wrongfully converted plaintiffs' severance proceeds, employment benefits, and continued compensation for the duration of the six-month placement period. Conversion is defined under the common law as "any distinct act of dominion wrongfully exerted *over another's personal property* in denial of or inconsistent with his rights therein." *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 346; 871 NW2d 136 (2015) (quotation marks and citations omitted; emphasis added). In accordance with our determinations that defendants had no contractual or equitable obligations either to disburse severance pay and benefits or to continue plaintiffs' employment for any duration, we conclude that plaintiffs had no ownership interest in severance proceeds, benefits, or continued compensation. With no ownership interest in the property sought, plaintiffs' conversion claims must fail. See *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 437; 683 NW2d 171 (2004), rev'd in part on other grounds 472 Mich 192 (2005) ("Because the checks do not belong to Echelon, their conversion does not amount to the invasion of one of Echelon's legally protected interests."). The trial court therefore properly dismissed plaintiffs' conversion claims.

E. CLAIMS AGAINST ASCENSION

Even if plaintiffs' claims had merit, plaintiffs are nevertheless unable to establish liability against Ascension, a defect that could not be cured through further discovery. Plaintiffs allege in their complaint that Ascension is the parent corporation of St. John. Under Michigan law, parent and subsidiary corpora-

tions are presumed to be separate and distinct entities absent some abuse of the corporate form. *Seasword v Hilti, Inc (After Remand)*, 449 Mich 542, 547; 537 NW2d 221 (1995). Consequently, before a corporate parent may be held liable for the actions of its subsidiary, facts that justify piercing the corporate veil must be shown. *Id*. at 548. "For the corporate veil to be pierced, the plaintiff must aver facts that show (1) that the corporate entity is a mere instrumentality of another entity or individual, (2) that the corporate entity was used to commit fraud or a wrong, and (3) that, as a result, the plaintiff suffered an unjust injury or loss." *Dutton Partners, LLC v CMS Energy Corp*, 290 Mich App 635, 643; 802 NW2d 717 (2010).

Plaintiffs do not allege in their complaint, let alone plead facts to support the proposition, that St. John is a "mere instrumentality" of Ascension or that the corporate form was somehow abused to commit the wrongs alleged. However, in their brief on appeal, plaintiffs contend that Ascension and St. John are "so intertwined that they appear to be one and the same," citing a September 2016 press release announcing that St. John planned to adopt the Ascension name. Additionally, plaintiffs rely on documents relevant to an unemployment claim pending before the MUIA that identifies the employer as "Ascension Health-IS Inc." and "Ascension Health Insurance, Inc."[4] However, even

[4] On appeal, plaintiffs stipulated to withdraw from evidentiary consideration all documents relating to these unemployment proceedings except for a hearing transcript that is relevant because it contains the testimony of Michelle Kosal, St. John's human resources manager, regarding the meaning of the term "comparable job." This transcript identifies Ascension Health Insurance, Inc., as the employer. However, because plaintiffs concede that the document is relevant only with respect to Kosal's testimony, we do not consider the fact that it identifies an Ascension-based entity as the employer.

if such facts had been pleaded, St. John's adoption in 2016 of its parent company's name for the sake of corporate branding does not suggest that Ascension exerted any influence or control over St. John's RIF or severance-pay policies in 2015. Likewise, the MUIA's identification of two Ascension-based entities as the employer in documents generated in 2016 does not demonstrate that Ascension had any role in creating, approving, or administering these policies. To the contrary, affidavits from both Ascension and St. John human resources executives stated that Ascension had no role in the process.

Plaintiffs contend that they have not had an opportunity to conduct discovery into the corporate relationship between Ascension and St. John. " 'Generally, a motion for summary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position.' " *Oliver*, 269 Mich App at 567, quoting *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). Plaintiffs have not identified any discovery they seek that would demonstrate that St. John was a mere instrumentality of Ascension. Because plaintiffs have neither alleged sufficient facts nor shown any likelihood that further discovery would yield support for their position, the trial court did not err by dismissing Ascension from the litigation. Accordingly, we affirm the trial court's opinion granting Ascension's motion for summary disposition.

F. DEFENDANTS' CROSS-APPEAL

On cross-appeal, defendants contend that the trial court erred by denying their motion to strike five documents submitted by plaintiffs concerning unemploy-

ment proceedings before the MUIA. Plaintiffs stipulated to withdraw four of the five documents, leaving at issue only an MUIA hearing transcript containing Kosal's testimony.

This Court generally reviews for an abuse of discretion a trial court's decision to admit or exclude evidence. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). "However, when the trial court's decision to admit evidence involves a preliminary question of law, the issue is reviewed de novo, and admitting evidence that is inadmissible as a matter of law constitutes an abuse of discretion." *Id*. at 159. Because the admissibility of the hearing transcript hinges on a question of law, we review this issue de novo. *Id*.

The Michigan Employment Security Act, MCL 421.1 *et seq*., prohibits the use of information and determinations elicited during the course of an unemployment proceeding before the MUIA in a subsequent civil proceeding unless the MUIA is a party to or complainant in the action. MCL 421.11(b)(1)(*iii*); *Storey v Meijer, Inc*, 431 Mich 368, 376; 429 NW2d 169 (1988). However, MCL 421.11a sets forth an exception to this rule, providing that

> [a]n individual who testifies voluntarily before another body *concerning representations the individual made to the unemployment agency* pursuant to the administration of this act waives any privilege under [MCL 421.11] otherwise applying to the individual's representations to the unemployment agency. [Emphasis added.]

In the present action, it is beyond dispute that Kosal voluntarily supplied an affidavit concerning St. John's historical interpretation of the terms "comparable job" and "current pay rate" as meaning the base rate of pay only and not including premiums or benefits. This affidavit was submitted before the trial court in support of defendants' motions for summary disposition. The

affidavit thus constitutes voluntary testimony submitted before a judicial body.[5]

The parties dispute whether the affidavit concerns the representations Kosal made to the MUIA in the hearing transcript. The purpose of the MUIA hearing was to determine whether plaintiff Kim Glanda fraudulently concealed from the agency that she had refused PSJ's offer of suitable work, thereby disqualifying her from receiving unemployment benefits. Part of this inquiry included whether Glanda had good cause for her refusal of suitable work. The parties disputed during the hearing whether PSJ's offer constituted "suitable work" or a "comparable job," given that the offer reduced or excluded many premiums and benefits.

Kosal stated during the hearing that Glanda was offered the same base rate of pay and that a comparable job was defined under the policies by reference to this value and did not take into account premiums and benefits. Kosal's affidavit submitted before the trial court thus concerned the same representations she made before the MUIA. Consequently, the privilege protecting information presented during a MUIA proceeding was waived under MCL 421.11a, and the trial court properly admitted the MUIA hearing transcript.

Affirmed.

SERVITTO, J., concurred with GADOLA, J.

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[5] In challenging whether a sworn affidavit submitted before a trial court constitutes testimony before a "body," defendants rely on an unpublished decision of a federal district court, which concluded that a deposition did not amount to testimony before a "body." See *Ablahad v Cellco Partnership*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued December 13, 2016 (Case No. 15-14009), p 3. "Although lower federal court decisions may be persuasive, they are not binding on state courts," *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004), and we decline to follow this authority.

SHAPIRO, P.J. (*concurring in part and dissenting in part*). I respectfully dissent from the majority's decision to affirm summary disposition of plaintiffs' breach-of-contract claim. I conclude that under *Cain v Allen Electric & Equip Co*, 346 Mich 568; 78 NW2d 296 (1956), defendant St. John Providence, Inc.'s policies amounted to an offer of severance pay that plaintiffs[1] accepted by continuing to work at St. John's hospitals. The scope of the disclaimer language and the meaning of the phrase "current pay rate" are ambiguous and, therefore, present questions of fact to be resolved by the jury.[2] I also conclude that there are material question questions of fact regarding plaintiffs' promissory-estoppel claim and that plaintiffs should be allowed to engage in discovery to determine whether defendant Ascension Health is a proper party to this action.[3]

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[1] Plaintiffs are all certified registered nurse anesthetists (CRNAs) who were formerly employed by St. John.

[2] I disagree with the majority that we should review the trial court's ruling as being made under MCR 2.116(C)(8) (failure to state a claim). I would review the trial court's summary disposition ruling under MCR 2.116(C)(10) because the court found that plaintiffs failed to create a genuine issue of material fact on multiple issues and it relied on documents outside of the complaint. See *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). MCR 2.116(C)(10) allows a trial court to grant summary disposition 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 or partial judgment as a matter of law." "To determine if a genuine issue of material fact exists, the test is whether the kind of record which might be developed, giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ." *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994) (quotation marks and citation omitted). In making this determination, we view the record in the light most favorable to the nonmoving party. See *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[3] I agree, however, with the majority's ruling that the trial court correctly granted summary disposition of plaintiffs' conversion claims. I also concur with the majority's ruling regarding defendants' cross-appeal.

I. BREACH OF CONTRACT

A. EXISTENCE OF A CONTRACT

The basic elements of a contract are an offer, an acceptance, and consideration. *Kirchhoff v Morris*, 282 Mich 90, 95; 275 NW 778 (1937). Plaintiffs rely primarily on *Cain*, 346 Mich at 579-580, in which the Supreme Court unanimously held that the plaintiff had a contractual right to severance pay as defined in the employer's written policy. In *Cain*, the plaintiff was an at-will employee. *Id*. at 570. The employer had a policy providing that an employee would be paid " 'separation pay.' " *Id*. The policy also provided that an executive, as the plaintiff was, "having 5 to 10 years employment should be entitled to 2 months termination pay." *Id*. at 571. In October, the plaintiff submitted his resignation effective December 15; the employer then terminated the plaintiff's employment effective immediately. *Id*. The employer denied the plaintiff severance pay and suit followed. *Id*. at 572. The trial court ruled in the plaintiff's favor. On appeal from that decision, the employer argued that its policies did not establish a contract and that instead, the polices were " 'a mere gratuitous statement of policy or intention' " that "contained no suggestion of agreement, nothing of promise, no offer of any sort . . . ." *Id*. at 573. Because there was no offer, the argument ran, "there could have been no acceptance and hence no contract." *Id*. at 573-574.

The Supreme Court first acknowledged the benefits that employers derive from offering "dismissal compensation." *Id*. at 574-576. The Court extensively quoted a treatise on that subject, which provided, in part, that "[p]ublic opinion, the needs of the employees, and the desire for a permanent, loyal, and efficient working force have united in making dismissal

compensation seem the proper course for a number of American companies." *Id*. at 576, quoting Hawkins, *Dismissal Compensation* (Princeton: Princeton University Press, 1940), p 27 (quotation marks omitted). The Court also reviewed out-of-state caselaw holding that the offer of such compensation was binding on the employer.[4] *Cain*, 346 Mich at 576-579. After that review, the *Cain* Court first determined that the employer's severance-pay policy constituted an offer:

> We cannot agree that all we have here is a mere gratuity, to be given, or to be withheld, as whim or caprice might move the employer. An offer was made, not merely a hope or intention expressed. The words on their face looked to an agreement, an assent. The cooperation desired was to be mutual. Did the offer consist of a promise? "A promise is an expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future, communicated in such manner to a promisee that he may justly expect performance and may reasonably rely thereon." (1 Corbin on Contracts, § 13 [p 29].) The essence of the announcement was precisely that the company would conduct itself in a certain way with the stated objective of achieving fairness, and we would be reluctant to hold under such circumstances that an employee might not reasonably rely on the expression made and conduct himself accordingly. [*Id*. at 579.]

"As for consideration," the Court continued, "[s]uffice in this respect, upon the authority of a multitude of cases, to point out that not only were there rewards to the employee, but, in addition, substantial rewards to the employer, arising, in part, out of the accomplishment of 'the daily work of the organization in a spirit of

[4] See, e.g., *Hercules Powder Co v Brookfield*, 189 Va 531, 541; 53 SE2d 804 (1949) (holding that an employer's offer of "dismissal pay" was binding when it was made in anticipation of "reductions of forces"). Though decided in 1949, *Hercules Powder Co* remains good law.

cooperation and friendliness.' " *Id*. The Court then concluded that the plaintiff had accepted the employer's offer by continuing his employment "beyond the five-year period specified" in the policy, *id*. at 580 (quotation marks omitted), qualifying him for an executive's severance pay, *id*. at 570-571.

Cain is binding precedent that we must follow. See *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191; 880 NW2d 765 (2016). And as the majority acknowledges, *Cain* was decided under traditional contract principles. Applying *Cain* to this case, I think it is clear that St. John's highly detailed polices constituted an offer for severance pay that plaintiffs accepted by continuing to work at St. John's hospitals. I would also conclude that there is adequate consideration to uphold the contract. The timing of the revision to the policies is no coincidence. St. John was in the process of outsourcing its anesthesiology services, and the revised polices provided assurances to the plaintiffs that they would be offered severance pay if a comparable job was not offered to them. The benefit received by St. John, of course, is that the policies could prevent an exodus of CRNAs in the event that rumor and speculation surfaced regarding St. John's plan to outsource anesthesiology services. Further, plaintiffs had to perform in several ways to qualify for the severance pay, including participating in St. John's transition plan, working through the defined date of termination, and meeting multiple other requirements. I also note that the amount of severance pay was directly linked to the employee's years of service, a clear indication that the payment constituted deferred compensation, i.e., payment to be made later for work done previously. See *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 529-530; 473 NW2d 652 (1991) (opinion by RILEY, J.).

In ruling that plaintiffs' contract claim fails as a matter of law, the majority focuses on the disclaimer language found in the "Staff Reduction in Force/ Workforce Transition" policy (the RIF policy), which provides in full:

> St. John Providence is an "at-will" employer. This means that no associate has a guarantee of employment for any definite duration of time. In addition, no associate is guaranteed that they will only be removed from employment if there is just cause for their removal. Any associate may be removed at any time and for any or no reason. As such, this policy provides guidelines only and does not constitute a contract of any type, or guarantee of continued employment in any position for any duration.

Cain was silent as to the presence of a provision disclaiming a legal right or claim under the policy.[5] Regardless, the statement that the RIF policy "does not constitute a contract of any type" must be read in context of the full text of the provision. See *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 148; 871 NW2d 530 (2015). It is clear that the provision is meant to reiterate to St. John's employees that they may be terminated at will and that the RIF policy does not create a contract of just-cause employment. However, this is irrelevant because plaintiffs do not assert that the policies provided them with just-cause employment.

Further, I do not see why a disclaimer in the RIF policy should be seen as controlling the "Severance Pay and Benefits for Staff (Non-Management) Associates" policy (the severance-pay policy). While the RIF policy provides the general procedure to implement staff reduction and reassignment, the severance-pay policy,

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[5] The majority characterizes as a "disclaimer" the policy language in *Cain* providing that the policy may be amended at any time.

as one might imagine, pertains solely to eligibility for and computation of severance pay. The disclaimer language provides only that "this policy," i.e., the RIF policy, does not create an employment contract. Further, the primacy of the severance-pay policy is made clear in its text: "[t]his policy supersedes any other policy or procedure that may conflict with this policy, with the exception of Employment at Will. It is administered in conjunction with [the RIF policy]. *Where differences exist, this policy takes priority* for those eligible for coverage." (Emphasis added). Read together, the RIF and severance-pay policies are, at a minimum, ambiguous regarding whether defendant was disclaiming the terms of severance or merely reiterating that employees did not have a just-cause contract for employment. *Scott v Farmers Ins Exch*, 266 Mich App 557, 561; 702 NW2d 681 (2005) ("A contract is ambiguous when its words may be reasonably understood in different ways."). Therefore, the meaning and scope of the disclaimer language is a question of fact for the jury. *Farmer's Ins Exch v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003) ("Ambiguities in a contract generally raise questions of fact for the jury[.]").

To summarize, *Cain* broadly held that severance-pay policies are contractually binding. *Cain* did not address the effect of policy language disclaiming the creation of an employment contract, but under the circumstances present here, I would decline to rule as a matter of law that defendant was not making a contractual offer to plaintiffs. Considering the ambiguous contract language, the benefit that the policies conferred on St. John, and the fact that St. John never revoked the severance-pay policy, I would hold that there is a material question of fact for the jury regarding whether St. John made plaintiffs a contractual offer.

B. THE MEANING OF THE CONTRACT

The next issue is whether there is a question of fact about the meaning of the phrase "current pay rate." It is undisputed that the policies do not define that phrase. In affidavits, St. John's human resources manager, Michelle Kosal, and vice president of human resources, Ann Vano, stated that St. John considers only the "hourly pay rate" in determining whether a comparable job offers an employee 80% of his or her current pay rate. Plaintiffs argue, however, that other policy provisions show that when St. John wants to refer to an employee's hourly pay rate, it knows how to do so. For example, the severance-pay policy states that "severance pay" is calculated by "multiplying the associate's *current base* hourly rate x current standard weekly hours." (Emphasis added.) In addition, a chart in the severance-pay policy for calculating an employee's severance pay based on years of service refers to "Weeks of Base Pay." For these reasons, reasonable minds could conclude that an employee's "current pay rate" is distinct from, and broader than, an employee's base or hourly pay rate.

The majority concludes that "current pay rate" is unambiguous, reasoning, in part, that a "common understanding" of that phrase would not include benefits. I would not be so bold as to determine the meaning of that phrase as a matter of law given the different iterations found in the policy, as discussed earlier. However, I suspect that when confronted with the circumstances faced by plaintiffs, reasonable people would consider more than hourly pay in determining the "pay rate" of the prospective employment. The majority also concludes that interpreting "current pay rate" to include all wages and benefits would lead to unreasonable computational issues. In an age of

advanced analytics, I am skeptical that assigning a numerical value to an employee's total compensation is "virtually impossible." In any event, whether such problems are real or fanciful, they are not grounds for summary disposition before an answer has even been filed and discovery conducted. "Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). For these reasons, I would conclude that the phrase "current pay rate" is ambiguous and that it presents a question of fact for the jury.[6]

II. PROMISSORY ESTOPPEL

The elements of promissory estoppel include: "(1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999). "[T]he sine qua non of the theory of promissory estoppel is that the promise be clear and definite . . . ." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (quotation marks and citation omitted; alteration in *Derderian*). "In determining whether a requisite promise existed, we are to objectively examine the words and actions surrounding the transaction in question as well as the nature of the relationship

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[6] However, I agree with the majority that the RIF policy does not support plaintiffs' claim that they were entitled to continued employment for a "placement period" of six months.

between the parties and the circumstances surrounding their actions." *Novak*, 235 Mich App at 687.

Under the doctrine of promissory estoppel, "[t]he existence and scope of the promise are questions of fact . . . ." *State Bank of Standish v Curry*, 442 Mich 76, 84; 500 NW2d 104 (1993). Similar to my analysis of plaintiffs' contract claim, I would conclude that a reasonable jury could find that St. John's highly detailed severance-pay policy constituted a promise that was intended to induce action by the employees, i.e., to remain and seek comparable employment through St. John. The effect of the RIF policy's no-contract disclaimer language on the severance-pay policy is a question of fact because (1) promissory estoppel assumes the absence of a contract, (2) a reasonable person could conclude that St. John was emphasizing that it was an at-will employer rather than disclaiming a promise to pay severance pay and benefits, and (3) a reasonable person could conclude that the RIF policy disclaimer did not apply to the severance-pay policy. Accordingly, I would reverse the trial court's decision to grant summary disposition of plaintiffs' promissory-estoppel claim.

III. ASCENSION

Lastly, I agree with plaintiffs that the trial court erred by dismissing Ascension on the ground that it was not a proper party to the action. If Ascension is merely St. John's parent company, then it should be dismissed from the case. However, given that no discovery has occurred, summary disposition on this disputed issue is premature. *Marilyn Froling Revocable Living Trust*, 283 Mich App at 292. Plaintiffs are entitled to conduct discovery on the nature of the corporate relationship, after which the trial court could

determine whether Ascension is a proper party. Therefore, I would reverse the trial court's grant of summary disposition to Ascension.

TREE CITY PROPERTIES, LLC v PERKEY

Docket No. 339539. Submitted February 12, 2019, at Lansing. Decided March 7, 2019, at 9:00 a.m.

Tree City Properties, LLC, filed an affidavit and claim against Eric Perkey and Julie Bateman in the 15th District Court, Small Claims Division, seeking a judgment in the amount of $2,186.55. Perkey had signed a lease in 2013 to rent one of Tree City's properties for a year. He paid a $2,150 security deposit. In 2014, Perkey and Bateman signed a lease for the same rental property for another year. Perkey's initial security deposit was transferred to the new lease. Perkey and Bateman moved out of the rental property on or before the date their lease expired. Tree City inspected the property and sent Perkey and Bateman a letter claiming that it was entitled to retain the entire security deposit because of physical damage to the rental unit, unpaid utility bills, late fees, multiple-check charges, and nonsufficient-fund charges. Perkey and Bateman objected. The case was transferred to the 15th District Court, General Civil Division, and the parties resolved all issues but the late fees, the multiple-check charges, and the nonsufficient-fund charges. On stipulated facts, the district court, Joseph F. Burke, J., concluded that Tree City could only recover the nonsufficient-fund charges from Perkey and Bateman. In addition, the court determined that Tree City was subject to the double-penalty provision of MCL 554.613(2) because it wrongfully withheld a portion of the security deposit. Tree City appealed in the Washtenaw Circuit Court, arguing that the double-penalty provision did not apply. The circuit court, Carol Anne Kuhnke, J., disagreed and affirmed the district court's judgment. The Court of Appeals granted Tree City's application for leave to appeal.

The Court of Appeals *held*:

The landlord and tenant relationships act, MCL 554.601 *et seq*., regulates relationships between landlords and tenants relative to rental agreements and the payment, repayment, and use of security deposits. MCL 554.613(1) permits a landlord claiming damages to file an action for a money judgment within 45 days after a tenant has terminated occupancy. MCL 554.613(1) further provides that a landlord is not entitled to retain any portion of a

security deposit for damages claimed unless the landlord has first obtained a money judgment for the disputed amount. Under MCL 554.613(2), a landlord that does not fully comply with MCL 554.613(1) waives all claimed damages and becomes liable to the tenant for double the amount of the security deposit retained. There was no dispute in this matter that Tree City fully complied with the statutory requirements in MCL 554.613(1) governing its intent to retain Perkey's security deposit. Because Tree City fully complied with MCL 554.613(1), the lower courts erred by ruling that Tree City was subject to the double-penalty provision in MCL 554.613(2).

Reversed and remanded.

LANDLORD-TENANT — SECURITY DEPOSIT — DAMAGES AND RETENTION OF DEPOSIT — TIMELY ACTION FOR MONEY JUDGMENT REQUIRED TO AVOID DOUBLE-PENALTY PROVISION.

MCL 554.613(1) requires a landlord claiming damages and wishing to retain some or all of a tenant's security deposit to file for a money judgment within 45 days of the tenant's termination of occupancy; a landlord failing to fully comply with MCL 554.613(1) waives all claimed damages and is liable to the tenant for double the amount of the security deposit retained; the double-penalty provision in MCL 554.613(2) applies only when a landlord has failed to fully comply with the requirements in MCL 554.613(1).

Ronald G. Carpenter for Tree City Properties, LLC.

Amicus Curiae:

Swistak & Levine, PC (by *I. Matthew Miller*) for the Property Management Association of Michigan, the Washtenaw Area Apartment Association, the Property Management Association of West Michigan, and the Property Management Association of Mid-Michigan.

Before: M. J. KELLY P.J., and SERVITTO and BOONSTRA, JJ.

PER CURIAM. Plaintiff appeals, by leave granted, the trial court's order affirming the district court's judgment in favor of defendants. Because both lower courts misinterpreted and misapplied the double-penalty provi-

sion in MCL 554.613(2), we reverse and remand for entry of an amended judgment consistent with this opinion.

Plaintiff, Tree City Properties LLC, owns and manages several rental properties in Ann Arbor, Michigan. In May 2013, defendant Eric Perkey signed a lease to rent one of plaintiff's properties from September 1, 2013, through August 20, 2014. Pursuant to the lease, Perkey paid a $2,150 security deposit. In August 2014, Perkey and defendant Julie Bateman signed a lease to rent the same property from August 20, 2014, through August 20, 2015, and Perkey's previous security deposit was transferred to the new lease. Defendants moved out of the rental property on or before August 20, 2015. Plaintiff's agent inspected the rental property after defendants' departure and thereafter sent defendants a letter claiming that plaintiff was entitled to retain the entire $2,150 security deposit because of physical damage to the rental unit, unpaid utility bills, late fees, multiple-check charges, and nonsufficient-fund charges. Defendants objected to almost all the charges plaintiff proposed to make against the security deposit.

On October 2, 2015, plaintiff filed an "affidavit and claim" against defendants in the small-claims division, seeking a judgment in the amount of $2,186.55. The matter was transferred to the general civil division of the district court, and the parties reached a resolution on all issues, except for the late fees, the multiple-check charges, and the nonsufficient-fund charges, all of which totaled $1,480. On stipulated facts, the district court issued an opinion, concluding that plaintiff was not entitled to collect the late fees or the multiple-check charges but was allowed to recover the nonsufficient-fund charges of $90. Relevant to the instant matter, the district court further found that plaintiff, because it

wrongfully withheld $1,390 from the security deposit, was subject to the double-penalty provision of MCL 554.613(2). It thus entered a judgment directing plaintiff to pay defendants the $1,390 and an additional $1,390 penalty minus the nonsufficient-fund charges of $90 for a total judgment of $2,690. Plaintiff appealed the judgment in the Washtenaw Circuit Court, arguing that the double-penalty provision was inapplicable. The circuit court disagreed and entered an order affirming the judgment.

On appeal, plaintiff now argues in this Court that the double penalty set forth in MCL 554.613(2) is inapplicable against a landlord who has complied with the provisions of MCL 554.613(1). We agree.

This Court reviews de novo questions of statutory interpretation. *Nason v State Employees' Retirement Sys*, 290 Mich App 416, 424; 801 NW2d 889 (2010). This Court also reviews de novo a trial court's application of a statute. *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).

"The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature . . . ." *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009). "The first criterion in determining legislative intent is the language of the statute." *Id*. If the language is clear and unambiguous, this Court must enforce the statute as written. *Id*. Unless defined by statute, words and phrases are to be given their plain and ordinary meaning, and this Court may consult a dictionary to determine that meaning. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). Further, "[a] statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained." *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1 (2009).

Neither this Court nor our Supreme Court has ever interpreted the double-penalty provision in MCL 554.613(2). This is therefore an issue of first impression.

The landlord and tenant relationships act (LTRA), MCL 554.601 *et seq*., "regulate[s] relationships between landlords and tenants relative to rental agreements and the payment, repayment, and use of security deposits." *De Bruyn Produce Co v Romero*, 202 Mich App 92, 108; 508 NW2d 150 (1993). "The act is intended to protect tenants, especially from the situation where a landlord surreptitiously usurps substantial sums held to secure the performance of conditions under the lease." *Id*. (quotation marks, citation, and alteration omitted). To that end, MCL 554.605 provides:

> For the purposes of this act and any litigation arising thereunder, the security deposit is considered the lawful property of the tenant until the landlord establishes a right to the deposit or portions thereof as long as the bond provision is fulfilled, the landlord may use this fund for any purposes he desires.

In *Hovanesian v Nam*, 213 Mich App 231, 235; 539 NW2d 557 (1995), this Court explained:

> A landlord must satisfy certain requirements in order to retain a security deposit. If the tenant leaves a forwarding address within four days of terminating occupancy, the landlord must notify the tenant in writing of his intent to retain the deposit. He must provide an itemized list of damages or other obligations. MCL 554.609. The landlord who fails to comply with the notice requirement waives his right to retain the deposit. MCL 554.610. (Citations omitted.)

If the landlord timely provides the tenant with an itemized list of damages,[1] the tenant has seven days to

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[1] A landlord must mail an itemized list of damages to the tenant within 30 days of the termination of occupancy. MCL 554.609.

respond in writing and must indicate in detail any disagreement with the landlord's listed damages. MCL 554.612. This Court explained further in *Hovanesian* that, to avoid waiver of the right to retain a security deposit after giving written notice of its intent to retain the security deposit, the landlord must commence an action for a money judgment under MCL 554.613. *Hovanesian*, 213 Mich App at 236.

MCL 554.613 provides:

> (1) Within 45 days after termination of the occupancy and not thereafter the landlord may commence an action in a court of competent jurisdiction for a money judgment for damages which he has claimed or in lieu thereof return the balance of the security deposit held by him to the tenant or any amount mutually agreed upon in writing by the parties. A landlord shall not be entitled to retain any portion of a security deposit for damages claimed unless he has first obtained a money judgment for the disputed amount or filed with the court satisfactory proof of an inability to obtain service on the tenant or unless:
>
> (a) The tenant has failed to provide a forwarding address as required by [MCL 554.611].
>
> (b) The tenant has failed to respond to the notice of damages as required by [MCL 554.612].
>
> (c) The parties have agreed in writing to the disposition of the balance of the deposit claimed by the landlord.
>
> (d) The amount claimed is entirely based upon accrued and unpaid rent equal to the actual rent for any full rental period or portion thereof during which the tenant has had actual or constructive possession of the premises.
>
> (2) This section does not prejudice a landlord's right to retain any security deposit funds as satisfaction or partial satisfaction of a money judgment obtained pursuant to summary proceedings filed pursuant to chapter 57 of Act No. 236 of the Public Acts of 1961, as amended, being sections 600.5701 to 600.5759 of the Compiled Laws of 1948 or other proceedings at law. Failure of the landlord to

> comply fully with this section constitutes waiver of all claimed damages and makes him liable to the tenant for double the amount of the security deposit retained.

There is no dispute in this matter that plaintiff complied with the statutory notice requirements with respect to its intent to retain defendants' security deposit. It is also undisputed that plaintiff filed its claim to retain defendants' security deposit in the small-claims court within the 45-day time frame required in MCL 554.613(1). The only disagreement in this matter is whether the lower courts erred by concluding that plaintiff was liable to defendants for double the amount of the security deposit wrongfully retained. We conclude that they did.

The provision relied on by the lower courts appears in MCL 554.613(2) and holds a landlord liable to a tenant for double the amount of the security deposit retained if the landlord fails "to comply fully with this section . . . ." "This" is defined as a term "[u]sed to refer to the person or thing present, nearby, or just mentioned[.]" *The American Heritage Dictionary of the English Language* (2011). The term "this section" is plainly self-referential and means that full compliance with MCL 554.613 is required and that it is noncompliance with the requirements of *MCL 554.613(1)* that creates the double-penalty liability set forth in MCL 554.613(2). "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Universal Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003) (quotation marks and citation omitted).

The record reflects that plaintiff complied with and did not violate MCL 554.613. Accordingly, because it

complied with the strictures of MCL 554.613(1), the double-penalty provision prescribed in MCL 554.613(2) plainly does not apply.

We reverse and remand for entry of an amended judgment consistent with this opinion. We do not retain jurisdiction.

M. J. KELLY P.J., and SERVITTO and BOONSTRA, JJ., concurred.

SAFDAR v AZIZ

Docket No. 344030. Submitted December 12, 2018, at Detroit. Decided March 7, 2019, at 9:05 a.m. Leave to appeal denied 504 Mich 964 (2019).

Zaid Safdar filed an action in the Oakland Circuit Court, Family Division, seeking a divorce from Donya Aziz. The parties, both Pakistani citizens, had been married in Pakistan but had relocated to the United States. The court granted a judgment of divorce, which provided that the parties would share joint legal custody of their minor child and that defendant would have sole physical custody of the child. The divorce judgment contained a provision prohibiting the exercise of parenting time in any country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction (the Convention). Defendant appealed the court's denial of her motion for attorney fees in relation to the judgment. While that appeal was pending in the Court of Appeals, defendant moved in the trial court for a change of domicile. The court, Lisa Langton, J., denied defendant's motion, reasoning that under MCR 7.208(A), it lacked the authority to modify the custody order while defendant's appeal of the attorney-fee award was pending in the Court of Appeals. Defendant appealed, and the Court of Appeals reversed. 321 Mich App 219 (2017). Plaintiff sought leave to appeal in the Supreme Court, and the Supreme Court vacated in part, affirmed the result reached, and remanded the matter to the Oakland Circuit Court, holding that a circuit court has jurisdiction to consider a motion to change the domicile of a minor child established by a custody award in a divorce judgment while that underlying judgment is pending on appeal. 501 Mich 213 (2018). Defendant filed a new motion for change of domicile, seeking to relocate the minor child with her to Pakistan and claiming that Pakistan had become a party to the Convention. Plaintiff filed an answer to the motion, asserting that Pakistan's accession to the Convention had not made it a treaty partner with the United States or a "party" as that term is used in MCL 722.27a(10). Following an evidentiary hearing, the trial court concluded that while Pakistan had properly acceded to the Convention, the United States had not accepted Pakistan's accession. The trial court then provided a thorough analysis of the factors set forth in MCL 722.31(4),

finding that three factors favored plaintiff, that two factors were neutral between the parties, and that defendant failed to establish by a preponderance of the evidence that a change in domicile was in the child's best interests. Defendant appealed.

The Court of Appeals *held*:

1. MCL 722.27a(10) provides, in pertinent part, that a parenting-time order shall contain a prohibition on exercising parenting time in a country that is not a party to the Convention unless both parents provide the court with written consent to allow a parent to exercise parenting time in a country that is not a party to the Convention. MCL 722.27a(10) establishes that a court may not grant physical custody to a parent when that parent lives in a country that is not a party to the Convention. A "party" means one who engages with another to perform or carry out an agreement. A nation only becomes bound by—that is, becomes a party to—a treaty when it takes the appropriate legal action to be bound. A nation can become a party to the Convention in one of two ways: (1) under Article 37 of the Convention, nations that were members of the fourteenth session of the Hague Conference could sign the Convention and then have the ratification of the signature deposited with the Ministry of Foreign Affairs in the Netherlands, or (2) under Article 38 of the Convention, a nation may accede to the Convention, but the accession "will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession." In this case, Pakistan's accession to the Convention did not make Pakistan a party to the Convention for purposes of state law because the United States had not declared its acceptance of Pakistan's accession. The clear and important legal effect of the United States not accepting Pakistan's accession to the Convention was that Pakistan was not bound to all the benefits and obligations imposed by the Convention when it comes to parenting-time orders arising out of the United States. Therefore, the prohibitions of MCL 722.27a(10) remained applicable. The trial court properly denied the motion to change domicile, and it was unnecessary to proceed with a review of defendant's remaining substantive allegations of error regarding the trial court's ruling on the motion for change of domicile.

2. A trial court's award of attorney fees in a divorce action is reviewed for an abuse of discretion. A party requesting attorney fees postjudgment must show that the fees were incurred and that they were reasonable. MCR 3.206(C)(2)(a), as amended April 1, 2003, 468 Mich lxxxv (2003), provided that a party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action and

that the other party is able to pay.[1] In this case, defendant asserted that she was entitled to attorney fees premised on the income discrepancy between the parties. The trial court had denied defendant's request that plaintiff pay her attorney fees, noting that both parties had incurred significant debt in the proceedings and that a significant factor for its denial was defendant's failure to secure any type of employment since the judgment of divorce despite her educational and professional background. There existed an evidentiary gap regarding defendant's assertions of need and her continued ability to survive economically without employment. Furthermore, defendant did not demonstrate that plaintiff had the ability to pay or contribute to her attorney fees. Accordingly, the trial court did not abuse its discretion when it denied defendant's request for attorney fees.

Affirmed.

SHAPIRO, J., concurring, agreed with the majority's conclusion that in adopting MCL 722.27a(10) the Legislature intended to ensure that parenting time would not be conducted in countries in which a Michigan court's custody determination may not be enforced, but he disagreed with the majority's view that the issue could be resolved by resort to the "plain language" of the statute. The statute does not say that the country must be a party to a treaty with the United States, nor does it refer to parties to the Convention whose accession has been accepted by the United States. The word "party" is modified only by the phrase that follows it, i.e., "to the Hague Convention." Therefore, Judge SHAPIRO would hold that the statute's plain language allows relocation to Pakistan if Pakistan is a "party to the Hague Convention" and that Pakistan is a "party" because Pakistan acceded to the Convention. However, the Legislature's intent was clear even though the language of the statute was imperfect; the purpose of the statute is to prevent the possibility that a child could be relocated to a country that is not required to enforce an order concerning custody issued by a court in the United States. Therefore, Judge SHAPIRO would have held that it was proper to discern the meaning of the statute by considering its clear purpose.

DIVORCE — PARENTING-TIME ORDERS — HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION — WORDS AND PHRASES — "PARTY."

MCL 722.27a(10) provides, in pertinent part, that a parenting-time order shall contain a prohibition on exercising parenting time in

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[1] MCR 3.206(C) was relettered MCR 3.206(D) effective September 1, 2018. 501 Mich cclxxviii, ccxcviii (2018).

a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) unless both parents provide the court with written consent to allow a parent to exercise parenting time in a country that is not a party to the Convention; a nation only becomes a "party" to a treaty when it takes the appropriate legal action to be bound; a nation's accession to the Convention does not make that nation a "party" to the Convention for purposes of MCL 722.27a(10) when the United States has not declared its acceptance of that nation's accession.

Williams, Williams, Rattner & Plunkett, PC (by *James P. Cunningham* and *Mary-Claire Petcoff*) for plaintiff.

Clark Hill PLC (by *Randi P. Glanz* and *Cynthia M. Filipovich*) for defendant.

Before: MURRAY, C.J., and SHAPIRO and RIORDAN, JJ.

MURRAY, C.J. This is defendant's appeal of the trial court's order denying her motion for change of domicile to Pakistan for the minor child, IBAS, born during her marriage to plaintiff. Under state law, MCL 722.27a(10), a trial court cannot enter a parenting-time order allowing for the exercise of parenting time in a country that is not a "party" to the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention or the Convention). Because the United States has not accepted Pakistan's accession to the Convention, Pakistan is not a "party" to the Convention for purposes of MCL 722.27a(10). Consequently, we affirm the trial court's order denying the motion for change of domicile, but for reasons different than those utilized by the trial court.

I. BACKGROUND FACTS AND PROCEEDINGS

The parties are once again before this Court on an issue primarily pertaining to their minor child. Rel-

evant to the current appeal is this Court's decision in *Safdar v Aziz*, 321 Mich App 219, 221-222; 909 NW2d 831 (2017), aff'd in part and vacated in part 501 Mich 213 (2018), which addressed the parties' history:

> Plaintiff and defendant, both Pakistani citizens, were married in Pakistan on June 24, 2011, and relocated to the United States, where plaintiff resided with an employment visa. In 2015, defendant moved to Michigan to live with her aunt, while plaintiff continued to reside in Maryland. The couple's only daughter was born in Oakland County on January 1, 2016, and the parties divorced on December 21, 2016. Pursuant to the judgment of divorce, the parties agreed to share joint legal custody of the minor child, while defendant would maintain sole physical custody. The divorce judgment contained a provision prohibiting the exercise of parenting time in any country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction. At that time, the prohibition applied to Pakistan. Challenging only the trial court's denial of her motion for attorney fees, defendant filed a claim of appeal from the divorce judgment. . . .
>
> In March 2017, defendant filed the motion to change domicile that is the subject of this appeal, expressing her desire to relocate with the minor child to Pakistan as soon as possible and claiming that Pakistan had completed steps to become a party to the Hague Convention since entry of the judgment of divorce. Plaintiff objected, arguing that the trial court lacked authority to set aside or amend the judgment of divorce while defendant's appeal from that judgment was pending before this Court. Defendant responded that her first appeal was limited to the issue of attorney fees and that the appeal did not preclude the trial court's consideration of custody matters. The trial court adopted plaintiff's position and entered an order dismissing defendant's motion for change of domicile without prejudice, reasoning that pursuant to MCR 7.208(A), it lacked jurisdiction to modify any component of the judgment of divorce.

This Court reversed the trial court on the basis that "[t]he trial court erred when it determined that it lacked the authority to consider defendant's motion for change of domicile and to modify the parties' divorce judgment during the pendency of defendant's appeal." *Id*. at 227. Plaintiff appealed this decision and, in lieu of granting leave to appeal, the Michigan Supreme Court held that "MCL 722.27(1) authorizes the continuing jurisdiction of a circuit court to modify or amend its previous judgments or orders and is an exception to MCR 7.208(A) 'otherwise provided by law.' " *Safdar v Aziz*, 501 Mich 213, 219; 912 NW2d 511 (2018). The Supreme Court vacated this Court's "decision to the extent it derived jurisdiction from MCL 552.17, affirm[ed] the result reached," and remanded the matter to the trial court for further proceedings. *Id*.

On September 27, 2017, which was shortly after the issuance of this Court's opinion but before the Supreme Court's ruling, defendant filed a new motion for change of domicile seeking to relocate the minor child with her to Pakistan. Defendant asserted that Pakistan was now a party to the Convention, eliminating any restriction imposed by MCL 722.27a(10).[1] Further, she argued that the move would greatly improve the quality of life for her and the minor child because a secure home, an excellent international school system, and free healthcare would be available, her immediate and extended family would be nearby, and she would have

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[1] MCL 722.27a(10) provides:

> Except as provided in this subsection, a parenting time order shall contain a prohibition on exercising parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction. This subsection does not apply if both parents provide the court with written consent to allow a parent to exercise parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction.

greater job opportunities and a more affordable cost of living. Defendant emphasized her full and complete compliance with the trial court's previous orders, plaintiff's monthly visits with the minor child, and her willingness to expand or accommodate a more beneficial parenting-time schedule to assure plaintiff's maintenance of a bond with the minor child. She also denied having any improper motivation for the relocation. Plaintiff filed an answer to the motion for change of domicile, asserting that Pakistan's accession to the Convention has not made it a treaty partner with the United States or a "party" in accordance with MCL 722.27a(10).[2]

At a subsequent motion hearing, the trial court discussed with the parties Pakistan's status with respect to the Convention, ultimately indicating that the United States' failure to recognize Pakistan as a treaty partner constituted "a concern" and "a big issue." Nonetheless, the trial court indicated that an evidentiary hearing was required to resolve the motion to change domicile:

> Well because the Court of Appeals says I had to I'm scheduling the hearing. I don't—I think you've got a up—uphill battle because I'm—I guess I will do more research but I have to be completely satisfied—I have that . . . with respect to their participation, even if I decide that changing—moving this child to a different

[2] Plaintiff also filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), primarily asserting that Pakistan's circumstances had not changed with regard to the Convention and the United States. But a motion for summary disposition is a vehicle to attack (or at times enforce) the validity of a claim or defense; it is not a means by which to seek dismissal of a previously filed motion. See MCR 2.116(C)(8) (allowing a party to challenge the validity of a "claim," which is a cause of action set forth in a complaint, MCR 2.111(B)), and MCR 2.116(C)(10) (allowing a party to seek a judgment, except as to damages, when the material facts are undisputed).

> country is a good idea for that . . . which . . . you know it's concerning 'cuz I don't—I don't know how you prove that it's in the child's best interest. I really don't know. I mean you gotta look at all the factors, I'm gonna do that but it's . . . not like you can go see him every . . . other weekend or whatever.

The evidentiary hearing was conducted over a two-day period, with witnesses testifying for both sides about such matters as the political and economic environment in Pakistan, the school and living conditions that would be made available to the child in both countries, the past and current history between the parties, and the procedure for, as well as the likelihood of, enforcing a United States custody order in Pakistan.

On March 30, 2018, the trial court issued a written order. The trial court engaged in a lengthy recitation of the parties' history and the testimony adduced at the hearing and then, as to the Convention issue, concluded:

> For the purposes of Article 38 [of the Convention], both parties agree that the United States is a contracting state, that Pakistan properly acceded to the Hague Convention, and that the United States did not take any of the required steps to declare its acceptance of Pakistan's accession. Thus, the United States has not accepted Pakistan's accession. Citizens of neither country have legal recourse, under the Hague Convention, if a parent from one country abducts a child into the other country.

The trial court then provided a thorough analysis of the factors set forth in MCL 722.31(4), finding that three factors favored plaintiff, that two factors were neutral between the parties, and that defendant failed to establish by a preponderance of the evidence that a change in domicile was in the child's best interests. Having determined that a change in the minor child's domicile was not in the child's best interests, the trial

court did not proceed to an analysis of whether a change would occur in the established custodial environment.

II. ANALYSIS

A. HAGUE CONVENTION AND MCL 722.27a(10)

Defendant contends that, because Pakistan has acceded to the Convention, it is now a "party" to that Convention as required by MCL 722.27a(10) and, therefore, the proscriptions imposed by MCL 722.27a(10) no longer remain an impediment to her request for change of domicile. As noted, the trial court recognized that the United States is a contracting party to the Convention and that Pakistan acceded to the Convention, but it never determined whether, as a result, Pakistan could be considered a "party" to the Convention for purposes of the statute.

"Issues of statutory interpretation are questions of law that this Court reviews de novo." *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012). "Treaties have the same legal effect as statutes, and therefore a . . . court's interpretation of a treaty is reviewed de novo as well." *VLM Food Trading Int'l, Inc v Illinois Trading Co*, 811 F3d 247, 251 (CA 7, 2016).[3]

The rules of statutory interpretation are recognized to encompass the following:

> In examining a statute, it is our obligation to discern the legislative intent that may reasonably be inferred

[3] While federal caselaw constitutes "only . . . persuasive authority [and] not binding precedent," *Sharp v Lansing*, 464 Mich 792, 803; 629 NW2d 873 (2001), we look to it for guidance here because the vast majority of decisions applying the Convention are from the federal judiciary.

> from the words expressed in the statute. One fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." Thus, when the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is to apply the terms of the statute to the circumstances in a particular case. Concomitantly, it is our task to give the words used by the Legislature their common, ordinary meaning. [*In re Request for Investigative Subpoena*, 256 Mich App 39, 45-46; 662 NW2d 69 (2003) (quotation marks and citations omitted).]

More specifically, the Michigan Supreme Court has held:

> Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, "[t]he words of a statute provide 'the most reliable evidence of its intent . . . .' " [*Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-157; 802 NW2d 281 (2011) (citations omitted; alterations in original).]

As set forth in note 1 of this opinion, MCL 722.27a(10) states:

> Except as provided in this subsection, a parenting time order shall contain a prohibition on exercising parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction. This subsection does not apply if both parents provide the court with written consent to allow a parent to exercise parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction.

With regard to MCL 722.27a(10), we recently stated that "[t]he plain language of the statute establishes that a court may not grant physical custody to a parent when that parent lives in a country that is not a party to the Hague Convention." *Elahham v Al-Jabban*, 319 Mich App 112, 127; 899 NW2d 768 (2017).

Defendant argues that because Pakistan acceded to the Convention, it is a party for purposes of MCL 722.27a(10). We do not think it is as simple as that. Instead, when examining the meaning of "party" under the statute, as well as how a nation becomes obligated to another nation for purposes of the Convention, it is clear that Pakistan is not a party to the Convention.

The Legislature did not provide a definition for the term "party" under MCL 722.27a(10). Additionally, the Convention does not refer to a nation joining it as a "party." So, to determine the term's meaning, we turn to a legal dictionary because the term "party" has a peculiar legal meaning. See *Feyz v Mercy Mem Hosp*, 475 Mich 663, 683; 719 NW2d 1 (2006). Additionally, "[t]he common understanding and the traditional legal usage of a term also guide our interpretation." *In re Erwin*, 503 Mich 1, 10; 921 NW2d 308 (2018), citing *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007); see also MCL 8.3a.[4]

A "party" is "[o]ne who takes part in a transaction." *Black's Law Dictionary* (7th ed). A "transaction," in turn, is generally defined as "[a]ny activity involving two or more persons" and is more specifically defined

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[4] MCL 8.3a states:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

as "[t]he act or an instance of conducting business or other dealings" and as "[s]omething performed or carried out; a business agreement or exchange." *Id*. Using these definitions, "party" means one who engages with another to perform or carry out an agreement. This general definition is consistent with the traditional usage of the term "party" in the context of contractual relations[5]—that being a competent person who, for valid consideration, mutually agrees to the performance or exchange of things. See *Lentz v Lentz*, 271 Mich App 465, 471; 721 NW2d 861 (2006); *Detroit Trust Co v Struggles*, 289 Mich 595, 599; 286 NW 844 (1939).

In determining whether Pakistan is a party to the Convention with the United States,[6] we must look to how a nation becomes bound to the Convention's rules

[5] We place our focus on what is meant by a contracting "party" because "[a]s a general matter, a treaty is a contract, though between nations." *BG Group PLC v Republic of Argentina*, 572 US 25, 37; 134 S Ct 1198; 188 L Ed 2d 220 (2014). See also *In re Extradition of Zhenly Ye Gon*, 613 F Supp 2d 92, 96 (D DC, 2009) (reasoning that "a treaty is a contract between countries").

[6] Our concurring colleague opines that we have departed from the plain language of the statute by considering whether Pakistan is a party to the Convention *with the United States*, as opposed to whether Pakistan is simply a party to the Convention in general, and that Pakistan is "surely" a "party" to the Convention because it acceded to it. But looking to dictionary definitions and considering the context of the term within the statute are precisely how courts determine the plain meaning of an undefined statutory term. See *Marcelle v Taubman*, 224 Mich App 215, 219; 568 NW2d 393 (1997); *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005) ("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. Further, we accord undefined statutory terms their plain and ordinary meanings and may consult dictionary definitions in such situations.") (citations omitted); *People v Gillis*, 474 Mich 105, 114; 712 NW2d 419 (2006) (holding that courts must consider, in addition to the dictionary definition, the placement and purpose of those words in the context of the statutory scheme). And when doing so here, we conclude that Pakistan

and procedures. After all, as one court has recognized, "[a] State only becomes bound by—that is, becomes a party to—a treaty when it" takes the appropriate legal action to be bound. *Flores v Southern Peru Copper Corp*, 414 F3d 233, 256 (CA 2, 2003). In doing so, we conclude that Pakistan's accession to the Convention—without the United States' acceptance—does not make Pakistan a party to the Convention for purposes of state law.

There are two ways in which a nation can become a party to the Convention. First, under Article 37, nations that were "Members of the Hague Conference on Private International Law at the time of its Fourteenth Session" could sign the Convention and then have the subsequent ratification of the signature deposited with the Ministry of Foreign Affairs in the Netherlands. Hague Convention, art 37. "The United States signed the Convention in 1981 and ratified it, thereby becoming a Contracting State, in 1988, and the Convention entered into force in the United States on July 1, 1988." *Marks v Hochhauser*, 876 F3d 416, 420 (CA 2, 2017).

Pakistan was not able to become a Contracting State through Article 37 but could through Article 38 of the Convention. Article 38 allows a nation to "accede" to the Convention. Hague Convention, art 38. " 'Accession' is 'the act whereby a State accepts the offer or the opportunity of becoming a party to a treaty already signed by some other States.' " *Marks*, 876 F3d at 419 n 2 (quotation marks and citation omitted). But as *Marks* points out, an accession to the Convention is only binding on those Contracting States that accept the accession:

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can only be a "party," as that term is used in MCL 722.27a(10), if it is a party to the Convention with the United States.

Article 38 explains that:

> Any other State may accede to the Convention. . . . The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. . . . The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

As Article 38 makes clear, accession requires the acceptance of other states before the Convention "will enter into force," *i.e.*, the accession has effect only as to Contracting States that "have declared their acceptance of the accession." [*Marks*, 876 F3d at 419-420 (citations omitted).]

There is no dispute that Pakistan acceded to the Convention by depositing its instrument of accession to the Convention on December 22, 2016, with the Convention entering into force for Pakistan on March 1, 2017.[7] See *Ozaltin v Ozaltin*, 708 F3d 355, 359 n 4 (CA 2, 2013) (citations omitted). However, the United States *has not* recognized Pakistan's accession to the Convention. As made clear above, "the Convention does not 'enter into force' until a ratifying state accepts an acceding state's accession," and "Article 35 limits the Convention's application to removals and retentions taking place after the Convention has entered into force between the two states involved." *Marks*, 876 F3d at 424. As a result, the clear and important legal

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[7] International Family Law Firm, *Country Report: Pakistan* <http://www.internationalfamilylawfirm.com/2017/06/country-report-pakistan.html> (accessed October 9, 2018) [https://perma.cc/8WRW-WJ25]. The referenced article was authored by Jeremy D. Morley, who served as a witness in this case.

effect of the United States not accepting Pakistan's accession to the Convention is that Pakistan is not bound to all the benefits and obligations imposed by the Convention when it comes to parenting-time orders arising out of the United States:

> It is undisputed that the United States and the Dominican Republic have not entered into the negotiations required by Article 38. Consequently, the Convention's administrative and judicial mechanisms are not yet applicable with regard to relations between the two countries. *See Gonzalez v. Gutierrez*, 311 F.3d 942, 945 [n 2] (9th Cir.2002) ("Accession . . . binds a country only with respect to other nations that accept its particular accession under Article 38.") (citing Lynda R. Herring, *Taking Away the Pawns: International Parental Abduction & the Hague Convention*, 20 N.C.J. INT'L L. & COMM. REG. 137, 138 n. 8 (1994)); *see also* Dep't of State, Hague Int'l Child Abduction Convention Text and Legal Analysis, 51 Fed.Reg. 10494, 10514 (Mar. 26, 1986) ("[U]nder Article 38 the Convention is open to accession by non-member States, but enters into force only between those States and member Contracting States which specifically accept their accession to the Convention."). [*Taveras v Taveras*, 397 F Supp 2d 908, 911 (SD Ohio, 2005), aff'd 477 F3d 767 (CA 6, 2007).]

See also *Marks*, 876 F3d at 423 ("Clearly, the Convention did not come into force between Thailand and the United States until after the latter accepted the former's accession."); *Souratgar v Lee*, 720 F3d 96, 102 n 5 (CA 2, 2013) ("Under Article 38, one state's accession will have effect with respect to another contracting state only after such other state has declared its acceptance of the accession."); *Viteri v Pflucker*, 550 F Supp 2d 829, 833 (ND Ill, 2008) ("Thus, the Convention enters into force between an acceding State and a member Contracting State only when the Contracting State accepts the acceding State's accession to the Convention."). Accordingly, the Convention has not

come into force, i.e., it is not binding between Pakistan and the United States, because the latter has not accepted the former's accession.

To accept defendant's argument would render hollow the word "party." As we hope to have made clear, a nation (or any other person or entity) that has not bound itself to comply with a contract's provisions is not a "party" to the contract. To conclude otherwise would render the term meaningless and would allow a circuit court to enter a parenting-time order without offending MCL 722.27a(10), despite there being no legal protections that the foreign nation would be bound to the Convention's terms.

The protective procedures and rules of the Convention are not binding between the United States and Pakistan, and as a result, Pakistan is not a "party" to the Convention as contemplated by MCL 722.27a(10). Therefore, the prohibitions of that statute remain applicable. For that reason, the trial court properly denied the motion to change domicile, and it is unnecessary to proceed with a review of defendant's remaining substantive allegations of error regarding the trial court's ruling on the motion for change of domicile.

B. ATTORNEY FEES

Defendant asserts that the trial court erred in denying her request that plaintiff contribute to or pay her attorney fees, citing the income discrepancy between the parties.

This Court reviews a trial court's award of attorney fees in a divorce action for an abuse of discretion. *Cassidy v Cassidy*, 318 Mich App 463, 479; 899 NW2d 65 (2017). "An abuse of discretion occurs when the result falls outside the range of principled outcomes." *Id*. Findings of fact are reviewed for clear error. *Id*. "A

finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made." *Id*. (quotation marks and citation omitted).

A party requesting attorney fees postjudgment must show that the fees were incurred and that they were reasonable. *Souden v Souden*, 303 Mich App 406, 415; 844 NW2d 151 (2013). "When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Id*. (quotation marks and citation omitted). In accordance with MCR 3.206(C), as amended April 1, 2003, 468 Mich lxxxv (2003):

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

Further:

> "Attorney fees are not awarded as a matter of right but only when necessary to enable a party to carry on or defend the litigation." "The party requesting the attorney fees has the burden of showing facts sufficient to justify the award." This burden includes the burden to provide evidence of the attorney fees that were incurred. A party cannot rely on unsubstantiated assertions when requesting attorney fees under MCR 3.206(C). [*Sulaica v Rometty*, 308 Mich App 568, 590; 866 NW2d 838 (2014) (citations omitted).]

Defendant asserts that she is entitled to attorney fees premised on the income discrepancy between the parties. In support of her position, defendant relies on this Court's ruling in *Stallworth v Stallworth*, 275 Mich App 282, 288-289; 738 NW2d 264 (2007), wherein it was stated:

> Necessary and reasonable attorney fees may be awarded to enable a party to carry on or defend a divorce action. . . . Because [the] plaintiff's yearly income is less than the amount she owed her attorney, she sufficiently demonstrated her inability to pay her attorney fees. Furthermore, [the] defendant earns more than double what [the] plaintiff earns in a year, which demonstrated his ability to contribute to [the] plaintiff's attorney fees. Under these circumstances, the trial court's ruling was within the range of reasonable and principled outcomes. [Citations omitted.]

Defendant made the same argument after the entry of the divorce judgment and the denial of her request for plaintiff to contribute to her attorney fees. On appeal of that ruling to this Court, we addressed the request for attorney fees on the basis of income disparity alone:

> Since *Stallworth* was decided in 2007, it has occasionally been cited for the proposition that a party has always demonstrated an inability to pay attorney fees if his or her annual income is less than the amount owed. But more recently, this Court has clarified that its explanation in *Stallworth* should not be construed as a bright-line rule that must be strictly enforced. Instead, *Stallworth* is properly read as a mere example of one instance in which the party seeking attorney fees satisfied the burden of demonstrating an inability to pay. In any event, whether a party has established entitlement to an award of attorney fees is always "dependent on the particular facts and circumstances of each case," giving "special consideration to the specific financial situations of the parties and the equities involved." For the same reason, we will not

> construe *Stallworth* as suggesting that when one party "earns more than double what [the adverse party] earns in a year," that party necessarily has the ability to pay the adverse party's attorney fees. In other words, while the rationale set forth in *Stallworth* can be viewed as persuasive in the context of similar facts, it is not dispositive of the issue presented in the present matter. [*Safdar v Aziz*, unpublished per curiam opinion of the Court of Appeals, issued March 13, 2018 (Docket No. 336590), pp 2-3 (citations omitted; alteration in original).]

The trial court's denial of defendant's request for attorney fees was based upon (1) "the parties' respective inabilities to pay," (2) plaintiff's significant debts and monthly expenses, including his own attorney fees which he paid by credit card, (3) defendant's failure to demonstrate plaintiff's ability to pay, and (4) defendant's lack of effort to obtain employment despite her level of education and "an impressive professional background." *Id*. at 3.

Postjudgment, the trial court again denied defendant's request that plaintiff contribute to, or pay, the attorney fees she had incurred. The trial court noted that both parties have incurred significant debt due to the proceedings. The trial court indicated that a significant factor for denial of the request was defendant's failure to secure any type of employment since the judgment of divorce in 2016. The trial court specifically acknowledged that its decision was premised on MCR 3.206(C)(2)(a), as amended April 1, 2003, 468 Mich lxxxv (2003), which requires proof that "the party is unable to bear the expense of the action, and that the other party is able to pay," rather than MCR 3.206(C)(2)(b), which involves a refusal to comply with previous orders.

At the evidentiary hearing, both parties asserted that the legal proceedings had been extremely expensive and that they had both incurred substantial-

legal fees, which remain unpaid. Defendant asserted that she has been required to borrow money to pay her attorney fees and that, although she has sought employment, she has not been able to procure such in the United States despite her education level and professional experience. While plaintiff acknowledged that he has a substantial income from his employment with World Bank, he attested to paying his attorney with a credit card and retaining an outstanding balance to his attorney of more than $100,000.

On this record, and given that the burden of proof is on defendant, it cannot be said that the trial court erred in denying her request for attorney fees. In accordance with MCR 3.206(C)(2)(a), it was incumbent on defendant to demonstrate that she was unable to bear the expense of the litigation and that plaintiff had the ability to pay. As noted by the trial court and by this Court in the prior appeal, despite defendant's assertion of the expenditure of effort to obtain employment, it is difficult to accept that defendant is unable to earn any monies or obtain a job given her educational and professional background. At the very least, the trial court could reasonably impute income to defendant, which could dispute or minimize her declared need for contribution to her attorney fees. Further, although defendant asserted that she was required to borrow funds to pursue the litigation, there was no testimony that defendant also incurred a commensurate obligation to repay those borrowed funds. There exists, in other words, an informational or evidentiary gap regarding defendant's assertions of need and her continued ability to survive economically without employment.

Commensurately, defendant has not demonstrated that plaintiff has the ability to pay or contribute to her attorney fees. Again, the evidentiary record, with re-

gard to testimony elicited at the hearing, lacked anything other than confirmation of plaintiff's salary and the incurrence of substantial attorney fees of $100,000 or more, with payment of the debt at least in part through credit cards. Additionally, during the evidentiary hearing, defendant offered plaintiff a place to stay, transportation, and the opportunity to see the minor child when she travels back to the United States, which she implied would be a regular occurrence, making her assertions of poverty or financial need somewhat suspect. Accordingly, the trial court did not abuse its discretion in denying defendant's request for attorney fees.

Affirmed.

RIORDAN, J., concurred with MURRAY, C.J.

SHAPIRO, J. (*concurring*). I agree with the majority's conclusion that in adopting MCL 722.27a(10) the Legislature intended to ensure that parenting time would not be conducted in countries in which a Michigan court's custody determination may not be enforced. Accordingly, I concur.

I disagree with the majority's view, however, that this issue can be resolved by resort to the "plain language" of the statute. To the contrary, if this case had to be decided solely on the bare words of the statute, I would conclude that it mandates the opposite result. However, the intent of the Legislature is clear regardless of any imperfections in the text of the statute.

The text states that parenting-time orders shall bar the exercise of parenting time "in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction." MCL 722.27a(10). The majority goes on to analyze the meaning of the term

"party" and concludes that "party to the Hague Convention" really means a "party to the Hague Convention whose accession the United States accepts." However, the statute does not say that the country must be a party to a treaty with the United States, nor does it refer to parties to the Convention whose accession has been accepted by the United States. The word "party" is modified only by the phrase that follows it, i.e., "to the Hague Convention." Thus, the statute's plain language allows relocation to Pakistan if Pakistan is a "party to the Hague Convention," which it surely is. Pakistan acceded to the Convention, becoming a party to it, several years ago. In sum, while it is true that the United States has not accepted Pakistan as a treaty partner, the statute does not refer to a requirement that the United States accept Pakistan's accession or to some relationship between the United States and Pakistan arising out of the treaty.[1] The words of the statute have but one requirement: that Pakistan become a party to the Hague Convention.[2]

I respectfully suggest that the Legislature's intent (which is ultimately what controls) is clear even if the language of the statute is imperfect. The Legislature's intent was to prevent the possibility that a child could be relocated to a country that is not required to enforce

[1] The majority cites *Elahham v Al-Jabban*, 319 Mich App 112; 899 NW2d 768 (2017), suggesting that it provides support for the view that until the United States accepts Pakistan's accession, Pakistan is not a party to the Convention. However, *Elahham* involved wholly different circumstances. In that case, the country in question was Egypt, a country that, unlike Pakistan, had neither signed nor acceded to the Convention, i.e., it was *not* "a party to the Hague Convention."

[2] Diverging from its plain-language approach, the majority essentially revises the statutory language on page 263 of its opinion, noting that its task is to "determin[e] whether Pakistan is a party to the Convention *with the United States* . . . ." (Emphasis added.)

an order concerning custody issued by a court in the United States. No one, including plaintiff, has ventured to articulate why the Legislature would pass a law that would allow children to be relocated to countries that have ratified the Hague Convention but are not yet bound to adhere to its requirements vis-à-vis the United States.

The words used by the Legislature in the statute are not clear or, at minimum, do not fully accomplish the statute's purpose. Rather than trying to get the words to mean something other than they do, I would conclude that it is proper here to discern the meaning of the statute by considering its clear purpose.

ESTATE OF TRUEBLOOD v P&G APARTMENTS, LLC

Docket No. 340642. Submitted March 6, 2019, at Detroit. Decided March 12, 2019, at 9:05 a.m. Leave to appeal denied 505 Mich 982 (2020).

Daniel G. Trueblood filed a complaint in the Wayne Circuit Court against P&G Apartments, LLC, after he slipped and fell on an icy sidewalk located near the parking lot where his car was parked in an apartment complex owned by P&G and at which he was a tenant. Trueblood was injured as a result of the fall. His complaint alleged two counts: (1) premises liability and (2) violations of MCL 554.139. P&G moved for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). P&G argued that Trueblood's premises-liability claim failed because the condition of the sidewalk was open and obvious given that Trueblood admitted to seeing snow on the sidewalk and a reasonable person would have expected to be on the lookout for ice. P&G further argued that Trueblood could not establish that the sidewalk was not fit for its intended use because he could not even verify that he fell on ice and because other people did not slip and fall on any ice. P&G also contended that the duty to keep the premises in reasonable repair did not apply to common areas like the sidewalk where Trueblood slipped. The court, John H. Gillis, Jr., J., granted P&G's motion for summary disposition. Approximately one year after he fell on the sidewalk, Trueblood died from causes apparently unrelated to this matter. Trueblood's estate appealed.

The Court of Appeals *held*:

1. In a typical landlord-tenant premises-liability action, a tenant must prove the elements of negligence: (1) the landlord owed the tenant a duty, (2) the landlord breached that duty, (3) the breach was the proximate cause of the tenant's injury, and (4) the tenant suffered damages. A landlord owes a tenant the duty it owes to an invitee; that is, a landlord owes a duty to a tenant to exercise reasonable care to protect the tenant from an unreasonable risk of harm caused by a dangerous condition on the land. Absent special aspects, this duty does not extend to open and obvious dangers, and the hazards presented by snow

and ice are generally open and obvious. Viewing the evidence in the light most favorable to Trueblood, the nonmoving party, a rational trier of fact could have found that Trueblood slipped on ice on the sidewalk located in P&G's apartment complex. However, even if Trueblood slipped on ice, there was no question that the ice was open and obvious. Trueblood was well aware of the wintry conditions outside on the day he fell, and the presence of such wintry weather conditions would have alerted a reasonably prudent person to the danger of slipping and falling. Further, Trueblood did not establish that the ice was effectively unavoidable. The standard for effective unavoidability is that a person, for all practical purposes, must be required or compelled to confront the dangerous hazard; a hazard is not unavoidable when a person has a choice whether to confront the hazard. Trueblood had his choice of two exits, and there was no evidence that the unused exit's sidewalk was covered with snow and ice. Such a conclusion would be speculation or conjecture, and speculation cannot create a question of fact. Therefore, the trial court did not err by granting summary disposition to P&G on Trueblood's premises-liability claim.

2. MCL 554.139(1)(a) requires that a landlord covenant in every lease for residential premises that the premises and all common areas are fit for the use intended by the parties. To assess liability under MCL 554.139(1)(a), a court must first determine whether the area in question is a common area, and if so, the court must identify the intended use of the area. Then, a court must determine if there could be reasonable differences of opinion regarding whether the conditions present made the common area unfit for its intended use. Sidewalks constructed and maintained by a landlord that lead from apartment buildings to adjoining parking lots are common areas for tenants because all tenants who park their vehicles in the spaces allotted to them by the landlord rely on these sidewalks to access their vehicles, and all tenants rely on the sidewalks to access their apartment buildings. The intended use of a sidewalk is walking on it, and ice covering a sidewalk may render the sidewalk unfit for its intended use unless the ice is a mere inconvenience. When a sidewalk is completely covered with ice, it represents more than a mere inconvenience because a person using the sidewalk would be forced to walk on ice. Consequently, a sidewalk completely covered with ice is not fit for its intended use. Moreover, there existed a question of fact about whether P&G breached its duty to its tenants to maintain the sidewalk in a manner that was fit for its intended use because reasonable minds could differ on whether P&G or anyone on its behalf salted the sidewalks on the morning of Trueblood's fall. The trial court erred

by granting summary disposition to P&G on the issue whether P&G maintained a common area, the sidewalk, in a manner that was fit for its intended use.

3. The remaining covenants present in every lease of residential premises appear in MCL 554.139(1)(b): (1) to keep the premises in reasonable repair during the term of the lease, and (2) to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants' willful or irresponsible conduct or lack of conduct. The covenants are separated by a comma followed by the word "and," which serves as a conjunction to separate the landlord's covenant to make reasonable repairs to the premises from the landlord's covenant to comply with applicable health and safety laws. The first covenant in MCL 554.139(1)(b), the covenant to repair, does not apply to the accumulation of snow and ice because the accumulation of snow and ice does not constitute a defect in property. Therefore, P&G had no duty with regard to snow and ice except to the extent that such snow and ice caused damage to the property. P&G's duty under the second covenant in MCL 554.139(1)(b) was to comply with local health and safety laws, including local ordinances. Trueblood argued that P&G violated the second covenant when it breached a local ordinance, Wyandotte Ordinance § 19-288(c), which requires that steps, walks, driveways, parking spaces and similar paved areas be maintained so as to afford safe passage under normal use and weather conditions. Because there was a question of fact about whether the sidewalk on which Trueblood slipped was completely covered with ice, there was a question whether P&G breached its duty to afford Trueblood with safe passage under normal use and weather conditions when he used the sidewalk. If there was a breach, reasonable minds could conclude that the breach caused Trueblood to slip and fall and sustain injuries. Therefore, the trial court erred by granting summary disposition to P&G with regard to its alleged statutory violation of MCL 554.139(1)(b).

Affirmed in part, reversed in part, and remanded.

1. LANDLORD-TENANT — PREMISES LIABILITY — LANDLORD'S DUTIES TO TENANT — SNOW AND ICE ON SIDEWALKS.

Absent special aspects, a landlord does not have a duty to protect a tenant from open and obvious dangers, such as snow and ice, unless the danger is effectively unavoidable; a danger is effectively unavoidable when a person, for all practical purposes, is required

or compelled to confront the dangerous hazard; a danger is not effectively unavoidable when a person has a choice whether to confront the hazard.

2. LANDLORD-TENANT — LANDLORD'S DUTIES TO TENANT — PREMISES AND COMMON AREAS TO BE FIT FOR THE USE INTENDED — SIDEWALKS.

Under MCL 554.139(1)(a), a landlord is required to covenant in every lease for residential premises that the premises and the common areas are fit for the use intended by the parties; the intended use of a sidewalk is walking on it, and ice that covers a sidewalk may render the sidewalk unfit for its intended purpose unless the ice is a mere inconvenience; when a sidewalk is completely covered with ice, it represents more than a mere inconvenience because a person walking on the sidewalk is forced to walk on the ice.

3. LANDLORD-TENANT — LANDLORD'S DUTIES TO TENANT — COVENANT TO REPAIR AND COVENANT TO COMPLY WITH APPLICABLE HEALTH AND SAFETY LAWS.

A landlord's statutory covenant to make reasonable repairs to the premises and a landlord's statutory covenant to comply with applicable health and safety laws are distinct from each other and should not be read together; a landlord's covenant to comply with applicable health and safety laws includes the duty to comply with local ordinances, including those that govern the maintenance of paved areas to afford safe passage (MCL 554.139(1)(b)).

Baratta & Baratta, PC (by *Christopher R. Baratta*) for the Estate of Daniel G. Trueblood.

Raftery & Barron PC (by *Jeanne V. Barron*) for P&G Apartments, LLC.

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

PER CURIAM. Plaintiff[1] appeals as of right the trial court's order granting summary disposition to defendant under MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings.

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[1] Plaintiff died on or about December 19, 2016, from causes apparently unrelated to this action, and the estate was substituted as plaintiff.

This slip-and-fall action arose after plaintiff slipped on a sidewalk on January 11, 2016, at around 11:00 a.m., injuring himself. The sidewalk was located on the premises of defendant's apartment complex where plaintiff was a tenant.

Jeffrey Andresen, who had a Ph.D. in atmospheric science and agronomy, prepared a report at plaintiff's request about the "meteorological and climatological records regarding the possible presence of snow and ice on the ground at" the property when and where plaintiff fell. Based on his review of the records, Andresen believed that approximately 3.4 inches of snow fell in the 24 hours before plaintiff's fall. According to Andresen, the snowfall combined with the conditions on paved surfaces at the property "would have resulted in a significant layer of ice . . . mostly refrozen slush . . . on the surface covered by a thin layer of dryer, fluffy snow[.]" Andresen testified that he based some of his conclusions on a combination of photographs[2] taken shortly after plaintiff fell and the records of the weather conditions around the time that plaintiff fell. According to Andresen, it was "pretty clear" from the photos "that there [was] ice on the surface." Andresen believed that the photos showed "ice covering almost everything," which he said was "consistent with what the weather records suggest also."

Gregory Borg, the sole owner of the apartment complex, testified that he does his own maintenance, snow removal, and deicing. Borg testified that he plows and uses a snowblower at the buildings, and "[s]ometimes [he has John] Suboch help [him] . . . ." Suboch confirmed that in January 2016, he would help Borg "remove the snow and throw salt out." Borg testified

[2] The photos are included as part of the lower court record.

that to determine when snow removal was necessary, he "look[ed] at the news" and "[if it was] snowing out [he would] get out there that night or in the morning." He explained that he would "[u]sually go the night before and assess the situation and either salt it down, and then the next morning if [there was] a big snowfall[,] plow or snow blow."

Borg testified that he was out at plaintiff's apartment "the night before" plaintiff fell because Borg "remember[ed that] there was a light dusting of snow . . . [a]nd [he] went out there and . . . threw some salt around the walkways, and [he] threw some in the parking lot." Borg estimated that he threw "a couple bags" of salt that night because that was "pretty much the norm" to "cover the area." Borg testified that he was also out at the property around 9:00 a.m. on the day that plaintiff fell. According to Borg, he and Suboch "salted the property" and "[p]robably snow-blowed and maybe ran the plow over the parking lot a couple times."

But several tenants of the subject property disputed Borg's testimony. Plaintiff testified that he never observed anyone doing snow or ice removal on the property on defendant's behalf. In fact, plaintiff said that he never saw Borg do any work at the premises, but did see another man doing maintenance. Tenant Anthony Lopenski testified that it did not "really" look like there had been any snow removal on the day that plaintiff fell, it looked "snowy" to him, and "[t]here was no salt to be found" anywhere on the property that day. Tenant Kyla Nunley testified that Borg "absolutely" had not salted before plaintiff fell and that she had not seen Borg or anyone else applying salt or plowing the premises the night before plaintiff fell. Nunley testified that she called Borg after plaintiff fell and saw Borg put salt down shortly "[a]fter the fact." Lopenski simi-

larly testified that he did not see Borg doing any snow removal or deicing until after plaintiff left in the ambulance. Borg confirmed that he was at the apartment complex with Suboch after he was informed that plaintiff fell.

Plaintiff testified that on the morning he fell, he was going to visit his attorney. According to plaintiff, he did not have any particular reason for going to see his attorney that day; it was simply "the day [he] chose." Plaintiff was aware that it had snowed the day before, and as he was leaving, "all [he] could see was a fine layer of snow . . . ." Plaintiff noted that it was possible to get to his car by using a different doorway on the other side of the building, but he stated that he would not use that route because a person would still "have to walk around the front through the snow" to get to his or her car on the other side, and it "would be kind of lame to do that when you can just walk out the door [on the other side] and go to your car."[3] Borg confirmed that tenants could use either entrance to access parking.

Plaintiff testified that when he used the door closest to where his car was parked, he took two or three steps on the sidewalk and then fell backward "on [his] derriere." Plaintiff saw snow on the ground, but assumed that "ice underneath the snow" made him fall, though he "didn't see [ice] under the snow." Plaintiff clarified that he assumed it was there because "it was slippery," he was wearing "the best boots you can buy," and he would not "have slipped on just snow." Plaintiff was not aware of anyone else ever falling on the property, and did not see anyone else slip on ice on the day he fell.

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[3] When defense counsel was confused about whether plaintiff was saying that "you can exit" through the second door, plaintiff clarified, "Oh, you can walk out the door . . . ."

Lopenski testified that he lived on the first floor of the property and that he saw plaintiff fall. When Lopenski saw plaintiff fall, he was sitting in his apartment in "a chair right by the window." Lopenski testified that he heard the door to the outside slam, then "looked over [and saw plaintiff's] arms go up and he disappeared." Lopenski testified that he went out to help plaintiff after he fell, and the sidewalk felt "[s]lippery." Lopenski assumed that it felt slippery because "it was icy." Lopenski later clarified that he did not see any ice, and that he just saw "a sheet of snow." But Lopenski doubled down on his testimony that there was ice beneath the snow, explaining that he "believe[d]" that there was a "real thin" layer of snow with "ice under there." Nunley, who was in Lopenski's apartment when Lopenski saw plaintiff fall, also went outside to the sidewalk after plaintiff fell. Nunley testified that the sidewalk where plaintiff fell was "real icy."

Plaintiff filed a two-count complaint on May 3, 2016. Count 1 alleged, in relevant part, violations of MCL 554.139, and Count 2 alleged premises liability.

On August 4, 2017, defendant moved for summary disposition under MCR 2.116(C)(10). Defendant first addressed plaintiff's claim under MCL 554.139(1)(a) that the sidewalk was not fit for its intended use. Defendant contended that plaintiff could not establish that the sidewalk was not fit for its intended use because he could "not even verify he fell on ice" and "could not say for sure that the ice caused his fall[.]" Defendant also pointed out that Lopenski did not slip and fall on any ice, nor did the EMS workers, which established that other people were able to use the sidewalk for its intended purpose. Defendant also argued that MCL 554.139(1)(b)—the duty "[t]o keep the premises in reasonable repair"—did not apply to common areas such as the sidewalk where plaintiff slipped.

Defendant then addressed plaintiff's premises-liability claim. Defendant argued that the dangerous condition was open and obvious because "plaintiff admitted to seeing a layer of snow as he exited the building" and, "[g]iven that it was January, in Michigan, a reasonable person would expect there to be other wintry conditions such as additional snow or even ice, and to be on the lookout." Defendant lastly argued that Andresen's testimony could not create a genuine question of fact because "all that can really be shown is that snow was likely present," and Andresen's testimony about ice "contradict[s] the plaintiff's own testimony about the condition of the sidewalk." Defendant concluded that "the mere presence of snow does not establish the Defendant's fault."

Plaintiff filed a brief in opposition to defendant's motion on September 5, 2017. Plaintiff first argued that there was a genuine issue of material fact as to his theory of premises liability. Plaintiff contended that the hazard was ice, and that the ice was not obvious because no one actually saw the ice; they only saw a thin sheet of snow. Alternatively, plaintiff argued that the ice was effectively unavoidable. According to plaintiff, he "had no other way of getting to his car than by traversing either the front (west) sidewalk or the rear sidewalk and parking areas, all of which were covered with the same frozen slush or sleet," so that walking on ice was effectively unavoidable.

Turning to his statutory theories of liability, plaintiff first argued that the sidewalk he slipped on was not fit for its intended use. Plaintiff argued that a sidewalk's intended purpose was for walking, and that it was not fit for its intended use if, as the evidence suggested, the sidewalk was icy and Borg had not salted the sidewalk before plaintiff fell. Plaintiff also contended that defen-

dant failed to comply with a local law that required it to maintain its walkways "so as to afford safe passage" because it failed to timely remove the ice from the sidewalk.

On September 28, 2017, the trial court held a hearing on defendant's motion. After hearing the parties' arguments, which were in line with their briefs, the trial court granted summary disposition to defendant. On October 2, 2017, the trial court entered an order granting defendant's motion for summary disposition.

Plaintiff now appeals as of right.

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We agree that the trial court erred by granting summary disposition to defendant on plaintiff's claims for statutory violations under MCL 554.139, but disagree that the trial court erred by granting summary disposition to defendant on plaintiff's premises-liability claim.

We review de novo a trial court's grant of summary disposition. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016). Defendant moved for summary disposition under MCR 2.116(C)(10). In *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), our Supreme Court explained the standard for a motion under MCR 2.116(C)(10):

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

A genuine issue of material fact exists when, after viewing the evidence in the light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The duty that a landlord owes a person depends on the person's status on the land. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). A tenant is an invitee of the landlord. See *id*. at 604. Thus, a landlord owes a duty to a tenant "to exercise reasonable care to protect the [tenant] from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Absent special aspects, this duty does not extend to open and obvious dangers. *Id*. at 516-517. "Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 694; 822 NW2d 254 (2012), quoting *Royce v Chatwell Club Apartments*, 276 Mich App 389, 392; 740 NW2d 547 (2007) (quotation marks omitted).

Plaintiff contends that he slipped on ice and that he did not see the ice because it was covered by a thin sheet of snow. In response, defendant contends that because neither plaintiff nor any other witness testified that they actually saw ice, there was no evidence that plaintiff slipped on any ice. In our opinion, defen-

dant's contention does not view the evidence in the light most favorable to plaintiff. Plaintiff testified that although he did not see the ice, he believed that he slipped and fell on ice. This was supported by the testimony of Lopenski, who stated, like plaintiff, that he believed there was ice underneath the snow. Both Lopenski and plaintiff explained that their belief was premised on the fact that it was "slippery." Although, like plaintiff, Lopenski did not see any ice, this goes to the weight of their testimonies about the ice, not to whether there was, in fact, ice on the sidewalk. Also of note, both Lopenski's and plaintiff's statements on this point were supported by Nunley, who testified that the sidewalk where plaintiff fell was "real icy."

While this might have been a close question if the only evidence had been a person's belief that there was ice, there was additional evidence to support that the sidewalk was icy: the testimony of Andresen. Andresen explained that the conditions were such that ice was likely to form. Looking at photos of the scene after the accident, Andresen opined that the entire area was covered with "frozen slush"—consistent with what Andresen expected—and that it would be slippery. Viewing this evidence in the light most favorable to plaintiff tends to confirm plaintiff's and Lopenski's testimony that plaintiff slipped on ice. Thus, we conclude that when viewing the evidence in the light most favorable to plaintiff, a rational trier of fact could have found that plaintiff slipped on ice on the sidewalk located in defendant's apartment complex.

Even if plaintiff slipped on ice, there is no question that the ice was open and obvious. In *Ragnoli v North Oakland-North Macomb Imaging, Inc*, 500 Mich 967 (2017), our Supreme Court reversed a panel of this Court that found a question of fact about whether ice in

a parking lot with low lighting at night was open and obvious. See *Ragnoli v North Oakland-North Macomb Imaging, Inc*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2016 (Docket No. 325206), p 2. Our Supreme Court explained that

> notwithstanding the low lighting in the parking lot, the presence of wintery weather conditions and of ice on the ground elsewhere on the premises rendered the risk of a black ice patch open and obvious such that a reasonably prudent person would foresee the danger of slipping and falling in the parking lot. [*Ragnoli*, 500 Mich at 967 (quotation marks and citation omitted).]

The weather conditions when plaintiff fell were clearly wintry. Andresen explained that it had snowed more than three inches in the 24 hours before plaintiff went out and that it was well below freezing when plaintiff stepped outside. Indeed, plaintiff acknowledged that it had snowed the night before and testified that he was wearing winter clothing and winter boots when he left his apartment, showing that he was well aware of the wintry conditions outside. And both plaintiff and Lopenski testified that they saw a layer of snow on the sidewalk when they walked outside. Thus, because snow and ice are generally open and obvious, *Buhalis*, 296 Mich App at 694, plaintiff admitted that he saw the snow, and "the presence of wintery weather conditions" would have alerted "a reasonably prudent person" to "the danger of slipping and falling," *Ragnoli*, 500 Mich at 967, the ice that plaintiff slipped on was open and obvious.

Plaintiff argues that even if the ice was open and obvious, his premises-liability claim was not barred because there was a question of fact about whether the ice was effectively unavoidable. See *Hoffner v Lanctoe*, 492 Mich 450, 463; 821 NW2d 88 (2012) ("This Court

has discussed two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*."). In *Hoffner*, our Supreme Court explained that "the standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard." *Id*. at 469. Consequently, "situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Id*.

The danger here was not effectively unavoidable. Plaintiff had access to another door through which he could have exited to go to his car. Thus, because plaintiff had a choice whether to confront the hazard, it was not effectively unavoidable. See *id*.

Plaintiff argues that the ice was unavoidable because it covered both entrances. Plaintiff bases this assertion on the testimony of Andresen, who said that the weather conditions created an icy condition across a large stretch of the Detroit metropolitan area. However, contrary to plaintiff's assertion, there was no evidence that the other entrance was covered in snow and ice. Andresen's testimony that many areas would have been icy was not sufficient to establish that the other entrance would have been icy. Such a conclusion would be speculation or conjecture—"an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994) (quotation marks and citation omitted). While assuming that the other entrance was covered with ice would have been consistent with Andresen's testimony that much of the Detroit metropolitan area was covered with ice, there is no way to reasonably infer that, because parts of the

area were covered in ice, then the other entrance was also icy. Speculation cannot create a question of fact. *Detroit v Gen Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998).

Turning to plaintiff's second argument, he contends that the trial court erred by dismissing his claim based on the statutory violations under MCL 554.139(1)(a) and (b). "[T]he open and obvious danger doctrine is not available to deny liability" for a statutory violation under MCL 554.139(1). *Benton*, 270 Mich App at 441.

MCL 554.139 states:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.

In *Allison*, 481 Mich at 427-431, our Supreme Court addressed the analytical framework to be used when determining liability under MCL 554.139(1)(a). First, the court is to determine whether the area in question is a "common area." Then, the court is to identify the intended use of the common area. Lastly, the court must determine if there could be "reasonable differences of opinion regarding" whether the conditions made the common area unfit for its intended use.

Plaintiff slipped on a sidewalk leading from his apartment building to the parking lot. In *Benton*, 270 Mich App at 443, this Court held that "sidewalks constitute common areas used by tenants." The *Benton* Court explained:

> First, sidewalks such as the one in question are located within the parameters of the apartment structure. They are constructed and maintained by the landlord or those in the landlord's employ. Second, sidewalks leading from apartment buildings to adjoining parking lots are common

> areas for tenants because all tenants who own and park their vehicles in the spaces allotted to them by their landlord rely on these sidewalks to access their vehicles and apartment buildings. Additionally, any person residing in an apartment complex must utilize the sidewalk provided by the landlord every time the tenant wishes to enter or exit his or her dwelling. [*Id*. at 442-443.]

We conclude that the rationale for finding that the sidewalk in *Benton* was a common area applies to the sidewalk in this case, so the sidewalk that plaintiff slipped on was a "common area" under MCL 554.139(1)(a).

Next, as in *Benton*, the intended use of the sidewalk in this case was "walking on it." *Benton*, 270 Mich App at 444. The only remaining question is whether the presence of ice on the sidewalk made it unfit for its intended use. In *Benton*, this Court held that "a sidewalk covered with ice is not fit" for its intended use. *Id*. But in *Allison*, our Supreme Court explained that ice does not inherently render a common area unfit for its intended use if the ice is a "[m]ere inconvenience." *Allison*, 481 Mich at 430. Yet in the instant case there is a question of fact about whether the sidewalk was completely covered with ice, making the ice more than a mere inconvenience. Plaintiff testified that the sidewalk was covered with snow and was slippery. Lopenski similarly testified that there was snow covering the sidewalk and that it was slippery. And Andresen testified that the weather conditions leading up to plaintiff's fall would have coated the entire area with ice and that based on the pictures taken after the accident, the entire area appeared coated with ice with some snow overtop, which is what Andresen would have expected. Viewing this evidence in the light most favorable to plaintiff, there is a question of fact about whether the sidewalk was completely covered with ice.

We conclude that a sidewalk completely covered in ice is not fit for its intended use, see *Benton*, 270 Mich App at 444, because it does not present a "[m]ere inconvenience of access," *Allison*, 481 Mich at 430; anyone walking on a sidewalk completely covered in ice would be forced to walk on ice, and there is no way to simply walk around it.

Defendant contends that, on the basis of *Allison*, plaintiff's claim should fail because he cannot establish that the sidewalk was not fit for its intended use. In *Allison*, 481 Mich at 423, 430, the plaintiff slipped and fell while walking to his car. The plaintiff's car was parked in the defendant apartment complex's parking lot, and plaintiff fell after he slipped on ice that was covered by one to two inches of snow. *Id*. The Court held that a parking lot was a common area, and part of a parking lot's intended use was to allow tenants reasonable access to their parked vehicles. *Id*. at 429. Our Supreme Court held that the plaintiff failed to establish a question of fact about whether the parking lot was fit for this intended use because his "allegation of unfitness was supported only by two facts: that the lot was covered with one to two inches of snow and that [he] fell." *Id*. at 430.

Relying on *Allison*, defendant argues that plaintiff cannot establish that the sidewalk was not fit for its intended use because "the only evidence presented that the sidewalk did not allow residents access to their vehicles, was the presence of ice and snow and [plaintiff's] fall." But this argument misconstrues *Allison*'s holding. *Allison* does not stand for the notion that evidence of ice cannot make a sidewalk unfit for its intended use. This would require overruling *Benton*, which *Allison* did not do. Rather, *Allison* stands for the proposition that a plaintiff must present more evidence

than simply the presence of ice or snow and someone falling. And here, plaintiff did that. As already explained, there is a question of fact about whether the sidewalk was *completely* covered in ice. Thus, if plaintiff walked on the sidewalk, he was inevitably going to confront the ice. Because the purpose of a sidewalk is walking, and ice is slippery and not easy to walk on, a sidewalk that is completely covered in ice is not fit for its intended use. See *Benton*, 270 Mich App at 444.

Defendant also argues that plaintiff failed to establish a genuine issue of material fact because uncontested testimony established that others—namely Lopenski and the EMS workers—had been able to walk on the sidewalk without falling. While this would tend to support that the sidewalk was fit for its intended use, it does not overcome the other evidence. Specifically, if the sidewalk was completely covered in ice, then it was not fit for its intended use. That others had been able to walk on the sidewalk without incident might have suggested that the sidewalk was not completely covered in ice, but it might also have suggested that the others had been walking more carefully on the sidewalk because given that plaintiff had slipped, they were aware that the sidewalk was slippery.

Because there was a question of fact about whether the sidewalk was fit for its intended use, the next question is whether defendant breached its duty under MCL 554.139(1)(a). See *Benton*, 270 Mich App at 444. Again, the duty that defendant owed plaintiff under MCL 554.139(1)(a) was "to maintain the sidewalk in a manner that was fit for its intended use." *Id*. Borg testified that he had salted the night before plaintiff fell and had begun salting the next morning at 9 a.m.—two hours before plaintiff fell. Yet the three tenant-witnesses testified that no one came out and

salted the morning of plaintiff's fall. Viewing this evidence in the light most favorable to plaintiff, reasonable minds could differ on whether anyone salted the sidewalk on defendant's behalf before plaintiff fell. If no one salted the sidewalk, then defendant would have breached its duty to maintain the sidewalk in a manner fit for its intended use.

Plaintiff also argues on appeal that defendant breached a second duty under MCL 554.139:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> * * *
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and *to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located*, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants['] wilful or irresponsible conduct or lack of conduct. [Emphasis added.]

Plaintiff contends that defendant breached Wyandotte Ordinance § 19-288(c), which requires that "[s]teps, walks, driveways, parking spaces and similar paved areas shall be maintained so as to afford safe passage under normal use and weather conditions."

Our Supreme Court in *Allison* addressed MCL 554.139(1)(b), but at issue in *Allison* was the first part of MCL 554.139(1)(b)—the covenant "[t]o keep the premises in reasonable repair during the term of the lease or license . . . ." It was this covenant that *Allison* held did not apply to common areas, see *Allison*, 481 Mich at 432 (explaining "that the covenant to repair under MCL 554.139(1)(b) does not apply to 'common areas' "), and it was this covenant that the Court held

did not apply to the accumulation of snow and ice, see *id*. at 434 (explaining that "repairing a defect equates to keeping the premises in a good condition as a result of restoring and mending damage to the property" and that because "[t]he accumulation of snow and ice does not constitute a defect in property, . . . the lessor would have no duty under MCL 554.139(1)(b) with regard to snow and ice, except to the extent that such snow and ice caused damage to the property"). Our reading of *Allison* makes it clear that *Allison*'s holding only applied to the covenant to make reasonable repairs, not to the covenant to comply with local health and safety laws.

Because the covenants to keep the premises in reasonable repair and to comply with state and local laws are listed together and not separated (as the covenant to keep common areas fit for their intended use is listed separately), there may be a possibility that the Legislature intended for both the covenant to make reasonable repairs and the covenant to comply with local health and safety laws to be read together—meaning that the limitations on the covenant to make reasonable repairs also applies to the covenant to comply with local health and safety laws. A plain reading of the statute, however, forecloses this possibility. The covenants are separated by a comma followed by the word "and." The word "and" serves as a conjunction to separate the landlord's covenant to make reasonable repairs to the premises from the landlord's covenant to comply with applicable health and safety laws.

Nothing in the statute suggests that both of these covenants are to be read together. For instance, if the Legislature had intended for both covenants to be limited to the premises (to the exclusion of common

areas), it would have written the statute to reflect that. But the statute is not written in such a way, and it instead reflects that a landlord is "to comply with the applicable health and safety laws" of the local government. Thus, given the statute's text, the covenant to make reasonable repairs appears distinct from the covenant to comply with local health and safety laws.

This reading of the statute is also supported by the fact that the covenant to make reasonable repairs has historically been considered distinct from the covenant to comply with local health and safety laws. In *Rome v Walker*, 38 Mich App 458, 462; 196 NW2d 850 (1972), this Court, while discussing MCL 554.139(1)(b), referred to "[t]he inclusion of the *covenants* [plural] to repair and comply with safety laws" as being a "statutory mandate." While the issue whether these covenants were separate was not squarely before the *Rome* Court, the Court's language is telling and supports the conclusion that the covenant to make reasonable repairs is distinct from the covenant to comply with local health and safety laws.

For these reasons, we conclude that a landlord's covenant to comply with local health and safety laws is distinct from its covenant to make reasonable repairs. MCL 554.139(1)(b) plainly states that the landlord covenants "to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located . . . ." The premises here are located in Wyandotte, Michigan. Therefore, defendant had a duty to comply with Wyandotte Ordinance § 19-288(c), which requires that "[s]teps, walks, driveways, parking spaces and similar paved areas shall be maintained so as to afford safe passage under normal use and weather conditions." Because there is a question of fact about whether the sidewalk

on which plaintiff slipped was completely covered in ice, there is a question whether defendant breached its duty "to afford safe passage under normal use and weather conditions" to plaintiff while he was using the sidewalk.[4] Wyandotte Ordinance § 19-288(c). And for the reasons explained above, there is a question of fact about whether defendant breached this duty by failing to salt the sidewalk. If defendant breached this duty, then reasonable minds could conclude that this breach caused plaintiff to slip and fall, and there is no question that plaintiff suffered injuries. The trial court erred by granting summary disposition to defendant with regard to its alleged violation of MCL 554.139(1)(b).

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

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

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[4] We expressly limit our ruling to finding a question of fact about whether the sidewalk afforded plaintiff "safe passage." We offer no opinion about whether the "weather conditions" were "normal" before plaintiff slipped because that question was not raised by the parties.

PEOPLE v ODOM

Docket No. 339027. Submitted March 6, 2019, at Lansing. Decided March 12, 2019, at 9:15 a.m. Leave to appeal denied 505 Mich 1053 (2020).

Steven A. Odom was convicted after a jury trial in the Washtenaw Circuit Court of armed robbery, MCL 750.529, and bank robbery, MCL 750.531. The court, Archie C. Brown, J., sentenced defendant to 210 to 420 months in prison for the armed-robbery conviction and 86 to 420 months in prison for the bank-robbery conviction. Defendant appealed his convictions and sentences, and the Court of Appeals, METER, P.J., and SERVITTO and RIORDAN, JJ., affirmed in an unpublished per curiam opinion issued January 7, 2014 (Docket No. 304699). The Supreme Court also affirmed defendant's convictions, but it concluded that defendant was entitled to resentencing under *People v Lockridge*, 498 Mich 358 (2015), because the trial court had engaged in judicial fact-finding when scoring defendant's then-mandatory sentencing guidelines. Accordingly, the Supreme Court ordered a remand pursuant to *United States v Crosby*, 397 F3d 103 (CA 2, 2005), to cure the constitutional error. 498 Mich 901 (2015). On remand, defendant elected to be resentenced. The trial court found that it would have imposed a materially different sentence had its sentencing discretion not been constrained by the mandatory sentencing guidelines and ordered resentencing, stating that defendant's original sentence was not proportionate to the seriousness of his conduct and that an out-of-guidelines sentence was likely warranted. Defendant then moved for a new attorney and to withdraw his request for resentencing. The trial court denied the motion to withdraw the resentencing request, but granted the motion for new counsel. After receiving updated sentencing information, the trial court sentenced defendant to 360 to 720 months in prison for each of his convictions and ordered him to pay restitution. Defendant again appealed his sentence, alleging in part that his first defense attorney on remand was ineffective for failing to inform him of the possibility of an increased sentence at resentencing. Following an evidentiary hearing, the trial court concluded that defendant was not unconstitutionally deprived of

the effective assistance of counsel and that he had been granted the relief he sought when his request for resentencing was granted. Defendant appealed.

The Court of Appeals *held*:

1. The trial court's authority on remand was not limited to correcting scoring errors predicated on judicial fact-finding. A *Crosby* remand returns the case to the trial court in a presentence posture, which allows the trial court to consider every aspect of the defendant's sentence de novo. Accordingly, the trial court was authorized to receive new sentencing information, rescore the guidelines with or without the use of judicial fact-finding, and exercise its discretion to depart from the sentencing guidelines range. The fact that the trial court's sentence on remand exceeded the original sentence did not render it presumptively vindictive, and defendant's argument to the contrary was without merit.

2. The retroactive application of the advisory sentencing guidelines does not violate the prohibition on ex post facto laws when the application on remand results in an increase in the defendant's sentence. A law violates the Ex Post Facto Clauses of the Michigan and United States Constitutions when it criminalizes conduct that was innocent when done or when it increases the punishment that was applicable when the crime was committed. The prohibition on ex post facto laws precludes retroactive application of decisions that implicate notice, foreseeability, and the right to fair warning. The Michigan Supreme Court's decision to rectify the constitutional infirmity in the mandatory sentencing guidelines by making the guidelines advisory did not alter the maximum penalty applicable to defendant when he committed the crimes at issue. Both offenses were punishable by up to life in prison when committed and remain punishable by up to life in prison under the advisory guidelines. Further, although the formerly mandatory sentencing guidelines constrained the trial court's exercise of discretion, those who committed crimes under the guidelines were on notice that the trial court had discretion to depart from them, and the trial court in this case noted at defendant's original sentencing that a departure sentence was a distinct possibility. Because the Supreme Court's decision in *Lockridge* followed nearly a decade of United States Supreme Court decisions striking down mandatory sentencing systems at the state and federal levels, it could not be said that *Lockridge* was unexpected and indefensible by reference to the law previously expressed.

3. The trial court did not abuse its discretion when it denied defendant's motion to withdraw his request for resentencing and

when it failed to rule on his motion for substitute counsel before deciding to resentence him. Defendant failed to identify any authority that requires a trial court to consider a motion for substitute counsel before it may consider any subsequently filed motion by the attorney who was the subject of the motion for substitution, and he thus abandoned this issue. Further, defendant provided no credible evidence that he wished to avoid resentencing before the trial court indicated that it would increase his sentence. While defense counsel could have been timelier when communicating with defendant and filing motions on defendant's behalf, any errors resulted, at most, in a delayed request for resentencing. Accordingly, because any error did not affect the outcome of the proceedings, defendant was not entitled to relief.

4. The trial court did not err by sentencing defendant using an insufficiently updated presentence investigation report (PSIR). Although the updated PSIR failed to include information about voluntary programs defendant completed while incarcerated, defendant provided the trial court with documentation on this point, which alleviated any concern that inaccurate or incomplete information hampered the trial court's sentencing decision. Defendant's claim that a victim whose statement was not included in the PSIR would have professed his innocence was unsupported by any evidence and was therefore without merit.

5. The sentence imposed by the trial court was proportionate to the seriousness of defendant's crimes and background. A sentence is reasonable when it is proportionate to the seriousness of the circumstances surrounding the offense and the offender. Relevant factors for determining whether an out-of-guidelines sentence is more proportionate than a sentence within the guidelines range include (1) whether the guidelines accurately reflect the seriousness of the crime, (2) factors not considered by the guidelines, and (3) factors considered by the guidelines but given inadequate weight. The trial court calculated defendant's guidelines on remand at 126 to 210 months of imprisonment, but it identified several factors that it felt were not adequately reflected in defendant's guidelines scores, including defendant's significant criminal history, the fact that he committed the instant offense while on parole, and the fact that he had not been scored as a fourth-offense habitual offender because of a notice issue in the original proceedings. Had the habitual-offender enhancement been applied, it would have provided for a mini-

mum sentence of up to 420 months in prison. Although the trial court's departure from defendant's guidelines range was substantial, it was not unwarranted.

6. The trial court did not err when it refused to modify its order of restitution on the ground that the collection of funds from defendant's prison account amounted to an undue hardship. Because defendant provided no evidence that enforcement of the restitution order had begun, any issue regarding his ability to pay was not ripe for the trial court's consideration.

Affirmed.

1. SENTENCING — REMANDS FOR RESENTENCING — SCOPE OF AUTHORITY.

A trial court's authority to resentence a defendant after a remand pursuant to *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005), is not limited to correcting scoring errors predicated on judicial fact-finding; a *Crosby* remand returns the case to the trial court in a presentence posture, which allows the trial court to consider every aspect of the defendant's sentence de novo.

2. SENTENCING — REMANDS FOR RESENTENCING — PRESUMPTIONS OF VINDICTIVENESS.

The fact that a trial court used its discretion to lengthen a defendant's sentence after a remand pursuant to *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005), does not render that sentence presumptively vindictive.

3. SENTENCING — REMANDS FOR RESENTENCING — EX POST FACTO LAWS.

The retroactive application of the advisory sentencing guidelines does not violate the prohibition on ex post facto laws when the application on remand results in an increase in the defendant's sentence (US Const, art 1, § 10; Const 1963, art 1, § 10).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *Brenda Taylor* and *Fawn Montgomery*, Assistant Prosecuting Attorneys, for the people.

Steven A. Odom, *in propria persona*, and *Ann M. Prater* for defendant.

Before: METER, P.J., and SERVITTO and REDFORD, JJ.

METER, P.J. Defendant appeals as of right the trial court's out-of-guidelines sentence, entered after our Supreme Court ordered a remand consistent with Part VI of its opinion in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). *People v Odom*, 498 Mich 901 (2015). In pertinent part, defendant argues that the prohibition on ex post facto laws—embodied in Article 1, § 10 of both the federal and state Constitutions—prevented the trial court from imposing a lengthier sentence on remand than it did during the original sentencing. We conclude that *Lockridge*'s shift from a mandatory sentencing regime to an advisory one was not the type of unforeseeable legal change that offends the Ex Post Facto Clauses. Accordingly, we hold that those clauses present no obstacle to the retroactive application of *Lockridge*, even when its application results in an increased sentence. Finding no merit in any of defendant's other assertions of error, we affirm the trial court's out-of-guidelines sentence.

I. BACKGROUND

In March 2011, a jury found defendant guilty of armed robbery, MCL 750.529, and bank robbery, MCL 750.531, after defendant stole nearly $3,000 from a payday lender. The trial court originally sentenced defendant to 210 to 420 months of imprisonment for the armed-robbery conviction and 86 to 420 months of imprisonment for the bank-robbery conviction. Defendant appealed, and in a pre-*Lockridge* opinion, this Court affirmed defendant's convictions and sentences. See *People v Odom*, unpublished per curiam opinion of the Court of Appeals, issued January 7, 2014 (Docket No. 304699). Then, after having held defendant's appeal in abeyance, our Supreme Court reversed the Court of Appeals judgment in part under its recently

issued opinion in *Lockridge*, which held that a defendant is entitled to resentencing if the trial court engaged in judicial fact-finding when scoring a defendant's then-mandatory sentencing guidelines. *Odom*, 498 Mich 901. Accordingly, our Supreme Court ordered a *Crosby*[1] remand to cure the constitutional error. *Id*.

On remand, defendant elected to be resentenced. The trial court found that it would have imposed a materially different sentence had its sentencing discretion not been constrained by the mandatory sentencing guidelines and ordered resentencing. In its order for resentencing, the trial court expressed its belief that defendant's original sentence was not proportionate to the seriousness of his conduct and that an out-of-guidelines sentence was likely warranted. Defendant then moved for a new attorney and to withdraw his request for resentencing. The trial court denied the motion to withdraw the resentencing request but granted the motion for new counsel. Eventually, the matter proceeded to a resentencing hearing. After receiving updated sentencing information, the trial court sentenced defendant to 360 to 720 months of imprisonment for each of his convictions and ordered him to pay restitution to the payday lender. The trial court opined that defendant's recidivism and the brazenness of his most recent offenses justified the upward departure from the sentencing guidelines range.

Defendant again appealed his sentence, alleging in part that his first defense attorney on remand was ineffective for failing to inform him of the possibility of an increased sentence at resentencing. To explore this issue further, we remanded this case for an evidentiary hearing. See *People v Odom*, unpublished order of the

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[1] *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005).

Court of Appeals, entered September 27, 2017 (Docket No. 339027). Following a *Ginther*[2] hearing, the trial court concluded that defendant was not unconstitutionally deprived of the effective assistance of counsel. The trial court found that defense counsel may have failed to timely communicate with defendant but that any error did not affect the outcome of defendant's resentencing. The trial court emphasized defendant's intent to seek resentencing; thus, defense counsel's ultimate motion for resentencing and the trial court's new sentence granted defendant the relief he sought. This appeal followed.

II. ANALYSIS

Defendant raises several challenges to the trial court's out-of-guidelines sentence. Broadly, we may group defendant's issues into two categories: those that address the general limits of the trial court's authority on remand and those that address the trial court's exercise of its sentencing discretion. We review de novo questions of law, including the interpretation of statutory and constitutional provisions. *People v Callon*, 256 Mich App 312, 315; 662 NW2d 501 (2003). The trial court's discretionary decisions—including its exercise of sentencing discretion—are reviewed for an abuse of discretion. See *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008); *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 353. We review the trial court's factual findings for clear error. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

[2] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

"Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Id*.

A. THE TRIAL COURT'S AUTHORITY ON REMAND

In *Alleyne v United States*, 570 US 99, 116; 133 S Ct 2151; 186 L Ed 2d 314 (2013), the United States Supreme Court determined that, in mandatory sentencing schemes, a criminal defendant's Sixth Amendment rights are violated when he or she is sentenced on the basis of facts that are not found by a jury beyond a reasonable doubt. Acknowledging that *Alleyne* directly implicated our own sentencing regime, in *Lockridge*, 498 Mich at 391, our Supreme Court severed Michigan's sentencing guidelines, MCL 777.1 *et seq*., to the extent that they were mandatory and "[struck] down the requirement of a substantial and compelling reason to depart from the guidelines range . . . ." (Citation and quotation marks omitted.) Our Supreme Court held that, moving forward,

> all defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry. [*Id*. at 395.]

For cases decided before *Lockridge* that require resentencing, our Supreme Court adopted the procedure set forth in *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005). *Lockridge*, 498 Mich at 395. On remand under *Crosby*, a defendant is first given an opportunity to inform the trial court that he or she will not seek resentencing. *Id*. at 398. If the defendant takes advantage of this opportunity, the original sentence stands. *Id*. If, however, the defendant fails to timely

inform the trial court of his or her desire to forgo resentencing or affirmatively requests resentencing, the trial court must then determine whether it "would have imposed a materially different sentence but for the constitutional error. If the trial court determines that the answer to that question is yes, the court shall order resentencing." *Id*. at 397.

A *Crosby* remand returns the case to the trial court in a "presentence posture, allowing the trial court to consider every aspect of defendant's sentence[] de novo." *People v Lampe*, 327 Mich App 104, 112; 933 NW2d 314 (2019). See also *People v Williams (After Second Remand)*, 208 Mich App 60, 65; 526 NW2d 614 (1994). Given that *Lockridge* rendered the sentencing guidelines purely advisory, the trial court may rescore the sentencing guidelines on the basis of judicially found facts, see *Steanhouse*, 500 Mich at 466-467, provided that its scoring determinations are supported by a preponderance of the evidence, *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). The trial court must consult the resulting guidelines range, but it retains its discretion to depart from that range. *Lockridge*, 498 Mich at 391-392. "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *Id*. at 392. A sentence is reasonable when it is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Steanhouse*, 500 Mich at 471-472. See also *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990).

1. APPLICATION OF *LOCKRIDGE* AND THE PRESUMPTION OF VINDICTIVENESS

On appeal, defendant argues that the trial court's authority on remand was limited to correcting scoring errors predicated on judicial fact-finding. Accordingly,

defendant argues that, because the error necessitating remand was the trial court's use of judicial fact-finding to score Offense Variable (OV) 4, the only correction that the trial court could make on remand was to delete the points scored for OV 4 on the basis of judicial fact-finding. We disagree. As noted previously, a *Crosby* remand returns the case to the trial court in a "presentence posture, allowing the trial court to consider every aspect of defendant's sentence[] de novo." *Lampe*, 327 Mich App at 112. Thus, the trial court may receive new sentencing information, may rescore the guidelines (even using judicial fact-finding), and may exercise its discretion to depart from the sentencing guidelines range.[3]

Relatedly, defendant argues that the trial court's sentence on remand was presumptively vindictive because it exceeded the original sentence. See *North Carolina v Pearce*, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969),[4] overruled in part by *Alabama v Smith*, 490 US 794 (1989). Again, we emphasize that a *Crosby*

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[3] We note that the trial court's assessment on remand of 10 points for OV 4 was supported by a preponderance of the evidence. The trial court should score OV 4 at 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). The victim, in her original statement, stated that she sought professional help because of the anxiety caused by the robbery. In her updated statement, the victim stated that, despite the passage of eight years since the offense, she still becomes anxious when she enters a bank. The victim's statements were sufficient to score OV 4 at 10 points. See *People v Gibbs*, 299 Mich App 473, 493; 830 NW2d 821 (2013).

[4] The *Pearce* Court noted:

> Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

remand returns the case to the trial court in a "presentence posture, allowing the trial court to consider every aspect of defendant's sentence[] de novo." *Lampe*, 327 Mich App at 112. It is axiomatic then that, if the trial court has discretion to impose an out-of-guidelines sentence during the original sentencing, on de novo resentencing there can be no presumption of vindictiveness for the trial court's exercise of that discretion —especially when our Supreme Court has struck the substantial-and-compelling requirement for departure and replaced it with a reasonableness review. See *Lockridge*, 498 Mich at 391-392. Indeed, the basic purpose of de novo resentencing is to make the sentencing decision anew, without any respect for the prior (now invalid) sentence. Accordingly, defendant's argument is without merit.[5]

2. EX POST FACTO PROHIBITION

Next, defendant argues that the retroactive application of the advisory sentencing guidelines violates the

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In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. [*Pearce*, 395 US at 725-726.]

[5] The federal decisions addressing this issue have uniformly held that a remand predicated on changes to the sentencing regime precludes application of the presumption of vindictive sentencing:

> When there is no relevant legal or factual change between sentence and resentence, the motive for an increase in punishment is indeed suspect. But [*United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005)] brought about a

prohibition on ex post facto laws when the application results in an increase in the defendant's sentence compared to the sentence originally imposed. Effectively, defendant argues that, to pass constitutional muster, the original sentence must act as a cap on the trial court's sentencing discretion on remand. We disagree.

A law violates the Ex Post Facto Clauses[6] when, in relevant part, it criminalizes conduct that was innocent when done or when it increases the punishment that was applicable when the crime was committed. *Callon*, 256 Mich App at 317-318. The United States Supreme Court has recognized that due process applies the Ex Post Facto Clause to judicial decisions construing or applying a statute because a state court may not do through a judicial decision what the ex post facto prohibition bars its legislature from doing. See *Rogers v Tennessee*, 532 US 451, 458-459; 121 S Ct 1693; 149 L Ed 2d 697 (2001). The rationale for this rule rests "on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct." *Id*. at 459. Accordingly, the ex post facto prohibition will preclude retroactive appli-

> fundamental change in the sentencing regime. The guidelines, mandatory when [the defendant] was sentenced, are now advisory. Were he to be resentenced, it would be under a different standard, one that would entitle the judge to raise or lower the sentence, provided the new sentence was justifiable under the standard of reasonableness. No inference of vindictiveness would arise from the exercise of the judge's new authority. [*United States v Goldberg*, 406 F3d 891, 894 (CA 7, 2005) (citations omitted); accord *United States v Williams*, 444 F3d 250, 254 (CA 4, 2006).]

[6] "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." US Const, art 1, § 10. "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Const 1963, art 1, § 10.

cation of those decisions implicating notice, foreseeability, and the right to fair warning—that is, those decisions that were "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue." *Id*. at 462 (citation and quotation marks omitted).

It cannot be said that our Supreme Court's decision in *Lockridge* criminalizes conduct that was previously innocent—robbery was criminal at the time of defendant's offense and remains so post-*Lockridge*. Therefore, defendant's ex post facto challenge must be premised on a lack of fair warning of increased punishment. On this ground, too, defendant's challenge fails. Our Supreme Court's decision to rectify the constitutional infirmity in the mandatory sentencing guidelines by making the guidelines advisory did not alter the maximum penalty applicable to defendant when he committed the crimes at issue. Both offenses were punishable by up to life in prison when committed and remain punishable by up to life in prison under the advisory guidelines. See MCL 750.529; MCL 750.531. See also *United States v Barton*, 455 F3d 649, 656-657 (2006) (noting that a majority of federal circuits addressing the issue have held that unchanging statutory maximums preclude any ex post facto notice issue). Further, although the formerly mandatory sentencing guidelines constrained the trial court's exercise of discretion, persons who committed crimes under the guidelines were on notice that the trial court had discretion to depart from them. See MCL 769.34(3). See also *Barton*, 455 F3d at 655-656. Indeed, the trial court opined at defendant's original sentencing that this was a case in which a departure sentence was a distinct possibility. Given that the trial court seriously considered an out-of-guidelines sentence at defendant's original sentenc-

ing, defendant can hardly claim surprise at an out-of-guidelines sentence issued on de novo resentencing.

Finally, we note that the United States Supreme Court's decision in *Alleyne*, which prompted our Supreme Court's decision in *Lockridge*, was not fashioned out of whole cloth. Rather, *Alleyne* was a logical extension of nearly a decade of decisions "strik[ing] down mandatory sentencing systems at the state and federal levels." *Alleyne*, 570 US at 120 (Sotomayor, J., concurring). Indeed, the majority of these decisions predate defendant's offense. See *id*. Accordingly, it cannot be said that *Lockridge* was unexpected and indefensible by reference to the law previously expressed. *Rogers*, 532 US at 462. Thus, we conclude that retroactive application of *Lockridge* does not offend the prohibition of ex post facto laws—even when its application results in a lengthier sentence than the one previously imposed.[7]

B. THE TRIAL COURT'S SENTENCE

Having addressed any misconceptions regarding the trial court's authority on remand, we now turn to defendant's other arguments on appeal.

1. OPPORTUNITY TO AVOID RESENTENCING

Defendant argues that several errors denied him the opportunity that *Lockridge* guarantees him to avoid resentencing. According to defendant, the trial court abused its discretion when it denied his motion to withdraw his request for resentencing and when it failed to rule on his motion for substitute counsel

[7] We note that no federal court has found that the retroactive application of advisory sentencing guidelines results in a due-process or ex post facto violation. See *Barton*, 455 F3d at 656.

before deciding to resentence him. Alternatively, defendant argues that his counsel's ineffectiveness denied him an opportunity to avoid resentencing. Each of defendant's arguments is without merit.

As a preliminary matter, defendant has failed to identify any authority that requires a trial court to consider a motion for substitute counsel before it may consider any subsequently filed motion by the attorney who was the subject of the motion for substitution. Accordingly, defendant has abandoned this issue. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

Regarding his other arguments, defendant has not provided this Court with any credible evidence that he wished to avoid resentencing *before* the trial court indicated that it would increase his sentence. At the *Ginther* hearing, defense counsel testified that he informed defendant of the *Crosby* remand procedure and defendant's opportunity to avoid resentencing. Defense counsel also testified that he reminded defendant that, at the original sentencing, the trial court had expressed an inclination to depart upward from the sentencing guidelines. Accordingly, defense counsel informed defendant that an out-of-guidelines sentence was a possibility at resentencing. Despite these explanations, defense counsel maintained that defendant wished to be resentenced. Defense counsel acknowledged that he may have failed to communicate timely with defendant for a portion of the time the case was pending before the trial court (and that, because of this untimely communication, defendant sought other counsel), but testified that he ultimately fulfilled defendant's wishes by requesting resentencing. According to defense counsel, once the trial court indicated its intent to increase defendant's sentence in its order for

resentencing, he moved to withdraw the request for resentencing. For his part, defendant offered a document entitled "Judicial Notice" in which he claims he expressed his intent to forgo resentencing. That document, however, was not registered with the trial court and was not in any attorney's records. The document first appeared as an attachment to a document that defendant submitted on his own behalf *after* the trial court had already determined that it would resentence defendant.

Given that its decision eliminated the requirement of a substantial and compelling reason to depart from the sentencing guidelines, the *Lockridge* Court granted defendants entitled to a remand under its opinion an opportunity to avoid resentencing by informing the trial court of their decision to forgo resentencing. *Lockridge*, 498 Mich at 398; *Crosby*, 397 F3d at 118. Yet a defendant must seize upon this opportunity before the trial court expresses its intent to resentence the defendant. *Lockridge*, 498 Mich at 398. Thus, because the record in this case is devoid of any indication that defendant wished to forgo resentencing *before* the trial court expressed its intention to increase his sentence, we conclude that the trial court did not abuse its discretion by denying defendant's motion to withdraw his request for resentencing.

Further, while it appears that defense counsel could have been timelier when communicating with defendant and filing motions on defendant's behalf, we may only grant relief when counsel's unprofessional errors affected the outcome of the proceedings. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). Here, any errors resulted, at most, in a delayed *request* for resentencing. Defendant was not denied his opportunity to avoid resentencing because

defendant did not wish to avoid resentencing until the trial court expressed its intention to increase his sentence. Accordingly, because no error affected the outcome of the proceedings, defendant is not entitled to relief.

2. UPDATED PRESENTENCE INVESTIGATION REPORT

Defendant argues that the trial court erred by sentencing him using an insufficiently updated presentence investigation report (PSIR). As defendant correctly notes on appeal, our Supreme Court has held that a trial court should not resentence a defendant without the benefit of a "reasonably updated presentence report . . . ." *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980).

Given the time between defendant's offense and his resentencing, on remand an agent updated defendant's PSIR to reflect defendant's conduct while incarcerated. The updated PSIR indicates that, while incarcerated, defendant only had one citation for misconduct. Defendant argues that the updated PSIR was insufficient because it failed to include information about voluntary programs defendant completed while incarcerated. While this information does not appear in defendant's updated PSIR, defendant did provide the trial court with documentation regarding the programs he voluntarily completed in prison. As our Supreme Court recognized in *People v Hemphill*, 439 Mich 576, 581-582; 487 NW2d 152 (1992), when it comes to sentencing, it is not particularly important how the information gets before the trial court; rather, it is important that the trial court have the relevant information available for sentencing. Accordingly, defendant's provision of his program documents to the trial court alleviates any concern that inaccu-

rate or incomplete information hampered the trial court's sentencing decision.

Defendant also argues that the PSIR was inaccurate because it did not include a victim impact statement by a different victim, who defendant claims would have professed his innocence. Defendant, however, has presented no evidence that this alleged other victim had or could have provided such a statement. Accordingly, because defendant has failed to establish the factual predicate for his claim, his claim is without merit. See *People v Ackerman*, 257 Mich App 434, 455-456; 669 NW2d 818 (2003).

3. PROPORTIONALITY

Defendant next argues that the trial court's out-of-guidelines sentence was not proportionate to his criminal conduct. As noted previously, we review sentences in excess of the sentencing guidelines for reasonableness. *Lockridge*, 498 Mich at 392. A sentence is reasonable when it is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Steanhouse*, 500 Mich at 472. The purpose of the proportionality requirement is to combat unjustified disparity in sentencing, thereby ensuring that "offenders with similar offense and offender characteristics receive substantially similar sentences." *People v Dixon-Bey*, 321 Mich App 490, 524; 909 NW2d 458 (2017) (citation and quotation marks omitted). Under our system of sentencing, this principle of proportionality is first entrusted to the Legislature, which is tasked with "grading the seriousness and harmfulness of a given crime and given offender within the legislatively authorized range of punishments." *Id*. (citation and quotation marks omitted). Although the Legislature's guidelines are advisory, they "remain a highly relevant consider-

ation in a trial court's exercise of [its] sentencing discretion." *Lockridge*, 498 Mich at 391; see also *Steanhouse*, 500 Mich at 469-470, 474-475. Indeed, a sentence within the Legislature's guidelines range is presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Accordingly, when sentencing an individual defendant, the trial court must first score the sentencing guidelines and take them into account. *Lockridge*, 498 Mich at 391. If the trial court chooses to depart from the sentencing guidelines, it must justify the departure on the record by explaining "why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been[.]" *Dixon-Bey*, 321 Mich App at 525 (citation and quotation marks omitted). Relevant factors for determining whether an out-of-guidelines sentence is more proportionate than a sentence within the guidelines range "include (1) whether the guidelines accurately reflect the seriousness of the crime; (2) factors not considered by the guidelines; and (3) factors considered by the guidelines but given inadequate weight." *Id*. (citations omitted).

On remand, the trial court calculated defendant's guidelines minimum sentence range at 126 to 210 months of imprisonment. The trial court, however, identified several factors that it felt were not adequately reflected in defendant's guidelines scores. The trial court noted defendant's significant criminal history, including three serious criminal convictions in 1980 and a first-degree criminal-sexual-conduct conviction in 1982. The trial court noted that defendant committed the instant offense while on parole from the criminal-sexual-conduct conviction, indicating that defendant was not a strong candidate for reform. The trial court also found noteworthy the fact that, despite defendant's

criminal history, defendant was not scored as a fourth-offense habitual offender because of a notice issue in the original proceedings. Finally, the trial court noted that each of defendant's current convictions carried a maximum penalty of life in prison. Opining that the guidelines range did not accurately reflect the serious recidivism of this defendant and the brazenness of his crimes, the trial court imposed a sentence of 360 to 720 months in prison for each conviction.

The sentence imposed by the trial court was proportionate to the seriousness of defendant's crimes and background. Notably, had the habitual-offender enhancement been applied, it would have provided for a minimum sentence of up to 420 months in prison. See MCL 777.21(3)(c). As stated previously, sentences within the legislative guidelines are presumptively proportionate. While we are unable to apply that presumption in this case given *Lockridge*, it stands to reason that defendant's criminal conduct places him in a similar position to other repeat offenders notwithstanding the notice error in the original proceeding.[8] Defendant has committed six serious criminal offenses since he was 17 years old, separated by only short periods of freedom. Indeed, defendant committed the instant offense while on parole for a serious criminal-sexual-conduct offense. Although the trial court's departure from defendant's guidelines range was substantial, it was not unwarranted. Defendant's argument to the contrary is without merit.

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[8] We reject defendant's related argument that the trial court formulaically applied the fourth-offense habitual-offender enhancement. Rather, the trial court made an individualized determination that defendant's conduct warranted a sentence in excess of the recommended range, reasoning by analogy to the habitual-offender enhancement in the same manner as we do on appeal.

4. RESTITUTION

Finally, defendant argues that the trial court erred when it refused to modify its order of restitution on the ground that defendant established that the collection of funds from his prison account amounted to an undue hardship. Under the Crime Victim's Rights Act, MCL 780.751 *et seq*., the trial court was required to order defendant to make full restitution to the victims of his crimes. *In re Lampart*, 306 Mich App 226, 232-233; 856 NW2d 192 (2014). When ordering restitution, the "defendant's ability to pay is irrelevant; only the victim's actual losses from the criminal conduct are to be considered." *Id*. at 233. The defendant's ability to pay only becomes an issue when enforcement of the restitution order has begun. See *People v Jackson*, 483 Mich 271, 292; 769 NW2d 630 (2009).

Under MCL 791.220h, the Department of Corrections is required to collect 50% of all the funds that a prisoner receives over $50 per month and forward it as payment of court-ordered restitution. Here, defendant asserted that he does not have more than $50 in his account and that he only receives $9 per month, meaning that the department was prohibited from remitting any funds from defendant's prisoner account for the payment of restitution. Defendant has provided no evidence that the department has violated this prohibition or that any other type of enforcement has been taken on the restitution order. Therefore, because defendant failed to establish the enforcement of the court-ordered restitution, any issue regarding defendant's ability to pay restitution was not ripe for the trial court's consideration. See *People v Robar*, 321 Mich App 106, 128; 910 NW2d 328 (2017) ("[T]he ripeness doctrine precludes adjudication of merely hypothetical claims.").

III. CONCLUSION

Our Supreme Court's remand order returned this case to the trial court in a presentence posture, entitling the trial court to consider de novo whether defendant's conduct justified an out-of-guidelines sentence. After receiving updated sentencing information, the trial court chose to impose a sentence exceeding the range recommended by the sentencing guidelines. Its out-of-guidelines sentence was reasonable, given defendant's extensive criminal history and tendency to reoffend. Therefore, for the reasons stated in this opinion, we affirm defendant's sentence.

SERVITTO and REDFORD, JJ., concurred with METER, P.J.

PEOPLE v OLNEY

Docket No. 343929. Submitted March 7, 2019, at Lansing. Decided March 14, 2019, at 9:00 a.m. Leave to appeal sought.

Casey L. Olney was charged in the 12th District Court with first-degree home invasion, MCL 750.110a(2); assault by strangulation, MCL 750.84; interfering with electronic communications, MCL 750.540(5)(a); and domestic violence, MCL 750.81(2). Although the complainant had been subpoenaed, she did not appear for the preliminary examination. Despite the complainant's absence, the court, R. Darryl Mazur, J., in accordance with MCL 768.27c, permitted a police officer to testify at the preliminary examination regarding statements the complainant had made to the police officer as substantive evidence for the purpose of establishing probable cause. Defendant was bound over for trial in the Jackson Circuit Court. Defendant moved to quash the bindover, and the circuit court, John G. McBain, J., granted defendant's motion, holding that the police officer's testimony was inadmissible because the district court did not declare the complainant unavailable and because the officer's testimony violated the Confrontation Clause of the Sixth Amendment of the United States Constitution. The prosecution appealed.

The Court of Appeals *held*:

1. In order to bind a defendant over for trial in the circuit court, the district court must find probable cause that the defendant committed a felony. Absent an abuse of discretion, a reviewing court should not disturb the district court's bindover decision. MCL 768.27c(1) provides that evidence of a statement by a declarant is admissible if all of the following apply: the statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant; the action in which the evidence is offered under this section is an offense involving domestic violence; the statement was made at or near the time of the infliction or threat of physical injury; the statement was made under circumstances that would indicate the statement's trustworthiness; and the statement was made to a law enforcement officer. In this case, the circuit court erred because it imposed an additional condition—unavailability—not found in the plain and unambiguous language of MCL 768.27c.

Nothing in the statutory language of MCL 768.27c suggested that the Legislature intended to impose an unavailability requirement. Moreover, imposing an unavailability requirement would essentially nullify the statute. Accordingly, the circuit court abused its discretion when it granted defendant's motion to quash on that basis.

2. The preliminary examination is a statutory right, and the rules of evidence apply. The evidentiary threshold for a preliminary examination is a probable-cause determination whether a crime has been committed and, if so, whether the defendant was the culprit. Probable cause requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. In this case, the domestic-abuse exception to the hearsay rule as embodied in MCL 768.27c allowed for the complainant's statement to be admitted, and the statement was, therefore, legally admissible evidence. The district court properly concluded that, based on the police officer's testimony regarding the complainant's statements, there was probable cause to believe that defendant committed the crimes of home invasion, domestic abuse, strangulation, and interference with an electronic device.

3. US Const, Am VI provides, in relevant part, that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him or her. MCL 768.27c may run afoul of the Confrontation Clause if the declarant is not available to testify at trial. However, the United States Supreme Court has never directly held that the Confrontation Clause applies at preliminary hearings. State and federal courts that have considered this precise issue have unanimously rejected the argument that the Confrontation Clause applies at preliminary examinations. Therefore, while the rules of evidence apply during a preliminary examination, the right of confrontation does not. In light of the relatively low burden of establishing probable cause that a crime has been committed and that defendant was the one who likely committed it, the circuit court abused its discretion when it granted defendant's motion to quash on the basis that defendant's right of confrontation was violated.

Reversed and remanded with instructions to reinstate the charges against defendant.

1. EVIDENCE — HEARSAY EXCEPTIONS — DOMESTIC VIOLENCE — STATEMENTS MADE TO LAW ENFORCEMENT OFFICERS.

Under MCL 768.27c, statements made to law enforcement officers are admissible in domestic-violence cases under certain circum-

stances; MCL 768.27c contains no requirement that the complainant be declared unavailable.

2. CRIMINAL LAW — CONSTITUTIONAL LAW — RIGHT OF CONFRONTATION — PRELIMINARY HEARINGS.

US Const, Am VI provides, in relevant part, that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him or her; the right of confrontation does not apply at a preliminary hearing.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Michael A. Faraone, PC (by *Michael A. Faraone*) for defendant.

Before: SAWYER, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM. Defendant was charged with first-degree home invasion, MCL 750.110a(2), assault by strangulation, MCL 750.84, interfering with electronic communications, MCL 750.540(5)(a), and domestic violence, MCL 750.81(2). Despite the complainant's absence, the district court, in accordance with MCL 768.27c, permitted a police officer to testify regarding statements the complainant had made as substantive evidence for the purpose of establishing probable cause. Defendant moved to quash the bindover in the circuit court. The circuit court held that the police officer's testimony was inadmissible because (1) the district court did not declare the victim-declarant "unavailable" and (2) the officer's testimony violated the Confrontation Clause of the Sixth Amendment of the United States Constitution. We reverse.

I. BASIC FACTS

Defendant was initially charged with first-degree home invasion and domestic violence. Although the prosecution subpoenaed the complainant for the preliminary examination, she did not appear. The prosecutor informed the district court that, despite the alleged victim's absence, the prosecution intended to proceed with the preliminary examination on the basis of the testimony of the law enforcement officer who responded to the scene, Deputy David Thomas of the Jackson County Sheriff's Office. The prosecutor stated that Thomas's hearsay testimony was admissible under MCL 768.27c, the statutory hearsay exception for statements to law enforcement officers made by victims of domestic violence under circumstances that would indicate the statement's trustworthiness. Defense counsel objected, noting that he did not believe that the statutory hearsay exception could apply to charges *other than* domestic abuse. The district court responded that the exception existed "for the very reason that the prosecutor is experiencing right now" because the prosecution had subpoenaed "someone that has either been intimidated or for whatever reason refuses to cooperate." As the actual examination began, the prosecutor informed the district court that "based upon what was told to the officer," he was adding charges of assault by strangulation and interfering with telephonic communications, which were not included in the original complaint.

Thomas testified that at approximately 9:30 a.m. on October 18, 2017, he responded to a residence in Liberty Township, Michigan, after dispatch informed him of a domestic-assault complaint and a possible violation of a conditional bond. When he arrived on site, the complainant was standing in the driveway.

Thomas described her demeanor as "[f]airly calm" and "not hysterical, but she was upset." When the prosecutor asked Thomas what the complainant had said to him, defense counsel objected and asked for "a continuing objection for any and all statements that are used that are *beyond the purpose of establishing a domestic violence* in this matter." That is, defense counsel continued to object to Thomas's testimony in a very limited way. While apparently conceding that the evidence was admissible for the purposes of establishing probable cause on the domestic-violence charges, defense counsel argued that the complainant's statement could not be used to establish probable cause for any other offense. In response, the district court stated:

> All right. Well we understand the nature of your objection. We briefly discussed the matter. The quandary is whether or not the statute permits hearsay given the circumstances of it being made to a police officer contemporaneous with the act itself and involving domestic [violence] applies to something beyond the charge of domestic violence. The Court is taking a flier at this point in time that it does. It's kind of in the spirit of the direction that the legislature seems to be going in almost eliminating probable cause or preliminary examinations. So I will allow the testimony and it can be reviewed by a superior court if it gets to that stage.

Thomas testified that the complainant had told him that she woke up to find defendant, her ex-boyfriend, in her apartment. Defendant was there to collect the money that the complainant admittedly borrowed from him and was supposed to have paid back the day before. The complainant told Thomas that when she yelled at defendant and told him that he was not supposed to have contact with her, defendant grabbed her by the neck and threw her to the ground. Defendant also took the complainant's cell phone, threw it on the ground,

and broke it. Thomas's report indicated that the complainant reported that she had trouble breathing. Thomas observed redness and irritation on the complainant's neck but did not take any photographs.

Following cross-examination, the district court reviewed MCL 768.27c and concluded that Thomas's "statement is admissible [if] the information is admissible." The district court found that the prosecution established probable cause, and defendant was bound over for trial.

Defendant filed a motion to quash in the circuit court, arguing that the use of Thomas's testimony to establish probable cause *for crimes other than domestic violence* violated defendant's constitutional right to confront his accuser. The circuit court issued a written opinion, the reasoning of which departed from the arguments made by defense counsel. The circuit court apparently rejected defendant's claim that the statute applied only to domestic-violence charges. It ruled:

> MCL 768.27(c)(1)(b) applies to offenses involving domestic violence, that being any offense that is connected to a domestic violence incident. For example a Home Invasion entering without permission, one of the elements is "that when defendant entered the dwelling, he/she intended to commit State offense" if the offense is domestic violence or related to a domestic violence then the exception would apply, but if the offense is larceny for example then the exception would not apply.

However, the circuit court went on to add that when it enacted MCL 768.27c, the Legislature intended to carve out an additional hearsay exception when the complainant was unavailable, similar to the exception found in MRE 804(b). The circuit court interpreted MCL 768.27c as requiring that "first the victim must be declared unavailable then and only then can you use

this exception to hearsay." The court then concluded that, because the complainant was not declared unavailable, the exception did not apply.

The circuit court also held that the exception could not apply because the statements of the complainant

> are testimonial, and that by not having [the complainant] there the Confrontation Clause of the sixth amendment was violated. Furthermore the exception to the hearsay rule found in MCL 768.27[c], extends on MRE 804(b) and you must first get passed [sic] the Confrontation Clause of the Sixth amendment before you can use a hearsay exception.

The circuit court granted the motion to quash and dismissed the charges against defendant.

The prosecution now appeals by right.

II. ANALYSIS

A. STANDARD OF REVIEW

> In order to bind a defendant over for trial in the circuit court, the district court must find probable cause that the defendant committed a felony. This standard requires evidence of each element of the crime charged or evidence from which the elements may be inferred. Absent an abuse of discretion, a reviewing court should not disturb the district court's bindover decision. An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. [*People v Anderson*, 501 Mich 175, 181-182; 912 NW2d 503 (2018) (quotation marks and citation omitted).]

"Questions of statutory interpretation are reviewed de novo." *Id*. at 182. Constitutional issues are likewise reviewed de novo. *People v Pennington*, 240 Mich App 188, 191; 610 NW2d 608 (2000).

B. THERE IS NO UNAVAILABILITY REQUIREMENT IN MCL 768.27c

The prosecution argues that the circuit court erred by dismissing the charges against defendant because, contrary to the circuit court's decision, MCL 768.27c contains no requirement that the complainant-declarant be unavailable in order to admit evidence of a statement that otherwise satisfies the statutory requirements. We agree.

"In MCL 768.27c, the Legislature determined that under certain circumstances, statements made to law enforcement officers are admissible in domestic violence cases." *People v Meissner*, 294 Mich App 438, 445; 812 NW2d 37 (2011). This provision is "a substantive rule of evidence reflecting specific policy concerns about hearsay[1] in domestic violence cases." *Id*. MCL 768.27c(1) provides:

> (1) Evidence of a statement by a declarant is admissible if all of the following apply:
>
> (a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> (b) The action in which the evidence is offered under this section is an offense involving domestic violence.
>
> (c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.
>
> (d) The statement was made under circumstances that would indicate the statement's trustworthiness.

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[1] " 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c).

> (e) The statement was made to a law enforcement officer.

The circuit court erred because it imposed an additional condition not found in the plain and unambiguous language of MCL 768.27c.

> When interpreting a statute, our primary goal is to ascertain and give effect to the Legislature's intent. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). In so doing, we assign each word and phrase its plain and ordinary meaning within the context of the statute. *People v Kowalski*, 489 Mich 488, 498; 803 NW2d 200 (2011); MCL 8.3a. We must also avoid any construction that would render any part of a statute surplusage or nugatory, if possible. *People v Rea*, 500 Mich 422, 428; 902 NW2d 362 (2017). [*People v Sharpe*, 502 Mich 313, 326-327; 918 NW2d 504 (2018).]

Nothing in the statutory language of MCL 768.27c suggests that the Legislature intended to impose an unavailability requirement. The Legislature did not use the word "unavailable" or its equivalent at any point in drafting the statute. We decline to judicially impose a requirement that has no basis in the statutory language.

Moreover, imposing an unavailability requirement would essentially nullify the statute. In *Meissner*, this Court held that MCL 768.27c permitted the prosecution to introduce a domestic-violence victim's statements to law enforcement after the victim recanted her allegations during her trial testimony. *Meissner*, 294 Mich App at 450-451. Of particular importance to the resolution of this case, the *Meissner* Court also recognized that "[c]ertain testimony offered pursuant to MCL 768.27c may be subject to challenge based on the Confrontation Clause"

of the United States Constitution and its state constitutional counterpart. *Id*. at 446 n 2. This warning presupposes that the absence of the declarant—rather than being a requirement for employing the statute, as the circuit court held in this case—might preclude the exception's application at trial.

The circuit court erred as a matter of law in holding that there is an "unavailability" requirement under MCL 768.27c. It consequently abused its discretion when it granted defendant's motion to quash on that basis.

C. THE RIGHT OF CONFRONTATION AT A PRELIMINARY EXAMINATION

The prosecution next argues that because Thomas's testimony concerning the complainant's statement was admissible under MCL 768.27c, the prosecution established probable cause and the circuit court abused its discretion when it determined that defendant's right of confrontation was violated. We agree.

In contrast to the evidence needed to convict a defendant at trial, the quantum of evidence needed to bind over a defendant is much lower. Our Supreme Court has explained:

> The purpose of the preliminary examination is to determine whether a felony has been committed and whether there is probable cause for charging the defendant therewith. If there is probable cause, the magistrate must bind the defendant to appear before the circuit court, or other court having jurisdiction of the cause, for trial.
>
> As this Court explained in *People v Yost*, [468 Mich 122, 126; 659 NW2d 604 (2003)], "[p]robable cause requires a quantum of evidence 'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief' of the accused's guilt." This standard is less rigorous than the requirement to find guilt beyond a

> reasonable doubt to convict a criminal defendant, and "the gap between probable cause and guilt beyond a reasonable doubt is broad . . . ." [*People v Plunkett*, 485 Mich 50, 57; 780 NW2d 280 (2010) (quotation marks and citations omitted; brackets and ellipses omitted).]

"The testimony of the complainant is not necessarily required at every preliminary examination if sufficient other evidence is produced." *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989). The preliminary examination is a statutory right, and the rules of evidence apply. See MCL 766.11b(1) ("The rules of evidence apply at the preliminary examination . . . ."); MCR 6.110(C) ("The court must conduct the examination in accordance with the Michigan Rules of Evidence.").

The evidentiary threshold for a preliminary examination is a probable-cause determination whether a crime has been committed and, if so, whether the defendant was the culprit. Only legally admissible evidence may be used. The domestic-abuse exception to the hearsay rule as embodied in MCL 768.27c allows for a declarant's statement to be admitted under certain circumstances and is, therefore, legally admissible evidence. The district court properly concluded that, based on Thomas's testimony regarding the complainant's statements, there was probable cause to believe that defendant committed the crimes of home invasion, domestic abuse, strangulation, and interference with an electronic device.

As previously stated, the circuit court was operating under the misconception that the complainant had to be "unavailable." On that basis alone, reversal is required. In the event the parties or the circuit court are inclined to revisit the Confrontation Clause issues, we provide the following guidance. In this case, the

prosecution concedes that, at trial, despite MCL 768.27c, the Sixth Amendment would likely bar the admission of Thomas's testimony to relate what the complainant said. The amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. [US Const, Am VI.]

As previously stated, in *Meissner* this Court expressly recognized that MCL 768.27c may run afoul of the Confrontation Clause if the declarant is not available to testify *at trial*. However, the United States Supreme Court has never directly held that the Confrontation Clause applies at preliminary hearings. The United States Supreme Court has stated that "[t]he right to confrontation is basically a trial right." See *Barber v Page*, 390 US 719, 725; 88 S Ct 1318; 20 L Ed 2d 255 (1968). Similarly, in *Pennsylvania v Ritchie*, 480 US 39, 52; 107 S Ct 989; 94 L Ed 2d 40 (1987), the Court concluded that the right to confrontation "is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination."

State and federal courts that have considered this precise issue have unanimously rejected the argument that the Confrontation Clause applies at preliminary examinations. See, e.g., *Commonwealth v Ricker*, 120 A3d 349, 357; 2015 Pa Super 153 (2015) (holding that hearsay evidence alone is sufficient to establish probable cause at a preliminary hearing); *State v O'Brien*, 354 Wis 2d 753, 773; 2014 WI 54; 850 NW2d 8 (2014)

("Our precedent is consistent with that of other jurisdictions which have determined that a defendant's right to confront accusers is a trial right that does not apply to preliminary examinations."); *Peterson v California*, 604 F3d 1166, 1170 (CA 9, 2010) (concluding that "the admission of hearsay statements at a preliminary hearing does not violate the Confrontation Clause"); *United States v Andrus*, 775 F2d 825, 836 (CA 7, 1985) (holding that "the sixth amendment does not provide a confrontation right at a preliminary hearing"); *United States v Harris*, 458 F2d 670, 677 (CA 5, 1972) ("There is no Sixth Amendment requirement that [the defendant] be allowed to confront [the witness] at a preliminary hearing prior to trial."); *Whitman v Superior Court of Santa Clara Co*, 54 Cal 3d 1063, 1082; 820 P2d 262 (1991) ("A preliminary hearing is not designed to be a dress rehearsal for the trial.").

Therefore, while the rules of evidence apply during a preliminary examination, the right of confrontation does not. In light of the relatively low burden of establishing probable cause that a crime has been committed and that defendant was the one who likely committed it, the circuit court abused its discretion when it granted defendant's motion to quash on the basis that defendant's right of confrontation was violated.

Reversed and remanded with instructions to reinstate the charges against defendant. We do not retain jurisdiction.

SAWYER, P.J., and CAVANAGH and K. F. KELLY, JJ., concurred.

In re AGD, MINOR

Docket No. 345717. Submitted March 6, 2019, at Detroit. Decided March 14, 2019, at 9:05 a.m.

Petitioners (the mother and the stepfather of the minor child) filed an action in the Genesee Circuit Court, Family Division, seeking termination of the parental rights of the child's legal father (respondent) and consent from the court for petitioner-stepfather to adopt the child. Petitioner-mother was unmarried when the child was born in 2015. Respondent executed an affidavit of parentage but had not seen the child since the child was eight months old. Respondent had a history of heroin abuse, obtained treatment, and had been sober for about one year in April 2018 when he filed to reestablish contact with the child. Respondent requested parenting time, a child custody determination, and entry of a child support order. Two months after respondent filed his complaint, petitioners filed their action. On the petition form supplied by the State Court Administrative Office, petitioner-mother indicated that she had custody of the child according to a court order. However, at a September 2018 hearing, the court, Jennie E. Barkey, J., found that no custody order existed and held as a matter of law that petitioners were not entitled to initiate their action under MCL 710.51(6) because the statute requires that the petitioning parent have custody of the child according to a court order. Petitioners appealed.

The Court of Appeals *held*:

1. The doctrine of vertical stare decisis provides that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction; consequently, a decision of the majority of justices of the Supreme Court is binding on lower courts. When a statute is amended after the Supreme Court decided a case involving the interpretation of the statute, lower courts are not bound to follow the Supreme Court's interpretation of a statute if the intervening amendment clearly superseded the Supreme Court's interpretation. MCL 710.51(6), the statutory provision in dispute here, was amended by 2016 PA 143 after the Supreme Court decided *In re AJR*, 496 Mich 346 (2014). In *In re AJR*, the Supreme Court had construed the meaning of the

phrase "the parent having legal custody of the child" in MCL 710.51(6) as requiring the parent to have sole legal custody of the child. In place of the language construed in *In re AJR*, the amended version of MCL 710.51(6) contains the phrase "a parent having custody of the child according to a court order," a much broader requirement than the requirement in the former version of MCL 710.51(6). The construction of former MCL 710.51(6) was clearly superseded by the language in 2016 PA 143 because the public act directly amended the operative statutory language on which the Supreme Court relied in *In re AJR*, and the Court of Appeals was not bound to follow the Supreme Court's construction of former MCL 710.51(6).

2. A provision of a statute is ambiguous if it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning. The pertinent language in MCL 710.51(6) is not ambiguous. Application of the last-antecedent rule does not result in ambiguity; "according to a court order" modifies the immediately preceding phrase "custody of the child," and the two phrases should be read as one unit. The basic sentence structure of MCL 710.51(6) is a logical construct—if *x*, then *y*—with a few disjunctive uses of "or" providing alternative options and with commas setting off dependent clauses. The meaning that is plainly expressed by the grammatical context is as follows: "[1] If [a] the parents of a child are divorced, or if [b] the parents are unmarried but the father [*i*] has acknowledged paternity or [*ii*] is a putative father who meets the conditions in [MCL 710.39(2)], and [2] if [a] a parent having custody of the child according to a court order subsequently marries and [b] that parent's spouse petitions to adopt the child, [then] the court upon notice and hearing may issue an order terminating the rights of the other parent if [3] both of the following occur . . . ." The phrases "and if" and "or if" have distinct meanings; the words "and" and "or" are not interchangeable, and their strict meaning should be followed when their accurate reading does not render the sense dubious and when there is no clear legislative intent to have the words or clauses read in the conjunctive. In this sentence, affording those words their respective conjunctive and disjunctive meanings does not render the provision unintelligible, nor is there any clear legislative intent that would require a different interpretation. The clause that addresses unmarried parents is not an independent clause separated from the first clause with commas. Rather, the clause that addresses unmarried parents is a dependent clause as is the clause that addresses divorced parents. The phrase "custody of a child according to a court order" applies to divorced parents, and it applies to unmarried parents when the

father has either acknowledged parentage or is a putative father who satisfies the conditions in MCL 710.39(2). The trial court properly interpreted MCL 710.51(6), as amended by 2016 PA 143, as requiring petitioner-mother to have custody of the child according to a court order because she and respondent were unmarried at the time of the child's birth and respondent had acknowledged parentage of the child.

3. In addition to asserting that the statutory language was ambiguous, petitioners asserted that the trial court's statutory interpretation would render part of MCL 710.51(6) nugatory because there would never be a situation in which a mother who has custody by court order could petition to terminate the rights of a putative father. Although a mother's acquisition of a court order awarding her custody of the child would make a putative father a legal father for purposes of MCL 710.51(6), the existence of that possibility does not render nugatory the entire clause pertaining to putative fathers. The assertion that "custody according to a court order" negates the clause that addresses putative fathers rests on an oversimplification of the statutory provision and on an assumption that MCL 710.51(6) only applies in cases involving traditional familial arrangements. Moreover, the definition of "putative father" in MCR 3.903(A)(24) does not render part of MCL 710.51(6) nugatory because "putative father" in MCL 710.51(6) cannot be construed by reference to the definition of "putative father" that appears in MCR 3.903(A)(24). "Putative father" was added to MCR 3.903 in 2003, roughly three decades after the term "putative father" was added to MCL 710.51(6). Consequently, an analysis of MCL 710.39(2) is necessary to decide who qualifies as a putative father for purposes of MCL 710.51(6). MCL 710.39(2) provides that a putative father's parental rights shall not be terminated except by proceedings in accordance with MCL 710.51(6) or MCL 712A.2 (the juvenile code) whenever the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with the putative father's ability to provide support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served on him. However, when the father of a child born to unmarried parents has not taken steps to establish a custodial or supportive relationship with the child, 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 married father. The trial court's conclusion that "custody according to a court order" applied to divorced parents

and to unmarried parents when the father either acknowledged parentage or was a putative father who satisfied the conditions in MCL 710.39(2) did not negate any part of MCL 710.51(6) and therefore did not invalidate its application in this case. The trial court did not err by ruling that MCL 710.51(6) requires a parent who was unmarried at the time of the child's birth to have custody of the child according to a court order before the parent's spouse's petition for stepparent adoption and the parent's accompanying petition for the termination of the other parent's parental rights may be considered.

Affirmed.

CHILDREN BORN OUT OF WEDLOCK — STEPPARENT ADOPTION AND TERMINATION OF PARENTAL RIGHTS.

The requirement under MCL 710.51(6) that a parent petitioning for termination have custody according to a court order applies to divorced parents and to parents who were unmarried at the time of the child's birth when the child's father has either acknowledged paternity or is a putative father who meets the conditions in MCL 710.39(2).

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Andrea Muroto*) for petitioners.

Gentry Nalley, PLLC (by *Kevin S. Gentry*) for respondent.

Before: BORRELLO, P.J., and SWARTZLE and CAMERON, JJ.

CAMERON, J. This dispute requires us to interpret the stepparent adoption statute, MCL 710.51(6), and to determine whether a parent in all cases must have custody according to a court order before a court can terminate the parental rights of the other parent. Petitioners are the mother and stepfather of the minor child, and they appeal the trial court's order denying their request to terminate under MCL 710.51(6) the parental rights of respondent, the minor child's legal father. On appeal, petitioners argue that the trial court

erred by interpreting MCL 710.51(6) as requiring that petitioner-mother have court-ordered custody of her child before seeking termination of respondent's parental rights. We disagree and therefore affirm the decision of the trial court.

I. FACTUAL AND LEGAL BACKGROUND

Petitioner-mother was unmarried when her child was born in 2015. Respondent is the child's legal father by way of an affidavit of parentage. According to respondent, he has not seen the child since 2015, when the child was eight months old. Respondent has a history of heroin abuse, and he was in residential treatment for his addiction in 2017. While respondent's work history is unclear from the record, he did have a job while in "sober living" and had been sober since March 15, 2017.

In April 2018, respondent filed a complaint seeking to reestablish contact with his child. Respondent requested parenting time and a child-custody determination, and he also requested entry of a child-support order. Two months later, petitioners filed their petition seeking consent from the court for the child's stepfather to adopt the child. Petitioners also sought termination of respondent's parental rights. In her supplemental petition and affidavit to terminate respondent's parental rights, petitioner-mother represented that she had custody of her child according to a court order.[1] At a September 2018 hearing, however, the trial court found that neither a child-support order nor a custody order existed. On the basis of that evidence, the trial court held "that as a matter of law," petitioners had "failed to meet the threshold procedural requirement of

[1] On the form issued by the State Court Administrative Office (SCAO), petitioner-mother signed an affidavit indicating she had custody of AGD according to a court order. SCAO, *Form PCA 302* (June 2017).

MCL 710.51(6)." The trial court noted that MCL 710.51(6) had been amended by 2016 PA 143,[2] effective September 5, 2016, and held, on the basis of the plain meaning expressed by the *current* statutory language, that the child's mother was not entitled to petition for the termination of respondent's parental rights because she did not have "custody of the child according to a court order." The trial court concluded that even if the parents were unmarried and the father acknowledged paternity or was a putative father according to MCL 710.39(2), petitioner-mother was required to have custody "according to a court order" before seeking the termination of respondent's parental rights in the context of stepparent adoption. MCL 710.51(6).

The trial court also held that even if petitioner-mother *had* been entitled to file her petition under MCL 710.51(6), the trial court nevertheless would have denied the requested relief, reasoning that petitioners had "failed to demonstrate by clear and convincing [evidence] that termination was warranted" or that "it would be in the best interest of the child[.]" The trial court further reasoned that because respondent had filed a complaint seeking parenting time and the establishment of a child-support order before petitioners had filed their petition under MCL 710.51(6), respondent expressed his desire to have contact with the minor child and to provide support for the child.

[2] The trial court concluded that the amendment of MCL 710.51(6) superseded the decision in *In re AJR*, 496 Mich 346, 356; 852 NW2d 760 (2014) (interpreting MCL 710.51(6), as amended by 1996 PA 409, and holding that "when consent to stepparent adoption has not or cannot be obtained, petitioners must follow the statutory procedures to obtain *sole* legal custody before seeking termination of the respondent-parent's parental rights under [former] MCL 710.51(6)") (emphasis added). In reaching its conclusion, the trial court observed that legislative-history materials suggested that 2016 PA 143 had been enacted in direct reaction to our Supreme Court's decision in *In re AJR*.

Therefore, the court reasoned, it would be premature to terminate respondent's parental rights under MCL 710.51(6) *before* a ruling was made regarding custody, parenting time, and child support.

On appeal, petitioners argue that the trial court erred by (1) interpreting MCL 710.51(6) as requiring that the petitioning parent have custody of the minor child "according to a court order" in *all* cases, even when the biological parents were never married; (2) finding that petitioners had failed to present clear and convincing evidence to satisfy all the required elements for termination under MCL 710.51(6); (3) concluding that the best interests of the minor child were not relevant as part of the inquiry under MCL 710.51(6); and (4) finding that petitioners had failed to present clear and convincing evidence that termination of respondent's parental rights was warranted.

II. STANDARD OF REVIEW

Questions of statutory interpretation are legal in nature, and thus they are reviewed de novo on appeal. *In re Hill*, 221 Mich App 683, 689; 562 NW2d 254 (1997). A trial court's factual findings during a proceeding to terminate parental rights under the Adoption Code are reviewed for clear error. *Id*. at 691-692. "A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *Id*. at 692.

III. ANALYSIS

Petitioners first argue that the trial court improperly interpreted and applied MCL 710.51(6) of the Adoption Code, MCL 710.21 *et seq*. We disagree.

A. VERTICAL STARE DECISIS

As a preliminary matter, the parties have not addressed an essential threshold question: whether this Court is free to announce a new construction of MCL 710.51(6) in light of our Supreme Court's decision in *In re AJR*, 496 Mich 346; 852 NW2d 760 (2014), and the doctrine of vertical stare decisis.

MCL 710.51, as amended by 2016 PA 143, provides:

> (6) If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if a parent having custody of the child according to a court order subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:
>
> (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition. A child support order stating that support is $0.00 or that support is reserved shall be treated in the same manner as if no support order has been entered.
>
> (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition.

The doctrine of vertical stare decisis, as defined by *Black's Law Dictionary* (10th ed), p 1626, is "[t]he doctrine that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction." As the trial court correctly noted, in *In re AJR*, our Supreme Court interpreted the language of *former*

MCL 710.51(6), as amended by 1996 PA 409, and held that "when consent to stepparent adoption has not or cannot be obtained, petitioners must follow the statutory procedures to obtain *sole* legal custody before seeking termination of the respondent-parent's parental rights." *In re AJR*, 496 Mich at 356 (emphasis added). Because MCL 710.51(6) was subsequently amended by 2016 PA 143, petitioners now ask this Court to disregard *In re AJR* and announce a new construction of MCL 710.51(6) based on the provision's amended wording, which differs significantly from the language that our Supreme Court relied on when interpreting former MCL 710.51(6) in *In re AJR*. The parties cite no authority, however, for the proposition that *In re AJR*'s construction of the statute is no longer binding on this Court.

"An elemental tenet of our jurisprudence, stare decisis, provides that a decision of the majority of justices of [the Supreme] Court is binding upon lower courts." *People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987). "The obvious reason for this is the fundamental principle that only [the Supreme] Court has the authority to overrule one of its prior decisions." *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006). "Until [it] does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided *or has become obsolete*." *Id*. (emphasis added). Accord *Rodriguez de Quijas v Shearson/American Express, Inc*, 490 US 477, 484; 109 S Ct 1917; 104 L Ed 2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

In past published decisions of this Court, there has been disagreement about whether this Court can, after the Legislature amends a statutory provision, disregard past decisions of our Supreme Court construing the provision as it was *formerly* drafted. However, our Supreme Court recently addressed that question in *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016), holding that this Court remains bound to follow the Supreme Court's interpretation of a since-amended statute if the intervening amendment merely "*undermined*" the foundations of the Supreme Court's prior decision, but not if the intervening amendment "*clearly* . . . superseded" the Supreme Court's interpretation. The Supreme Court acknowledged that this can be a thorny inquiry:

> Although one can determine with relative ease whether a case was overruled by this Court, we acknowledge that it is not always so easy to determine whether a case has been "clearly overruled or superseded" by intervening changes in the positive law. At one end of the spectrum are situations in which the Legislature has entirely repealed or amended a statute to expressly repudiate a court decision. In such situations, lower courts have the power to make decisions without being bound by prior cases that were decided under the now-repudiated previous positive law. [*Id*. at 191 n 32.]

"The other end of the spectrum is harder to define," but as a general rule, when the operative statutory language interpreted by the Supreme Court in the previous case remains the same after amendment, the intervening amendment of the statute does not clearly overrule or supersede the Supreme Court's prior interpretation. *Id*.

Under the framework delineated in *Associated Builders*, we conclude that this Court is not bound to follow *In re AJR*'s construction of former MCL 710.51(6) because

that construction was clearly superseded by 2016 PA 143. Importantly, 2016 PA 143 directly amended the operative statutory language that our Supreme Court relied on in deciding *In re AJR*: the phrase "*the* parent having *legal* custody of the child" was changed to "*a* parent having custody of the child *according to a court order* . . . ." (Emphasis added.) As held in *In re AJR*, 496 Mich at 348-349, the former version of MCL 710.51(6) required the parent to have "sole legal custody" of the child. However, the new language is clear that only "a" parent, rather than "the" parent, must have custody according to a court order—a much broader requirement. Consequently, 2016 PA 143 clearly superseded *In re AJR*'s construction of MCL 710.51(6), and this Court is therefore no longer bound to follow that construction.

While we agree with the trial court's interpretation of the statute, we are not persuaded by its reliance on legislative history to support its holding. It is true that several legislative bill analyses support the trial court's conclusion that the proposed amendment to 2016 PA 143 was intended to counter *In re AJR*'s holding and change the meaning that courts would ascribe to MCL 710.51(6), but such "legislative analyses should be accorded very little significance by courts when construing a statute." *In re Certified Question from the US Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). Legislative bill analyses, which are nothing more than the summaries and interpretations of unelected employees of the legislative branch, have been described by our Supreme Court as "a feeble indicator of legislative intent and . . . therefore a generally unpersuasive tool of statutory construction." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001). We similarly conclude that legislative bill analyses provide neither authoritative nor persuasive

insight into whether an intervening amendment of a statute supersedes prior Michigan Supreme Court interpretations. Because the amended language of MCL 710.51(6) unambiguously supersedes *In re AJR*'s construction of the statute, no further analysis is required or permitted.

B. STATUTORY ANALYSIS

We are now tasked with determining whether the trial court properly interpreted MCL 710.51(6), as amended by 2016 PA 143. We conclude that it did.

As our Supreme Court explained in *Sun Valley Foods Co v Ward*, 460 Mich 230, 236-237; 596 NW2d 119 (1999):

> The rules of statutory construction are well established. The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. This task begins by examining the language of the statute itself. The words of a statute provide the most reliable evidence of its intent . . . . If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent.
>
> In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. As far as possible, effect should be given to every phrase, clause, and word in the statute. [Quotation marks and citations omitted.]

"A provision of a statute is ambiguous only if it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning." *Bedford*

Pub Sch v Bedford Ed Ass'n MEA/NEA, 305 Mich App 558, 565; 853 NW2d 452 (2014).

"Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *Walters v Leech*, 279 Mich App 707, 709-710; 761 NW2d 143 (2008). "The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. If statutes lend themselves to a construction that avoids conflict, that construction should control." *Id*. at 710 (citation omitted).

We disagree with petitioners' suggestion that the pertinent language in MCL 710.51(6) is ambiguous. Petitioners assert that the language of MCL 710.51(6) is ambiguous because it is unclear whether all parents petitioning for stepparent adoption must have custody "according to a court order" or whether this applies only to the first clause of the sentence and is therefore limited to divorced parents. Specifically, petitioners first posit that under the last-antecedent rule of statutory construction, the statute is ambiguous because it is unclear whether the phrase "according to a court order" applies *only* to a divorced parent who later remarries and files a petition seeking stepparent adoption under MCL 710.51(6), or whether the phrase also applies to the putative-father situation addressed by the statutory language. Under those same principles of grammar and statutory interpretation, we find no ambiguity.

As this Court recently noted in *In re Rhea Brody Living Trust (On Remand)*, 325 Mich App 476, 490; 925 NW2d 921 (2018):

> "Because the Legislature is presumed to know the rules of grammar, . . . statutory language must be read within its grammatical context unless something else was clearly

> intended . . . ." *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 315; 683 NW2d 148 (2004). "Proper syntax provides that commas usually set off words, phrases, and other sentence elements that are parenthetical or independent." *Dale v Beta-C, Inc*, 227 Mich App 57, 69; 574 NW2d 697 (1997). Moreover, "[i]t is a general rule of grammar and of statutory construction that a modifying word or clause is confined solely to the last antecedent, unless a contrary intention appears." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).
>
> The "last antecedent" of a given term or phrase is " 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence . . . .' " *People v English*, 317 Mich App 607, 614; 897 NW2d 184 (2016) (opinion by WILDER, P.J.), quoting 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 47:33, pp 494-497.

In this circumstance, the last-antecedent rule does not support petitioners' argument that the statute is ambiguous. The last word, phrase, or clause that can be made an antecedent of the modifying phrase "according to a court order"—without impairing the meaning of the sentence—is the phrase "custody of the child." Put differently, the phrase "according to a court order" modifies the immediately preceding phrase "custody of the child." Its meaning is clarified by reading the two phrases as one unit—i.e., "custody of the child according to a court order." Thus, we do not find the last-antecedent rule particularly helpful, and it certainly does not render the statute ambiguous.

We similarly disagree that other rules of grammar render the statute ambiguous. The provision at issue can be broken down as follows. Before the colon that introduces the two subsections of the provision at issue, i.e., MCL 710.51(6)(a) and (b), there is a single complete sentence, which consists of four comma-separated clauses: (1) "If the parents of a child are divorced," (2) "or if the parents are unmarried but the

father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter," (3) "and if a parent having custody of the child according to a court order subsequently marries and that parent's spouse petitions to adopt the child," (4) "the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur: . . . ." Petitioners insist that rules of grammar dictate that the second clause, which involves unmarried parents, is an independent clause that stands alone and that unmarried parents therefore are not subject to the court-order requirement. Petitioners argue that because the phrase "according to a court order" appears in the third clause of the sentence and is separated from the first two clauses by commas, that phrase should be interpreted as applying only to the *first* clause. Petitioners support this argument by asserting that the sentence's second clause "is an independent clause, since it is set off by commas." This argument is unpersuasive.

A basic principle of grade-school grammar is that an independent clause is one that can stand alone as a complete sentence. In other words, an independent clause is a complete thought that stands by itself as a simple sentence or is part of a complex sentence in which there is at least one dependent clause. By contrast, dependent clauses are clauses in a complex sentence that cannot stand alone as complete sentences. Thus, contrary to petitioners' assertion, a clause is not independent just because it is separated by commas from the surrounding text.

In this case, the second clause at issue here—"or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter"—is a depen-

dent clause because it is not a complete thought and cannot stand alone as a grammatically correct sentence. The independent clause is the fourth one, which *can* stand alone as a complete sentence: "[T]he court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur[.]" Therefore, the operative clause at issue here is a dependent clause, making up part of the complex sentence overall.

Accordingly, petitioners' proposed construction of MCL 710.51(6) is unpersuasive on its grammatical merits. In context, it is clear that the commas that set off the first three dependent clauses of the sentence from the fourth independent clause are parenthetical in nature. The basic sentence structure is a logical construct—if *x*, then *y*—with a few disjunctive uses of "or" providing alternative options. The meaning that is plainly expressed by the grammatical context is as follows: "[1] If [a] the parents of a child are divorced, or if [b] the parents are unmarried but the father [*i*] has acknowledged paternity or [*ii*] is a putative father who meets the conditions in section 39(2) of this chapter, and [2] if [a] a parent having custody of the child according to a court order subsequently marries and [b] that parent's spouse petitions to adopt the child, [then] the court upon notice and hearing may issue an order terminating the rights of the other parent if [3] both of the following occur . . . ."

To arrive at petitioners' contrary interpretation, one is forced to ignore the plain meaning that is expressed by the Legislature's decision to use "or" in the disjunctive sense and "and" in the conjunctive sense at different times, particularly in concert with the word "if." Put simply, petitioners' construction of the sentence does not assign distinct meanings to the phrases "and

if" and "or if." "As this Court has previously recognized, the words 'and' and 'or' are not interchangeable and their strict meaning should be followed when their accurate reading does not render the sense dubious and there is no clear legislative intent to have the words or clauses read in the conjunctive." *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n (On Remand)*, 317 Mich App 1, 14; 894 NW2d 758 (2016) (quotation marks and citation omitted). In this sentence, affording those words their respective conjunctive and disjunctive meanings does not render the provision unintelligible, nor is there any clear legislative intent that would require a different interpretation. For those reasons, we reject petitioners' attempt to inject ambiguity into the statute.

Petitioners also argue that the trial court's construction of the statute would render part of MCL 710.51(6) nugatory because there would never be a situation in which a mother who has custody according to a court order could petition to terminate the parental rights of a putative father.[3] In support, petitioners argue that under MCR 3.903(A)(24), a putative father is defined as one who has never obtained a court order to establish legal fatherhood. Thus, if a mother obtains a court order granting her custody, then that order would also change the status of the putative father to a legal father. Therefore, according to petitioners, "if all mothers are required to obtain a custody order before petitioning for stepparent adoption [under MCL 710.51(6)], then it would be impossible to petition for stepparent adoption against a *putative* father because there could never be a *putative* father under the Trial Court's interpretation." This argument is without merit.

[3] See *Sun Valley Foods Co*, 460 Mich at 237 ("As far as possible, effect should be given to every phrase, clause, and word in the statute.").

Among other things, petitioners' argument ignores several contemporary legal and societal realities, such as the fact that there can be more than one putative father, that a child's legal parents can differ from the child's biological parents, and that the custodial parent petitioning for termination under MCL 710.51(6) need not be the mother. In other words, petitioners' argument rests on oversimplification and on the tacit assumption that MCL 710.51(6) will only be applied in cases involving traditional familial arrangements.

Petitioners' view of the operation of MCL 710.51(6) is also inconsistent with the fundamental principle that MCL 710.51(6) must, as part of the Adoption Code, be construed *in pari materia* with several other acts that also relate to child custody and the rights of, among others, biological parents, adoptive parents, "presumed" fathers, "acknowledged" fathers, "genetic" fathers, and putative fathers generally, including the Child Custody Act, MCL 722.21 *et seq.*, the Acknowledgment of Parentage Act, MCL 722.1001 *et seq.*, the Paternity Act, MCL 722.711 *et seq.*, the Revocation of Paternity Act, MCL 722.1431 *et seq.*, the Genetic Parentage Act, MCL 722.1461 *et seq.*, and the Summary Support and Paternity Act, MCL 722.1491 *et seq*. As these acts demonstrate, this state has an extensive statutory scheme governing paternity disputes. See, e.g., *Jones v Jones*, 320 Mich App 248; 905 NW2d 475 (2017) (construing the Revocation of Paternity Act); *In re KH*, 469 Mich 621; 677 NW2d 800 (2004) (discussing the "presumption of legitimacy," the Paternity Act, and applicable court rules). A proper construction of MCL 710.51(6) cannot be reached without considering the statute's operation within this complex scheme.

Given that statutory context, we disagree with petitioners about the meaning of the term "putative father"

in MCL 710.51(6). Petitioners attempt to use the definition from MCR 3.903(A)(24)—" 'Putative father' means a man who is alleged to be the biological father of a child who has no father as defined in MCR 3.903(A)(7)"—to argue that the trial court's interpretation would render part of MCL 710.51(6) nugatory. To begin with, however, the term "putative father" was added to MCL 710.51(6) by 1982 PA 72, roughly three decades before MCR 3.903 was adopted in 2003. See *In re AJR*, 496 Mich at 360 n 29 (summarizing the history of MCL 710.51). As a matter of logic, our 1982 Legislature could not have intended for the term "putative father" to be construed by reference to a definition that was first set forth in a court rule in 2003. See *id*. at 359 ("Our inquiry is the intent of the Legislature that in 1980 added the provision . . . .").

More importantly, petitioners take the term "putative father" out of context. The full relevant phrasing is "putative father *who meets the conditions in section 39(2) of this chapter*," i.e., MCL 710.39(2).[4] (Emphasis added.) Therefore, instead of importing a definition for "putative father" from MCR 3.903(A)(24), this Court must look to MCL 710.39(2) to decide who qualifies as a "putative father" for purposes of MCL 710.51(6).

As this Court recognized in *In re BKD*, 246 Mich App 212, 215; 631 NW2d 353 (2001), in the context of adoption proceedings, MCL 710.39 acts to determine the

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[4] MCL 710.39(2) provides:

> If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with the putative father's ability to provide support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with [MCL 710.51(6)] or [MCL 712A.2].

parental rights of a putative father "[w]hen the parents of a child are unmarried . . . ." This is necessary because although a putative father is one who, by definition, has not legally established his paternity, see *In re MKK*, 286 Mich App 546, 558; 781 NW2d 132 (2009),[5] "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," *In re BKD*, 246 Mich App at 222. "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." *Id*.; see also *In re MKK*, 286 Mich App at 561 (noting that it remains an unsettled question in this state whether a putative father who has *not* established a custodial or supportive relationship with the child has any cognizable liberty interest in the child).

This separation of putative fathers into two distinct categories, in compliance with federal constitutional law, is precisely what MCL 710.39(1) and (2) accomplish. *In re MKK*, 286 Mich App at 559-560 & n 5. "[B]ecause proceedings under the Adoption Code routinely take precedence over separate paternity actions," *In re MGR*, 323 Mich App 279, 286; 916 NW2d

[5] Recently, in *In re MGR*, 503 Mich 877 (2018) (*In re MGR II*), the Supreme Court granted leave to appeal this Court's decision in *In re MGR*, 323 Mich App 279; 916 NW2d 662 (2018) (*In re MGR I*), which relied on *In re MKK* as binding precedent. One of the issues the Supreme Court has ordered the parties to address in *In re MGR* is whether *In re MKK* "should be overruled." *In re MGR II*, 503 Mich at 877.

662 (2018) (*In re MGR I*), lv gtd 503 Mich 877 (2018), without MCL 710.39, there would be a distinct risk that a biological father's protected liberty interest in his child could be impinged on by an order of adoption that was entered while the father's duly instituted paternity action remained pending. For instance, without MCL 710.39, which protects the interests of *putative* fathers as if they were *legal* fathers, a child whose unmarried mother had consented to the termination of her parental rights might be placed with and adopted by an unrelated couple before the biological father was ever afforded an opportunity to establish his paternity. Indeed, after considering such constitutional implications, this Court held that notwithstanding the protections afforded by MCL 710.39(1) and (2), a paternity action instituted by a putative father can represent "good cause" justifying the adjournment of pending adoption proceedings, at least under certain circumstances. *In re MKK*, 286 Mich App at 562.

With this legal backdrop in mind, petitioners' argument is logically unsound. Petitioners contend that under the trial court's construction of MCL 710.51(6), which would require a petitioning parent to have custody of the involved child "according to a court order," it would be "impossible" for a petitioning parent to petition for the termination of the rights of a putative father. Although this argument has facial appeal at first blush, it is ultimately incorrect. We will not list every factual scenario that may arise in the context of a putative father where the mother of the child has custody by way of a court order. However, we could certainly imagine a situation in which the mother was unmarried when the child was born and had never been divorced but nevertheless had custody of the minor child according to a court order and had petitioned to have the parental rights of the child's

putative father terminated. Therefore, the trial court's construction of MCL 710.51(6) does not render the phrase "putative father" nugatory and is plainly reflected in the statutory language. Thus, the trial court properly determined that a parent is only entitled to petition for termination under MCL 710.51(6) if the petitioning parent, at the time of the petition, has custody of the child at issue according to a court order.[6]

Lastly, petitioners argue that the trial court erred in its application of MCL 710.51(6) to the facts of this case. We need not reach this issue.

There is no dispute that petitioner-mother, although she had custody of the child, did not have custody according to a court order when petitioners filed their petition under MCL 710.51(6) and when the trial court ruled on that petition. Therefore, dismissal of the disputed petition was appropriately granted, and this Court need not consider or decide the other claims of error raised by petitioners on appeal because those claims are moot. *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016) ("A matter is moot if this Court's ruling cannot for any reason have a practical legal effect on the existing controversy.") (quotation marks and citation omitted).

Affirmed.

BORRELLO, P.J., and SWARTZLE, J., concurred with CAMERON, J.

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[6] Petitioners have misdirected their policy arguments concerning why the law ought to be different. "Arguments that a statute is unwise or results in bad policy should be addressed to the Legislature." *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 462; 639 NW2d 332 (2001). See also *In re AJR*, 496 Mich at 365 ("[T]o the extent that petitioners are dissatisfied with the remedy available to them in light of their circumstances, they may seek recourse from the Legislature.").

BLACKWELL v FRANCHI (ON REMAND)

Docket No. 328929. Submitted August 17, 2018, at Lansing. Decided March 14, 2019, at 9:10 a.m. Leave to appeal denied 505 Mich 1001 (2020).

Susan Blackwell filed a premises-liability complaint in the Oakland Circuit Court against Dean and Debra Franchi after she was injured in a fall in defendants' home. Plaintiff's injury occurred as she stepped into a dark mudroom off of defendants' front hallway, unaware of the eight-inch step that descended into the mudroom. Defendants moved for summary disposition, claiming that there was no genuine issue of material fact because the drop-off into the mudroom presented an open and obvious danger. The court, COLLEEN A. O'BRIEN, J., granted defendants' motion. Plaintiff appealed, and the Court of Appeals, SHAPIRO and GLEICHER, JJ. (K. F. KELLY, P.J., dissenting), reversed the circuit court's conclusion that the open and obvious danger doctrine barred plaintiff's claim. 318 Mich App 573 (2017). Defendants sought leave to appeal in the Supreme Court, and the Supreme Court denied defendants' request to review the holding but remanded the case to the Court of Appeals to consider whether defendants owed plaintiff a duty to warn about the step. 502 Mich 918 (2018).

On remand, the Court of Appeals *held*:

Defendants had a general duty to plaintiff as a licensee, and whether defendants violated their duty to plaintiff by their specific actions or omissions is a question for the fact-finder. A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees and should expect that they will not discover or realize the danger, and (b) he or she fails to exercise reasonable care to make the condition safe or to warn the licensees of the condition and the risk involved, and (c) the licensees do not know or have reason to know of the condition and the risk involved. *Case v Consumers Power Co*, 463 Mich 1 (2000), explained that whether an alleged tortfeasor's action violated that general standard of care is, in essence, a determination of the specific duty under the facts of the given case. In other words, when determining whether a defendant violated the gen-

eral standard of care, the jury must determine what a defendant need do (or not do) to meet that general standard under the specific facts before it. Two exceptions to this principle exist: the court sometimes decides a specific standard of care if it is of the opinion that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy. In considering whether there is an overriding judicially declared public policy, a determination of public policy must be more than a different nomenclature for describing the personal preferences of individual judges. In this case, there was no overriding legislative public policy that would require a court to determine the specific standard of care applicable in this case. Finally, reasonable persons could disagree on whether the alleged condition, i.e., the nonvisible change in floor level, presented an unreasonable risk of harm, whether plaintiff knew or had reason to know of the condition and the risk involved, and whether defendants should have expected that plaintiff would not have discovered the hazard before falling victim to it. Accordingly, the grant of summary disposition was again reversed.

Reversed and remanded to the circuit court for trial.

GLEICHER, J., concurring, agreed that a jury must determine whether defendants bear liability but wrote separately to expand the analysis and to respond to the dissent. The evidence substantiated that defendants knew of the abrupt drop-off between the hallway and the mudroom and that the room was unlit during the party; the remaining questions were whether the dark step involved an unreasonable risk of harm to a visitor unaware of it and whether defendants should have anticipated that plaintiff would not discover or realize the danger on her own. These questions were framed as standard-of-care issues: whether a duty exists is just another way of asking whether the general standard of care has been breached. General negligence principles support that the concept of duty encapsulates that of a standard of care. The dissent treated the question whether defendant had a duty to warn plaintiff of the step as one only of law and concluded that, as a matter of law, defendants owed no duty because defendants were entitled to expect that plaintiff would be on the alert to discover conditions that involved risk to her. Judge GLEICHER disagreed for three reasons. First, the dissent misperceived the nature of the duty. The duty of care owed to a social guest is quite minimal; however, the dissent would have social guests alone bear the legal responsibility for detecting conditions on the property that present an unreasonable risk of harm, and this proposition eliminates the landowner's duty entirely because it holds licensees responsible for

any risk that the guest could possibly have avoided. Second, plaintiff's failure to turn on the light is relevant not to defendants' duty but to her own. The determination of whether plaintiff should have looked for a light before walking into the mudroom depends on sorting and weighing the facts; therefore, it belongs only to the jury. Third, the dissent failed to distinguish between questions of fact and questions of law.

K. F. KELLY, P.J., dissenting, would have found that the step at issue did not give rise to a duty to warn and, absent a duty to warn, defendants could not be held liable. The step was remarkable only because it was in a dark room. However, that did not mean that the step posed an unreasonable risk of harm to plaintiff or that defendants should have expected that plaintiff would not discover the step. A social host is entitled to expect that social guests reasonably will discover for themselves commonplace potential dangers on the land without the assistance of an affirmative warning. The majority relied on *Case* for guidance on how to analyze whether a particular action or omission violates a general standard of care or general duty; however, the issue in *Case* had nothing to do with whether the defendant owed the plaintiffs a duty in the first instance. Rather, the issue was whether the defendant breached that duty. *Case* had no application in this case given that the Supreme Court's remand order specifically provided that there was no need to attack the duty element if the defendants owed no duty in the first place. Accordingly, Judge KELLY would have affirmed the trial court's order on the alternative basis that defendants owed plaintiff no duty under the circumstances.

Oliver Law Firm (by *Kevin S. Oliver* and *Lindsay F. Sikora*) for plaintiff.

Kopka Pinkus Dolin PLC (by *Mark L. Dolin* and *Steven M. Couch*) for defendants.

ON REMAND

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

SHAPIRO, J. This case returns to us on remand from the Supreme Court. The Court denied defendants' request to review our holding reversing the trial court's conclusion that the open and obvious danger doctrine

barred plaintiff's claim. The Court, however, remanded the case to us

> for consideration of this issue it has not yet addressed: whether defendants owed plaintiff a duty to warn about the step because the plaintiff did not know or have reason to know of the condition and the risk involved, and it involved an unreasonable risk of harm, and the defendants should not have expected that a licensee like the plaintiff would discover or realize the danger . . . . [*Blackwell v Franchi*, 502 Mich 918, 920 (2018) (quotation marks and citation omitted).]

Our prior opinion set forth the background to this case. *Blackwell v Franchi*, 318 Mich App 573; 899 NW2d 415 (2017). The condition alleged by plaintiff is a nonvisible[1] eight-inch floor level drop-off as one walks from the hallway in defendants' home into the darkened mudroom of that home. Plaintiff alleges that the nonvisible change in floor level caused her to fall as she attempted to enter the mudroom and that she suffered injury as a result. We conclude that defendants had a general duty to plaintiff as a licensee and that whether defendants violated that duty by their specific actions or omissions is a question for the fact-finder.

The general duty owed by premises owners to licensees is well settled and, as the Supreme Court's order observes, is properly articulated in Restatement Torts, 2d, § 342, p 210, as follows:

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

[1] Defendant does not concede that the drop-off was not visible; this presents a question of fact for the jury. But for purposes of this appeal we view the evidence in a light most favorable to plaintiff, the nonmoving party. *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). And deposition testimony supports plaintiff's position that the drop-off was nonvisible.

> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
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> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
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> (c) the licensees do not know or have reason to know of the condition and the risk involved. [*Blackwell*, 502 Mich at 918-919 (quotation marks and citation omitted).]

The Supreme Court has previously provided guidance on how to analyze whether a particular action or omission violates a general standard of care or general duty. In *Case v Consumers Power Co*, 463 Mich 1, 7; 615 NW2d 17 (2000), the Court explained that whether an alleged tortfeasor's action violated that general standard of care is, in essence, a determination of the specific duty under the facts of the given case. In other words, when determining whether a defendant violated the general standard of care, the jury must determine what a defendant need do (or not do) to meet that general standard under the specific facts before it:

> Ordinarily, it is for the jury to determine whether a defendant's conduct fell below the general standard of care. *Stated another way, the jury usually decides the specific standard of care that should have been exercised by a defendant in a given case*. [*Id*. (emphasis added).]

Case went on to quote the United States Supreme Court's caution to courts that in performing their responsibility to define general duties, they should not define what a defendant's specific duty was given the facts and circumstances of a particular case. That determination is left to the fact-finder:

> "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct

> shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. *The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court*. *It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs*." [*Id*. at 10, quoting *Grand Trunk R Co v Ives*, 144 US 408, 417; 12 S Ct 679; 36 L Ed 485 (1892) (emphasis added).]

Having said that, *Case* also acknowledged two exceptions to this principle: "[T]he court sometimes decides the specific standard of care if it is of the opinion 'that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy . . . .' " *Id*. at 7, quoting *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977) (emphasis omitted).

We find no overriding legislative public policy that would require a court to determine the specific standard of care applicable in this case. None has been cited to us, and our own research has not revealed any. And in considering whether there is an overriding judicially declared public policy, we are mindful of the Supreme Court's admonition that a determination of public policy "must be more than a different nomenclature for describing the personal preferences of individual judges . . . ." *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002). Undoubtedly, in any given case, some jurists might prefer that the specific standard of care be narrower or broader than that which a jury

might determine. However, those personal preferences cannot be said to constitute public policy grounds to remove the jury's power and responsibility to determine the specific standard of care. It is the trial court's role to give proper instructions concerning the general standard of care, but it is the jury's role to determine just what that general standard requires of a party under the specific facts and circumstances in a particular case. *Case*, 463 Mich at 7; *Moning*, 400 Mich at 438.

Given the lack of overriding policy concerns, we must next consider whether "all reasonable persons would agree" that the specific standard of care applicable under the facts of this case did not require defendants to warn plaintiff of the floor level change.[2] *Case*, 463 Mich at 7 (quotation marks and citation omitted). We hold that the answer to this question is "no" because a reasonable person could conclude that the specific standard of care in this case included

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[2] As the *Case* Court recognized:

> Clearly, "reasonable care under the circumstances" represents a sliding scale. The more severe the potential injury, the more resources a reasonable person will expend to try and prevent that injury. Similarly, the greater the likelihood that a severe injury will result, the greater the lengths a reasonable person will go to prevent it. This principle is widely recognized.[11]
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> [11] See *Dembicer v Pawtucket Cabinet & Builders Finish Co*, 58 RI 451, 455; 193 A 622 (1937) ("The greater the appreciable danger, the greater the degree of care necessary to constitute due or ordinary care"); *Wyrulec Co v Schutt*, 866 P2d 756, 762 (Wyo, 1993) ("[W]hat constitutes ordinary care increases as the danger increases. The concept of ordinary care accommodates all circumstances so that the degree of care varies with the circumstances."); *Webb v Wisconsin Southern Gas Co*, 27 Wis 2d 343, 350; 134 NW2d 407 (1965) ("The degree of effort, caution, or diligence required of a person to reach or attain the standard of ordinary care necessarily varies with the degree of hazard inherent under the circumstances").
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> [*Case*, 463 Mich at 9 & n 11.]

giving a warning to plaintiff and other licensees that upon entering the mudroom they would encounter an eight-inch drop-off that was not visible.[3] Put in the terms of the remand order, reasonable persons could disagree on whether the alleged condition, i.e., the nonvisible change in floor level, presented an unreasonable risk of harm, whether plaintiff knew or had reason to know of the condition and the risk involved, and whether defendants should have expected that plaintiff would not have discovered the hazard before falling victim to it.

Accordingly, we again reverse the grant of summary disposition and remand to the circuit court for trial. Plaintiff may tax her costs as the prevailing party. MCR 7.219(A). We do not retain jurisdiction.

GLEICHER, J., concurred with SHAPIRO, J.

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[3] This fundamental principle dates back to the earliest days of Michigan jurisprudence. As stated in *Detroit & Milwaukee R Co v Van Steinburg*, 17 Mich 99, 121 (1868), "[When] there is *any* uncertainty [as to negligence], it remains a matter of fact for the consideration of the jury[.]" (Emphasis added.) Even when the facts are not in dispute, it is for the jury, not the court, to determine the specific standard of care and whether it was breached.

> It is a mistake . . . to say . . . that when the facts are undisputed the question of negligence is necessarily one of law. . . . The fact of negligence is very seldom established by such direct and positive evidence that it can be taken from the consideration of the jury and pronounced upon as matter of law. On the contrary, it is almost always to be deduced as an inference of fact, from several facts and circumstances disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their force and weight considered. In such case the inference can not be made without the intervention of a jury, although all the witnesses agree in their statements, or there be but one statement which is consistent throughout. Presumptions of fact, from their very nature, are not strictly objects of legal science, like presumptions of law. [*Id*. at 122-123 (quotation marks and citation omitted).]

GLEICHER, J. (*concurring*). Susan Blackwell attended a holiday party in the Franchi home. Debra Franchi suggested that guests place their purses in the "mud room." A dimly lit hallway led from the Franchis' foyer to the mudroom. The mudroom itself was dark. Unbeknownst to Blackwell, there was an eight-inch drop between the hallway floor and that of the mudroom. Blackwell fell when she entered the mudroom. The question presented in our Supreme Court's remand order is whether the Franchis had a duty to warn Blackwell of the step.

Restatement Torts, 2d, § 342, p 210, establishes the duty of care the Franchis owed to Blackwell, a licensee. The duty has two components: a requirement that the landowner exercise reasonable care to make a known dangerous condition safe, and a duty to warn. *Id*. at § 342(b). A duty to warn arises when a landowner knows of a condition, "should realize that it involves an unreasonable risk of harm, . . . and should expect that [a licensee] will not discover or realize the danger . . . ." *Id*. at § 342(a). The lead opinion concludes that the evidence fulfills the Restatement requirements, necessitating that a jury determine whether the Franchis bear liability for the injuries Blackwell sustained when she fell. I concur and write separately to expand the lead opinion's analysis and to respectfully respond to the dissent.

I

The Restatement's provisions apply *generally* to premises-liability cases involving social guests and licensees. They have been adopted by our Supreme Court. *Preston v Sleziak*, 383 Mich 442, 453; 175 NW2d 759 (1970), overruled in part on other grounds by *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591

(2000).[1] In this sense, the duty applicable to this case is not subject to debate.

Legal duties such as § 342 incorporate broad policy choices. See *Stitt*, 462 Mich 591 (holding that as a matter of policy, a noncommercial visitor is a licensee rather than an invitee), and *MacDonald v PKT, Inc*, 464 Mich 322, 335; 628 NW2d 33 (2001) ("A premises owner's duty is limited to responding reasonably to situations occurring on the premises because, as a matter of public policy, we should not expect invitors to assume that others will disobey the law."). Courts select the policies reflected in *general* statements about duty.

Whether a general statement about duty extends to a defendant's *specific* conduct presents a question of fact for a jury. When a court has recognized that certain policy choices justify a duty and has defined its scope, a jury decides whether the duty has been breached. Professor Stephen Sugarman describes the distinction as follows:

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[1] The Supreme Court's remand order confines this Court's consideration of the Franchis' duty to the failure-to-warn component of § 342(a). Respectfully, this constraint strikes me as inconsistent with Justice MARKMAN's dissent. Both Justice MARKMAN and Judge KELLY urge that no duty existed here because Blackwell could and should have turned on the light, eliminating the danger of the drop-off. In other words, both dissenters contend that Blackwell could and should have made the premises reasonably safe *for herself*. Logically, however, if the relevant duty required a licensee to turn on the light despite her lack of awareness of the step, the landowner would bear the same duty—to turn on the light and make the room safe for invited guests directed to it. If the plaintiff bore a duty of care to make the room safe before she entered, it necessarily follows that the Franchis shared that duty, particularly since they had knowledge of the step. The component of Restatement Torts, 2d, § 342(b), requiring that a landowner "make the condition safe," I suggest, compels this conclusion. And because Justice MARKMAN and Judge KELLY rest their dissents on this aspect of the rule, it merits more discussion than the remand order permits.

> [M]ore broadly, the difference between the doctrines comes to this. "Breach/No breach" involves the evaluation of a specific defendant. Given what she knew or should have known, is there some way that the community (i.e., the jury, or perhaps the judge) thinks she should have acted otherwise? "No duty," however, is not a matter of making an evaluation of the specific facts of this case. Rather, it is a global determination that, for some overriding policy reason, courts should not entertain causes of action for cases that fall into certain categories. [Sugarman, *The Monsanto Lecture: Assumption of Risk*, 31 Val U L Rev 833, 843 (1997).]

Courts make the rules governing duty, and juries apply them.[2]

Restatement Torts, 2d, § 342 controls the duty analysis in this case and defines the duty's parameters. Our job is to apply that standard to the facts of the case and to decide a narrow question: is there a reason that a jury should not hear this dispute? I agree with the lead opinion that questions of fact demand a jury's resolution and that no other reason exists for a summary dismissal.

II

The evidence substantiates that the Franchis knew of the abrupt drop-off between the hallway and the mudroom and that the room was unlit during the party. Section 342 instructs that the remaining questions are whether the dark step involved an unreasonable risk of harm to a visitor unaware of it and whether the Franchis should have anticipated that Blackwell would not discover or realize the danger on her own.

[2] The narrow exception to this rule is that a court may summarily decide a *specific* duty question when reasonable minds cannot differ as to the application of a duty to a fact situation.

Affirmative answers mean that the Franchis bore a duty to warn Blackwell of the drop-off.

The lead opinion frames these questions as standard-of-care issues, explaining that whether a duty exists is just another way of asking whether the general standard of care has been breached. The dissent disapproves of that formulation. But general negligence principles support that the concept of duty encapsulates that of a standard of care. Here is Dean Prosser's take:

> "[D]uty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty. The distinction is one of convenience only, and it must be remembered that the two are correlative, and one cannot exist without the other. [Prosser & Keeton, Torts (5th ed), § 53, p 356.]

While the dissent finds it "inexplicabl[e]" that the lead opinion "discusses at length defendants' 'standard of care,' " the answers we seek are inextricably linked to that standard. Or, as Dean Prosser puts it, a duty "may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." *Id*.

Nomenclature aside, the real issue is not whether the law imposed a duty on the Franchis as premises owners; the Restatement and the Supreme Court say that it did. Rather, under the remand order, our task is to determine whether under the circumstances of this case, a jury should decide whether the Franchis had a duty to warn Blackwell of the step before she walked into the dark mudroom.

The dissent treats the duty question as one only of law. "[T]here was nothing to suggest that defendants should have known that plaintiff would not discover the step," the dissent insists, and therefore "[d]efendants were entitled to expect that [Blackwell] would be on the alert to discover conditions which involved risk to her." (Quotation marks, citation, and brackets omitted.) In the dissent's view, this means that as a matter of law, the Franchis owed no duty. I respectfully disagree for three reasons.

First, the dissent misperceives the nature of the duty described in the Restatement. The duty of care owed to a social guest is quite minimal. A landowner need not closely inspect her premises for dangers or latent defects. Nor does the duty entail "ensuring" a guest's safety, or even preparing a safe place for a visit. Rather, the Restatement imposes a duty on the landowner to use reasonable care when the landowner *knows* of a safety risk and can reasonably anticipate that a social guest does not. Essentially, the Restatement equally allocates risks. The landowner who knows of dangers in her home can protect herself from them. A landowner who provides social guests with that same knowledge conforms to the standard of care. Once the knowledge-sharing is accomplished, the guest and the landowner stand (or fall) on precisely the same factual and legal footings. Here, a simple warning of the step's presence and nothing more would have sufficed.

The dissent would have social guests alone bear the legal responsibility for detecting conditions on the property that present "an unreasonable risk of harm."[3]

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[3] The dissent suggests that the darkened step did not present an unreasonable risk of harm. I would agree that objectively, a well-lit eight-inch step is not dangerous. But an invisible eight-inch step poses

According to the dissent, Blackwell should have "discover[ed]" the step without being warned about it. But this proposition eliminates the landowner's duty entirely because it holds licensees responsible for any risk that the guest could possibly have avoided, including, in the example penned by Chief Justice MCCORMACK in her concurrence to the Supreme Court's remand order, that of "an open shark tank" at the bottom of the mudroom drop-off. *Blackwell v Franchi*, 502 Mich 918, 921 (2018) (MCCORMACK, J., concurring). Were such a tank installed just inside the entry to the dark mudroom, flicking on the light surely would have revealed it. In the dissent's view, however, a potentially discoverable danger—even a shark tank—is no danger at all if a guest can possibly dodge it even without knowing that the danger exists.

The dissent's second error relates inextricably to the first. Blackwell's failure to turn on the light is relevant not to the Franchis' duty, but to her own. This is called comparative negligence. The availability of the affirmative defense of comparative negligence in a premises liability case is well established. See *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 98; 485 NW2d 676 (1992). Should Blackwell have looked for a light before walking into the mudroom? Perhaps. That determination, however, depends on sorting and weighing the facts, including by comparing Blackwell's negligence with that of the Franchis. Therefore, it belongs only to the jury.

Finally and most importantly, the dissent fails to distinguish between questions of fact and questions of

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an entirely different risk. Whether that risk is "unreasonable" constitutes a jury question. "If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995).

law. The *general* duty applicable to this case is set forth in the Restatement. The dissent reasons that an "unremarkable" step could not have posed an "unreasonable" risk of harm, and therefore no *specific* duty of care existed in this case. It is certainly true that a normal, well-lit, eight-inch step is not objectively dangerous; objectively, the likelihood of injury for a person walking down a visible, everyday step approaches zero. But an invisible eight-inch step poses a different risk. We negotiate visible steps safely because we adjust our strides to account for the changes in riser heights. An unlit step escalates the risk of falling for the simple reason that we cannot anticipate and accommodate a change in tread level. Whether the risk posed by the unlit step into the mudroom was reasonable or unreasonable is a quintessential question of fact, particularly since the risk was known to the Franchis and could have been eliminated with minimal effort on their part. "If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995).[4]

III

In *Riddle*, 440 Mich at 96, the Supreme Court explained that "[o]nce a defendant's legal duty is established, the reasonableness of the defendant's conduct under that standard is generally a question for

[4] A more expansive discussion of the reasonableness of risk may be found in *Moning v Alfono*, 400 Mich 425, 450; 254 NW2d 759 (1977). In *Moning*, Justice CHARLES LEVIN cited 2 Restatement Torts, 2d, § 291, for the proposition that "[t]he reasonableness of the risk depends on whether its magnitude is outweighed by its utility." *Moning*, 400 Mich at 450. The social utility of a *darkened* step is zero.

the jury." In a premises-liability case also involving a step, the Supreme Court subsequently echoed that approach: "If the jury determines that the risk of harm was unreasonable, then the scope of the defendant's duty to exercise reasonable care extended to this particular risk." *Bertrand*, 449 Mich at 617. *Riddle* and *Bertrand* limit the court's role to determining whether a duty exists and to announcing its general contours. The jury figures out whether the specific risk is unreasonable and whether the landowner breached its duty of care. See M Civ JI 19.06 (incorporating these principles).

The lead opinion holds that reasonable people may disagree about whether an unwarned-of eight-inch drop-off into a darkened room presents an unreasonable risk of injury and whether Blackwell should have discovered that condition on her own. I agree that a jury may reasonably conclude that the step was invisible given that the room was dark and the hallway dimly lit, and that the drop-off was sudden enough to merit a warning. Neither of these propositions stretches credulity. A jury may also decide that Blackwell should have located and turned on the light before venturing into a dark and unknown place. Her theoretical ability to do so (we have no facts in this regard) does not extinguish the Franchis' general duty to licensees. A reasonable jury could decide that due to the step and the darkness, it was not safe to invite Blackwell to put her purse in the mudroom without supplying a warning. Or a jury may adopt the opposite views.

The point is that whether this step from a dim hallway into a dark room presents an unreasonable risk of harm is not a question that judges should answer. As with any determination of "reasonableness" in a negligence case, we rely on juries to weigh the utility of a

thing or of an actor's conduct and to compare that benefit to the likelihood of injury and the cost or bother of doing things a different way. Where the answers could go either way, as here, judges are in no better position than juries to make the call. More importantly, our common law has appointed the jury as the umpire of these disputes. I continue to concur with the lead opinion's conclusion that reversal of the grant of summary disposition is warranted.

K. F. KELLY, P.J. (*dissenting*). Once again, I respectfully dissent.

In my previous dissent, I expressed consternation that an invited guest would enter a darkened room to confront what she claims to be unknown and unidentified dangers and then be heard to complain when the homeowners failed to ensure her safety. I approached the matter through the lens of whether the "danger" plaintiff confronted was open and obvious. Our Supreme Court has left intact the majority's opposite conclusion that questions of fact remain as to whether the condition was open and obvious. *Blackwell v Franchi*, 502 Mich 918, 918 (2018). However, the Court remanded the case for us to consider defendants' alternative argument that no duty existed. In essence, the Supreme Court concluded that our previous opinions may have placed the cart before the horse by discussing the open and obvious danger without first ascertaining whether defendants owed plaintiff a duty in the instance.

The Supreme Court's order sets forth the duty owed by premises owners to licensees as found in Restatement Torts, 2d, § 342, p 210:

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved. [*Blackwell*, 502 Mich at 918-919 (quotation marks and citations omitted).]

The Court added:

> If the defendants had no duty to warn of the condition because it did not " 'involve[] an unreasonable risk of harm to [the plaintiff]' " or was not one that the defendants " 'should expect that [the plaintiff would] not discover,' " the plaintiff's prima facie negligence claim fails, regardless of the openness and obviousness of the condition . . . . A question of fact as to the openness and obviousness of the step is irrelevant if there is no prima facie claim. There is no need to "attack[] the duty element" if the defendants owed no duty in the first place. [*Blackwell*, 502 Mich at 919 (alterations in original).]

The Court noted that defendants had argued "that the particular condition complained of here—a single step in a dark room—was not a condition that a licensee would not know of or have reason to know of that posed an unreasonable risk of harm such that the defendants had a duty to warn." *Id*. To that end, the Supreme Court remanded

> for consideration of this issue it has not yet addressed: whether defendants owed plaintiff a duty to warn about the step because the plaintiff did not know or have reason to know of the condition and the risk involved, and it involved an unreasonable risk of harm, and the defendants should not have expected that a licensee like the plaintiff would discover or realize the danger . . . . [*Id*. at 920 (quotation marks omitted).]

On remand, the majority effectively leapfrogs over our only task—determining whether defendants owed plaintiff a duty—and inexplicably discusses at length defendants' "standard of care." The majority relies on *Case v Consumers Power Co*, 463 Mich 1, 7; 615 NW2d 17 (2000), for "guidance on how to analyze whether a particular action or omission violates a general standard of care or general duty." However, the case had nothing to do with premises liability. At issue in *Case* was whether the trial court erred when it instructed the jury that the defendant, a power company, was required to inspect and repair its electrical lines because electricity was inherently dangerous. The Court was asked to address the standard of care applicable to providers of electricity in stray-voltage cases. It determined that the "general standard of care is always 'reasonable care,' and it is for the jury to determine whether the defendant's conduct in a given case fell below that standard." *Case*, 463 Mich at 3.

The *Case* Court set forth the elements needed to establish a prima facie case of negligence: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Id*. at 6. "The disputed instruction in [*Case*] was intended to aid the jury in determining *whether defendant breached its duty* to plaintiffs to exercise 'reasonable care.' " *Id*. (emphasis added). Therefore, the issue in *Case* had nothing to do with whether the defendant *owed* the plaintiffs a duty in the first instance; rather, the issue was whether the defendant *breached* that duty. *Case* has no application here where our Supreme Court's remand order specifically provides that "[t]here is no need to attack the duty element if the defendants owed no duty in the first place." *Blackwell*, 502 Mich at 919 (quotation marks and citation omitted).

In keeping with the Supreme Court's remand order in this case, I would find that the step at issue did not give rise to a duty to warn and, absent a duty to warn, defendants cannot be held liable. The step is remarkable only because it was in a dark room. However, that does not mean that the step posed an unreasonable risk of harm to plaintiff or that defendants should have expected that plaintiff would not discover the step.

I do not mean to say that, as a matter of law, a homeowner will *never* owe a guest the duty to warn about a condition in a dark room, but, as Justice MCCORMACK aptly notes:

> The Restatement contemplates that a licensee will discover "conditions which are perceptible by his senses, or the existence of which can be inferred from facts within the licensee's knowledge." Restatement, § 342, comment *f*, p 212. Some conditions in a dark room will be more predictable than others . . . . The Restatement's standard thus assigns the homeowner a duty commensurate with the hazard: a slipper on the floor in a dark mudroom is different than an open shark tank in that same dark room. I trust the Court of Appeals can evaluate based on the record where the 8-inch step falls on that continuum. [*Blackwell*, 502 Mich at 921 (MCCORMACK, J., concurring).]

In reviewing the Supreme Court's remand order, concurrence, and dissent, the issues to be addressed are whether the condition itself—an unremarkable step—posed (1) an unreasonable risk of harm or (2) whether defendants should have expected that plaintiff would not discover the step.

The majority appears to concede that the unremarkable step did not pose an unreasonable risk of harm. It focuses entirely on whether defendants should have anticipated that plaintiff was not in a position to discover the step. However, there was nothing to suggest that defendants should have known that plaintiff

would not discover the step. Defendants "were entitled to expect that plaintiff would 'be on the alert to discover conditions which involve[d] risk' to her." *Blackwell*, 502 Mich at 932 (MARKMAN, C.J., dissenting), quoting Restatement, § 342, comment *f*, p 212. I agree with Chief Justice MARKMAN's statement that "a social host is entitled to expect that social guests reasonably will discover for themselves commonplace potential dangers on the land without the assistance of an affirmative warning." *Id*. at 931. I fully agree with Chief Justice MARKMAN's conclusion:

> I would reiterate today the principle of our common law that a social host may not be held liable for injuries suffered by a social guest from an allegedly dangerous condition of the land when the host had no reason to expect that the guest would reasonably fail to discover the condition. That is, hosts are not required to monitor or surveil their guests to ensure that they do not suffer injury from commonplace household conditions, conditions to which the hosts and their families themselves are ordinarily and routinely subject. Here, plaintiff was injured when she stepped into the darkened mudroom without turning on the light or otherwise ascertaining that it was safe to enter. In my judgment, the law should not hold defendants liable when they had no reason to expect that plaintiff—or any other guest—would fail to exercise their own reasonable precautions. [*Id*. at 934.]

Far from being a comparative negligence analysis, the focus remains on the condition at issue (an unremarkable step) and defendants' reasonable expectations.

I would affirm the trial court's order on the alternative basis that defendants owed plaintiff no duty under the circumstances.

LICHON v MORSE
SMITS v MORSE

Docket Nos. 339972, 340513, and 341082. Submitted February 5, 2019, at Detroit. Decided March 14, 2019, at 9:15 a.m. Leave to appeal granted at 504 Mich 962 (2019) in Docket Nos. 339972 and 341082.

In Docket No. 339972 (the *Lichon* case), Samantha Lichon filed an action in the Oakland Circuit Court against Michael Morse and Michael J Morse, PC (individually, the Morse firm), alleging sexual harassment in the workplace against the Morse firm under the Elliott-Larsen Civil Rights Act (the ELCRA), MCL 37.2101 *et seq*.; sexual assault and battery against Morse; and negligent and intentional infliction of emotional distress, negligence, gross negligence, wanton and willful misconduct, and civil conspiracy against Morse and the Morse firm. In Docket No. 341082 (*Smits I*), Jordan Smits filed a similar action in the Wayne Circuit Court against Morse and the Morse firm, alleging sexual harassment in the workplace against the Morse firm under the ELCRA; sexual assault and battery against Morse; and negligent and intentional infliction of emotional distress, negligence, gross negligence, and wanton and willful misconduct against the Morse firm and Morse. Lichon and Smits both worked for the Morse firm when the events underlying their respective claims occurred and both signed the same Mandatory Dispute Resolution Procedure agreement (the arbitration agreement) when they began working for the Morse firm. The agreement required the parties to submit to binding arbitration all concerns over the application or interpretation of the Morse firm's policies and procedures relative to the employee's employment, including disagreements regarding discipline and any claims against another employee of the Morse firm for violation of the firm's policies, discriminatory conduct, or violation of other state or federal employment or labor laws; the only exception to required arbitration involved claims related to insurance benefits, unemployment compensation, workers' compensation, or claims protected by the National Labor Relations Act. The Morse firm's policies provided that the firm did not permit any act of harassment, including harassment based on an individual's sex. Smits also signed a separate document in which she agreed that any claim or lawsuit relating to her employment

with the Morse firm had to be filed no more than six months after the date of the employment action that was the subject of the claim or lawsuit unless a shorter period was provided by law. Lichon alleged that Morse frequently harassed her at work through unwelcome comments or conduct of an offensive or sexual nature and that Morse sexually assaulted her during work hours by physically touching her in a sexual manner without her consent. Morse's actions continued after Lichon reported the sexual assault and harassment to her superior and to human resources, and she was ultimately fired from the Morse firm for poor job performance. Smits alleged that Morse assaulted her at the Morse firm Christmas party when he grabbed her breasts without her consent in front of two senior attorneys; Smits reported the incident but later resigned, stating that she was no longer comfortable working for the Morse firm. Defendants moved to dismiss and compel arbitration in each case, arguing that Lichon and Smits had signed agreements when they began working for the Morse firm that required them to submit all claims relative to their employment to binding arbitration. In *Smits I*, defendants alternatively argued that Smits' complaint should be dismissed because she had agreed to a shortened limitations period with respect to such claims and that period had lapsed. In the *Lichon* case, Oakland Circuit Court Judge Shalina D. Kumar granted defendants' motion and ordered the case to arbitration, concluding that the arbitration agreement was valid and enforceable and that Lichon's intertwined claims all fell within the agreement and the workplace policies; the court denied Lichon's motion for reconsideration. In *Smits I*, Wayne Circuit Court Judge Daniel A. Hathaway granted defendants' motion and ordered the case to arbitration, concluding that the arbitration agreement was valid and enforceable and that because Smits's claims were related to her employment, they were governed by the arbitration agreement; the court denied Smits's motion for reconsideration. In Docket No. 340513 (*Smits II*), Smits filed a second action in the Wayne Circuit Court against Morse only, alleging claims of sexual assault and battery, gross negligence, and willful and wanton misconduct based on the same facts as alleged in *Smits I*. Morse moved for summary disposition, arguing that Smits's claims were barred by res judicata and collateral estoppel, that there was a binding arbitration agreement, and that the agreed-to six-month limitations period had passed. The court, Daniel A. Hathaway, J., granted Morse's motion, concluding that because *Smits I* included the same parties as *Smits II* and because Smits conceded that any claims arose out of the same transaction or occurrence as alleged in *Smits I*, *Smits II*

was barred by res judicata and the compulsory-joinder rule. Lichon and Smits appealed, and the Court of Appeals consolidated the three appeals.

The Court of Appeals *held*:

1. An agreement to arbitrate is a contractual matter between parties; therefore, parties are not required to submit matters they did not agree to arbitrate to an arbitrator. To determine whether the subject matter of a dispute is of the type that the parties intended to submit to arbitration, a court looks at the plain language of the arbitration clause to determine whether the plaintiff's action falls within the scope of the agreement. If a plaintiff's claim can arguably fall within the confines of the arbitration clause, any doubts should be resolved in favor of arbitration and the court should order arbitration. There is a strong public policy that a person should not be forced to arbitrate his or her sexual-assault claims. Accordingly, although Michigan is generally favorable to arbitration, it is unimaginable that two parties would knowingly and voluntarily agree to arbitrate a sexual-assault claim; to do so would effectively perpetuate a culture that silences sexual-assault victims and allows abusers to settle those claims behind an arbitrator's closed door. To that end, an employee's agreement to arbitrate all claims related to the employee's employment does not encompass claims arising from a superior's sexual assault and battery of the employee. Lichon's and Smits's claims were not subject to the arbitration agreement because the respective sexual assaults were not related to their respective positions as a receptionist and a paralegal and because the sexual assaults were not a foreseeable consequence of employment in a law firm. While a claim for failure to discipline a fellow employee for sexual misconduct or sexual harassment may fall within the parameters of an arbitration agreement in certain circumstances, the facts of the case—namely, that Morse and the Morse firm were essentially a single entity given that Morse held all corporate positions within the firm as well as being the firm's sole shareholder—precluded such a conclusion because it was impossible to separate the claims against Morse and the Morse firm. The Oakland Circuit Court erred by dismissing Lichon's action and ordering the case to arbitration, and the Wayne Circuit Court erred by dismissing Smits's action and ordering the case to arbitration.

2. Res judicata prevents multiple lawsuits litigating the same cause of action. A second, subsequent action is barred when (1) the prior action was decided on the merits, (2) both actions involved the same parties or their privies, and (3) the matter in

the second case was, or could have been, resolved in the first. Res judicata bars not only claims already litigated but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. Relatedly, under MCR 2.203(A), the compulsory-joinder rule provides that in a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against the opposing party at the time of serving the pleading if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. In Docket No. 340513, the Wayne Circuit Court correctly dismissed *Smits II* under the compulsory-joinder rule because the claims against Morse in *Smits II* arose out of the same transaction or occurrence that was the subject matter in *Smits I*; res judicata did not apply because the claims in *Smits I* had not been decided on the merits given the Court of Appeals' conclusion that the circuit court erred by sending the claims to arbitration.

3. Smits's contractual agreement that any claim related to her employment with the Morse firm must be filed no more than six months after the action giving rise to her claim occurred did not apply because Smits's claims against Morse and the Morse firm were not related to her employment as a paralegal at the Morse firm. Accordingly, defendants' alternative claim for affirmance in Docket Nos. 340513 and 341082 failed.

Docket Nos. 339972 and 341082 reversed and remanded for further proceedings; Docket No. 340513 affirmed.

O'BRIEN, J., dissenting, disagreed with the majority's conclusion that Lichon's and Smits's claims were not within the scope of the arbitration agreement. The majority erred by concluding that the issue before the Court was whether the sexual assault and battery of an employee by a superior constituted conduct related to employment. Instead of focusing solely on the phrase "relative to your employment" in the first sentence of the arbitration agreement, the majority should have reviewed other phrases in the arbitration agreement that explained what claims the parties intended to be arbitrated. Specifically, the parties agreed to arbitrate any claim against another Morse firm employee for discriminatory conduct. Lichon's and Smits's complaints each included an ELCRA claim; because sexual assault under the ELCRA is a form of sexual harassment and because discrimination on the basis of sex includes sexual harassment, their claims arguably fell within the scope of the arbitration agreement. Although Judge O'BRIEN did not believe that an employee should

be required to arbitrate sexual-assault allegations, she was constrained by the law and the terms of the arbitration agreement and would have affirmed the circuit court orders in Docket Nos. 339972 and 341082.

CONTRACTS — EMPLOYERS AND EMPLOYEES — ARBITRATION AGREEMENTS — SCOPE OF AGREEMENT — SEXUAL-ASSAULT CLAIMS NOT RELATED TO EMPLOYMENT FOR PURPOSES OF ARBITRATION AGREEMENTS.

An agreement to arbitrate is a contractual matter between parties; therefore, parties are not required to submit matters they did not agree to arbitrate to an arbitrator; an employee's agreement to arbitrate all claims related to the employee's employment does not encompass claims arising from a superior's sexual assault and battery of the employee.

Fieger, Fieger, Kenney & Harrington, PC (by *Geoffrey N. Fieger* and *Sima G. Patel*) for plaintiffs.

Deborah Gordon Law (by *Deborah L. Gordon* and *Benjamin I. Shipper*) and *Starr, Butler, Alexopoulos & Stoner, PLLC* (by *Joseph A. Starr* and *Thomas Schramm*) for defendants.

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

JANSEN, P.J. In Docket No. 339972, referred to by the parties as the *Lichon* case, plaintiff, Samantha Lichon (Lichon), appeals as of right the June 22, 2017 order granting summary disposition in favor of defendants, Michael Morse (Morse) and Michael J Morse, PC (the Morse firm), and compelling arbitration. We reverse, vacate the Oakland Circuit Court's June 22, 2017 order, and remand for proceedings consistent with this opinion.

In Docket No. 341082, referred to by the parties as *Smits I*, plaintiff, Jordan Smits (Smits), appeals as of right the July 18, 2017 written order and opinion granting summary disposition in favor of defendants and compelling arbitration. We reverse, vacate the

Wayne Circuit Court's July 18, 2017 written opinion and order, and remand for proceedings consistent with this opinion.

In Docket No. 340513, referred to by the parties as *Smits II*, Smits appeals as of right the October 2, 2017 order granting summary disposition in favor of Morse. We affirm.

Docket Nos. 339972, 341082, and 340513 were consolidated by this Court in an order dated December 27, 2017. *Lichon v Morse*, unpublished order of the Court of Appeals, entered December 27, 2017 (Docket Nos. 339972, 340513, and 341082). The parties have filed consolidated briefs on appeal, and this Court will address the merits of the cases together when possible.

I. RELEVANT FACTUAL BACKGROUND

A. THE *LICHON* CASE

The *Lichon* case arises out of Morse's alleged sexual assault and harassment of Lichon while Lichon was working for the Morse firm as a receptionist. Lichon alleges that Morse frequently sexually harassed her through unwelcome comments or conduct of an offensive or sexual nature. Lichon alleges that on multiple occasions, Morse sexually assaulted her during work hours by physically touching her in a sexual manner without her permission. According to Lichon, the unwanted touching included groping Lichon's breasts and groin area, while making comments including " 'you make me so hard' " and " 'I want to take you into my office.' " Lichon claimed that she "complained to her superiors" and to the human resources department at the Morse firm, but no action was taken and the sexual assaults and sexual harassment continued. On February 17, 2017, Lichon was terminated from the Morse firm because of poor professional performance.

On May 24, 2017, Lichon filed a four-count complaint against the Morse firm and against Morse individually. Lichon alleged workplace sexual harassment in violation of the Elliott-Larsen Civil Rights Act (the ELCRA), MCL 37.2101 *et seq*., against the Morse firm and Morse; sexual assault and battery against Morse individually; negligent and intentional infliction of emotional distress against the Morse firm and Morse; and negligence, gross negligence, and wanton and willful misconduct against the Morse firm and Morse. On May 26, 2017, Lichon filed a first amended complaint, adding a fifth count of civil conspiracy against the Morse firm and Morse, alleging that defendants had sought to intimidate, pressure, or attempt to persuade or coerce her not to file a lawsuit.

In lieu of an answer, defendants moved to dismiss and compel arbitration, arguing that as a condition of her employment, Lichon had signed a Mandatory Dispute Resolution Procedure agreement (MDRPA), which requires Lichon to arbitrate her claims. Because Lichon's claims arise out of her "employment with and termination from" the Morse firm, pursuant to MCR 2.116(C)(7) and MCR 3.602, defendants requested that the Oakland Circuit Court "compel [Lichon] to prosecute her claims exclusively by way of compulsory and binding arbitration and to dismiss this action."

The MDRPA, signed by Lichon on September 29, 2015, provides, in pertinent part:

> This Mandatory Dispute Resolution Procedure shall apply to all concerns you have over the application or interpretation of the Firm's Policies and Procedures relative to your employment, including, but not limited to, any disagreements regarding discipline, termination, discrimination or violation of other state or federal employment or labor laws. This includes any claim over the denial of hire. This Procedure includes any claim against

> another employee of the Firm for violation of the Firm's Policies, discriminatory conduct or violation of other state or federal employment or labor laws. Similarly, should the Firm have any claims against you arising out of the employment relationship, the Firm also agrees to submit them to final and binding arbitration pursuant to this Procedure.
>
> * * *
>
> The only exceptions to the scope of this Mandatory Dispute Resolution Procedure shall be for questions that may arise under the Firm's insurance or benefit programs (such as retirement, medical insurance, group life insurance, short-term or long-term disability or other similar programs). These programs are administered separately and may contain their own separate appeal procedures. In addition, this Procedure does not apply to claims for unemployment compensation, workers' compensation or claims protected by the National Labor Relations Act. While this Procedure does not prohibit the right of an employee to file a charge with the Equal Employment Opportunity Commission ("EEOC") or a state civil rights agency, it would apply to any claims for damages you might claim under federal or state civil rights laws. In addition, either Party shall have the right to seek equitable relief in a court of law pending the outcome of the arbitration proceeding.

The dispute-resolution procedure is outlined as follows: first, within one year an employee must file with a direct supervisor a "request for review of your concern stating your disagreement or concern and the action you request the Firm to take." The supervisor will date the request, provide the employee with a copy, and then "generally schedule a meeting with [the employee] to hear [the employee's] concerns and will provide [the employee] with a written decision within" 15 business days. Second, if the dispute is not resolved to the employee's satisfaction, a written request for

review must be filed directly with Morse within 15 days. Morse, or his "designated representative," will issue a written decision within 15 days. If the employee is still not satisfied, the final recourse is to submit a written request for arbitration to the firm within 15 days, and the employee "<u>must</u> deposit with the Firm $500.00 or Five (5) Days' pay, whichever is less."

Lichon responded, arguing that her claims are related to the "sexual assault and harassment that she suffered at the hands of" Morse and accordingly do not " 'arise out of her employment and termination' " from the Morse firm. Lichon asserted that simply because a sexual assault happened at work does not mean that it is related to the plaintiff's employment and, in particular, that "[b]eing the victim of sexual assault has no relationship with [Lichon's] employment obligations as a receptionist, and is not a foreseeable consequence of her employment." She further argued that in fact the arbitration agreement "is neither valid nor enforceable . . . . The agreement is unenforceable as a matter of law because, in the context of the claims alleged here, the agreement is unconscionable, illusory and contrary to public policy." Thus, Lichon asserted that she is not required to arbitrate her claims.

The Oakland Circuit Court held a hearing on defendants' motion on June 21, 2017. The parties argued consistently with their briefs. At the end of the hearing, the court granted defendants' motion, concluding on the record:

> I find that this is a valid and enforceable arbitration agreement. I find that all of plaintiff's claims are inextricably intertwined and therefore all fall within the arbitration agreement and the workplace policies. I also find that Michael Morse named individually is also bound by the terms of the arbitration agreement as her employer of

> Michael Morse, P.C., and I'm sending all of the claims to arbitration granting defendant[s'] [summary disposition] motion.

An order to the same effect was entered on June 22, 2017. Lichon moved for reconsideration; the court denied the motion in an order dated August 18, 2017. This appeal followed.

B. *SMITS I*

Smits I and *Smits II* share an identical fact pattern and arise out of Morse's alleged sexual assault of Smits while Smits was working for the Morse firm as a paralegal. In December 2015, the Morse firm held a company Christmas party for all staff at the Masonic Temple in Detroit, Michigan. According to Smits, during that party, Morse approached her from behind and grabbed her breasts in front of two other senior attorneys. Smits immediately removed Morse's hands from her breasts.

In January 2016, Smits reported the incident to the human resources department of the Morse firm. However, a representative from human resources told Smits that " 'her number one priority [was] to protect Morse's reputation.' " Smits then "expressed her concerns" to one of the attorneys who had witnessed Morse sexually assault her. That attorney responded, " '[W]hat was I supposed to do, you know how Michael is.' " In February 2016, Smits e-mailed "various supervising employees" at the Morse firm, indicating that she "was not comfortable working at the firm due to the Christmas incident" and tendering her resignation. After leaving the Morse firm, an attorney from the firm contacted Smits and "indicated that [Morse] would offer two weeks pay if [Smits] signed a non-disclosure agreement." Smits declined the offer. Morse then personally contacted Smits

and told her to "be careful" because given his connections in the legal community, he could make it difficult for Smits to find work.

On May 30, 2017, in *Smits I*, Smits filed a four-count complaint against the Morse firm and against Morse individually. Smits alleged workplace sexual harassment in violation of the ELCRA against the Morse firm and Morse, sexual assault and battery against Morse individually, negligent and intentional infliction of emotional distress against the Morse firm and Morse individually, and negligence, gross negligence, and wanton and willful misconduct against the Morse firm and Morse individually.

In lieu of an answer, defendants moved for summary disposition pursuant to MCR 2.116(C)(7), asserting that there was a valid agreement to arbitrate or, alternatively, pursuant to MCR 2.116(C)(7), that the period of limitations had passed. In sum, defendants argued that Smits's claims should be dismissed pursuant to MCR 2.116(C)(7) because Smits had signed "a valid and enforceable agreement to arbitrate all aspects of her employment, including, but not limited to, allegations of discrimination discipline, termination, and discrimination, and other state and federal employment laws." Alternatively, defendants argued, Smits's claims should be dismissed pursuant to MCR 2.116(C)(7) because as part of her employment, Smits had agreed to a shortened limitations period with respect to litigation and that period had lapsed.

The MDRPA signed by Smits on February 7, 2014, is identical to the MDRPA signed by Lichon in Docket No. 339972. Additionally, in *Smits I* defendants attached to their motion the Employee Acknowledgment Form from the Employee Policy Manual for the Morse firm, signed by Smits on February 20, 2014. The form provides, in relevant part:

> I agree that any claim or lawsuit relating to my employment with Michael J. Morse, P.C. must be filed no more than six (6) months after the date of employment action that is the subject of the claim or lawsuit unless a shorter period is provided by law. I waive any statute of limitations to the contrary.

Defendants also filed a supplement to their motion to dismiss. Following the Wayne Circuit Court's order requiring that defendants provide Smits with a copy of her personnel file and a complete copy of the "Firms Policies and Procedures," defendants supplemented their motion with an additional copy of the MDRPA, a copy of the Morse firm's Employee Policy Manual, and a copy of the Morse firm's Agreement for At-Will Employment and Agreement For Resolution of Disputes. The latter agreement, signed by Smits on September 29, 2015, provides, in relevant part:

> IV. ARBITRATION OF DISPUTES:
>
> As a condition of my employment, I agree that any dispute or concern relating to my employment or termination of employment, including but not limited to claims arising under state or federal civil rights statutes, must be resolved pursuant to the Firm's [MDRPA] which culminates in final and binding arbitration. I have been provided with a copy of the Firm's [MDRPA] and agree to be bound by this Dispute Procedure.

Smits responded, arguing that her sexual-assault claims are not related to her employment such that they come within the purview of the MDRPA. Likewise, Smits argued, "the policy manual truncating the statute of limitations only applies to a 'claim or lawsuit relating to' " employment with the Morse firm. Smits further stated that because her claims are not "related" to her employment but, rather, stem "solely from Michael Morse's sexual assaults," the arbitration provision and the policy manual are inap-

plicable to her claims. Smits also argued that the "arbitration provision itself is unenforceable because: it is procedurally and substantively unconscionable and illusory; Michael Morse personally is not a party to the [MDRPA] so it is inapplicable to him; and [d]efendants have forfeited enforcement of the agreement by not adhering to the supposed dispute resolution process when plaintiff made multiple complaints to her supervisors and the Human Resources department regarding the assault and [d]efendants did nothing."

The Wayne Circuit Court heard arguments on defendants' motion on July 6, 2017. At the end of the hearing, the court took the matter under advisement and indicated its intent to issue a written opinion and order. On July 18, 2017, the court entered its written opinion and order granting defendants' motion and directing this matter to arbitration. The court concluded that the MDRPA signed by Smits is "a valid and enforceable agreement, supported by consideration and mutuality of obligation." The court further stated that given the "allegations set forth in [Smits's] own verified complaint," her claims are related to her employment and therefore governed by the MDRPA. Accordingly, the court ordered the matter to arbitration and retained "jurisdiction only to enforce any such arbitration award."

Smits moved for reconsideration; the court denied the motion in an order dated November 3, 2017. This appeal followed.

C. *SMITS II*

The *Smits II* case arises out of the same set of facts as the *Smits I* case. However, in *Smits II*, on July 25, 2017, Smits filed a three-count complaint solely

against Morse as an individual, alleging sexual assault and battery, negligent and intentional infliction of emotional distress, and negligence, gross negligence, and willful and wanton misconduct.

In lieu of an answer, Morse moved to dismiss pursuant to MCR 2.116(C)(7), arguing that Smits's complaint should be dismissed with prejudice because it was barred by the doctrine of res judicata, the doctrine of collateral estoppel, an agreement to arbitrate, and/or a six-month contractual period of limitations. In response, Smits argued that because the Wayne Circuit Court in *Smits I* had dismissed the case on jurisdictional grounds, it did not make a determination on the merits and that she was therefore not precluded from filing the instant case against Morse individually. Smits asserted that because Morse did not sign the MDRPA, there is no valid contractual agreement between Morse and Smits to arbitrate and that "[a]bsent such a contract, [Smits] has the right to vindicate her rights in a court of law."

The Wayne Circuit Court heard argument on Morse's motion on September 29, 2017. Ruling from the bench, the court found that:

> [B]ecause that prior suit included the same parties as this current Complaint and because [Smits] concedes any claims here "arise out of the same transaction or occurrence" as were alleged in her former Complaint, res judicata and [the] compulsory joinder rule preclude the subsequent action.
>
> [Morse's] Motion for Summary Disposition is accordingly granted under MCR 2.116(C)(7), no costs, fees, or penalties of any kind.

An order to the same effect was entered on October 2, 2017. The appeal in Docket No. 340513 followed.

II. CONDUCT "RELATED TO EMPLOYMENT" UNDER THE MDRPA

In Docket Nos. 339972 and 341082, plaintiffs first argue that because the MDRPA limits the scope of arbitration to only those claims that are "related to" plaintiffs' employment and because sexual assault at the hands of an employer or supervisor cannot be related to their employment, the MDRPA is inapplicable to their claims against Morse and the Morse firm. We agree.

This Court has previously announced that it will review de novo a motion for summary disposition brought under MCR 2.116(C)(7). *Galea v FCA US LLC*, 323 Mich App 360, 368; 917 NW2d 694 (2018). Specifically, this Court explained:

> We review de novo a trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(7). *Hicks v EPI Printers, Inc*, 267 Mich App 79, 84; 702 NW2d 883 (2005). A motion under MCR 2.116(C)(7) is appropriately granted when a claim is barred by an agreement to arbitrate. *Maiden v Rozwood*, 461 Mich 109, 118 n 3; 597 NW2d 817 (1999). "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Id*. at 119. However, "a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id*. Whether an arbitration agreement exists and is enforceable is a legal question that we review de novo. *Hicks*, 267 Mich App at 84. [*Galea*, 323 Mich App at 363.]

Likewise, questions regarding the interpretation of contractual language are subject to de novo review. *VHS Huron Valley-Sinai Hosp, Inc v Sentinel Ins Co (On Remand)*, 322 Mich App 707, 715; 916 NW2d 218 (2018).

Neither plaintiffs nor defendants dispute the existence of an arbitration agreement. Both Lichon and Smits signed the MDRPA. However, the parties disagree whether the conduct at issue here—the alleged sexual assaults and batteries perpetrated by Morse as an individual—is conduct related to Lichon's and Smits's employment with the Morse firm such that plaintiffs must arbitrate their claims against Morse and the Morse firm. In short, this Court is asked to decide whether the sexual assault and battery of an employee at the hands of a superior is conduct related to employment. We conclude that it is not.

In *Bienenstock & Assoc, Inc v Lowry*, 314 Mich App 508, 515; 887 NW2d 237 (2016), this Court explained that an agreement to arbitrate presents a contractual matter between parties and that those parties are not required to submit matters they did not agree to arbitrate to an arbitrator. Specifically, this Court stated:

> "[A]rbitration is simply a matter of contract between parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago Inc v Kaplan*, 514 US 938, 943; 115 S Ct 1920; 131 L Ed 2d 985 (1995). In other words, " 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *Howsam v Dean Witter Reynolds, Inc*, 537 US 79, 83; 123 S Ct 588; 154 L Ed 2d 491 (2002), quoting *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574, 582; 80 S Ct 1347; 4 L Ed 2d 1409 (1960). "In this endeavor, as with any other contract, the parties' intentions control." *Stolt-Nielsen S A v AnimalFeeds Int'l Corp*, 559 US 662, 682; 130 S Ct 1758; 176 L Ed 2d 605 (2010) (quotation marks and citations omitted). [*Bienenstock & Assoc, Inc*, 314 Mich App at 515 (alteration in *Bienenstock & Assoc, Inc*).]

Our Supreme Court has also announced that it is the party seeking to avoid the arbitration agreement that bears the burden of "establishing that his or her claims fall outside the ambit of the arbitration agreement." *Lebenbom v UBS Fin Servs, Inc*, 326 Mich App 200, 211; 926 NW2d 865 (2018), citing *Altobelli v Hartmann*, 499 Mich 284, 295; 884 NW2d 537 (2016). "Moreover, when deciphering whether plaintiff's claims are covered by the parties' arbitration clause, this Court is not permitted to analyze 'the substantive merits' of plaintiff's claims. Rather, if the dispute is subject to arbitration, the merits of the dispute are left to the arbitrator to decide." *Lebenbom*, 326 Mich App at 211 (citation omitted).

As noted earlier, the MDRPA provides, in relevant part:

> This [MDRPA] shall apply to all concerns you have over the application or interpretation of the Firm's Policies and Procedures relative to your employment, including, but not limited to, any disagreements regarding discipline, termination, discrimination or violation of other state or federal employment or labor laws. This includes any claim over the denial of hire. This Procedure includes any claim against another employee of the Firm for violation of the Firm's Policies, discriminatory conduct or other state or federal employment or labor laws. Similarly, should the Firm have any claims against you arising out of the employment relationship, the Firm also agrees to submit them to final and binding arbitration pursuant to this Procedure.

The only exceptions to the MDRPA are for insurance benefits, claims for unemployment compensation, workers' compensation, or claims protected by the National Labor Relations Act. Additionally, the Morse firm's policies (Firm Policies) provide, in relevant part:

> We are committed to preventing workplace violence and making Michael J. Morse, P.C. a safe place to work. This policy explains our guidelines for dealing with intimidation, harassment, violent acts, or threats of violence that might occur on our premises at anytime, at work-related functions, or outside work if it affects the workplace.
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> * * *
>
> The Firm does not allow behavior in the workplace at any time that threatens, intimidates, bullies, or coerces another employee, a client, or a member of the public. We do not permit any act of harassment, including harassment that is based on an individual's sex, race, religion, age, national origin, height, weight, marital status, disability, sexual orientation, or any characteristic protected by federal, state, or local law.

The sole issue for us to decide is whether the MDRPA "encompasses the subject matter of the dispute at issue in this case." *Altobelli*, 499 Mich at 299.

> Generally speaking, to ascertain whether the subject matter of a dispute is of the type that parties intended to submit to arbitration, we again begin with the plain language of the arbitration clause. We then consider whether a plaintiff's particular action falls within that scope. We note that the gravamen of an action is determined by considering the entire claim. We look beyond the mere procedural labels to determine the exact nature of the claim. This is to avoid "artful pleading." [*Id*. at 299-300 (citations omitted).]

See also *Lebenbom*, 326 Mich App at 211, in which this Court explained that "we must review the arbitration clause and determine 'whether the *subject matter*' of the instant dispute is covered by the arbitration clause." (Citation omitted.) "If plaintiff's claims can be characterized as 'arguably' falling within the confines of the arbitration clause, any doubts are resolved in

favor of arbitration and the trial court should have granted defendant's motion to compel arbitration." *Id.*, citing *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 500; 591 NW2d 364 (1998).

In Docket No. 339972, Lichon alleges that Morse repeatedly sexually assaulted and sexually harassed her in the workplace. Lichon claims that Morse repeatedly touched her in a sexual manner during work hours without her consent or her permission. The unwanted touching involved Morse groping Lichon's breasts and groin area, while pressing his own groin into her back and "audibly stating sexual comments, including . . . 'you make me so hard,' and 'I want to take you into my office[.]' " In Docket No. 341082, Smits claims that Morse sexually assaulted her at a firm-sponsored Christmas party. Specifically, Smits claims Morse approached her from behind and groped her breasts without permission or consent in front of other senior attorneys. It is therefore clear that the gravamen of plaintiffs' complaints is that while working at the Morse firm, they were sexually assaulted and/or harassed by Morse as an individual either during work hours or at work-sponsored events.

Despite the fact that the sexual assaults may not have happened but for plaintiffs' employment with the Morse firm, we conclude that claims of sexual assault cannot be related to employment. The fact that the sexual assaults would not have occurred but for Lichon's and Smits's employment with the Morse firm does not provide a sufficient nexus between the terms of the MDRPA and the sexual assaults allegedly perpetrated by Morse. To be clear, Lichon's and Smits's claims of sexual assault are unrelated to their positions as, respectively, a receptionist and paralegal. Furthermore, under no circumstances could sexual assault be a fore-

seeable consequence of employment in a law firm. Accordingly, the circuit courts erroneously granted defendants' motions to dismiss these actions and compel arbitration of plaintiffs' claims. Both Lichon and Smits shall be permitted to litigate their claims in the courts of this state because the claims fall outside the purview of the MDRPA. *Bienenstock & Assoc, Inc*, 314 Mich App at 515.

This issue, whether the sexual assault and battery of an employee at the hands of a superior is conduct related to employment, is an issue of first impression in Michigan. Although the parties have provided extensive authority in support of their respective positions, most is persuasive authority, and none is directly on point.[1] We therefore note that central to our conclu-

[1] We note that our conclusion in this matter, that sexual assault is not related to employment in a law firm and that therefore claims of sexual harassment perpetrated by a superior are not subject to arbitration, is not an issue that has been directly confronted by other jurisdictions. However, our conclusion is consistent with the general conclusion reached by other courts in this country that sexual assault is not related to employment. See *Jones v Halliburton Co*, 583 F3d 228 (CA 5, 2009) (holding that the plaintiff, a federal contractor residing in overseas housing, did not agree to arbitrate her claims stemming from the sexual harassment and gang rape of her by coworkers after-hours because those events were not related to her employment within the meaning of the arbitration provision); *Doe v Princess Cruise Lines, Ltd*, 657 F3d 1204 (CA 11, 2011) (concluding that the broadly drafted arbitration agreement did not encompass certain claims arising from an employee being drugged and sexually assaulted by coworkers because those acts did not arise out of and were not related to her employment and were not a foreseeable result of the employment relationship); *Hill v JJB Hilliard, W L Lyons, Inc*, 945 SW2d 948, 951-952 (Ky App, 1996) (holding that the plaintiff's allegations of rape against a supervisor did not arise out of her employment for purposes of the arbitration agreement despite the fact that the alleged rape was committed "by a co-worker and occurred while on a business trip"); *Smith ex rel Smith v Captain D's, LLC*, 963 So 2d 1116, 1121 (Miss, 2007) ("While recognizing the breadth of language in the arbitration provision, we unquestionably

sion in this matter is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault. Though we acknowledge that "[t]he general policy of this State is favorable to arbitration," *Detroit v A W Kutsche & Co*, 309 Mich 700, 703; 16 NW2d 128 (1944), the idea that two parties would knowingly and voluntarily agree to arbitrate a dispute over such an egregious and possibly criminal act is unimaginable. See *Bienenstock & Assoc, Inc*, 314 Mich App at 515 ("[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") (quotation marks and citation omitted). The effect of allowing defendants to enforce the MDRPA under the facts of this case would effectively perpetuate a culture that silences victims of sexual assault and allows abusers to quietly settle these claims behind an arbitrator's closed door. Such a result has no place in Michigan law.

We caution future litigants that our conclusion with respect to the Morse firm is based on a very specific set of facts. Under different circumstances, we might have concluded that the gravamen of plaintiffs' claims

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find that a claim of sexual assault neither pertains to nor has a connection with [the plaintiff's] employment."); *Club Mediterranee, S A v Fitzpatrick*, 162 So 3d 251, 252-253 (Fla App, 2015) (stating that the fact that plaintiff's claim of sexual assault by an unknown assailant while sleeping in a dormitory room provided by her employer would not have arisen "but for the existence of her employment agreement is insufficient by itself to transform a dispute into one 'arising out of' her employment" and that there was no nexus between the sexual assault and the plaintiff's employment agreement); *Arnold v Burger King*, 2015-Ohio-4485, ¶¶ 65, 67; 48 NE3d 69 (Ohio App, 2015) (holding that the plaintiff's claims "relating to and arising from the sexual assault [by a supervisor during work hours] exist independent of the employment relationship as they may be 'maintained without reference to the contract or relationship at issue' " and that "ongoing verbal and physical contact culminating in sexual assault . . . is not a foreseeable result of the employment").

against the Morse firm were a failure to discipline, or adequately discipline, a fellow employee of the firm for offensive and egregious sexual misconduct and/or sexual harassment. Accordingly, in such different circumstances, we might have agreed with the circuit courts that the subject matter of plaintiffs' claims against the Morse firm fell under the mantle of the MDRPA and that plaintiffs had to arbitrate those claims in light of the language of the MDRPA. Recall that the MDRPA provides, in relevant part, that "[the MDRPA] shall apply to all concerns you have over the application or interpretation of the Firm's Policies and Procedures relative to your employment, including, but not limited to, any disagreements regarding *discipline* . . . ." (Emphasis added.) In these cases, however, the corporate structure of the Morse firm precludes such a result. Morse has never disputed that he is the owner of the Morse firm. In fact, the Morse firm's most recent annual report, filed with the Michigan Department of Licensing and Regulatory Affairs, Corporations, Securities & Commercial Licensing Bureau, shows that Morse is the president, secretary, treasurer, director, and sole shareholder of the Morse firm. Essentially, Morse and the Morse firm are the same: Morse *is* the Morse firm, and he is solely legally responsible for the actions, or inaction, of the Morse firm.[2] Any recovery plaintiffs obtain from a jury or from an arbitrator would come out of the same pocket. Under these circumstances, plaintiffs' claims against

[2] During oral argument, we took note of defendants' argument that the Morse firm's Firm Policies and Workplace Violence Prevention Plan, quoted earlier in this opinion, are expansive, which is unique. However we remain incredulous that these policies are stringently followed. In particular, given the nature of plaintiffs' claims, we question the sincerity of the firm policies as articulated by Morse, the sole shareholder of the Morse firm.

the Morse firm and Morse individually are so intertwined that they are impossible to separate. In reality, a claim of failure to discipline a fellow employee of the firm for offensive and egregious sexual misconduct and/or sexual harassment in these cases is essentially a claim that Morse failed to discipline himself for committing sexual assault and harassment in the workplace. For these reasons, it is impossible to separate plaintiffs' claims against defendants.

Plaintiffs raise several other arguments related to the MDRPA, including whether the MDRPA is unconscionable or illusory, and whether Morse, a nonsignatory, can enforce the MDRPA against plaintiffs in his capacity as an individual.[3] However, given our conclusion that the circuit courts erroneously dismissed plaintiffs' complaints and compelled arbitration, we need not address plaintiffs' remaining claims of error.

III. RES JUDICATA AND COMPULSORY JOINDER

In Docket No. 340513, Smits argues that the Wayne Circuit Court erred by dismissing *Smits II*. Specifically, Smits argues on appeal that because the court did not make a decision in *Smits I* on the merits, but rather dismissed the action on jurisdictional grounds by ordering that the matter proceed in arbitration, dismissal on res judicata or compulsory-joinder grounds "was grossly improper."

"The question whether res judicata bars a subsequent action is reviewed de novo by this Court." *Adair*

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[3] It is undisputed that an agent of the Morse firm, not Morse, signed the MDRPA on behalf of the Morse firm with respect to the agreements between the Morse firm, Lichon, and Smits. Additionally, no party has produced a copy of an MDRPA signed by Morse as an employee of the Morse firm agreeing to be bound as an individual by the terms of the MDRPA.

v Michigan, 470 Mich 105, 119; 680 NW2d 386 (2004). Likewise, "[w]e review de novo the proper interpretation and application of a court rule." *Garrett v Washington*, 314 Mich App 436, 450; 886 NW2d 762 (2016).

Here, the circuit court did not dismiss *Smits II* solely on res judicata grounds. Rather, the court cited the doctrine of res judicata as well as the compulsory-joinder rule when dismissing *Smits II*. Regarding the doctrine of res judicata, our Supreme Court explained in *Adair*:

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). [*Adair*, 470 Mich at 121.]

Relatedly, the compulsory-joinder rule is laid out in MCR 2.203(A), which provides:

> In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

"In determining whether two claims arise out of the same transaction or occurrence for purposes of MCR

2.203(A), res judicata principles should be applied." *Garrett*, 314 Mich App at 451.

In *Smits II*, Smits filed a complaint alleging sexual assault and battery, negligent and intentional infliction of emotional distress, and negligence, gross negligence, and willful and wanton misconduct against Morse individually. Smits's claims against Morse in *Smits II* are nearly identical to Smits's claims against Morse in *Smits I* and, in fact, arise out of the same "transaction." Therefore, as already discussed, because Smits's claims against Morse as an individual are alive and well, the doctrine of res judicata is not implicated. However, the circuit court correctly concluded that the compulsory-joinder rule, as articulated in MCR 2.203(A), bars her claims in *Smits II*. Accordingly, the court did not err by dismissing *Smits II*.

IV. ALTERNATIVE GROUNDS FOR AFFIRMANCE

Finally, in Docket No. 341082 and Docket No. 340513, defendants argue in the alternative that this Court should affirm the dismissal of *Smits I* and *Smits II* on the basis that Smits agreed to a contractual limitations period of six months.

This issue, although raised by defendants in the Wayne Circuit Court, was not addressed and decided by the court. Accordingly, it is unpreserved. *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014). However, this Court had authority to address the argument because the issue concerns "a legal question and all of the facts necessary for its resolution are present." *Dell v Citizens Ins Co of America*, 312 Mich App 734, 751 n 40; 880 NW2d 280 (2015). Regardless, we do not find defendants' alternative grounds for affirmance to be persuasive.

The Employee Acknowledgment Form that imposes a six-month limitations period reads:

> I agree that any claim or lawsuit relating to my employment with Michael J. Morse, P.C. must be filed no more than six (6) months after the date of employment action that is the subject of the claim or lawsuit unless a shorter period is provided by law. I waive any statute of limitations to the contrary.

Smits agreed to the contractual limitations period when she signed the Policy Manual Acknowledgment Form. However, this provision does not apply to the instant case. As discussed, Smits's claims against the Morse firm and Morse are not related to her employment as a paralegal at the Morse firm. Accordingly, the contractual limitations period does not apply to her claims, and defendants' argument is without merit.

In Docket No. 339972, we reverse, vacate the Oakland Circuit Court's June 22, 2017 order, and remand for proceedings consistent with this opinion.

In Docket No. 341082, we reverse, vacate the Wayne Circuit Court's July 18, 2017 written opinion and order, and remand for proceedings consistent with this opinion.

In Docket No. 340513, we affirm.

BECKERING, J., concurred with JANSEN, P.J.

O'BRIEN, J. (*dissenting*). The parties agreed to arbitrate "any claim against another employee" for "discriminatory conduct." Based on this language, I would hold that plaintiffs' claims arguably fall within the scope of the arbitration agreement, and therefore I respectfully dissent.

In Docket No. 341082, plaintiff Jordan Smits's complaint alleged that defendant Michael Morse (Morse)

approached Smits from behind at a company party and intentionally "groped her breasts without . . . permission" for purposes of sexual gratification. In Docket No. 339972, plaintiff Samantha Lichon's complaint alleged in pertinent part that Morse, "on multiple occasions," approached her "from behind, groped her breasts, and touched his groin to her rear while audibly stating sexual comments[.]" The complaint also alleged that Morse "stated sexually motivated comments" to Lichon and that he "made intentional and unlawful threats to physically and inappropriately touch [Lichon's] body in a sexual manner . . . ." Plaintiffs, individually, filed claims against Morse and defendant Michael J. Morse, PC (the Morse firm) as described by the majority. Both complaints included claims for sex discrimination under the Elliott-Larsen Civil Rights Act (the ELCRA), MCL 37.2101 *et seq*., and sexual assault and battery against Morse.

Both Smits and Lichon signed an arbitration agreement—the Mandatory Dispute Resolution Procedure agreement—with the Morse firm, which states, in pertinent part:

> This Mandatory Dispute Resolution Procedure shall apply to all concerns you have over the application or interpretation of the Firm's Policies and Procedures relative to your employment, including, but not limited to, any disagreements regarding discipline, termination, discrimination or violation of other state or federal employment or labor laws. This includes any claim over the denial of hire. This Procedure includes any claim against another employee of the Firm for violation of the Firm's Policies, discriminatory conduct or violation of other state or federal employment or labor laws. Similarly, should the Firm have any claims against you arising out of the employment relationship, the Firm also agrees to submit them to final and binding arbitration pursuant to this Procedure.

The trial courts relied on this language to hold, respectively, that Smits and Lichon had agreed to arbitrate their claims. The question on appeal is whether those decisions were proper.

"Arbitration is a matter of contract." *Altobelli v Hartmann*, 499 Mich 284, 295; 884 NW2d 537 (2016) (quotation marks and citation omitted). The interpretation of contractual language is reviewed de novo. *VHS Huron Valley-Sinai Hosp, Inc v Sentinel Ins Co (On Remand)*, 322 Mich App 707, 715; 916 NW2d 218 (2018).

"Michigan jurisprudence favors arbitration, and the employment context is no exception." *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 130; 596 NW2d 208 (1999). "[T]he parties' agreement determines the scope of arbitration." *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007). As explained by this Court:

> To ascertain the arbitrability of an issue, [a] court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract. The court should resolve all conflicts in favor of arbitration. However, a court should not interpret a contract's language beyond determining whether arbitration applies and should not allow the parties to divide their disputes between the court and an arbitrator. Dispute bifurcation defeats the efficiency of arbitration and considerably undermines its value as an acceptable alternative to litigation. [*Id*. (quotation marks and citations omitted; alteration in *Rooyakker*).]

There is no dispute about the existence of the arbitration agreement, nor do the parties contend that the issues to be arbitrated are exempted by the terms of the agreement. The only issue is whether the claims to be

arbitrated—which include claims that plaintiffs were sexually assaulted by their superior—are arguably within the scope of the parties' arbitration agreement.

The majority concludes that we must decide "whether the sexual assault and battery of an employee at the hands of a superior is conduct related to employment." If that were the question before this Court, I would agree that sexual assault is not conduct related to employment. But I would more broadly frame the question before us as whether plaintiffs' claims arguably fall within the scope of the arbitration agreement.

Arbitration agreements are treated as ordinary contracts, and so we apply general principles of contract to their interpretation. *Oakland-Macomb Interceptor Drain Drainage Dist v Ric-Man Constr, Inc*, 304 Mich App 46, 55-56; 850 NW2d 498 (2014). Unambiguous contracts are not open to interpretation and must be enforced as written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).

The majority focuses on the phrase "relative to your employment" in the first sentence of the arbitration agreement. In so doing, I believe that the majority overlooks other portions of the contract that explain what claims the parties intended—and therefore arguably agreed—to arbitrate. Most relevant here, the parties agreed to arbitrate "any claim against another employee of the Firm for violation of the Firm's Policies, discriminatory conduct or violation of other state or federal employment or labor laws." Thus, the parties unambiguously agreed to arbitrate "any claim against another employee of the Firm for . . . discriminatory conduct . . . ."

Under the ELCRA—which both plaintiffs filed claims under—"[d]iscrimination because of sex includes sexual

harassment." MCL 37.2103(i). The ELCRA then broadly defines conduct constituting sexual harassment:

> Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> (*i*) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
>
> (*ii*) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing.
>
> (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment. [*Id*.]

Given this definition, sexual assault is sexual harassment.[1] See *Radtke v Everett*, 442 Mich 368, 394-

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[1] I base my reasoning solely on the language in the parties' arbitration agreement. I believe that the majority highlights an interesting, yet potentially problematic, national trend. When courts label an instance of "sexual harassment" as "sexual assault," they generally find that the conduct is unrelated to employment. See the cases listed in note 1 of the majority opinion. But see *Barker v Halliburton Co*, 541 F Supp 2d 879, 886, 889 (SD Tex, 2008) (holding that the parties agreed to arbitrate the plaintiff's claim of sexual assault because the parties agreed to arbitrate all claims " 'related to . . . employment' "). Yet when courts use the term "sexual harassment," they generally find that the conduct *is* related to employment. See *Lyster v Ryan's Family Steak Houses, Inc*, 239 F3d 943, 946-947 (CA 8, 2001) (holding that the plaintiff agreed to arbitrate her "claim of sexual harassment . . . which arose during [the plaintiff's] employment with [the defendant]" because she agreed to arbitrate " 'any and all employment-related disputes' "); *Cruise v Kroger Co*, 233 Cal App 4th 390, 397; 183 Cal Rptr 17 (2015) (holding that the plaintiff's claims

395; 501 NW2d 155 (1993) (acknowledging that sexual assault is a form of sexual harassment that can form the basis for a claim of sex discrimination under the ELCRA). And sexual harassment is, under the ELCRA, discrimination because of sex. MCL 37.2103(i). The parties agreed to arbitrate any claim for discriminatory conduct against another employee. Therefore, in light of the unambiguous language in the parties' arbitration agreement, I believe that plaintiffs' claims arguably fall within the scope of the agreement.

Although I do not believe that an employee should be required to arbitrate allegations of sexual assault, I am constrained by the law and the terms of the employment contract to dissent in this case. I believe that our Legislature is the appropriate forum for addressing this policy matter. See *Gilmer v Interstate/Johnson Lane*

"for retaliation, sexual harassment, sexual and racial discrimination, failure to investigate and prevent harassment and retaliation, as well as her common law claims for wrongful termination in violation of public policy, intentional infliction of emotional distress and defamation, are all 'employment-related disputes' within the meaning of the above arbitration clause, and therefore clearly are covered disputes subject to the arbitration agreement"); *Kindred v Second Judicial Dist Court*, 116 Nev 405, 411; 996 P2d 903 (2000) (holding that the plaintiff agreed to arbitrate her sexual-harassment claim when the agreement that " 'any controversy or dispute arising between [the plaintiff] and [the defendant] in any respect to this agreement or your employment by [the defendant] shall be submitted for arbitration' "); *Freeman v Minolta Business Sys, Inc*, 699 So 2d 1182, 1187; 29,655 (La App 2 Cir 09/24/97) (holding that the plaintiff's sexual-harassment claim "involve[d] violation of a term or condition of her employment" and therefore was "included in the scope of the arbitration clause of her employment contract"); *Arakawa v Japan Network Group*, 56 F Supp 2d 349, 353 (SD NY, 1999) ("All of [the plaintiff's] claims—sexual harassment, wrongful discharge and discrimination—arise out of or relate to her employment and are therefore claims that are subject to binding arbitration pursuant to the agreement."). While it is clear from the majority's holding that sexual assault is conduct unrelated to employment, it is unclear whether the majority is bucking the national trend and holding that *all* sexual harassment is conduct unrelated to employment.

Corp, 500 US 20, 26; 111 S Ct 1647; 114 L Ed 2d 26 (1991) (explaining that "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue") (quotation marks and citation omitted; alteration in *Gilmer*).[2]

For these reasons, I respectfully dissent.

[2] I offer no opinion on the majority's policy reasoning, though it appears to run counter to this Court's extensive reasoning in *Rembert*, 235 Mich App at 135-159, for why civil-rights claims in general are arbitrable. Among other things, the *Rembert* Court acknowledged arguments that "the public policy advanced by [civil-rights] statutes would be undermined if these disputes were addressed in the relatively private forum of arbitration," but rejected those arguments, in part, because they "were thoroughly considered and rejected by the United States Supreme Court in a trio of cases known as the *Mitsubishi* trilogy and, later, in *Gilmer* [500 US 20]." *Id*. at 135 (citations omitted).

WASHTENAW COUNTY BOARD OF COUNTY ROAD COMMISSIONERS v SHANKLE

Docket No. 340612. Submitted March 13, 2019, at Lansing. Decided March 19, 2019, at 9:00 a.m.

The Washtenaw County Board of County Road Commissioners initiated condemnation proceedings in Washtenaw Circuit Court in August 2017 against five individuals who owned parcels of land located on or near Textile Road in Pittsfield Charter Township, the site of a road-improvement project involving the reconstruction and paving of a portion of Textile Road. Plaintiff alleged that Mildred Shankle (owner of two affected parcels of land), Kevin C. Nevaux and Janet L. Nevaux (owners of one affected parcel), and Christina L. Lirones and Stephen W. Berger (owners of one affected parcel) had rejected its good-faith offers to acquire the owners' property interests as needed for the project; plaintiff sought temporary grading permits or agreements not involving permanent takings regarding some of the parcels and also sought some permanent right-of-way easements. Defendants moved under MCR 2.116(C)(4) (lack of subject-matter jurisdiction), (C)(8) (failure to state a claim), and (C)(10) (no genuine issue of material fact) for summary disposition of the action, asserting that the trial court lacked subject-matter jurisdiction and that rather than immediately filing the condemnation action after defendants' rejection of plaintiff's initial offers, plaintiff was required to continue negotiating. In question was whether plaintiff failed to tender a good-faith offer to all owners of any interests in each of the subject parcels, resulting in a failure to properly invoke the trial court's jurisdiction. Specifically, defendants provided an affidavit indicating that there were at least four additional interest holders of record that did not receive good-faith written offers. The additional entities' interests in the four parcels were disclosed by encumbrances on the properties. After a hearing, the court, Timothy P. Connors, J., denied defendants' motion as it related to subject-matter jurisdiction. The Court of Appeals granted defendants' application for leave to appeal, limited to the issues related to subject-matter jurisdiction.

The Court of Appeals *held*:

The Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq.*, governs the acquisition of property by public authorities through the power of eminent domain. Strict compliance with the UCPA is required, and the tendering of a good-faith offer is a necessary condition precedent to invoking the jurisdiction of the circuit court in a condemnation action. For the purposes of the UCPA, an "owner" is a person or entity having an interest in the property sought to be condemned, and "property" includes land and other property rights. Therefore, plaintiff was required to provide a good-faith offer to acquire the properties to all persons or entities with an interest in the properties. Plaintiff failed to identify numerous holders of interests in the properties at issue and failed to satisfy the statutory requirements regarding them. Because plaintiff failed to strictly comply with the statutory requirements, the trial court never acquired subject-matter jurisdiction. Any consideration of the effects of plaintiff's condemnation actions with respect to particular ownership interests was therefore premature. Plaintiff's omissions deprived the trial court of subject-matter jurisdiction over plaintiff's condemnation action, and the trial court's lack of subject-matter jurisdiction required dismissal of the action. Therefore, the trial court erred when it denied defendants' motion for summary disposition.

Reversed and remanded without prejudice to plaintiff's refiling an action complying with the statutory requirements.

SUBJECT-MATTER JURISDICTION — CONDEMNATION PROCEEDINGS — EFFECT OF FAILURE TO MAKE A GOOD-FAITH WRITTEN OFFER TO ALL INTEREST HOLDERS.

The Uniform Condemnation Procedures Act, MCL 213.51 *et seq.*, governs the acquisition of property by public authorities through the power of eminent domain; under MCL 213.55(1), the act requires as a necessary condition precedent to invoking a circuit court's jurisdiction over a condemnation action that the condemning agency provide a good-faith written offer to all persons or entities having an interest in the property; failure to provide a required good-faith written offer deprives the court of subject-matter jurisdiction and requires dismissal of the action.

Conlin, McKenney & Philbrick, PC (by *Allen J. Philbrick* and *W. Daniel Troyka*) for plaintiff.

Clark Hill PLC (by *Stephon B. Bagne*) for defendants.

Before: STEPHENS, P.J., and GLEICHER and BOONSTRA, JJ.

BOONSTRA, J. Defendants appeal by leave granted[1] the trial court's order denying their motion for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) and (C)(10) (no genuine issue of material fact).[2] We reverse and remand for entry of an order granting summary disposition in favor of defendants.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This condemnation action relates to a road-improvement project for the reconstruction and paving of a portion of Textile Road in Pittsfield Charter Township. According to plaintiff, the project affects 42 parcels of real property along Textile and Platt Roads. Plaintiff sought temporary grading permits or agreements not involving permanent takings regarding some of the parcels, reaching agreements with 19 of the 22 affected fee owners (i.e., all fee owners except defendants). Plaintiff also sought permanent right-of-way easements regarding some of the parcels, and reached agreements with four of five affected fee owners (i.e., all fee owners except defendant Mildred Shankle).

Shankle owns two parcels of real property affected by the project—a parcel on Michigan Avenue and a parcel on Textile Road. Defendants Kevin and Janet

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[1] *Washtenaw Co Bd of Co Rd Comm'rs v Shankle*, unpublished order of the Court of Appeals, entered May 10, 2018 (Docket No. 340612) (granting application for leave to appeal as to Issues I through V, relating to the trial court's jurisdiction, and otherwise denying leave for lack of merit).

[2] Defendants' motion was also brought under MCR 2.116(C)(8) (failure to state a claim), but the trial court never specifically addressed the grounds for summary disposition found in that subrule. That aspect of defendants' motion is not at issue in this appeal.

Nevaux own a single parcel on Textile Road affected by the project. Defendants Christina Lirones and Stephen Berger also own a single parcel affected by the project on Textile Road. Consequently, four parcels are at issue in this case.

In August 2017, plaintiff filed this action against defendants, alleging that defendants had rejected its good-faith offers to pay just compensation. Defendants moved for summary disposition of the action, asserting a lack of subject-matter jurisdiction and challenging the necessity of the action. Regarding the asserted lack of subject-matter jurisdiction, defendants claimed that plaintiff had failed to tender a good-faith offer to all owners of all interests in each of the subject parcels and had made additional procedural errors, thereby failing to properly invoke the jurisdiction of the trial court. Defendants provided an affidavit from Patrick McVeigh, a title examination attorney, stating that there were at least four additional interest holders of record, aside from defendants' fee interests, that did not receive good-faith written offers: (1) Mortgage Electronic Registration Systems, Inc. (MERS), as disclosed by a mortgage encumbering the Nevaux property; (2) the State of Michigan Department of Agriculture, as disclosed by a Farmland Development Rights Agreement encumbering the Lirones/Berger property; (3) Pittsfield Charter Township, as disclosed by an Easement for Recreational Trail encumbering one of the Shankle properties; and (4) Michigan Bell Telephone Company, as disclosed by an easement encumbering the second Shankle property. The affidavit further stated that these interests were "examples only and not a complete recitation of all potential owners" because the affiant had "not undertaken full title examinations . . . ." Defendants also maintained that plaintiff

was required to continue negotiating before filing the condemnation action, rather than filing such an action at the time its initial offers were rejected.

After a hearing, the trial court denied defendants' motion insofar as it related to subject-matter jurisdiction, stating:

> I am finding there is no material factual dispute and I do not find that the Complaint is materially defective such that it requires the harsh remedy of dismissal. And, therefore, the just compensation claim will proceed. Your point is well taken, that there is the anticipated second hearing on necessity where objections have been raised. I am not ruling on that today. However, having heard at least the cursory arguments, I am not at all convinced it requires an evidentiary hearing. You two talk about a time you'll come back within that 30 days, my preference would be not at the late [sic] minute, but sometime before that. I'll hear those arguments and then if I think I require to hear from witnesses for purposes of that hearing, I'll tell you who I would like to hear from, and what the subject matter would be. But I don't want to say just because you have a second hearing it's like Field of Dreams, if I build it, you will come. I mean, I—you know, I'm not convinced on that. So go—so the first order I'll sign, set a time to come back and argue on the necessity objection, but it is not an evidentiary hearing, I'll hear your arguments if you proffer to me at that hearing why you think I need to hear from somebody, I'll listen to that argument, and if we decide that I—I agree, then we'll set up the time to hear that.[3]

This Court granted defendants' application for leave to appeal, limited to the issues relating to subject-matter jurisdiction.

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[3] After a subsequent hearing on defendants' challenges to the necessity of condemnation, including defendants' assertion that plaintiff may have acted fraudulently or abused its discretion by bringing this action, the trial court denied the remainder of defendants' motion. That ruling is not at issue on appeal.

II. STANDARD OF REVIEW

We review de novo issues arising from the interpretation and application of the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*. *Novi v Woodson*, 251 Mich App 614, 621; 651 NW2d 448 (2002). We also review de novo whether a trial court had subject-matter jurisdiction. *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 559; 840 NW2d 375 (2013).

III. "STRICT COMPLIANCE" STANDARD

Defendants argue that the trial court erred by not requiring plaintiff to strictly comply with the procedural requirements for condemning property under the UCPA and that because of plaintiff's failure to strictly comply, the trial court lacked subject-matter jurisdiction. We agree.

As early as 1876, our Supreme Court stated:

> The rule is well settled, that in all cases where the property of individuals is sought to be condemned for the public use by adverse proceedings, *the laws which regulate such proceedings must be strictly followed*, and especially that every jurisdictional step, and every requirement shaped to guard the rights and interests of parties whose property is meant to be taken, *must be observed with much exactness*. [*Detroit Sharpshooters' Ass'n v Hamtramck Hwy Comm'rs*, 34 Mich 36, 37-38 (1876) (emphasis added).]

Michigan's appellate courts have approvingly reaffirmed this language ever since. See, e.g., *In re Petition of Rogers*, 243 Mich 517, 522; 220 NW 808 (1928) ("The statute of eminent domain is to be strictly construed, and its jurisdictional conditions must be established in fact and may not rest upon technical waiver or estop-

pel."); *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 672; 760 NW2d 565 (2008); *State Bd of Ed v von Zellen*, 1 Mich App 147, 155-156; 134 NW2d 828 (1965) (citing additional cases requiring strict compliance).[4]

Plaintiff argues that the Legislature rejected the common-law strict-compliance requirement when it enacted the UCPA but cites no legislative text or caselaw to support this assertion. As stated earlier, by 1876 the standard was "well settled," see *Detroit Sharpshooters' Ass'n*, 34 Mich at 37, as a foundational tenet of eminent-domain law.[5] We will not depart from that tradition absent a clear statement from the Legislature or our Supreme Court. See *People v Woolfolk*, 304 Mich App 450, 497; 848 NW2d 169 (2014) (noting that while the Legislature has the authority to abrogate the common law, "[l]anguage used by the Legislature should show a clear intent to abrogate the common law" rather than mere implication). The trial

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[4] Although Michigan Court of Appeals cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), we may consider them as persuasive authority. *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2013).

[5] We note that the strict-compliance requirement for the exercise of eminent domain is not unique to Michigan. See, e.g., *Cincinnati v Vester*, 281 US 439, 448; 50 S Ct 360; 74 L Ed 950 (1930) ("We understand it to be the rule in Ohio, as elsewhere, that the power conferred upon a municipal corporation to take private property for public use must be strictly followed."); *Indianapolis v Schmid*, 251 Ind 147, 150; 240 NE2d 66 (1968) ("Statutes of eminent domain are in derogation of common law rights of property and must be strictly followed, both as to the extent of the power and as to the manner of its exercise."); *D-Mil Prod, Inc v DKMT, Co*, 260 P3d 1262, 1267; 2011 OK 55 (2011) ("Additionally, eminent domain proceedings may only be initiated in strict compliance with the specific constitutional mandates and legislative enactments that confer eminent domain powers to the condemning entity . . . ."); 27 Am Jur 2d, Eminent Domain, § 365, pp 21-23 nn 5, 6, and 11 (citing additional cases requiring strict compliance).

court erred when it applied a lesser standard in determining that plaintiff's complaint was not "materially defective" and that strict compliance was not necessary.

Applying the proper standard, we conclude that the trial court lacked subject-matter jurisdiction over plaintiff's complaint because the UCPA requires, as a necessary condition precedent to invoking the trial court's jurisdiction, that the condemning agency provide a good-faith written offer to all property owners of record affected by the proposed condemnation.

"Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." Const 1963, art 10, § 2. "The ultimate purpose of the [UCPA] statutory scheme . . . is to ensure the guarantee of just compensation found in Const 1963, art 10, § 2." *Dep't of Transp v Frankenlust Lutheran Congregation*, 269 Mich App 570, 576; 711 NW2d 453 (2006). As the *Frankenlust* Court stated:

> The UCPA, which governs the acquisition of property by public authorities through the power of eminent domain, see MCL 213.75, requires that before initiating negotiations for the purchase of property the authority "shall establish an amount that it believes to be just compensation for the property and promptly shall submit to the owner a good faith written offer to acquire the property for the full amount so established." MCL 213.55(1). [*Id*. at 572.]

More specifically, MCL 213.55(1) provides, in pertinent part:

> *Before initiating negotiations for the purchase of property*, the agency shall establish an amount that it believes to be just compensation for the property and *promptly shall submit to the owner a good faith written offer to*

acquire the property for the full amount so established. . . . *If there is more than 1 owner of a parcel, the agency may make a single, unitary good faith written offer*. The good faith offer shall state whether the agency reserves or waives its rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property and the agency's appraisal of just compensation for the property shall reflect such reservation or waiver. . . . *If an agency is unable to agree with the owner for the purchase of the property, after making a good faith written offer to purchase the property, the agency may file a complaint for the acquisition of the property in the circuit court in the county in which the property is located*. [Emphasis added.]

This Court has recognized " 'that the tendering of a good-faith offer is a necessary condition precedent to invoking the jurisdiction of the circuit court in a condemnation action.' " *Lenawee Co v Wagley*, 301 Mich App 134, 160; 836 NW2d 193 (2013) (citation omitted). In concluding that the good-faith offer is a jurisdictional requirement, this Court has not hesitated to dismiss condemnation actions for want of subject-matter jurisdiction when there was no good-faith written offer. See, e.g., *In re Acquisition of Land for the Central Indus Park Project*, 177 Mich App 11, 17; 441 NW2d 27 (1989).

The UCPA defines "property" as follows:

[L]and, buildings, structures, tenements, hereditaments, easements, tangible and intangible property, and property rights whether real, personal, or mixed, including fluid mineral and gas rights. [MCL 213.51(i).]

The UCPA defines "owner" as follows:

[A] person, fiduciary, partnership, association, corporation, or a governmental unit or agency having an estate, title, or *interest*, including beneficial, possessory, and se-

> curity interest, in *a property sought to be condemned*. [MCL 213.51(f) (emphasis added).]

Reading these definitions together, for the purposes of the UCPA, an "owner" is a person or entity having an interest in the property sought to be condemned, and "property" includes land and other property rights. Therefore, plaintiff was required to provide a good-faith offer to acquire the properties to all persons or entities with an interest in the properties.

Finally, MCL 213.55(1) expressly requires that a good-faith written offer include a statement of

> whether the agency reserves or waives its rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property and the agency's appraisal of just compensation for the property shall reflect such reservation or waiver.

Plaintiff acknowledges that a good-faith written offer to acquire the property is a necessary condition precedent to invoking the trial court's jurisdiction for a condemnation action but argues that it satisfied this requirement. We disagree.

Plaintiff failed to identify numerous holders of interests in the properties at issue and to satisfy the statutory requirements regarding them. Based on the record, these include, at a minimum, Pittsfield Charter Township, the Michigan Department of Agriculture, Michigan Bell Telephone Company, and MERS.[6] Plaintiff does not dispute that these entities were never served with a good-faith offer to purchase. Rather, plaintiff argues that it subsequently made a determination that

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[6] Again, a full title examination has yet to be done, and the McVeigh Affidavit identified these four interest holders as "examples only." Consequently, it is conceivable that there are additional interest holders, a possibility that plaintiff has offered nothing to discount.

these four interest holders were either partners in the development or not affected by the condemnation[7] and that it was therefore unnecessary to include them in the condemnation process. We find this argument unpersuasive. In order to initially invoke the trial court's jurisdiction, strict compliance with the statutory language of the UCPA required that the fee owners and any other owners of legal property interests be given a good-faith offer.[8] Whether and to what extent the interests of those owners may (or may not) be affected is a matter that may properly be considered by the trial court, but only *after* the trial court's jurisdiction is properly invoked. Because plaintiff failed to strictly comply with the statutory requirements, the trial court never acquired subject-matter jurisdiction. Any consideration of the effects of plaintiff's condemnation actions with respect to particular ownership interests was therefore premature. See *Wagley*, 301 Mich App at 160; see also *Todd v Dep't of Corrections*, 232 Mich App 623, 628; 591 NW2d 375 (1998) (noting that when a court lacks subject-matter jurisdiction, the only permissible action is to dismiss the case).

Further, while Shankle and Lirones and Berger were served with written documents on plaintiff's letterhead titled "Good Faith Offer to Purchase," which described in detail the condemnation process under the UCPA, reserved the right to a recovery action, contained signature spaces for the property owners to accept the terms

[7] Plaintiff relies on the affidavit of County Highway Engineer Sheryl Soderholm Siddall, P.E., executed on September 15, 2017, after the complaint was filed, to establish that plaintiff "is not asserting any taking against" defendants.

[8] We note that at least one of the omitted owners, MERS, held a security interest in the entire Nevaux property and was thus explicitly the type of "owner" to which the UCPA requires that notice be given.

and conditions set forth in the offer, and included as attachments the applicable survey sketches and legal descriptions, the Nevaux defendants only received a document entitled "Compensation Estimate Market Study," which did not satisfy the statutory requirements and did not constitute a good-faith written offer under the UCPA. The Compensation Estimate Market Study did not contain the required statement concerning "whether the agency reserves or waives its rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property and the agency's appraisal of just compensation for the property [that] shall reflect such reservation or waiver." MCL 213.55(1). Moreover, nothing in the one-page document suggested that it was a written offer to purchase property for a specific sum and not simply an in-house appraisal or estimate. Although plaintiff attempts to rehabilitate this jurisdictional defect with a post hoc affidavit from Curtis M. Brochue, the "Senior Right of Way Professional for the Washtenaw County Road Commission," the affidavit does not, at a minimum, cure the defect of the missing reservation-of-rights language required by MCL 213.55(1).

Because a good-faith written offer is a necessary condition precedent to invoking the trial court's jurisdiction in condemnation proceedings under the UCPA, the failure to tender a statutorily compliant good-faith written offer to all fee owners and any other owners of interests in the properties rendered the trial court without subject-matter jurisdiction over the action. See *Wagley*, 301 Mich App at 160; *Central Indus Park Project*, 177 Mich App at 17.[9]

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[9] Although plaintiff presented individual arguments concerning each of the identified additional owners of a property interest in the subject

We reverse and remand with directions to enter an order granting summary disposition in favor of defendants because the trial court lacked subject-matter jurisdiction. Summary disposition is without prejudice to plaintiff's refiling the action in compliance with the statutory requirements. We do not retain jurisdiction.

STEPHENS, P.J., and GLEICHER, J., concurred with BOONSTRA, J.

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parcels that it failed to serve and argues that this Court could find that it properly invoked the trial court's jurisdiction for some, if not all, defendants, nothing in the UCPA permits us to pick and choose the interests over which the trial court has jurisdiction. Moreover, we have previously determined that it would be inappropriate for this Court or the trial court to retain jurisdiction to allow a plaintiff to cure a defect in a good-faith written offer. *Central Indus Park Project*, 177 Mich App at 18. Rather, the condemning agency is free to refile its action in compliance with statutory requirements. *Id*.

KAZOR v DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

Docket No. 343249. Submitted March 5, 2019, at Lansing. Decided March 19, 2019, at 9:05 a.m.

Periodontist Christopher E. Kazor brought an action in the Court of Claims against the Department of Licensing and Regulatory Affairs (LARA), the Bureau of Professional Licensing, and the Michigan Board of Dentistry, seeking a declaratory judgment. In 2016, Kazor had settled a malpractice claim brought by a former patient. The settlement was reported to LARA's Bureau of Professional Licensing, which forwarded the report to the Michigan Board of Dentistry. The board authorized an investigation to determine whether Kazor had violated the Public Health Code, MCL 333.1101 *et seq*. As part of the investigation, LARA requested the former patient's records, and Kazor sought a declaration from the Court of Claims, CYNTHIA D. STEPHENS, J., that receipt of a malpractice settlement report is not sufficient to grant LARA the authority to investigate. LARA moved for summary disposition under MCR 2.116(C)(8), and the court granted the motion. Kazor appealed.

The Court of Appeals *held*:

1. MCL 333.16211(4)(d) requires LARA to review a licensed health professional's entire file on receipt of an adverse malpractice settlement, award, or judgment. If, after the file review, (1) LARA concludes that there is a reasonable basis to believe that a violation of MCL 333.16101 *et seq*., MCL 333.7101 *et seq*., MCL 333.8101 *et seq*., or rules promulgated under those articles exists and (2) a panel of the appropriate board authorizes an investigation, then MCL 333.16231(2)(a) requires LARA to investigate. On receipt of the report regarding Kazor's malpractice settlement, LARA was required to review his entire file. LARA then forwarded the matter to the Board of Dentistry, which had the authority under MCL 333.16231(2)(a) to authorize an investigation.

2. MCL 333.16221 requires LARA to investigate health-profession licensees when certain enumerated grounds exist. The same sentence in this statute independently grants LARA broad discretionary authority to investigate "any activities" related to the

licensee's practice, without reference to the grounds that require a mandatory investigation. Under the maxim *expressio unius est exclusio alterius*, the express enumerated grounds that require an investigation do not limit LARA's discretionary authority to investigate. Because LARA had discretionary authority to investigate Kazor under MCL 333.16221, it was irrelevant whether the grounds supporting a mandatory investigation were met.

3. Although MCL 333.16231(4) requires LARA to investigate when malpractice settlements, awards, or judgments meet certain thresholds, that section does not preclude an investigation under another section of the Public Health Code. Because the investigation of Kazor is authorized under MCL 333.16221, it was irrelevant whether the thresholds under MCL 333.16231(4) were met.

Affirmed.

LICENSES — INVESTIGATIONS.

MCL 333.16221 grants the Department of Licensing and Regulatory Affairs (LARA) broad discretionary authority to investigate any activities related to a licensed health professional; that discretionary authority is not limited by the grounds and thresholds that require LARA to investigate under a separate provision of MCL 333.16221 and under MCL 333.16231.

Merry, Farnen & Ryan, PC (by *John J. Schutza*) for plaintiff.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Bridget K. Smith*, Assistant Attorney General, for defendants.

Before: METER, P.J., and SERVITTO and REDFORD, JJ.

PER CURIAM. In this declaratory action, plaintiff, Christopher E. Kazor, appeals as of right the Court of Claims order granting summary disposition in favor of defendants. We affirm.

In July 2016, Kazor, a periodontist, settled a malpractice claim brought against him by a former patient. Kazor admitted no liability in settling the matter. Thereafter, the National Practitioner Data Bank

(NPDB) reported to the Department of Licensing and Regulatory Affairs (LARA) that Kazor's insurance carrier had paid a malpractice settlement to one of Kazor's patients. LARA forwarded the report to the Michigan Board of Dentistry, which authorized an investigation into whether Kazor had violated the Public Health Code (the Code), MCL 333.1101 *et seq*. LARA informed Kazor that it had initiated an investigation to determine his compliance with the Code, and it requested that Kazor provide it with the nonredacted dental records of the patient with whom he had settled. In response, Kazor initiated this action seeking a declaration that the Code does not authorize LARA to undertake an investigation based solely on an NPDB report of a malpractice settlement, which does not fit within the parameters of the settlements LARA is authorized to investigate. In lieu of answering Kazor's complaint, defendants sought summary disposition in their favor pursuant to MCR 2.116(C)(8), which the Court of Claims granted. This appeal followed.

A motion under MCR 2.116(C)(8) tests the factual sufficiency of the complaint based on the pleadings alone, and we review a decision made pursuant to this subrule de novo. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In reviewing a motion brought under MCR 2.116(C)(8), "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. Judgment is properly granted under this subrule "when the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Long v Liquor Control Comm*, 322 Mich App 60, 67; 910 NW2d 674 (2017) (citation and quotations omitted). We also review de novo questions of statutory interpretation. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008).

On appeal, Kazor contends that the Code does not authorize defendants to investigate him under the circumstances present in this matter. We disagree.

The Code applies to health professions (MCL 333.16111) and, thus, indisputably to Kazor. Relevant to the instant matter, LARA informed Kazor that it was initiating an investigation "as authorized by the Public Health Code (Section 333.16221) . . . ." In relevant part, that section of the Code provides:

> Subject to section 16221b, the department[1] shall investigate any allegation that 1 or more of the grounds for disciplinary subcommittee action under this section exist, and may investigate activities related to the practice of a health profession by a licensee, a registrant, or an applicant for licensure or registration. The department may hold hearings, administer oaths, and order the taking of relevant testimony. After its investigation, the department shall provide a copy of the administrative complaint to the appropriate disciplinary subcommittee. The disciplinary subcommittee shall proceed under section 16226 if it finds that 1 or more of the following grounds exist:
>
> (a) Except as otherwise specifically provided in this section, a violation of general duty, consisting of negligence or failure to exercise due care, including negligent delegation to or supervision of employees or other individuals, whether or not injury results, or any conduct, practice, or condition that impairs, or may impair, the ability to safely and skillfully engage in the practice of the health profession.

Defendants additionally relied on MCL 333.16231 for authority to investigate Kazor. MCL 333.16231 provides, in part:

> (1) A person or governmental entity that believes that a violation of this article [MCL 333.16101 *et seq*.], article 7

[1] " 'Department' means the department of licensing and regulatory affairs" (LARA). MCL 333.16104(3).

[MCL 333.7101 *et seq*.], or article 8 [MCL 333.8101 *et seq*.] or a rule promulgated under this article, article 7, or article 8 exists may submit an allegation of that fact to the department in writing.

(2) Subject to subsection (3) and section 16221b, if the department determines after reviewing an application or an allegation or a licensee's or registrant's file under section 16211(4) that there is a reasonable basis to believe that a violation of this article, article 7, or article 8 or a rule promulgated under this article, article 7, or article 8 exists, 1 of the following applies:

(a) Unless subdivision (b) applies, subject to subsection (10), with the authorization of a panel of at least 3 board members that includes the chair and at least 2 other members of the appropriate board or task force designated by the chair, the department shall investigate the alleged violation. Subject to subsection (10), if the panel fails to grant or deny authorization within 7 days after the board or task force receives a request for authorization, the department shall investigate. If the department believes that immediate jeopardy exists, the director or his or her designee shall authorize an investigation and notify the board chair of that investigation within 2 business days.

(b) If it reviews an allegation in writing under subsection (1) that concerns a licensee or registrant whose record created under section 16211 includes 1 substantiated allegation, or 2 or more written investigated allegations, from 2 or more different individuals or entities, received in the preceding 4 years, the department shall investigate the alleged violation. Authorization by a panel described in subdivision (a) is not required for an investigation by the department under this subdivision.

(3) If a person or governmental entity submits a written allegation under subsection (1) more than 4 years after the date of the incident or activity that is the basis of the alleged violation, the department may investigate the alleged violation in the manner described in subsection (2)(a) or (b), as applicable, but is not required to conduct an investigation under subsection (2)(a) or (b).

> (4) If it receives information reported under section 16243(2) that indicates 3 or more malpractice settlements, awards, or judgments against a licensee in a period of 5 consecutive years or 1 or more malpractice settlements, awards, or judgments against a licensee totaling more than $200,000.00 in a period of 5 consecutive years, whether or not a judgment or award is stayed pending appeal, the department shall investigate.

Kazor asserts that MCL 333.16221 and MCL 333.16231, read together, evidence the Legislature's intent that LARA, the Board of Dentistry, or both may investigate him because of a settlement *only* under the circumstances set forth in MCL 333.16231(4), which was not the factual scenario before LARA. However, MCL 333.16231(2) provides that if LARA "determines after reviewing an application *or* an allegation *or* a licensee's or registrant's file under section 16211(4) that there is a reasonable basis to believe" that a violation of specific provisions in the Code occurred, it is required to take certain actions. (Emphasis added.)

In relevant part, MCL 333.16211(4) provides:

> The department shall promptly review the entire file of a licensee or registrant, including all prior matters with respect to which no action was taken at the time, with respect to whom there is received 1 or more of the following:
>
> * * *
>
> (d) An adverse malpractice settlement, award, or judgment.

There is no dispute that Kazor entered into a settlement with his former patient with respect to a claim of malpractice, agreeing to pay the former patient a sum of money. That qualifies as an adverse malpractice settlement under MCL 333.16211(4)(d), and LARA was

required to review Kazor's entire file as a result, MCL 333.16211(4). There is no reference in that section to any particular settlement amount; it simply states that when there has been an adverse malpractice settlement, LARA "shall" promptly review the licensee's entire file. "Shall" indicates a mandatory directive. See, e.g., *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 420; 716 NW2d 236 (2006).

Pursuant to MCL 333.16231(2), if LARA determined, after reviewing Kazor's file under MCL 333.16211(4), that there was a reasonable basis to believe that a violation of certain provisions of the Code occurred, then, "with the authorization of a panel of at least 3 board members that includes the chair and at least 2 other members of the appropriate board or task force designated by the chair, the department *shall* investigate the alleged violation." MCL 333.16231(2)(a) (emphasis added). LARA apparently determined, after reading Kazor's file, that there was a reasonable basis to believe that Kazor violated an article or rule specified in MCL 333.16231(2). It thus forwarded the information to the Board of Dentistry, which authorized an investigation. LARA was thereafter required, under the plain language of MCL 333.16231(2), to investigate. See *In re Petition of Attorney General for Subpoenas*, 327 Mich App 136; 933 NW2d 351 (2019).

While LARA may have received the information regarding its belief that Kazor violated a provision in the Code from the report of the malpractice settlement, that does not mean that LARA determined that the settlement itself justified an investigation. Rather, after reviewing Kazor's full file, LARA could have determined that the facts underlying the allegation of malpractice, or even wholly unrelated facts

contained in the file, led to a reasonable belief that Kazor had violated the Code, prompting its investigation.

In addition, while MCL 333.16231(4) requires LARA to investigate if it receives information indicating "3 or more malpractice settlements, awards, or judgments against a licensee in a period of 5 consecutive years or 1 or more malpractice settlements, awards, or judgments against a licensee totaling more than $200,000.00 in a period of 5 consecutive years," that provision does not limit and is not inconsistent with MCL 333.16231(2) or MCL 333.16221, as alleged by Kazor.

When construing statutory language, this Court's goal is to ascertain the Legislature's intent. *Cook v Dep't of Treasury*, 229 Mich App 653, 658-659; 583 NW2d 696 (1998). The best indicator of that intent is the plain language used. *Ferguson v City of Lincoln Park*, 264 Mich App 93, 95-96; 694 NW2d 61 (2004). If the language is clear and unambiguous, it must be applied as written. *Id*. Statutory provisions that relate to the same subject are *in pari materia* and should be construed harmoniously to avoid conflict. *Sinicropi v Mazurek*, 273 Mich App 149, 156-157; 729 NW2d 256 (2006). In addition, the Legislature has stated its intent that the Code "shall be liberally construed for the protection of the health, safety, and welfare of the people of this state." MCL 333.1111.

MCL 333.16231(2) requires an investigation when LARA reviews a licensee's file and determines that there is a reasonable basis to believe that a violation occurred and the relevant board authorizes investigation. MCL 333.16231(4), in contrast, requires LARA to investigate under certain specified circumstances without having to obtain board authorization.

MCL 333.16221 broadly requires LARA to investigate "any allegation that 1 or more of the grounds for disciplinary subcommittee action under this section exist" and permits[2] LARA to "investigate activities related to the practice of a health profession by a licensee, a registrant, or an applicant for licensure or registration." The Legislature clearly intended to provide LARA with broad discretionary authority to investigate other activities related to the practice of a licensee's (or registrant's or applicant's) health profession that fall *outside* the enumerated grounds for disciplinary subcommittee action listed in MCL 333.16221. See *City of Monroe v Jones*, 259 Mich App 443, 450; 674 NW2d 703 (2003) (relying on the maxim *expressio unius est exclusio alterius* to explain that the express mention of one thing is to the exclusion of others; the express mention of the enumerated grounds referred to in the first phrase of the first sentence of MCL 333.16221 implies exclusion of those grounds in the second phrase of the first sentence).

MCL 333.16231(4), on the other hand, requires LARA to investigate when it receives very specific, enumerated information with respect to a licensee's malpractice settlements, awards, or judgments.[3] And while a report of a malpractice settlement is not necessarily an "allegation that 1 or more of the grounds for disciplinary subcommittee action" exist under MCL 333.16221, the NPDB report of Kazor's alleged malpractice could be an activity related to the practice of

[2] Use of the term "may" in MCL 333.16221 with respect to LARA investigating "activities related to the practice of a health profession by a licensee" indicates that such investigation is permissive, rather than mandatory. See *Walters*, 481 Mich at 383.

[3] Significantly, this section does not *prohibit* the investigation of allegations related to malpractice that do not meet these thresholds.

dentistry, and Kazor does not argue otherwise. LARA would thus be permitted to investigate the malpractice settlement pursuant to its broad discretionary authority set forth in MCL 333.16221 to investigate "activities related to the practice of a health profession by a licensee[.]"

In sum, Kazor's assertion that LARA's authority to investigate malpractice settlements is limited to those specified in MCL 333.16231(4) is without merit. The Code grants LARA the authority to investigate both the settlement and the underlying facts leading to the settlement under the circumstances of this case pursuant to either MCL 333.16231(2)(a) or MCL 333.16221. Because no factual development of Kazor's complaint could possibly justify a declaratory ruling in Kazor's favor, summary disposition for defendants under MCR 2.116(C)(8) was proper.

Affirmed.

METER, P.J., and SERVITTO and REDFORD, JJ., concurred.

PEOPLE v COLEMAN
PEOPLE v ROBERTS

Docket Nos. 339482 and 340368. Submitted February 12, 2019, at Detroit. Decided March 21, 2019, at 9:00 a.m.

In these consolidated cases, Ernest Coleman and Lillian Roberts were convicted after pleading guilty in the Wayne Circuit Court to various charges for their roles in the kidnapping, torture, and murder of a 13-year-old boy. A third individual orchestrated the events leading to the boy's death and actually committed the murder; his convictions and sentences are not at issue in this appeal. In Docket No. 339482, Coleman pleaded guilty to possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; being a felon in possession of a firearm (felon-in-possession), MCL 750.224f; torture, MCL 750.85; and unlawful imprisonment, MCL 750.349b. The court, Michael M. Hathaway, J., sentenced Coleman as a third-offense habitual offender, MCL 769.11, to 12 to 15 years of imprisonment for torture, 10 to 15 years of imprisonment for unlawful imprisonment, 1 to 5 years of imprisonment for felon-in-possession, and 2 years of imprisonment for felony-firearm. The court indicated that the two-year felony-firearm sentence was to be consecutive to the other sentences. Coleman moved to correct his judgment of sentence to make the felony-firearm sentence consecutive only to the predicate felony of felon-in-possession. The court agreed, and Coleman's judgment of sentence was amended accordingly. The prosecution appealed. In Docket No. 340368, Roberts pleaded guilty to second-degree murder, MCL 750.317; and kidnapping, MCL 750.349. At sentencing, Roberts argued that her plea was defective because her attorney had failed to advise her that a defendant convicted of kidnapping a minor must register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. Roberts was permitted to plead guilty to unlawful imprisonment instead of kidnapping. The trial court, Michael M. Hathaway, J., sentenced Roberts as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of 24 to 40 years of imprisonment for each of her convictions. After sentencing, Roberts petitioned the trial court to withdraw her guilty plea to unlawful imprisonment because her attorney had failed to advise her that unlawful

imprisonment of a minor also required registration under SORA. Instead of permitting Roberts to withdraw her plea as a whole as she requested, the trial court treated Roberts's plea-based convictions as severable and ordered that only her plea to unlawful imprisonment be withdrawn. Roberts appealed. The trial court also sua sponte vacated Coleman's conviction of unlawful imprisonment of a minor after learning that he did not know it required SORA registration.

The Court of Appeals *held*:

1. The plain language of the felony-firearm statute, MCL 750.227b, indicates that the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for the specific felony underlying the felony-firearm conviction. No language in the statute permits consecutive sentencing with convictions other than the predicate offense—the offense during which the defendant possessed a firearm. The trial court initially ordered that Coleman's felony-firearm sentence be served consecutively with all of Coleman's other sentences, but after Coleman appealed, the trial court amended the judgment of sentence to reflect that Coleman's felony-firearm sentence was to be consecutive only to the predicate felony of felon-in-possession. The felony-firearm statute refers to a singular predicate felony and requires that the sentence for felony-firearm be served consecutively with the sentence imposed for *the* underlying felony or attempt to commit *the* felony. This outcome does not conflict with the Supreme Court's decision in *People v Clark*, 463 Mich 693 (1993). The *Clark* Court stated in dicta that the prosecution had the discretion to list on the complaint and the information additional and alternative crimes as underlying offenses for a felony-firearm count or that the prosecution could file more separate felony-firearm counts when there were multiple felonies involved in a case. But *Clark* never said that the prosecution's introduction of multiple felony charges meant that the ultimate conviction of a single count of felony-firearm could be tied to multiple predicate felonies for sentencing purposes. In fact, in *Clark*, each felony-firearm sentence was tied to a single, corresponding felony conviction. Reasonably interpreted, *Clark*'s dicta indicates that if the prosecution had listed multiple felonies in the felony information, there might have been options about the felony sentence to which the felony-firearm sentence would have ultimately been consecutive. The trial court properly amended Coleman's judgment of sentence to reflect that Coleman's felony-firearm sentence was consecutive only to his sentence for felon-in-possession.

2. A criminal defendant's ability to withdraw a guilty plea after sentencing is limited to cases in which there was a defect in the plea-taking process. The failure to accurately inform a defendant of the consequences of his or her plea may constitute a defect in the plea-taking process because the defendant may not have been capable of making an understanding plea. There was no dispute that Roberts's plea was defective because her attorney failed to inform her that a conviction of unlawful imprisonment of a minor would require Roberts to register as a sex offender under SORA. The failure to inform a pleading defendant that the plea will necessarily require registration as a sex offender affects whether the plea was knowingly made. That Roberts was not informed of the mandatory sex offender registration entitled her to withdraw her plea to unlawful imprisonment, but the trial court abused its discretion by denying her motion to withdraw her plea in its entirety. When circumstances objectively indicate that the prosecution and the defendant intended a plea agreement involving multiple charges to be a package deal, the plea agreement should be regarded as indivisible. In such a case, a defendant must be permitted to withdraw his or her plea in its entirety when the defendant shows a defect in the plea process, even when the defect pertains to only one charge. Roberts's plea was clearly intended as a package deal—she pleaded guilty to multiple charges at the same time, some charges were dropped in exchange for her plea, the charges and the plea agreement were described in a single document, and the plea was accepted in a single proceeding. Therefore, the trial court abused its discretion by severing the plea from the agreement in its entirety.

Docket No. 339482 affirmed. Docket No. 340368 vacated and remanded.

1. CRIMINAL LAW — SENTENCING — FELONY-FIREARM — CONSECUTIVE TO AND PRECEDING PREDICATE FELONY.

A sentence for possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, must run consecutively with and preceding the predicate felony—the felony on which the felony-firearm conviction is based; a felony-firearm sentence may only be made consecutive to the sentence for a *single* predicate felony; it may not run consecutively with *any* other sentences in addition to the sentence for the predicate felony.

2. CRIMINAL LAW — GUILTY PLEA — PLEA AGREEMENT INVOLVING MULTIPLE CHARGED OFFENSES — PLEA WITHDRAWAL.

When circumstances objectively indicate that the prosecution and the defendant intended a plea agreement involving multiple

charges to be a package deal, the plea agreement should be regarded as indivisible; circumstances indicating that a plea agreement is a package deal include a defendant's pleading to multiple charges at the same time, some charges being dropped in exchange for the defendant's plea, the charges and plea agreement being described in a single document, and the plea being accepted in a single proceeding; when a plea agreement is determined to be a package deal a defendant must be permitted to withdraw his or her plea in its entirety when the defendant shows a defect in the plea process, even when the defect pertains to only one charge.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Amanda Morris Smith*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Malaika D. Ramsey-Heath*) for Ernest Coleman.

Tracie R. Gittleman for Lillian Roberts.

Before: GLEICHER, P.J., and K. F. KELLY and LETICA, JJ.

PER CURIAM. Ernest Coleman and Lillian Roberts both pleaded guilty to various counts for their roles in the kidnapping, torture, and murder of a 13-year-old boy. In Docket No. 339482, the prosecution appeals the trial court's decision to make Coleman's two-year sentence for possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, consecutive only to his one-to-five-year sentence for being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, rather than consecutive to all his sentences, which included torture, MCL 750.85, and unlawful imprisonment, MCL 750.349b. The trial court did not err, and we affirm Coleman's sentences.

In Docket No. 340368, Roberts appeals the trial court's partial denial of her motion to withdraw her plea. Roberts successfully petitioned the court to withdraw her guilty plea to unlawful imprisonment based on her attorney's failure to accurately advise her of the plea consequences. However, the court denied her request to withdraw her plea as a whole (her plea agreement also included second-degree murder), treating the plea-based convictions as severable. The prosecution concedes the trial court's error. We vacate the trial court's order and remand for further proceedings in this regard.

I. BACKGROUND

In May 2016, Gregory Walker devised a plan to kidnap and torture a 13-year-old boy who picked up and kept a $50 bill dropped by Walker in a party store parking lot. With the assistance of Coleman and Roberts, Walker dragged the child into his car. The trio tortured the boy for six hours, trying to force him to reveal where his parents lived. Ultimately, Walker choked the child to death. During these events, Walker possessed a handgun and Coleman held the weapon for a period of time. The prosecution charged Walker with first-degree premeditated murder, felony murder, kidnapping, torture, unlawful imprisonment, felony-firearm, and felon-in-possession. He pleaded guilty to second-degree murder, unlawful imprisonment, and felony-firearm. His convictions and sentences are not at issue in this appeal.

The prosecution charged Coleman with kidnapping, MCL 750.349; torture; unlawful imprisonment; felony-firearm; and felon-in-possession. He pleaded guilty to torture, unlawful imprisonment, felony-firearm, and felon-in-possession. The court sentenced Coleman as a

third habitual offender, MCL 769.11, to 12 to 15 years' imprisonment for his torture conviction, 10 to 15 years' imprisonment for his unlawful-imprisonment conviction, and 1 to 5 years' imprisonment for his felon-in-possession conviction. The court imposed a two-year sentence for felony-firearm to be served "consecutive to the other sentences."

Coleman subsequently moved to correct his judgment of sentence to make the felony-firearm sentence consecutive only to the predicate felony of felon-in-possession. The trial court agreed that Coleman's felony-firearm sentence should be consecutive only to the felon-in-possession sentence and amended the judgment of sentence accordingly.

The prosecution charged Roberts with felony murder, MCL 750.316; kidnapping; torture; unlawful imprisonment; felony-firearm; and felon-in-possession. Roberts pleaded guilty to second-degree murder, MCL 750.317, and kidnapping. At the sentencing hearing, Roberts contended that her plea was defective because her attorney failed to advise her that a defendant convicted of kidnapping a minor must register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The parties agreed that Roberts would plead guilty to unlawful imprisonment instead. The court then sentenced Roberts as a fourth habitual offender, MCL 769.12, to concurrent terms of 24 to 40 years' imprisonment for each of her convictions.

Roberts later learned that a defendant also must register under SORA for unlawfully imprisoning a minor. She sought to withdraw her plea based on the inaccurate information provided by her counsel. The prosecution agreed with Roberts that the error rendered Roberts's entire plea defective and that it could be withdrawn in its entirety. The trial court, however,

severed Roberts's convictions and permitted her to withdraw her guilty plea only as to the unlawful-imprisonment charge. After learning that Coleman was also ignorant of the SORA consequences of his guilty plea to unlawful imprisonment, the court sua sponte vacated Coleman's conviction and sentence for unlawful imprisonment as well.

II. CORRECTION OF COLEMAN'S SENTENCE

In Docket No. 339482, the prosecution challenges the trial court's decision to amend the judgment of sentence to make Coleman's felony-firearm sentence consecutive only to his felon-in-possession sentence. The trial court's decision was based on its interpretation of the felony-firearm statute—MCL 750.227b. We review de novo a trial court's interpretation of a statute. *People v Shenoskey*, 320 Mich App 80, 82; 903 NW2d 212 (2017).

MCL 750.227b provides for consecutive sentencing for a felony-firearm conviction, in relevant part, as follows:

> (1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony and shall be punished by imprisonment for 2 years. . . .
>
> * * *
>
> (3) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

In the double-jeopardy case of *People v Harding*, 443 Mich 693, 716; 506 NW2d 482 (1993) (opinion by

BRICKLEY, J.), abrogated in part by *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008), the Michigan Supreme Court held "that a defendant can be charged, convicted, and sentenced for felony-firearm for each felony committed in a spree of criminal activity." But "[a] defendant can be convicted for only one charge of felony-firearm for each convicted felony." *Harding*, 443 Mich at 716-717 (opinion by BRICKLEY, J.). "Felony-firearm can only attach to individual felonies." *Id*. at 717. The Court used the plain language of the felony-firearm statute to hold that if an appellate court vacates a predicate felony, the defendant's attached felony-firearm conviction must also be vacated. *Id*.

In *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000), the Supreme Court subsequently described:

> From the plain language of the felony-firearm statute, it is evident that the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony. Subsection 2 [now 3] clearly states that the felony-firearm sentence "shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the *felony* or attempt to commit the *felony*." It is evident that the emphasized language refers back to the predicate offense discussed in subsection 1, i.e., the offense during which the defendant possessed a firearm. No language in the statute permits consecutive sentencing with convictions other than the predicate offense.

Mr. Clark had been charged with 15 felonies, including two counts of felony-firearm with underlying felonies of possessing a bomb with unlawful intent. *Id*. at 460-461. The trial court imposed Mr. Clark's felony-firearm sentences "consecutive to all thirteen of the other charges." *Id*. at 462. After explaining that the statutory language required that the felony-firearm

sentences be consecutive only to the underlying bomb-possession convictions, the Court added a twist that has confused lower courts in the years that followed. In a footnote, the *Clark* Court stated, "At the discretion of the prosecuting attorney, the complaint and the information could have listed additional crimes as underlying offenses in the felony-firearm count, or the prosecutor could have filed more separate felony-firearm counts." *Id*. at 464 n 11.

Despite that the language in *Clark*'s footnote 11 is dicta, many unpublished decisions of this Court have adopted it to hold that a defendant's felony-firearm sentence may be imposed consecutively with multiple other sentences as long as the prosecutor lists the other charges as predicate felonies and the court instructs the jury that multiple felonies underlie the felony-firearm charge.[1]

Other panels of this Court have reached the opposite conclusion. The trial court relied upon *People v Hough*, unpublished per curiam opinion of the Court of Appeals, issued August 18, 2016 (Docket No. 326930), lv den 500 Mich 951 (2017), as that opinion affected a sentence the trial court had personally imposed. The trial court had made Mr. Hough's felony-firearm sen-

[1] See *People v Adams*, unpublished per curiam opinion of the Court of Appeals, issued September 13, 2018 (Docket No. 338654), lv den 503 Mich 1019 (2019); *People v Washington*, unpublished per curiam opinion of the Court of Appeals, issued February 24, 2015 (Docket No. 318941), lv den 498 Mich 905 (2015); *People v Smith*, unpublished per curiam opinion of the Court of Appeals, issued February 15, 2005 (Docket No. 249833), lv den 473 Mich 885 (2005); *People v Southward*, unpublished per curiam opinion of the Court of Appeals, issued December 28, 2004 (Docket No. 249293), lv den 472 Mich 895 (2005); *People v Welch*, unpublished per curiam opinion of the Court of Appeals, issued November 25, 2003 (Docket No. 241083), lv den 471 Mich 950 (2004); *People v Vandeventer*, unpublished per curiam opinion of the Court of Appeals, issued April 23, 2002 (Docket No. 230137), lv den 467 Mich 914 (2002).

tence consecutive to all his other sentences—carjacking, armed robbery, and resisting arrest. *Id*. at 1, 4. This Court noted that the felony information alleged that Mr. Hough possessed a firearm while committing carjacking, armed robbery, or both, but not while resisting arrest. *Id*. at 4. The prosecutor conceded error and agreed that the felony-firearm conviction should be consecutive only to the predicate felonies of armed robbery and carjacking. *Id*. This Court continued:

> Given that [Mr. Hough] was only charged with and convicted on *one count* of felony-firearm, it would appear, despite the parties' agreement, that the felony-firearm sentence should run consecutive to only one underlying felony, not both carjacking and armed robbery. The trial court's ruling in the bench trial plainly evidenced a conclusion that a firearm was used in the general transaction encompassing both the carjacking and armed robbery, although the court did speak in terms of the "carjacking" when addressing the felony-firearm charge. Because [Mr. Hough] received concurrent 15-to-25 year sentences for the carjacking and armed robbery offenses, it ultimately makes no difference whether the felony-firearm sentence runs consecutive to one or both crimes. Considering that there was only the one count of felony-firearm, and given the trial court's reference to the carjacking when rendering the felony-firearm verdict, we order a remand to correct the judgment of sentence so as to show that the felony-firearm sentence is consecutive solely in relationship to the carjacking sentence, not the armed robbery or resisting and obstructing sentences. [*Id*. at 4-5.]

In *People v Palmore*, unpublished per curiam opinion of the Court of Appeals, issued August 20, 2009 (Docket No. 284220), p 1, lv den 485 Mich 1080 (2010), the prosecutor charged Mr. Palmore with felony-firearm based upon three predicate felonies—armed

robbery, home invasion, and unlawful imprisonment. The trial court instructed the jury that it could convict Mr. Palmore of felony-firearm based on one or more of the predicate felonies, and the jury ultimately convicted him of all offenses. *Id*. at 2. This Court noted, "Since the jury convicted [Mr. Palmore] of all three predicate offenses, it is . . . not clear as to which underlying felony the felony-firearm was linked." *Id*. This Court remanded for the trial court to "revise[]" Mr. Palmore's sentence "so that he serves his sentence for the predicate offense consecutive to the felony-firearm sentence, but serves his sentences for the remaining two felonies concurrently with the felony-firearm sentence." *Id*.

Similarly, in *People v Rocca*, unpublished per curiam opinion of the Court of Appeals, issued January 27, 2009 (Docket No. 280295), pp 1, 2, lv den 485 Mich 925 (2009), Mr. Rocca was convicted of various felony offenses, and the jury was instructed that any one could serve as the predicate felony for felony-firearm. After the trial court ordered that Mr. Rocca's felony-firearm sentence was to be served consecutively with his other sentences, this Court reversed and remanded for a new trial as to the felony-firearm charge. *Id*. at 3. This Court reasoned that the felony-firearm statute only permitted consecutive sentencing with the predicate offense, and that for the purpose of sentencing, there was "no way for this Court or the trial court on remand to determine which felony the felony-firearm conviction was based upon." *Id*. at 2-3.

Hough, *Palmore*, and *Rocca* are in line with the plain language of MCL 750.227b and the Supreme Court's pre-*Clark* holding in *Harding*, and we follow their example. The goal of statutory interpretation is to give effect to the intent of the Legislature by

applying the plain and unambiguous language of the statutes the Legislature has enacted. *People v Pinkney*, 501 Mich 259, 268; 912 NW2d 535 (2018). The statute at issue here—MCL 750.227b—refers to a singular predicate felony for a felony-firearm conviction. MCL 750.227b(3) provides that a felony-firearm sentence shall be served consecutively with the sentence imposed for "*the* [underlying] felony or the attempt to commit *the* felony . . . ." (Emphasis added.) " '[T]he' is a definite article . . . ." *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). When followed by a singular noun, "the" contemplates one subject. See *id*. ("[R]ecognizing that 'the' is a definite article, and 'cause' is a singular noun, it is clear that the phrase 'the proximate cause' contemplates *one* cause."). A felony-firearm sentence must therefore be served consecutively with the sentence for the one predicate felony.

This conclusion does not conflict with *Clark*. The *Clark* Court noted that the prosecuting attorney in that case "could have listed additional crimes as underlying offenses in the felony-firearm count," but never suggested that the prosecution's introduction of multiple felony charges meant that the ultimate conviction of a single count of felony-firearm, for sentencing purposes, could be tied to multiple predicate felonies. *Clark*, 463 Mich at 464 n 11. If anything, the result in *Clark* suggests the opposite: each felony-firearm sentence in that case was tied to a single, corresponding conviction for possession of a bomb with unlawful intent. *Id*. at 465. The Court held that "[n]o language in the statute permits consecutive sentencing with convictions other than *the* predicate offense," *id*. at 464 (emphasis added), and clarified that, when appropriate, the prosecution has the freedom to file multiple, separate felony-firearm counts,

id. at 464 n 11. Reasonably interpreted, this footnote instructs that had the prosecution listed multiple predicate felonies in the felony information, there might have been options as to which felony would ultimately run consecutive to the felony-firearm sentence. In context, the Supreme Court did not mean to say that Clark's sentence for felony-firearm could have run consecutively with *all* the listed felonies.

The trial court correctly recognized that Coleman's sentences were rendered invalid by making his felony-firearm sentence consecutive to all his other sentences. The trial court sagely remedied that error. We discern no error in that regard and affirm.[2]

III. WITHDRAWAL OF ROBERTS'S PLEA

In Docket No. 340368, Roberts challenges the trial court's severance of her unlawful-imprisonment con-

[2] The prosecution alluded to another argument, but failed to fully flesh it out: that Coleman should have been deemed to have waived any challenge to his sentences as he received the exact benefit he negotiated in exchange for his plea. "[T]he ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001), citing Const 1963, art 4, § 45. "[T]he Legislature may impose restrictions on a judge's exercise of discretion in imposing [a] sentence." *Id*. at 440. The Legislature has the authority "to delegate various amounts of sentencing discretion to the judiciary." *People v Garza*, 469 Mich 431, 434; 670 NW2d 662 (2003). "[T]here are offenses with regard to which the judiciary has no sentencing discretion, offenses about which discretion is sharply limited, and offenses regarding which discretion may be exercised under the terms set forth in the sentencing guidelines legislation." *Id*. MCL 750.227b removes sentencing discretion from the judiciary, mandating the imposition of a two-year sentence for a felony-firearm conviction consecutive to the sentence of the one predicate felony. A felony-firearm sentence that runs consecutively with multiple other felonies or a felony other than the predicate felony would be illegal and invalid. The trial court was not permitted to impose the bargained-for sentence in the first instance.

viction and sentence from the remainder of her plea and the withdrawal of only that part of her plea. We review for an abuse of discretion a trial court's resolution of a plea-withdrawal motion brought after sentencing. *People v Seadorf*, 322 Mich App 105, 109; 910 NW2d 703 (2017), citing *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes." *People v Seewald*, 499 Mich 111, 116; 879 NW2d 237 (2016) (quotation marks and citation omitted). "A trial court necessarily abuses its discretion when it makes an error of law." *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (quotation marks and citation omitted). The trial court in this case abused its discretion by making such a legal error.

A criminal defendant's ability to withdraw a guilty plea after sentencing is limited to cases in which there was a defect in the plea-taking process. *People v Brown*, 492 Mich 684, 693; 822 NW2d 208 (2012); *People v Blanton*, 317 Mich App 107, 118; 894 NW2d 613 (2016). The failure to accurately inform a defendant of the consequences of his or her plea may constitute a defect in the plea-taking process because the defendant may not have been capable of making an understanding plea. *Brown*, 492 Mich at 694. See MCR 6.302(A) ("The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate.").

All agreed below that there was a defect in the plea-taking process as no one informed Roberts that her conviction of unlawfully imprisoning a minor would require her to register under SORA. This Court has specifically held that "[t]he failure to inform a pleading defendant that the plea will necessarily re-

quire registration as a sex offender affects whether the plea was knowingly made." *People v Fonville*, 291 Mich App 363, 392; 804 NW2d 878 (2011).

However, the trial court abused its discretion by denying Roberts's motion to withdraw her plea in its entirety. In *Blanton*, 317 Mich App at 120, no one informed Mr. Blanton before he pleaded guilty that his sentence for felony-firearm would run consecutively with his sentence for his underlying conviction. Despite that this failure of information did not relate to Mr. Blanton's convictions and sentences for his two other charges, this Court held that the defect rendered the entire plea unknowing. Based upon the plain language of the applicable court rules—MCR 6.302 and MCR 6.310—and persuasive extrajurisdictional authority, this Court adopted a general rule that

> when the objective circumstances indicate an intent by the prosecution and the defendant to treat a plea agreement to multiple charges as a "package deal," the plea agreement is indivisible and the defendant is permitted, upon showing a defect, to withdraw the plea in its entirety, even when the defect pertains to only one charge. [*Id*. at 122-125 (citations omitted).]

Roberts's plea was clearly intended as a package deal. Roberts pleaded to multiple charges at the same time, some charges were dropped in exchange for her plea, the charges and the plea agreement were described in singular documents, and the plea was accepted in a single proceeding. See *id*. at 126; *State v Turley*, 149 Wash 2d 395, 400; 69 P3d 338 (2003). Accordingly, Roberts should have been afforded the right to withdraw her *entire* plea based upon the defect in the plea-taking process. The trial court abused its discretion in severing the plea against Roberts's wishes. We must vacate the trial court's order denying in part

Roberts's motion to withdraw her plea and remand to allow Roberts to withdraw her plea in its entirety if she still so desires.[3]

We affirm in Docket No. 339482 and vacate and remand for further proceedings in Docket No. 340368. We do not retain jurisdiction.

GLEICHER, P.J., and K. F. KELLY and LETICA, JJ., concurred.

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[3] We note that when the trial court sua sponte vacated Coleman's unlawful-imprisonment conviction and sentence, it improperly divided Coleman's package plea deal as well. Coleman did not join Roberts's challenge on appeal, and we therefore have no ground to disturb his remaining convictions and sentences.

RIVERA v SVRC INDUSTRIES, INC

Docket No. 341516. Submitted February 12, 2019, at Lansing. Decided April 4, 2019, at 9:00 a.m. Leave to appeal sought.

Linda Rivera filed an action in the Saginaw Circuit Court against SVRC Industries, Inc., alleging that defendant violated the Whistleblowers' Protection Act (the WPA), MCL 15.361 *et seq*., by retaliating against plaintiff when she was allegedly about to report coworker LS's conduct to the police and by retaliating against plaintiff when she reported LS's conduct to defendant's attorney, Gregory Mair; plaintiff also claimed that the retaliation violated Michigan public policy. Plaintiff worked for defendant from October 2015 through October 2016. In September 2016, plaintiff held a disciplinary meeting with LS to address insubordination issues. During the meeting, LS made statements that plaintiff perceived as threatening in violation of the Michigan Anti-Terrorism Act, MCL 750.543a *et seq*. Plaintiff reported LS's statements to defendant's chief operating officer, Debra Snyder, and asked Snyder whether she should report LS's statements to the police. Plaintiff also discussed the incident with a friend who worked at a different company and with the chair of defendant's board of directors, Sylvester Payne, with whom she had a personal relationship. Snyder told plaintiff that Snyder would give plaintiff further instructions after speaking with defendant's chief executive officer, Dean Emerson; after meeting with Mair, Emerson instructed Snyder not to file a police report on defendant's behalf regarding LS's statements. When plaintiff later texted Snyder, again questioning whether she should contact the police, Snyder informed plaintiff that Mair had advised against filing a police report on defendant's behalf but that plaintiff could file a personal protection order against LS if she wanted. No one working for defendant discouraged plaintiff from reporting LS's conduct to the police, plaintiff never indicated that she was going to report it to the police, and she never reported it to the police. After an investigation of the incident involving LS, defendant terminated LS's employment with the company on October 3, 2016. Plaintiff was permanently laid off from her position with defendant on October 4, 2016, for purported budgetary and

economic reasons. Plaintiff filed this action, and defendant moved for summary disposition; the trial court denied the motion. Defendant appealed.

The Court of Appeals *held*:

1. The WPA protects two types of whistleblowers: (1) those who report or are about to report violations of law, regulations, or rule to a public body and (2) those who are requested by a public body to participate in an investigation held by that public body or in a court action. Under MCL 15.361(d)(*iv*), the term "public body" includes practicing members of the State Bar of Michigan. Simply because a plaintiff discusses suspected illegal activity with a licensed attorney who is an agent for the plaintiff's employer—that is, a person who qualifies as a "public body" under the WPA—does not automatically transform the communication into a "protected activity" under the act. A "type 1 whistleblower" is one who initiates or takes it upon himself or herself to communicate the employer's wrongful conduct to a public body in an attempt to bring the as-yet-hidden violation to light to remedy the situation or harm done by the violation. In contrast, a "type 2 whistleblower" is one who participates in a previously initiated investigation or hearing at the behest of a public body. To avoid summary disposition of a claim for retaliation under the WPA, a plaintiff must establish a prima facie case by establishing that (1) the employee was engaged in one of the protected activities listed in the provision, (2) the employee was discharged, threatened, or otherwise discriminated against regarding his or her compensation, terms, condition, location, or privileges of employment, and (3) a causal connection exists between the employee's protected activity and the employer's act of discharging, threatening, or otherwise discriminating against the employee. A plaintiff may establish the first element of a prima facie case by demonstrating that he or she was "about to report" a suspected violation of law to a public body. Given the dictionary definitions of the word "about" when followed by an infinitive, when pursuing an about-to-report claim under the WPA, a plaintiff has the burden of proving by clear and convincing evidence that he or she was on the verge of reporting a suspected violation of law; however, a concrete action is not necessary to satisfy the about-to-report element. The term "report" under the act means "to make a charge against" or "to make known the presence, absence, condition, etc.," of something. Thus, a plaintiff reports a violation of the law when he or she makes a charge of illegality against a person or entity or makes known to a public body pertinent information related to illegality. While a plaintiff need not explicitly state that he or she possessed an intent to report a violation or suspected

violation of the law in the immediate future to establish that the plaintiff was about to report the activity, an employer is entitled to objective notice of a report or a threat to report by the whistle-blower. A plaintiff may rely on either direct or circumstantial evidence of retaliation to establish a prima facie case. When a plaintiff presents circumstantial evidence of retaliation, the burden shifts to the defendant to rebut the presumption of a causal connection by articulating a legitimate business reason for its adverse employment action. If the defendant offers such a reason, the burden shifts back to the plaintiff to show that a genuine issue of material fact still exists by showing that a reasonable fact-finder could still conclude that the employer's articulated legitimate reason was a pretext disguising unlawful animus.

2. In this case, plaintiff never explicitly or implicitly threatened to report LS's conduct to the police. Although plaintiff discussed with Snyder, Payne, and a friend the option of filing a police report about LS's statements and conveyed her opinion on the matter, plaintiff's actions did not demonstrate that she was on the verge of contacting law enforcement and filing a report after those discussions. Additionally, there was no evidence that defendant was put on notice that plaintiff was about to report LS's conduct. Therefore, the trial court erred by denying defendant's motion for summary disposition of plaintiff's about-to-report claim under the WPA because a genuine issue of material fact did not exist regarding whether plaintiff had engaged in a protected activity, i.e., that she had been about to report a violation or suspected violation of law.

3. Plaintiff did not engage in protected activity when she spoke with Mair about LS—that is, she did not "report" a violation of law to Mair for purposes of the WPA—because she did not communicate, on her own initiative, the employer's wrongful conduct in an attempt to bring the as-yet-hidden violation to light; instead, plaintiff spoke with Mair at defendant's request after defendant had already conveyed plaintiff's concerns to Mair. As a result, even though Mair, a licensed attorney, qualified as a "public body" for purposes of the WPA, because the information was no longer hidden when plaintiff talked with Mair, the communication did not constitute protected activity under the act. Further, Mair acted as defendant's agent when he spoke with plaintiff. Thus, plaintiff communicated with Mair's principal—that is, defendant—when plaintiff spoke with Mair at defendant's direction. Plaintiff's communication with Mair was therefore not an attempt to bring the as-yet-hidden violation to light because plaintiff had already imparted the information to defendant, defendant had already shared

the information with Mair, and plaintiff had merely repeated the same information to defendant's agent, Mair. To hold otherwise would have erroneously transformed plaintiff's nonactionable communication to defendant (who was not a "public body" for purposes of the WPA) into an actionable one under the act merely because defendant requested plaintiff to convey the same information to Mair, who just happened to be a "public body" for purposes of the WPA. Accordingly, the trial court erred by concluding that plaintiff engaged in protected activity when she communicated with Mair regarding LS. Even if the communications with Mair were protected activity, plaintiff failed to show a causal connection between the communication with Mair and her termination. For these reasons, the trial court erred by denying defendant's motion for summary disposition of plaintiff's claim that defendant retaliated against her when she discussed LS's conduct with Mair at defendant's request.

4. In Michigan, termination of at-will employment is proscribed by public policy when (1) the employee is adversely treated after acting in accordance with a statutory right or duty, (2) the employee refuses or fails to violate a law in the course of employment, or (3) the employee exercises a right conferred by a well-established legislative enactment. However, when a statute already exists that prohibits a particular adverse employment action, the statute provides the exclusive remedy and a Michigan public-policy claim cannot be maintained. To that end, the remedies provided under the WPA are exclusive, and those remedies preempt public-policy claims arising from the same activity. Plaintiff asserted the public-policy claim that she was retaliated against for attempting to report or refusing to conceal LS's alleged violations of the Michigan Anti-Terrorism Act. The trial court erred by denying defendant's motion for summary disposition of that issue because the claim arose from the same activity as her claims under the WPA.

Reversed and remanded for further proceedings.

1. ACTIONS — WHISTLEBLOWERS' PROTECTION ACT — WORDS AND PHRASES — "PUBLIC BODY."

The Whistleblowers' Protection Act (the WPA) protects two types of whistleblowers: (1) those who report or are about to report a violation of a law, regulation, or rule to a public body and (2) those who are requested by a public body to participate in an investigation held by that public body or in a court action; the term "public body" includes practicing members of the State Bar of Michigan; simply because a plaintiff discusses suspected illegal

activity with a licensed attorney who is an agent of the plaintiff's employer—that is, a person who qualifies as a "public body" under the WPA—does not automatically transform the communication into a "protected activity" under the act (MCL 15.361 *et seq*.).

2. ACTIONS — WHISTLEBLOWERS' PROTECTION ACT — WORDS AND PHRASES — "ABOUT TO REPORT."

To establish a prima facie case of retaliation under the Whistleblowers' Protection Act, MCL 15.361 *et seq*., a plaintiff must demonstrate that (1) the employee was engaged in one of the protected activities listed in the act, (2) the employee was discharged, threatened, or otherwise discriminated against regarding his or her compensation, terms, condition, location, or privileges of employment, and (3) a causal connection exists between the employee's protected activity and the employer's act of discharging, threatening, or otherwise discriminating against the employee; a plaintiff may establish the first element of a prima facie case by demonstrating that he or she was "about to report" a suspected violation of law to a public body; the phrase "about to report" means that a plaintiff must prove by clear and convincing evidence that he or she was on the verge of reporting a suspected violation of law; a concrete action is not necessary to satisfy the about-to-report element; the term "report" means "to make a charge against" or "to make known the presence, absence, condition, etc.," of something; a plaintiff reports a violation of the law when he or she makes a charge of illegality against a person or entity or makes known to a public body pertinent information related to illegality.

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

David A. Wallace, *Brett Meyer*, *Robert A. Jordan*, and *Kailen C. Piper* for defendant.

Before: M. J. KELLY, P.J., and SERVITTO and BOONSTRA, JJ.

BOONSTRA, J. Defendant appeals by leave granted[1] the trial court's denial of its motion for summary

[1] *Rivera v SVRC Indus, Inc*, unpublished order of the Court of Appeals, entered February 1, 2018 (Docket No. 341516).

disposition under MCR 2.116(C)(10) (no genuine issue of material fact) in this action alleging that defendant violated the Whistleblowers' Protection Act (the WPA), MCL 15.361 *et seq.*, and unlawfully retaliated against plaintiff in violation of Michigan public policy. We reverse and remand the case for entry of an order granting summary disposition in favor of defendant.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff, Linda Rivera, was employed as the director of industrial operations at defendant, SVRC Industries, Inc., from October 2015 to October 2016. On September 15, 2016, plaintiff conducted a disciplinary meeting with an employee, LS, to address insubordination issues. According to plaintiff, LS made several statements during the meeting that plaintiff perceived to be threatening; specifically, LS raised the possibility of a "revolution" in this country and alluded to the fact that he could operate a firearm, that he was not afraid to pull the trigger, and that he did not discriminate.

Plaintiff reported LS's statements to defendant's chief operating officer, Debra Snyder. Plaintiff asked Snyder whether she should report the incident to the police, and Snyder stated that she would apprise chief executive officer Dean Emerson of the situation before calling back with further instructions. After consulting with the company's attorney, Gregory Mair, Emerson instructed Snyder not to file a police report on defendant's behalf. Meanwhile, plaintiff sought advice from a friend at a different company, who told her to notify the police and to, in effect, "start a paper trail." Plaintiff then discussed the incident with Sylvester Payne, her "on and off" significant other, who served as the chairman of defendant's board of directors.

Plaintiff also communicated with Snyder about the incident by text message. In the text messages, plaintiff reasserted her concern and inquired about whether she should contact the police. Snyder informed plaintiff that Mair had advised against filing a police report on defendant's behalf. Plaintiff told Snyder that she had contacted Payne to discuss the incident, and Snyder responded by text message:

> Linda, Sylvester is not an employee of SVRC. He is a board member. Please be very careful with sharing confidential information about employees. If you want to file a personal protection order you can do so, which may mean filing a police report, but that is not what was advised by our attorney. Let's talk when you get to work in the morning.

Plaintiff acknowledged that she was never discouraged by Snyder or anyone else from reporting LS's conduct to the police. Regardless, plaintiff never gave any indication that she was going to report the incident to the police, and she apparently never took any action to do so.

Emerson instructed Mair to investigate the incident. Mair spoke with plaintiff, as well as other employees who were present at the meeting with LS, between September 22 and September 28, 2016. Defendant terminated LS's employment on October 3, 2016.

On October 4, 2016, plaintiff received notice that she was being permanently laid off from her position with defendant, effective October 6, 2016, for "budgetary and economic reasons." Plaintiff filed suit against defendant, claiming that defendant had violated MCL 15.362 of the WPA in two ways: (1) by retaliating against plaintiff when she was about to report LS's conduct to the police and (2) by retaliating against plaintiff when she reported LS's conduct to Mair.

Plaintiff additionally claimed that defendant had unlawfully retaliated against her in violation of Michigan public policy. Defendant moved for summary disposition under MCR 2.116(C)(10), which the trial court denied. This appeal followed. After oral argument in this Court, we issued an order directing the parties to file supplemental briefs

> addressing whether plaintiff's communications with Mr. Mair constituted a "report" of a violation or suspected violation of law within the meaning of MCL 15.362. The parties need not address the status of Mr. Mair as a member of the State Bar of Michigan. Rather, the supplemental briefs should focus only on whether the communications in the context of this case constituted a "report" within the meaning of the statute. [*Rivera v SVRC Indus, Inc*, unpublished order of the Court of Appeals, entered February 14, 2019 (Docket No. 341516).]

The parties filed supplemental briefs in accordance with that order, and we have additionally considered the arguments presented in those briefs.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). Whether evidence establishes a prima facie case of retaliation under the WPA is a question of law that this Court also reviews de novo. *Roulston v Tendercare (Mich), Inc*, 239 Mich App 270, 278; 608 NW2d 525 (2000).

Under MCR 2.116(C)(10), summary disposition is appropriate if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." Motions for summary disposition under MCR

2.116(C)(10) test the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Dextrom*, 287 Mich App at 416. When evaluating motions brought under this subrule, a trial court must consider—in the light most favorable to the nonmoving party—the parties' affidavits, pleadings, depositions, admissions, and other documentary evidence. *Id*. at 415-416, citing MCR 2.116(G)(5). Such evidence is required when judgment is sought under subrule (C)(10). MCR 2.116(G)(3)(b). Motions under subrule (C)(10) "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). The nonmoving party may not rest upon its pleading but must set forth specific facts showing that there is a genuine issue for trial. *Id*. If the nonmoving party fails to do so, the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120.

III. ANALYSIS

Plaintiff's complaint alleged three claims: (1) retaliation in violation of the WPA as a result of plaintiff allegedly being about to report LS's conduct to the police, (2) retaliation in violation of the WPA as a result of plaintiff's allegedly having actually reported LS's conduct to Mair, and (3) retaliation in violation of Michigan public policy as a result of plaintiff's alleged attempt to report LS's conduct to the police and by plaintiff's alleged refusal to conceal LS's supposed violation of the Michigan Anti-Terrorism Act, MCL 750.543a *et seq*. Defendant argues that the trial court

should have granted summary disposition in its favor on all these claims. We agree.

A. WPA LEGAL PRINCIPLES

The WPA protects plaintiffs who report or are about to report violations or suspected violations of law undertaken by employers and coworkers. *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 403; 572 NW2d 210 (1998). Under MCL 15.362,

> [a]n employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee . . . reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

The WPA "provides protection for two types of 'whistleblowers': (1) those who report, or are about to report, violations of law, regulation, or rule to a public body, and (2) those who are requested by a public body to participate in an investigation held by that public body or in a court action." *Henry v Detroit*, 234 Mich App 405, 409; 594 NW2d 107 (1999). A "type 1 whistleblower" is someone "who, on his own initiative, takes it upon himself to communicate the employer's wrongful conduct to a public body in an attempt to bring the, as yet hidden, violation to light to remedy the situation or harm done by the violation." *Id*. at 410. "[T]ype 2 whistleblowers" are those who "participate in a previously initiated investigation or hearing at the behest of a public body." *Id*. In this case, plaintiff principally

argues that she was a type 1 whistleblower, i.e., that she reported or was about to report a violation of the law to a public body.[2]

The parties do not dispute that plaintiff was an employee or that defendant was an employer under the act. A "public body" refers to any of the following:

> (*i*) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.
>
> (*ii*) An agency, board, commission, council, member, or employee of the legislative branch of state government.
>
> (*iii*) A county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or any member or employee thereof.
>
> (*iv*) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body.

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[2] In her supplemental brief on appeal, plaintiff argues for the first time that she also engaged in protected activity by participating in an investigation conducted by Mair (i.e., that she was a type 2 whistleblower). However, a fair reading of plaintiff's complaint does not reflect any such claim. Moreover, in opposing defendant's motion for summary disposition in the trial court, plaintiff made no such argument and, instead, effectively disclaimed any such contention ("Plaintiff claims two (2) distinct acts constitute protected activity. First, Plaintiff was about to report a violation of law to the local police department. . . . Second, Plaintiff reported [LS's] unlawful behavior to a licensed attorney, Gregory Mair."). We need not consider an issue that, although it could have been, was not raised before the trial court but was instead raised for the first time on appeal in a supplemental brief. See *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Moreover, in speaking with Mair, plaintiff did not "participate in a *previously initiated* investigation or hearing *at the behest of a public body*." *Henry*, 234 Mich App at 410 (emphasis added). To the contrary, and by her own admission, she participated in an interview at the direction of her *employer* and did so only *after* she had already communicated her concerns to the employer. We therefore conclude, in any event, that plaintiff did not engage in protected activity under this prong of the WPA.

> (*v*) A law enforcement agency or any member or employee of a law enforcement agency.
>
> (*vi*) The judiciary and any member or employee of the judiciary. [MCL 15.361(d)(*i*) through (*vi*).]

To survive summary disposition of a claim for retaliation under the WPA, a plaintiff must establish a prima facie case. *McNeill-Marks v MidMich Med Ctr-Gratiot*, 316 Mich App 1, 16-17; 891 NW2d 528 (2016). This Court has identified three elements a plaintiff must establish to carry his or her burden of making out a prima facie case for retaliation under the WPA:

> (1) The employee was engaged in one of the protected activities listed in the provision.
>
> (2) [T]he employee was discharged, threatened, or otherwise discriminated against regarding his or her compensation, terms, conditions, location, or privileges of employment.
>
> (3) A causal connection exists between the employee's protected activity and the employer's act of discharging, threatening, or otherwise discriminating against the employee. [*Wurtz v Beecher Metro Dist*, 495 Mich 242, 250-252; 848 NW2d 121 (2014).]

To establish a prima facie case, a plaintiff can rely on either direct or circumstantial evidence of retaliation. *McNeill-Marks*, 316 Mich App at 17. Direct evidence of retaliation is evidence that, if believed, requires the conclusion that retaliatory animus was "at least a motivating factor in the employer's actions." *Id.* at 18 (quotation marks and citation omitted). Our Supreme Court has stated with regard to circumstantial evidence of retaliation that

> [a]bsent direct evidence of retaliation, a plaintiff must rely on indirect evidence of his or her employer's unlawful motivations to show that a causal link exists between the whistleblowing act and the employer's adverse em-

> ployment action. A plaintiff may present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful [retaliation]. [*Debano-Griffin v Lake Co*, 493 Mich 167, 173, 176; 828 NW2d 634 (2013) (quotation marks and citations omitted; alteration in *Debano-Griffin*).]

Consequently, circumstantial evidence of retaliation requires the application of the burden-shifting framework set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Debano-Griffin*, 493 Mich at 176. That is, when a plaintiff presents circumstantial evidence of retaliation, the burden then shifts to the defendant to rebut the presumption of a causal connection by articulating a legitimate business reason for its adverse employment action. *McNeill-Marks*, 316 Mich App at 17-18. If the defendant offers such a reason, the burden shifts back to the plaintiff to show that a genuine issue of material fact still exists by showing that " 'a reasonable fact-finder could still conclude that the plaintiff's protected activity was a motivating factor for the employer's adverse action,' i.e., that the employer's articulated legitimate reason was a pretext disguising unlawful animus." *Id*. at 18, quoting *Debano-Griffin*, 493 Mich at 176 (some quotation marks omitted). This Court has explained:

> "A plaintiff can establish that a defendant's articulated legitimate . . . 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." [*McNeill-Marks*, 316 Mich App at 18, quoting *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998).]

B. PLAINTIFF'S "ABOUT TO REPORT" CLAIM

Defendant argues that the trial court should have granted summary disposition in its favor on plaintiff's "about to report" claim under the WPA because plaintiff presented no evidence that she was about to report LS's conduct to the police. We agree.

An employee may establish the first element of a prima facie case by demonstrating that he or she was "about to report" a suspected violation of law to a public body. *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 610; 566 NW2d 571 (1997). Our Supreme Court has noted that "*Webster*'s defines 'about' as '*on the verge of*' when followed by an infinitive, such as 'to leave,' or in this case, 'to report.' " *Id*. at 612, quoting *Random House Webster's College Dictionary* (1995) (emphasis added). When pursuing an "about to report" claim under the WPA, a plaintiff bears the burden of proving by clear and convincing evidence that he or she was on the verge of reporting a suspected violation of law. *Shallal*, 455 Mich at 611; MCL 15.363(4). However, the plaintiff's proof "need not consist of a concrete action to satisfy the 'about to' report element." *Shallal*, 455 Mich at 615.

The law does not require a plaintiff to explicitly state that he or she possessed an intent to report a violation or suspected violation of the law in the immediate future in order to establish that the plaintiff was "about to" report such activity. *Id*. at 620 n 9. However, " '[a]n employer is entitled to objective notice of a report or a threat to report by the whistleblower.' " *Roulston*, 239 Mich App at 279, quoting *Roberson v Occupational Health Ctrs of America, Inc*, 220 Mich App 322, 326; 559 NW2d 86 (1996) (some quotation marks and citation omitted).

In *Shallal*, 455 Mich at 621, our Supreme Court held that

> [the] plaintiff's express threat to the wrongdoer that she would report him if he did not straighten up, especially coupled with her other actions, was more than ample to conclude that reasonable minds could find that she was "about to report" a suspected violation of the law to the [Department of Social Services].

By "other actions," the Court was referring to the plaintiff's having scheduled and attended meetings with her coworkers to discuss the reporting of their agency president's alcohol abuse and misuse of agency funds. *Id.* at 606, 613-614. The Court noted that the plaintiff had made an "*express* threat to her employer" that she would report the president to the board of directors if he did not change, and it explained that "[c]onfronting a supervisor with a threat of a report serves to promote the public policy of whistleblower statutes. Certainly such a threat should demonstrate that the employee has an actual intent to report the violation." *Id.* at 619.

In *Hays v Lutheran Social Servs of Mich*, 300 Mich App 54, 62-64; 832 NW2d 433 (2013), the plaintiff discussed a client's marijuana use with her supervisor, coworkers, and a Bay Area Narcotics Enforcement Team (BAYANET) official to inquire about the legal ramifications of knowing that someone was using illegal drugs and failing to report it. *Id.* at 57. When the BAYANET official asked if the plaintiff would like to make a report, the plaintiff declined. *Id.* The plaintiff's employment was terminated when the defendant, her employer, discovered that the plaintiff had breached a client-confidentiality agreement by disclosing her client's drug use. *Id.* at 57-58. The plaintiff argued that the defendant had violated the WPA because she was

about to report a violation or suspected violation of law. *Id*. at 62-64. However, this Court held that the plaintiff had failed to satisfy the protected-activity element of her prima facie case because her inquiries about potential consequences did not indicate an affirmative intent to *actually* report her client's behavior. *Id*. at 63. Instead, "[h]er conversations demonstrate[d] only that while plaintiff knew about the behavior and had a sufficiently long time to report the behavior, she declined to do so." *Id*. Moreover, the plaintiff in *Hays* never threatened to take further action, and there was "no evidence that defendant received objective notice that plaintiff was about to report [her client's] behavior to a public body." *Id*. at 63-64.

In this case, plaintiff's conduct is more akin to that of the plaintiff in *Hays*, *id*., than to that of the plaintiff in *Shallal*, 455 Mich at 621. Plaintiff did not, either explicitly or implicitly, threaten to report LS's conduct to the police. Rather, while plaintiff's text messages and deposition testimony reveal that she believed that contacting the police was the correct course of action, the record shows only that she discussed with various people the option of filing a police report and conveyed her opinion. It does not demonstrate that after her consultations, she had determined that filing a police report was still the best course of action or, more significantly, that she was on the verge of contacting law enforcement. See *Shallal*, 455 Mich at 612. Additionally, there is no evidence that defendant was ever put on notice that plaintiff was about to report LS's conduct. *Roulston*, 239 Mich App at 279.

For these reasons, plaintiff has failed to prove that a genuine issue of material fact existed regarding whether she had engaged in a protected activity by being about to report a violation or suspected violation

of law. *Shallal*, 455 Mich at 610. Accordingly, the trial court erred by denying defendant summary disposition on this claim. MCR 2.116(C)(10); *Maiden*, 461 Mich at 120.

C. PLAINTIFF'S "ACTUAL REPORT" RETALIATION CLAIM

Defendant also argues that the trial court erred by denying summary disposition in its favor on plaintiff's WPA claim premised on her communication with Mair. We agree.

As the trial court noted, practicing attorneys who are members of the State Bar of Michigan are considered members of a "public body" under MCL 15.361(d)(*iv*). *McNeill-Marks*, 316 Mich App at 23. On that basis, the trial court concluded, without further analysis, that when plaintiff discussed LS's conduct with Mair, plaintiff had engaged in protected activity. We conclude that the trial court's analysis did not go deep enough and that the trial court erred by reaching that conclusion.

Although *McNeill-Marks* does hold that a licensed attorney is a member of a "public body" for purposes of the WPA, *id*., it does not compel the conclusion that plaintiff's conversation with Mair was, in this case, a "report" of a violation (or suspected violation) of the law. For several reasons, we conclude that it was not. First, plaintiff did not "on [her] own initiative, take[] it upon [herself] to communicate the employer's wrongful conduct to a public body in an attempt to bring the, as yet hidden, violation to light . . . ." *Henry*, 234 Mich App at 410. Rather, plaintiff spoke with Mair at defendant's request.[3] In other words, when she spoke

[3] Indeed, plaintiff affirmatively stated, both in her complaint and in her affidavit, that defendant had "required" her to meet with Mair.

with Mair, plaintiff was not an "initiator" and did not "take[] it upon [herself]" to communicate with Mair. *Id*.[4]

Additionally, the trial court appears to have assumed that the nature of plaintiff's discussion with Mair was that of "reporting." We do not agree. Indeed, the information that plaintiff conveyed to Mair was the same as that which she had already directly communicated to defendant, and that information was already known to Mair by virtue of plaintiff's earlier communications with defendant itself.[5] As a consequence, the information was no longer "as yet hidden," *id*., at the time of plaintiff's communication with Mair. We conclude, in this context, that plaintiff's communications with Mair do not constitute "reporting" under the WPA.

As Justice ZAHRA noted in his dissent from the Court's denial of leave in *McNeill-Marks*, see *McNeill-Marks v MidMich Med Ctr-Gratiot*, 502 Mich 851, 858 (2018) (ZAHRA, J., dissenting), the term "report" is not defined in the WPA. Therefore, this Court may consult a dictionary to determine the plain and ordinary meaning of the term. *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015). Although "report" has many definitions, we conclude

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[4] Our decision does not rest on the motivation behind plaintiff's communication. See *Whitman v City of Burton*, 493 Mich 303, 306, 313; 831 NW2d 223 (2013).

[5] In her complaint, plaintiff alleged that in meeting with Mair, she "again relayed" the information that she had previously conveyed to defendant. Similarly, in her affidavit, plaintiff described her conversation with Mair as "the same conversation I had with Ms. Snyder in my text messages to her," as a "reiteration," and as "again indicating" what she had previously conveyed to defendant directly. In her deposition, plaintiff also acknowledged that she conveyed the same information to Mair that she had earlier conveyed to Snyder.

that the definitions most applicable in the context of the WPA are "to make a charge against" or "to make known the presence, absence, condition, etc." of something. *Random House Webster's College Dictionary* (2000). These definitions comport with *Henry*'s characterization of a type 1 whistleblower. *Henry*, 234 Mich App at 410. In other words, under the WPA, a plaintiff "reports" a violation of the law when he or she "makes a charge" of illegality against a person or entity or "makes known" to a public body pertinent information related to illegality. Plaintiff in this case did neither in her conversation with Mair. Her discussion with Mair cannot reasonably be seen as "charging" LS with illegal conduct, and plaintiff did not make anything known to Mair that he did not already know by virtue of plaintiff's earlier communications with defendant. We conclude that plaintiff, at most, "communicate[d] an illegality[6] to a person falling under the broad definition of 'public body' " and did not engage in protected activity under the WPA. *McNeill-Marks*, 502 Mich at 859 (ZAHRA, J., dissenting) (emphasis omitted).

Further, although Mair may, in general terms, have been a member of a "public body" under *McNeill-Marks* by virtue of his profession, he was also acting as defendant's agent when plaintiff communicated with him. "A lawyer is an agent, to whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity." See 1 Restatement Law Governing Lawyers, 3d, Introductory Note, p 124. "[F]undamental to

[6] Again, even though it is not critical to our analysis, plaintiff in this case communicated information about statements that she perceived to be threatening in nature; it is not clear that she communicated information about an "illegality" or even a "suspected illegality."

the existence of an agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to him." *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 458 Mich 540, 557-558; 581 NW2d 707 (1998) (citation omitted). Therefore, when plaintiff communicated with Mair at defendant's direction, she was, in essence, again communicating with Mair's principal, i.e., defendant. Plaintiff's communication with Mair cannot reasonably be termed "an attempt to bring the, as yet hidden, violation to light to remedy the situation or harm done by the violation," *Henry*, 234 Mich App at 410, when (1) plaintiff had already imparted the information directly to defendant, (2) defendant had already shared the information with Mair, and (3) in further speaking with Mair, plaintiff merely repeated the same information to defendant's agent. Consequently, plaintiff's communication with Mair was not a "reporting" of information under the WPA.

To conclude otherwise would be to transform what was a nonactionable communication (i.e., plaintiff's communication with defendant, which is not a "public body" under the WPA) into an actionable one merely because, at defendant's behest, plaintiff reconveyed the same information to defendant's attorney-agent. We cannot endorse such a strained reading of the "reporting" requirement of the protected-activity element under the WPA.

The trial court therefore erred by concluding that plaintiff had engaged in protected activity by communicating with Mair. But even if we were to find otherwise, we would hold that the trial court erred by concluding that plaintiff carried the burden of showing a causal connection between her *communication with*

Mair and the resulting adverse employment action. As stated earlier, plaintiff admitted that she told Mair what he and defendant already knew. Plaintiff offered no evidence before the trial court establishing a causal connection between that communication, which was initiated at defendant's request, and her termination. Temporal proximity, without more, is insufficient to prove a causal connection between the protected activity and any adverse employment action. *Debano-Griffin*, 493 Mich at 177. Plaintiff's claims under the WPA are essentially that her reaction to the incident with LS led to defendant's decision to terminate her; however, even if true, she presented no evidence even suggesting that any "reporting" she did to Mair played a role in that decision. Indeed, plaintiff chiefly argued below, and argues on appeal, that defendant's proffered legitimate business reason for her termination was pretextual. But defendant did not even need to offer a legitimate business reason for her termination until plaintiff carried her initial burden with respect to causation. *McNeill-Marks*, 316 Mich App at 18. Because there was no evidence of causation, as between her communication with Mair and her termination, plaintiff failed to carry that burden, and therefore no presumption of retaliation arose. Absent a presumption of retaliation, it simply does not matter whether defendant's offering of "budgetary and economic reasons" was factually supported. "[A] 'plaintiff cannot 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.' " *Debano-Griffin*, 493 Mich at 180, quoting *Hazle v Ford Motor Co*, 464 Mich 456, 476; 628 NW2d 515 (2001).

For all these reasons, we conclude that the trial court erred by denying summary disposition in favor of defendant regarding plaintiff's claim under the WPA based on her communication with Mair. MCR 2.116(C)(10); *Maiden*, 461 Mich at 120.

D. UNLAWFUL RETALIATION IN VIOLATION OF MICHIGAN PUBLIC POLICY

Defendant also argues that the trial court erred when it denied summary disposition in its favor on plaintiff's claim of unlawful retaliation in violation of public policy. Again, we agree. Termination of at-will employment is typically proscribed by public policy in Michigan in three situations: "(1) 'adverse treatment of employees who act in accordance with a statutory right or duty,' (2) an employee's 'failure or refusal to violate a law in the course of employment,' or (3) an 'employee's exercise of a right conferred by a well-established legislative enactment.' " *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 573; 753 NW2d 265 (2008), quoting *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695-696; 316 NW2d 710 (1982). However, when a statute already exists that prohibits a particular adverse employment action, the statute provides the exclusive remedy and claims under Michigan public policy cannot be maintained. *Kimmelman*, 278 Mich App at 573.

To that end, "[t]he remedies provided by the WPA are exclusive and not cumulative. Thus, when a plaintiff alleges discharge in retaliation for engaging in activity protected by the WPA, [t]he WPA provides the exclusive remedy for such retaliatory discharge and consequently preempts common-law public-policy claims arising from the same activity." *McNeill-*

Marks, 316 Mich App at 25 (quotation marks and citation omitted; second alteration in *McNeill-Marks*).

Plaintiff's "public policy" claim that she was terminated because she "attempted to report" LS's conduct to the police or "refused to conceal" LS's alleged violations of the Michigan Anti-Terrorism Act arises from the same activity as do her claims under the WPA. See MCL 15.362; see also *McNeill-Marks*, 316 Mich App at 25. Indeed, a refusal to conceal unlawful conduct from a public body is not distinguishable from reporting or being about to report that conduct to a public body because there is "no logical distinction between the refusal to conceal and the report by which that refusal manifested itself; rather, the two are flip sides of the same coin." *Id*. at 26. Accordingly, the trial court erred by denying summary disposition of plaintiff's claim for retaliation in violation of public policy because it was duplicative of her claims under the WPA. MCR 2.116(C)(10); *Maiden*, 461 Mich at 120.[7]

We reverse and remand for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

M. J. KELLY, P.J., and SERVITTO, J., concurred with BOONSTRA, J.

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[7] We are not persuaded by plaintiff's contention that her public-policy claim is broader that her WPA claims because it "could include" a refusal to conceal LS's conduct from Payne or others who are not public bodies. First, not only is there no evidence that plaintiff "refused to conceal" LS's conduct from Payne or others, there is instead evidence that plaintiff actually disclosed that conduct to them. There is, moreover, no evidence in the record that defendant directed plaintiff not to disclose LS's conduct to (or that plaintiff "refused" to conceal it from) anyone. Finally, Snyder's caution to plaintiff (after she had disclosed information to Payne) to "[p]lease be very careful with sharing confidential information about employees" wholly fails to provide any basis for plaintiff's public-policy claim.

BUCKMASTER v DEPARTMENT OF STATE

Docket No. 343931. Submitted April 2, 2019, at Lansing. Decided April 11, 2019, at 9:00 a.m.

Emilee K. Buckmaster sent a request to the Department of State under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., seeking all vehicle registration and licensing records associated with her name and a certain vehicle. The department denied Buckmaster's request on the basis of the exemption in MCL 15.243(1)(d) and because she failed to pay upfront the fees associated with obtaining the information she requested. The department's denial letter included the department's Record Lookup Request form and indicated that Buckmaster must submit her request for the records using that form, which was authorized under MCL 257.208b(1) of the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*., and which was required under MCL 257.208b(1) for requests made using the department's commercial look-up service. Buckmaster brought an action in the Court of Claims under MCL 15.240(1)(b), alleging that she was wrongfully denied the records she requested and seeking an order compelling disclosure of the records and a declaration that the department had violated the FOIA. Buckmaster asserted that the commercial look-up service did not constitute the exclusive way for persons to obtain public records from the department—she claimed the records could also be obtained through a FOIA request without using the Record Lookup Request form. The department moved under MCR 2.116(C)(8) and (C)(10) for summary disposition of Buckmaster's complaint, arguing that it lawfully denied Buckmaster's FOIA request because Buckmaster failed to pay in advance the fees required by the MVC for the records she requested. The Court of Claims, CYNTHIA D. STEPHENS, J., denied the department's motion for summary disposition, holding that the department could neither require use of the commercial look-up service nor require advance payment of the fees associated with the look-up. The Court of Appeals granted the department's application for leave to appeal.

The Court of Appeals *held*:

1. The FOIA, under MCL 15.234(1), generally allows a public body to charge fees to search for, copy, or provide public records on

request. The MVC governs the provision of motor vehicle records maintained by the department. Under MCL 257.208a, motor vehicle records, unless confidential or restricted by law from disclosure, must be available to the public upon a request made under the MVC, the FOIA, or other applicable laws. MCL 15.243(10) expressly states that the FOIA fee provision does not apply when the fee for providing a copy of a public record is otherwise specifically provided by an act or a statute. The MVC is such an act, and MCL 257.208b(1), the fee provision in the MVC, expressly applies to motor vehicle records, whether the records are requested under the MVC, the FOIA, or another applicable law. Buckmaster did not dispute that the MVC fee applied to her FOIA request; she disagreed with the timing of the payment of the fee. MCL 257.208b(9) prohibits providing records maintained under the MVC to a nongovernmental person or entity *unless* the person or entity pays the prescribed fee for each individual record. In short, requested records are not to be provided unless the fees are paid. Therefore, the Court of Claims erred by concluding that the department could not require Buckmaster to pay in advance the fee for production of the motor vehicle records she requested through the FOIA.

2. MCL 257.208b(1) authorizes the department (1) to provide a commercial look-up service for records maintained under the MVC, (2) to charge a specified fee for each individual record looked up, and (3) to process a commercial look-up request only if the request is in a form or format prescribed by the department. The department argued that Buckmaster's request for motor vehicle records must be made using the form created for the department's commercial look-up service, despite the fact that she made her request under the FOIA. MCL 257.208a expressly permits a request for motor vehicle records to be made under the MVC, the FOIA, or other applicable laws. Buckmaster submitted a FOIA request under MCL 15.233(1), which requires the production of a public record upon a public body's receipt of a written request that describes the public record sufficiently to enable the public body to find the public record. Requiring that a request for motor vehicle records be made through the commercial look-up service would remove the FOIA method of requesting records from the statutory language in the MVC. Even if it did not eliminate the FOIA as a means of obtaining motor vehicle records, it would impose a detailed and technical requirement on the process of obtaining records under the FOIA that does not comport with the purposes of the FOIA. Accordingly, the Court of Claims did not err by conclud-

ing that the department could not require Buckmaster to use the commercial look-up service or its associated form.

Affirmed in part, reversed in part, and remanded.

1. RECORDS — METHODS OF OBTAINING MOTOR VEHICLE RECORDS — DEPARTMENT OF STATE COMMERCIAL LOOK-UP SERVICE AND FREEDOM OF INFORMATION ACT.

MCL 257.208b(1) authorizes the Department of State to provide a commercial look-up service for records maintained under the Michigan Vehicle Code, MCL 257.1 *et seq*., and to require any request made through the commercial look-up service to be in a form or format prescribed by the department; MCL 257.208b(1) does not mandate use of the commercial look-up service; it requires only that if the commercial look-up service is used, the look-up request form provided by the department must be completed; a person making a request for motor vehicle records under the Freedom of Information Act, MCL 15.231 *et seq*., need not submit the request using the record look-up request form supplied by the department.

2. RECORDS — OBTAINING MOTOR VEHICLE RECORDS — MICHIGAN VEHICLE CODE FEE PROVISION — UPFRONT PAYMENT REQUIRED.

The fee provision in MCL 257.208b(1) of the Michigan Vehicle Code, rather than the fee provision in MCL 15.234(1) of the Freedom of Information Act, applies to motor vehicle records requested from the Department of State; motor vehicle records requested by an individual cannot be provided to the individual unless that person has paid upfront any applicable fees for finding, copying, or providing the records (MCL 15.234(10); MCL 257.208a; MCL 257.208b(9)).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Kyla Barranco* and *Sarah R. Robbins*, Assistant Attorneys General, for the Department of State.

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

CAVANAGH, J. Defendant, the Michigan Department of State, appeals by leave granted[1] an order denying

[1] *Buckmaster v Dep't of State*, unpublished order of the Court of Appeals, entered October 25, 2018 (Docket No. 343931).

defendant's motion for summary disposition of this case arising under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. We affirm in part and reverse in part.

In 2017, plaintiff's attorney sent defendant a request under the FOIA seeking all vehicle registration and licensing records associated with plaintiff's name and a certain vehicle. Defendant, through its FOIA Coordinator, denied the request for the following reasons with the following instructions:

> Pursuant to the Freedom of Information Act (FOIA), MCL § 15.231 *et seq*. your request is denied because the exemption contained in MCL § 15.243(1)(d), which authorizes the Department to withhold " . . . record or information specifically described and exempted from disclosure by statute." MCL § 257.208b(1) (emphasis added) of the Michigan Vehicle Code . . . provides[:]
>
>> The Secretary of State may provide a commercial look-up service of records maintained under this act. For each individual record looked up, the secretary of state shall charge a fee specified annually by the legislature, or if the legislature does not specify a fee, a market-based price established by the secretary of state. *The secretary of state shall process a commercial look-up request only if the request is in the form or format prescribed by the secretary of state*.
>
> You must complete the enclosed Record Lookup Request form and pay upfront the associated lookup fees to obtain any driving and/or vehicle records from our Department that are not exempt from release. The fee for each record lookup is $11, $12 if certified for court purposes.

Defendant notified plaintiff of the right to appeal this decision to the Secretary of State's designee or to bring a court action challenging the decision. Defendant also attached a record look-up request form, which stated

underneath the instructions for completing the form: "Lookups . . . are available for $11.00 for each record lookup. Certifications cost an additional $1.00 per record."

Plaintiff then filed this action in the Court of Claims, alleging under MCL 15.240 a wrongful denial of requested records. Plaintiff acknowledged that the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*., permits defendant to create and provide a commercial look-up service and that defendant had done so, but plaintiff asserted that the commercial look-up service did not constitute the exclusive way for persons to obtain public records from defendant. Plaintiff alleged that the records were also available through a FOIA request and that by denying her request, defendant had violated the FOIA. Therefore, plaintiff requested an order compelling disclosure of the records; a declaration that defendant had violated the FOIA; an award of all costs, disbursements, and attorney fees; and punitive damages.

Defendant responded to plaintiff's complaint by filing a motion for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that it had lawfully denied plaintiff's FOIA request because plaintiff failed to pay the required fee as established under the MVC, MCL 257.208b(1). Defendant argued that as stated in MCL 15.234(10), the FOIA's fee provisions do "not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, or if the amount of the fee for providing a copy of the public records is otherwise specifically provided by an act or statute." Therefore, defendant argued, "when a person requests public records maintained pursuant to the MVC, the fee provisions within the MVC apply . . . ." In other

words, the MVC fee provisions preempted the FOIA fee provisions, as stated in the FOIA at MCL 15.234(10), and as this Court held in *Ellison v Dep't of State*, 320 Mich App 169, 180; 906 NW2d 221 (2017). Because plaintiff did not pay the full MVC fee in advance, defendant argued, plaintiff's request for the records was properly denied.

Plaintiff opposed defendant's motion, arguing that defendant did not deny the FOIA request because plaintiff failed to pay the fee required by the MVC. Rather, plaintiff claimed that defendant denied the FOIA request because the motor vehicle records were allegedly exempt from disclosure under the FOIA and could only be produced through the commercial look-up service. Plaintiff disagreed with defendant's position, arguing that motor vehicle records could be requested through the FOIA or the MVC and that the records were not exempt. Plaintiff agreed that the FOIA deferred to the MVC's fee provision and that the MVC established the fee as $11 per record. Although the MVC's fee provision applied, plaintiff argued, the FOIA otherwise controlled the request. Plaintiff also argued that no legal authority existed for defendant's requirement that a requester complete a "record lookup request form" when the request is made through the FOIA rather than the MVC.

The Court of Claims denied defendant's motion for summary disposition, holding: "The Secretary of State can neither require the commercial look up nor require advance payment of the fee associated with a commercial look up form." Defendant then filed an application for leave to appeal, which was granted. *Buckmaster v Dep't of State*, unpublished order of the Court of Appeals, entered October 25, 2018 (Docket No. 343931).

On appeal, defendant argues that it lawfully denied plaintiff's FOIA request because the MVC's fee provisions apply and plaintiff failed to pay the required fee as established under MCL 257.208b(1); defendant thus contends that its motion for summary disposition should have been granted. We agree in part.

We review de novo a trial court's decision on a motion for summary disposition. *Barnes v Farmers Ins Exch*, 308 Mich App 1, 5; 862 NW2d 681 (2014). This FOIA case involves issues of statutory interpretation which we also review de novo. *Mich Federation of Teachers & School-Related Personnel, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 664; 753 NW2d 28 (2008). The primary goal of statutory interpretation is to give effect to the Legislature's intent. *TRJ & E Props, LLC v Lansing*, 323 Mich App 664, 670; 919 NW2d 795 (2018). "The language of the statute itself is the primary indicator of the Legislature's intent." *Id*. When the language of the statute is clear and unambiguous, judicial construction is not permitted and this Court must give the words their plain and ordinary meaning. *Mich Federation of Teachers*, 481 Mich at 664. "When two statutes cover the same general subject, they must be construed together to give reasonable effect to both, if at all possible." *Titus v Shelby Charter Twp*, 226 Mich App 611, 615; 574 NW2d 391 (1997).

Plaintiff brought her request for records under the FOIA, which generally allows a public body to charge fees to search for, copy, or provide the public record. MCL 15.234(1). However, the FOIA's fee provision "does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute." MCL 15.234(10).

The MVC lists various driving records the Secretary of State must maintain. MCL 257.204a. Those records, unless confidential or restricted by law from disclosure, must be available to the public as set forth in the MVC, the FOIA, or other applicable laws. MCL 257.208a. MCL 257.208b(1) governs the procedure for obtaining driving records under the MVC. It provides, in relevant part:

> (1) The secretary of state may provide a commercial look-up service of records maintained under this act. For each individual record looked up, the secretary of state shall charge a fee specified annually by the legislature, or if the legislature does not specify a fee, a market-based price established by the secretary of state. The secretary of state shall process a commercial look-up request only if the request is in a form or format prescribed by the secretary of state. [MCL 257.208b.]

This Court has interpreted these FOIA and MVC provisions to mean that motor vehicle records can be requested through the MVC or the FOIA, but the MVC's fee provision applies. *Ellison*, 320 Mich App at 180.

In this case, defendant does not dispute that plaintiff could request records maintained under the MVC through a FOIA request. And plaintiff did not dispute that the MVC fee of $11 per record applied to her FOIA request for motor vehicle records. Therefore, there is no dispute that the $11 MVC fee applied to plaintiff's FOIA request for motor vehicle records.

The issues in dispute are the timing of the payment of the fee and the form of the request for records. The MVC states that "[t]he secretary of state shall not provide an entire computerized central file or other file of records maintained under this act to a nongovernmental person or entity, unless the person or entity

pays the prescribed fee for each individual record contained within the computerized file." MCL 257.208b(9). Consequently, in *Ellison* this Court affirmed the trial court's conclusion that the defendant properly denied the plaintiff's FOIA request for motor vehicle records because the plaintiff failed to pay the associated MVC fee of about $1.6 million. *Ellison*, 320 Mich App at 181. According to the statute's plain language, the requested records are not to be provided unless the fees are paid. Therefore, in this case, the Court of Claims erred by concluding that defendant could not require plaintiff to pay—in advance—the fee for production of the motor vehicle records requested through the FOIA.

Regarding the form of the request for public records, defendant reads into *Ellison* a requirement that the request for motor vehicle records be made through the commercial look-up service using the record look-up request form. The *Ellison* Court did not directly address the plaintiff's failure to complete the record look-up request form associated with the commercial look-up service. Rather, the Court noted: "A FOIA request need only be descriptive enough that a defendant can find the records containing the information that the plaintiff seeks." *Id*. at 178. Thus, contrary to defendant's argument, *Ellison* does not establish that plaintiff was required to use the commercial look-up service and complete the record look-up request form.

The MVC fee provision referring to the commercial look-up service states that "[t]he secretary of state *may* provide a commercial look-up service of records" and that "the secretary of state *shall* process a commercial look-up request only if the request is in a form or format prescribed by the secretary of state." MCL 257.208b(1) (emphasis added). The plain language of

this MVC provision only requires that if a request for records is made through the commercial look-up service, it must be in the proper form. MCL 257.208b(1) does not mandate use of the commercial look-up service.

In fact, as stated in MCL 257.208a, the MVC permits a request for motor vehicle records to be made in accordance with the procedures set forth in the FOIA. And the FOIA directs the production of a public record upon a public body's receipt of "a written request that describes a public record sufficiently to enable the public body to find the public record . . . ." MCL 15.233(1). Our Supreme Court has cautioned against a "restrictive reading" of the FOIA standard governing the description of records to be produced because the FOIA "is a prodisclosure act." *Coblentz v Novi*, 475 Mich 558, 572; 719 NW2d 73 (2006). Accordingly, our Supreme Court has noted, "[t]he FOIA does not establish detailed requirements for a valid request." *Herald Co v Bay City*, 463 Mich 111, 120; 614 NW2d 873 (2000), mod on other grounds by *Mich Federation of Teachers*, 481 Mich at 682. In keeping with the FOIA's stated purpose of granting all persons full and complete information regarding governmental affairs, "the Legislature did not impose detailed or technical requirements as a precondition for granting the public access to information. Instead, the Legislature simply required that any request be sufficiently descriptive to allow the public body to find public records containing the information sought." *Herald Co*, 463 Mich at 121.

Defendant's argument that a request for motor vehicle records must be made through the commercial look-up service would write the FOIA method for requesting motor vehicle records out of the MVC, as well as impose a detailed and technical requirement

that does not comport with the purpose of the FOIA. See *id*. Accordingly, the Court of Claims did not err by concluding that defendant could not require plaintiff to use the commercial look-up service and associated form.

Further, defendant's reliance on the FOIA exemption set forth in MCL 15.243(1)(d) is misguided. Generally, the FOIA makes information publicly available unless otherwise exempted. MCL 15.233(1); see also *Herald Co*, 463 Mich at 121. The FOIA exempts from disclosure "[r]ecords or information specifically described and exempted from disclosure by statute." MCL 15.243(1)(d). For example, the FOIA exempts from disclosure minutes of closed executive sessions when the Open Meetings Act prohibits their disclosure unless a civil action is properly filed. *The Local Area Watch v Grand Rapids*, 262 Mich App 136, 143-146; 683 NW2d 745 (2004). By contrast, the MVC states that motor vehicle records maintained under the MVC "*shall be available to the public* in accordance with procedures prescribed in this act, the [FOIA], or other applicable laws," unless otherwise restricted from disclosure. MCL 257.208a (emphasis added). That is, the MVC does not exempt the production of motor vehicle records; rather, it requires their disclosure. This case turns on the procedural requirements for disclosure, not the FOIA exemption. Therefore, defendant's reliance on the FOIA exemption in its FOIA denial letter was an improper characterization; the records are not exempt from disclosure and are obtainable if the proper procedure is followed.

In summary, the Court of Claims erred by concluding that defendant could not require advance payment of the fee for the production of motor vehicle records. But the Court of Claims properly held that defendant

could not mandate use of the commercial look-up service when a request for motor vehicle records is made through the FOIA.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

SWARTZLE, P.J., and CAMERON, J., concurred with CAVANAGH, J.

TURNER v FARMERS INSURANCE EXCHANGE
EVERSON v FARMERS INSURANCE EXCHANGE

Docket Nos. 339624 and 339815. Submitted February 8, 2019, at Detroit. Decided April 16, 2019, at 9:00 a.m. Reversed and circuit court summary-disposition orders reinstated 506 Mich ___ (2021).

In Docket No. 339624, Maegan Turner, through her conservator, Walter Sakowski, brought an action in the Wayne Circuit Court against Farmers Insurance Exchange; Enterprise Leasing Corporation of Detroit, LLC; EAN Holdings, LLC; the estate of Jason Puckett, through his personal representative, Gary D. Rupp; Patsy Villneff, and Tamera Harper following injuries Turner sustained in a motor vehicle accident while riding in a car driven by Harper in the city of Detroit. The car was registered in Maryland and was owned by EAN Holdings, which had obtained a certificate of self-insurance. There was no substantial difference between Enterprise and EAN Holdings for purposes of this appeal. Following the accident, Enterprise denied a request to pay personal protection insurance (PIP) benefits stemming from Turner's injuries. Enterprise concluded that it was not financially responsible for Turner's PIP benefits, asserting that the Michigan no-fault act, MCL 500.3101 *et seq*., was inapplicable because the rental car that Harper had been driving was registered in Maryland and had not been operated in Michigan for an aggregate of more than 30 days at the time of the accident. Turner's claim for benefits was assigned to Farmers by the Michigan Automobile Insurance Placement Facility. Turner then initiated this lawsuit. Farmers filed a cross-claim seeking to have Enterprise declared the highest priority insurer, alleging that Enterprise was the insurer of the owner of the car that was involved in the motor vehicle accident and that the no-fault priority provision in MCL 500.3114(4)(a) required a person who was injured while he or she was an occupant in a motor vehicle to claim PIP benefits from the insurer of the owner or registrant of the vehicle occupied. Enterprise moved for summary disposition, arguing that the car in which Turner had been riding was not required to have been registered in Michigan and therefore Enterprise did not have to maintain the security for payment of PIP benefits that is otherwise required

by MCL 500.3101(1). Enterprise further argued that, as a nonresident corporation, it was not required to maintain security on the car under MCL 500.3102(1) because the car was not registered in Michigan and had not been operated in Michigan for an aggregate of more than 30 days within the relevant calendar year. The court, Annette J. Berry, J., granted Enterprise's motion for summary disposition and ruled that Enterprise was not required to reimburse Farmers for benefits it paid to Turner. The court held that pursuant to *Parks v Detroit Auto Inter-Ins Exch*, 426 Mich 191 (1986), the priority statute was inapplicable in the instant case because the vehicle involved in the accident was registered in Maryland and was not driven in Michigan for an aggregate of more than 30 days or required to have been registered in Michigan, thus making the vehicle at issue not subject to the security requirements of the no-fault act. Farmers appealed.

In Docket No. 339815, Jonte Everson brought an action in the Washtenaw Circuit Court against Farmers Insurance Exchange following a motor vehicle accident in the city of Novi. Everson had been driving a car that he had rented from Enterprise. The car was registered in Pennsylvania and owned by EAN Holdings. As in Docket No. 339624, evidence was submitted into the record that EAN Holdings had obtained a certificate of self-insurance for purposes of Michigan's no-fault act. Additionally, the car had not been operated in Michigan for an aggregate of more than 30 days during the relevant calendar year. Everson made a claim for benefits through the Michigan Assigned Claims Plan, and his claim was assigned to Farmers. Farmers then filed a third-party complaint against Enterprise, seeking a declaration that Enterprise was higher in priority and was liable to pay any no-fault benefits owed to Everson, including reimbursement to Farmers for any no-fault benefits it was required to pay to or for the benefit of Everson. Enterprise moved for summary disposition, making essentially the same argument that it made in Docket No. 339624. Farmers opposed the motion, also making essentially the same argument that it made in Docket No. 339624. The court, David S. Swartz, J., granted summary disposition in favor of Enterprise and held that under *Parks*, Enterprise was entitled to summary disposition because there was no genuine issue of material fact that the car that Everson was driving had not been operated in Michigan for an aggregate of more than 30 days during the calendar year. Farmers appealed, and the Court of Appeals consolidated the appeal in Docket No. 339815 with the appeal in Docket No. 339624.

The Court of Appeals *held*:

1. MCL 500.3101(1) provides, in relevant part, that the owner or registrant of a motor vehicle required to be registered in Michigan shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance; security is only required to be in effect during the period the motor vehicle is driven or moved on a highway. MCL 500.3102(1) provides that a nonresident owner or registrant of a motor vehicle or motorcycle not registered in this state shall not operate or permit the motor vehicle or motorcycle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits pursuant to this chapter. Under MCL 500.3114(1), a person seeking no-fault benefits must generally look first to his or her own insurer, unless one of the exceptions in MCL 500.3114(2), (3), or (5) applies. In these cases, it was undisputed that none of these exceptions applied, and there was also no dispute that neither Turner nor Everson had an applicable policy of no-fault insurance under § 3114(1). When Subsection (1) applies but there is no available insurer, Subsection (4) then establishes the general order of priority. MCL 500.3114(4)(a) provides, in pertinent part, that a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from the insurer of the owner or registrant of the vehicle occupied. In *Farmers Ins Exch v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 106 (2006), the Court of Appeals interpreted language that was materially identical to the language of MCL 500.3114(4)(a) and concluded that the language plainly referred to the insurer of the vehicle's "owner or registrant," regardless of whether the particular vehicle involved in the accident was actually covered by the security described in § 3101(1). Applying the analytical framework set forth in *Farmers Ins Exch* to the facts of these cases, there was no dispute that Enterprise was the owner and registrant of the vehicles at issue that were occupied by Turner and Everson respectively when each of the accidents occurred. Furthermore, there was no dispute that Enterprise was self-insured. The issue then was whether Enterprise, as a self-insured entity that was the owner and registrant of the vehicles at issue, could be considered the "insurer of the owner or registrant" under MCL 500.3114(4)(a).

2. Under MCL 500.3101(4), an entity may satisfy the security requirement of MCL 500.3101(1) by becoming a self-insurer rather than obtaining a policy of no-fault insurance. Addition-

ally, MCL 500.3101d provides, in pertinent part, that a person in whose name more than 25 motor vehicles are registered may qualify as a self-insurer by obtaining a certification of self-insurance. The plain language of MCL 500.3114(4)(a) refers to the "insurer of the owner or registrant" and therefore means the entity providing no-fault insurance for the owner or registrant. There was evidence in the records below that Enterprise had formalized its status as a self-insurer under the Michigan no-fault act by obtaining the certificate of self-insurance described in MCL 500.3101d. Enterprise manifested its intent to comply with the requirements of the Michigan no-fault act's security mandate by using its own means to provide security equivalent to that afforded by a policy of insurance, thus functioning as its own insurer. In light of the specific language of MCL 500.3114(4)(a) and the function of a self-insurer, it was permissible in this context to include a self-insured entity such as Enterprise within the meaning of the term "insurer" as used in MCL 500.3114(4)(a).

3. The Supreme Court held in *Parks* that an out-of-state vehicle not required to be registered in Michigan and not operated in this state for more than 30 days is not subject to the security provisions or MCL 500.3114(3) of the no-fault act and that when an employee is injured while an occupant of such a vehicle, the employee's personal insurer, if there is one, must pay the employee's personal protection benefits under MCL 500.3101(1). *Parks* was not binding on the specific issue presented in these cases for several reasons. First, the Court in *Parks* was primarily concerned with a different priority provision—§ 3114(3)—than the one at issue in the instant cases—§ 3114(4)(a). *Parks* did not require a certain result with respect to the meaning of Subsection (4)(a), and contrary to Enterprise's argument, *Parks* was not dispositive in resolving the instant priority dispute. Second, the language of § 3114(3) explicitly ties the insurer's priority status to whether it insured "the furnished vehicle," while the language of § 3114(4)(a) instead ties the insurer's priority status to whether it insured the vehicle's "owner or registrant." Third, considering that Subsection (4)(a) makes the insurer of the vehicle's owner or registrant the focus (rather than the insurer of the vehicle itself), the questions whether the vehicles at issue were required to be registered in Michigan or were covered by no-fault security were completely irrelevant for purposes of determining priority when that determination is to be made under MCL 500.3114(4)(a).

4. MCL 500.3101(4) provides that a self-insurer will be treated as an insurer under the no-fault act wherever the context permits. The fact that the Supreme Court in *Parks* held that a self-insurer will not be treated as an insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state under MCL 500.3163(1) did not equate to a finding that a self-insurer cannot be treated as an "insurer" under MCL 500.3114(4)(a). In these cases, Enterprise was higher in priority than Farmers under § 3114(4)(a) because Enterprise was self-insured and therefore was the insurer of the vehicles' owner and registrant. Accordingly, Farmers was entitled to summary disposition in its favor.

Reversed and remanded for further proceedings.

Judge REDFORD, dissenting, would have affirmed the orders granting summary disposition in both cases because precedent, including *Parks*, established that the no-fault insurance sections that require coverage, MCL 500.3101(1) and MCL 500.3102(1), did not apply to either vehicle in the two matters at bar given that the vehicles in question were out-of-state vehicles, they were not required to be registered in Michigan, and they were not operated in Michigan for more than 30 days in any given year. Therefore, the priority provisions of MCL 500.3114 did not apply, and the self-insured out-of-state owners were not required to pay no-fault benefits. Instead, plaintiffs' claims should have been covered by Farmers as the assigned insurer in each case.

INSURANCE — NO-FAULT ACT — PERSONAL PROTECTION INSURANCE BENEFITS — PRIORITY — QUALIFIED SELF-INSURERS.

The term "insurer" as used in the MCL 500.3114(4)(a) priority provision may refer to a self-insured entity, and the question whether the particular vehicle involved in an accident was required to be covered by no-fault security under MCL 500.3101(1) or MCL 500.3102(1) is irrelevant for purposes of determining priority under MCL 500.3114(4)(a).

Plunkett Cooney (by *Robert G. Kamenec*) for Enterprise Leasing Corporation of Detroit, LLC, and EAN Holdings, LLC, in Docket No. 339624 and for Enterprise Leasing Company in Docket No. 339815.

Hewson & Van Hellemont, PC (by *Jordan A. Wiener*) for Farmers Insurance Exchange.

Amicus Curiae:

Anselmi Mierzejewski Ruth & Sowle PC (by *Michael D. Phillips*) for the Michigan Automobile Insurance Placement Facility.

Before: CAVANAGH, P.J., and BORRELLO and REDFORD, JJ.

BORRELLO, J. These consolidated appeals[1] arise from insurer-priority disputes under the Michigan no-fault act, MCL 500.3101 *et seq*. In Docket No. 339624, Farmers Insurance Exchange appeals as of right the Wayne Circuit Court's order granting summary disposition of its cross-claim in favor of Enterprise Leasing Corporation of Detroit, LLC, and EAN Holdings, LLC. In Docket No. 339815, Farmers appeals as of right the Washtenaw Circuit Court's order granting summary disposition on its third-party complaint in favor of Enterprise Leasing Company. For the reasons set forth in this opinion, we reverse and remand for further proceedings.

I. BACKGROUND

A. DOCKET NO. 339624

In Docket No. 339624, Maegan Turner was injured in a motor vehicle accident while riding as a passenger in car driven by Tamera Harper that Harper had rented from Enterprise Leasing Corporation of Detroit, LLC. The car was registered in Maryland and owned by EAN Holdings, LLC, which had obtained a certificate of

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[1] This Court consolidated these appeals "to advance the efficient administration of the appellate process." *Turner v Farmers Ins Exch*, unpublished order of the Court of Appeals, entered March 14, 2018 (Docket Nos. 339624 and 339815).

self-insurance that permitted it to operate as a Michigan automobile self-insured entity pursuant to MCL 500.3101d(1). For purposes of the instant appeal, there appears to be no substantial difference between Enterprise and EAN Holdings.[2]

Following the accident, Enterprise denied a request to pay personal protection insurance (PIP) benefits stemming from Turner's injuries. Enterprise concluded that it was not financially responsible for Turner's PIP benefits, asserting that the Michigan no-fault act was inapplicable because the rental car that Harper had been driving was registered in Maryland and had not been operated in Michigan for more than 30 days at the time of the accident. Turner's claim for benefits was assigned to Farmers by the Michigan Automobile Insurance Placement Facility.

Turner subsequently initiated this lawsuit. During the course of the proceedings, Farmers filed a cross-claim seeking to have Enterprise declared the highest priority insurer such that Enterprise would be required to pay Turner's PIP benefits and reimburse Farmers for any benefits and expenses paid or incurred by Farmers in connection with Turner's claim for no-fault benefits. Farmers alleged that Enterprise was the insurer of the owner of the car that was involved in the motor vehicle accident and that the no-fault priority provision in MCL 500.3114(4)(a) required a person who was injured while he or she was an occupant in a motor vehicle to claim PIP benefits from the insurer of the owner or registrant of the vehicle occupied. Thus, Farmers asserted, because Enterprise was an applicable source of PIP benefits for Turner under MCL 500.3114(4)(a), Enterprise was higher in priority than Farmers as the assigned claims plan insurer.

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[2] Accordingly, we will refer to these entities collectively as "Enterprise" throughout this opinion.

Reiterating its argument that it was not required to pay PIP benefits under the no-fault act for its out-of-state vehicle, Enterprise moved under MCR 2.116(C)(8) and (10) for summary disposition. Enterprise argued that the car in which Turner had been riding was not required to have been registered in Michigan and therefore Enterprise did not have to maintain the security for payment of PIP benefits that is otherwise required by MCL 500.3101(1). Enterprise further argued that, as a nonresident corporation, it also was not required to maintain security on the car under MCL 500.3102(1) because the car was not registered in Michigan and had not been operated in Michigan for an aggregate of more than 30 days within the relevant calendar year.

In making this argument, Enterprise relied on our Supreme Court's decision in *Parks v Detroit Auto Inter-Ins Exch*, 426 Mich 191, 195-196; 393 NW2d 833 (1986). *Parks* involved an insurer-priority dispute stemming from an accident involving an employee who was injured while occupying a vehicle owned by the employee's self-insured employer. Enterprise argues that *Parks* stands for, in relevant part, the proposition that "an out-of-state vehicle not required to be registered in Michigan and not operated in this state for more than thirty days is not subject to the security provisions" of the no-fault act. Accordingly, Enterprise argues, the priority provisions in MCL 500.3114 were inapplicable to the instant case.

In response, Farmers argued that as the assigned claims insurer, it was merely the PIP provider of last resort when no other PIP coverage was available and that Enterprise was the entity actually obligated to provide Turner's PIP benefits. Farmers specifically argued that pursuant to MCL 500.3114(4)(a), Enter-

prise was first in priority because it owned the vehicle at issue and was self-insured, thus making it the insurer of the "owner or registrant of the vehicle occupied." Farmers maintained that under MCL 500.3114(4)(a), it was irrelevant whether Enterprise was required to register the vehicle at issue in Michigan or maintain security on that particular vehicle because § 3114(4)(a) was only concerned with the insurer "of the owner or registrant" of the vehicle and not with whether the particular vehicle involved in the accident was itself actually insured by the security required under the Michigan no-fault act.

In a written opinion, the trial court granted Enterprise's motion for summary disposition under MCR 2.116(C)(8) and (10) and ruled that Enterprise was not required to reimburse Farmers for benefits it paid to Turner. Relying on *Parks*,[3] the trial court concluded that the priority statute was inapplicable to the instant case because the vehicle involved in the accident was registered in Maryland and was not driven in Michigan for more than 30 days or required to have been registered in Michigan, thus making the vehicle

[3] The trial court also relied on this Court's unpublished opinion in *Heichel v Geico Indemnity Co*, unpublished per curiam opinion of the Court of Appeals, issued March 1, 2016 (Docket Nos. 323818 and 324045), for the proposition that the no-fault act's priority provisions in MCL 500.3114 are completely inapplicable if the vehicle involved in an accident is not required to have been registered in Michigan. This Court in *Heichel* relied on our Supreme Court's decision in *Parks* to reach its decision. However, because we conclude that the *Parks* Court's analysis of MCL 500.3114(3) is not controlling on the question of the construction of MCL 500.3114(4)(a), we rely instead on this Court's published decision in *Farmers Ins Exch v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 106; 724 NW2d 485 (2006), which involved analysis of language in former Subsection (5)(a) that is virtually identical to the language in Subsection (4)(a) that is at issue in the instant case.

at issue not subject to the security requirements of the no-fault act. These appeals then ensued.

B. DOCKET NO. 339815

In Docket No. 339815, Jonte Everson was involved in a motor vehicle accident while driving a car that he had rented from Enterprise. The car was registered in Pennsylvania and owned by EAN Holdings. As in Docket No. 339624, evidence was submitted into the record that EAN Holdings had obtained a certificate of self-insurance for purposes of Michigan's no-fault act. Additionally, the car had not been operated in Michigan for an aggregate of more than 30 days during the relevant calendar year. Everson made a claim for benefits through the Michigan Assigned Claims Plan, and his claim was assigned to Farmers.

After Everson initiated this lawsuit against Farmers, Farmers filed a third-party complaint against Enterprise in which Farmers sought a declaration that Enterprise was higher in priority and was liable to pay any no-fault benefits owed to Everson, including reimbursement to Farmers for any no-fault benefits it was required to pay to or for the benefit of Everson. As in Docket No. 339624, the sole matter requiring resolution at this juncture in Docket No. 339815 is the priority dispute between Farmers and Enterprise.

Enterprise moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), making essentially the same argument that it made in Docket No. 339624. Farmers opposed the motion, also making essentially the same argument that it made in Docket No. 339624.

The trial court granted summary disposition in favor of Enterprise under MCR 2.116(C)(10). Relying

on *Parks*,[4] the trial court ruled that Enterprise was entitled to summary disposition because there was no genuine issue of material fact that the car that Everson was driving had not been operated in Michigan for an aggregate of more than 30 days during the calendar year. The trial court reasoned that a "vehicle that is exempt from registration in Michigan cannot and does not trigger application of the statutory order of priority under no-fault law."

II. STANDARD OF REVIEW

A trial court's summary-disposition ruling is reviewed de novo to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Because it is necessary in these consolidated cases to consider material outside the pleadings, we review the summary-disposition rulings of the respective trial courts as having been granted under MCR 2.116(C)(10). See *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). In doing so, a court must consider "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion." *Maiden*, 461 Mich at 120 (citation omitted). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "A genuine issue of material fact exists when the record, giving the benefit

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[4] Like the trial court in Docket No. 339624, the trial court in Docket No. 339815 also relied on this Court's unpublished opinion in *Heichel*.

of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Additionally, issues of statutory interpretation are reviewed de novo. *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013).

III. ANALYSIS

On appeal, Farmers argues, as it did below, that Enterprise is higher in priority because Enterprise was self-insured and owned the vehicles involved in each of the accidents, and MCL 500.3114(4)(a) provides that PIP benefits must be paid by the "*insurer of the owner or registrant* of the vehicle occupied" regardless of whether the particular vehicle involved in the accident was actually insured or required to be insured. (Emphasis added.) Enterprise, also arguing consistently with its position at the trial court level, maintains that under *Parks*, 426 Mich at 203-207, the priority provisions in MCL 500.3114 are completely inapplicable and Enterprise cannot be considered the "insurer of the owner or registrant of the vehicle occupied" for purposes of § 3114(4)(a) because Enterprise was not required to maintain no-fault security on the vehicles.

In opposition, Enterprise argues that as a nonresident corporation, it was exempt from the security mandates of §§ 3101(1)[5] and 3102(1)[6] of the no-fault act

[5] MCL 500.3101(1) provides, in relevant part, as follows:

> The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security is only required to be in effect during the period the motor vehicle is driven or moved on a highway.

[6] MCL 500.3102(1) provides as follows:

because the vehicles at issue were not required to have been registered in Michigan and were not operated in Michigan for an aggregate of more than 30 days in the calendar year at issue. Enterprise thus argues that because it was not required to maintain no-fault security on the specific vehicles involved in each of the accidents, the priority provisions of the no-fault act do not apply and it cannot be liable for paying PIP benefits based on the accidents involving those specific vehicles.

The issue before us concerns the construction of various provisions of the no-fault act. "When interpreting statutes, our primary goal is to ascertain and give effect to the intent of the Legislature." *Averill v Dauterman*, 284 Mich App 18, 22; 772 NW2d 797 (2009). We first consider the "fair and natural import of the terms employed" in the statutory language in light of the subject matter of the law. *Id*. If the plain and ordinary meaning of the statute is clear, then it is enforced as written and judicial construction is "normally neither necessary nor permitted." *Id*.

We begin our analysis with the no-fault act priority provisions contained in MCL 500.3114. Under MCL 500.3114(1), a person seeking no-fault benefits must generally look first to his or her own insurer,[7] unless

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> A nonresident owner or registrant of a motor vehicle or motorcycle not registered in this state shall not operate or permit the motor vehicle or motorcycle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits pursuant to this chapter.

[7] Under this general first-priority rule, an injured person also may be covered under the no-fault policy of certain relatives. More specifically, the statutory provision states, in relevant part, as follows: "Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to

one of the exceptions in MCL 500.3114(2), (3), or (5) applies. *Farmers Ins Exch v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 106, 111; 724 NW2d 485 (2006). In the instant case, it is undisputed that no exceptions apply, and there is also no dispute between the parties that neither Turner nor Everson had an applicable policy of no-fault insurance under § 3114(1). In such a case, when Subsection (1) applies but there is no available insurer, we next look to Subsection (4) because these two subsections "together establish the general order of priority." *Titan Ins Co v American Country Ins Co*, 312 Mich App 291, 301; 876 NW2d 853 (2015) (quotation marks and citation omitted). MCL 500.3114(4) provides, in pertinent part, as follows:

> [A] person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) *The insurer of the owner or registrant of the vehicle occupied*.
>
> (b) The insurer of the operator of the vehicle occupied. [Emphasis added.]

Finally, under "certain limited circumstances, a person may also claim benefits through the Assigned Claims Facility under MCL 500.3172(1) . . . ." *Farmers Ins Exch*, 272 Mich App at 112. Section 3172(1) provides as follows:

> A person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this

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the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident." MCL 500.3114(1). In this case, it is undisputed that neither Turner nor Everson had any available no-fault insurance coverage under MCL 500.3114(1).

> state may obtain personal protection insurance benefits through the assigned claims plan if no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, the personal protection insurance applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. In that case, unpaid benefits due or coming due may be collected under the assigned claims plan and the insurer to which the claim is assigned is entitled to reimbursement from the defaulting insurers to the extent of their financial responsibility.

"Under the no-fault act, the Assigned Claims Facility represents the insurer of last priority." *Spencer v Citizens Ins Co*, 239 Mich App 291, 301; 608 NW2d 113 (2000).

Resolution of the instant appeal turns on the meaning of the language in § 3114(4)(a) providing that "a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits" first from the "*insurer of the owner or registrant* of the vehicle occupied." (Emphasis added.)

Essentially the same language appears in the priority provision in MCL 500.3114(5)(a), which is an exception to Subsection (1) and applies when a motorcycle rider is injured in a motor vehicle accident involving a motor vehicle. *Farmers Ins Exch*, 272 Mich App at 111. Section 3114(5)(a) provides as follows:

> A person suffering accidental bodily injury arising from a motor vehicle accident that shows evidence of the involvement of a motor vehicle while an operator or

> passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) *The insurer of the owner or registrant of the motor vehicle involved* in the accident. [Emphasis added.]

In *Farmers Ins Exch*, this Court interpreted this language in MCL 500.3114(5)(a) in a case that presented an issue analogous to the issue presented here. In *Farmers Ins Exch*, a motorcyclist was injured when he was struck by an uninsured van. *Farmers Ins Exch*, 272 Mich App at 108. However, the defendant insurance company had issued a no-fault insurance policy to one of the van's owners. *Id*. The policy listed another vehicle owned by the insured, but it did not list the van that was involved in the accident or the insured's girlfriend, who had been driving the van when the accident occurred. *Id*. The motorcyclist submitted a claim for first-party no-fault benefits through the Assigned Claims Facility, and the claim was assigned to the plaintiff insurance company. *Id*. The plaintiff subsequently sought to make the defendant begin paying no-fault benefits to the motorcyclist as well as reimbursement from the defendant for benefits the plaintiff had already paid. *Id*. The plaintiff argued that the defendant was first in priority under MCL 500.3114(5), while the defendant argued that it had no obligation under that statute to pay. *Id*.

In describing the issue presented on appeal in *Farmers Ins Exch*, this Court stated:

> The issue before us is whether MCL 500.3114(5)(a) requires an insurer to pay an injured motorcyclist no-fault benefits when the insurer did not issue a policy covering the vehicle involved in the accident. Defendant's position is that MCL 500.3114(5)(a) does not require payment of no-fault benefits because MCL 500.3114(5)(a) only requires an insurer to provide no-fault benefits under these

> facts if the insurer actually insured the motor vehicle involved in the accident. Plaintiff's position is that MCL 500.3114(5)(a) does require payment of no-fault benefits because the plain language of MCL 500.3114(5)(a) states that the insurer need not insure the vehicle in the accident, but must insure the owner or registrant. [*Id*. at 110-111.]

This Court then analyzed the statutory language as follows:

> MCL 500.3114(5)(a) states that the insurer is liable if it is "[t]he insurer of the owner or registrant of the motor vehicle involved in the accident." In order to scrutinize the plain language of the statutory sentence, we consult the dictionary definition of the word "of." The word "of" is "used to indicate inclusion in a . . . class" and "used to indicate possession or association . . . ." *Random House Webster's College Dictionary* (1997). The sequential prepositional phrases "*of* the owner or registrant" and "*of* the motor vehicle involved in the accident" define the relevant insurer. The first prepositional phrase, "of the owner or registrant," establishes a relationship between the "insurer" and an individual "owner or registrant" on the basis of the contractual nature of the parties' relationship. The second phrase establishes a relationship between an individual "owner or registrant" and "the motor vehicle involved in the accident" on the basis of "the owner or registrant['s]" possession of "the motor vehicle involved in the accident."
>
> The prepositional phrases demarcate contracting parties, with the first party defined by the contractual relationship and the second party defined by the possessive relationship. Pursuant to the plain language of the statute, all that is required for an insurer to be first in priority to pay no-fault benefits is to insure "the *owner or registrant* of the motor vehicle involved in the accident." In other words, the plain language of MCL 500.3114(5)(a) states that the insurer need not insure the vehicle in the accident, but must insure the owner or registrant. Here, because defendant insured Petiprin, who owned the van

involved in the accident, defendant is first in priority to provide benefits under MCL 500.3114(5)(a). Had the Legislature intended MCL 500.3114(5)(a) only to require an insurer to provide no-fault benefits if the insurer actually insured the motor vehicle involved in the accident, it could have chosen the following language for MCL 500.3114(5)(a): "The insurer of the motor vehicle involved in the accident," deleting the first prepositional phrase, "of the owner or registrant." Clearly, the Legislature did not choose that language, and for us to adopt defendant's position would be to render the phrase "of the owner or registrant" in the statute nugatory.

Defendant asserts that by repeating the article "the" in MCL 500.3114(5)(a), the Legislature intended to "particularize the subject matter," i.e., to indicate that priority is limited to "the insurer of the motor vehicle involved in the motor vehicle accident." Again, to interpret the statute as defendant suggests is contrary to the plain language of the subsection and renders meaningless the qualifying phrase, "the owner or registrant of." If the Legislature had intended to limit MCL 500.3114(5)(a) as defendant suggests, it could have done so, but it did not. Because the plain language of MCL 500.3114(5)(a) requires that an insurer that insures an owner or registrant who owns the motor vehicle involved in an accident with a motorcycle is first in priority to pay no-fault benefits to the injured person, further construction is not permitted. Our holding "is consistent with the legislative intent that persons rather than vehicles be insured against loss." *Pioneer State Mut Ins Co v Titan Ins Co*, 252 Mich App 330, 337; 652 NW2d 469 (2002).

Further supporting our reasoning in this case is this Court's holding in *Pioneer*, *supra*. In construing similar language in MCL 500.3115(1)(a), the Court in *Pioneer* concluded that an insurer is required to provide no-fault benefits regardless of whether the insurer covered the motor vehicle involved in the accident. *Pioneer*, *supra* at 336. MCL 500.3115(1) establishes the priority in which an uninsured nonoccupant of a vehicle must claim no-fault benefits and provides in relevant part as follows:

> Except as provided in subsection (1) of section 3114, a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) *Insurers of owners or registrants of motor vehicles involved in the accident*. [Emphasis added.]

The *Pioneer* Court was called on to construe MCL 500.3115(1)(a), and it concluded:

> This statutory language clearly states that the insurer of the owner or registrant of the motor vehicle involved in the accident is liable for payment of personal protection insurance benefits. . . . [T]he statute does not state that the injured person must seek these benefits from the insurer of the motor vehicle. Stated another way, the statute does not mandate that the vehicle involved in the accident must have been insured by the insurer of the owner before an injured person can seek benefits. [*Pioneer*, *supra* at 336.]

Because the language in MCL 500.3115(1)(a) is materially identical to that in MCL 500.3114(5)(a), the *Pioneer* reasoning also applies in this case and supports our holding. [*Id*. at 113-115 (alterations and ellipses in original; some citations omitted).]

Here, the language in MCL 500.3114(4)(a) is materially identical to the language in MCL 500.3114(5)(a). Accordingly, the analysis in *Farmers Ins Exch* applies to the construction of § 3114(4)(a). *Farmers Ins Exch*, 272 Mich App at 115. Thus, we adopt the reasoning of *Farmers Ins Exch* for purposes of the instant case. See also *Titan Ins Co*, 312 Mich App at 295, 302 (holding that priority is determined under § 3114(4) by looking to the insurer of other vehicles owned by the owner of the particular uninsured vehicle that was involved in a motor vehicle accident). Section 3114(4)(a) plainly refers to the insurer of the vehicle's "owner or regis-

trant," regardless of whether the particular vehicle involved in the accident was actually covered by the security described in § 3101(1).

Applying the analytical framework set forth in *Farmers Ins Exch* to the facts of this case, we find no dispute that Enterprise was the owner and registrant of the vehicles at issue that were occupied by Turner and Everson respectively when each of the accidents occurred. Furthermore, there is no dispute that Enterprise was self-insured. The issue then becomes whether Enterprise, as a self-insured entity that was the owner and registrant of the vehicles at issue, may be considered the "insurer of the owner or registrant."

MCL 500.3101(1) mandates that an "owner or registrant of a motor vehicle required to be registered in this state . . . maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." The no-fault act permits an entity to satisfy this requirement by becoming a self-insurer rather than obtaining a policy of no-fault insurance. Specifically, MCL 500.3101(4) provides as follows:

> Security required by subsection (1) may be provided by any other method approved by the secretary of state as affording security equivalent to that afforded by a policy of insurance, if proof of the security is filed and continuously maintained with the secretary of state throughout the period the motor vehicle is driven or moved on a highway. The person filing the security has all the obligations and rights of an insurer under this chapter. *When the context permits, "insurer" as used in this chapter, includes a person that files the security as provided in this section*. [Emphasis added.]

Additionally, MCL 500.3101d states, in pertinent part:

> (1) A person in whose name more than 25 motor vehicles are registered may qualify as a self-insurer by

> obtaining a certificate of self-insurance issued by the commissioner under subsection (2).
>
> (2) The commissioner may, in his or her discretion, on the application of a person who wishes to qualify under subsection (1), issue a certificate of self-insurance to the person if the commissioner is satisfied that the person has and will continue to have the ability to pay judgments obtained against the person.

The plain language of MCL 500.3114(4)(a) refers to the "insurer of the owner or registrant" and must therefore mean the entity providing no-fault insurance for the owner or registrant. There was evidence in the records below that Enterprise had formalized its status as a self-insurer under the Michigan no-fault act by obtaining the certificate of self-insurance described in MCL 500.3101d. Enterprise manifested its intent to comply with the requirements of the Michigan no-fault act's security mandate by using its own means to provide "security equivalent to that afforded by a policy of insurance," thus functioning as its own insurer. MCL 500.3101(4). In light of the specific language of MCL 500.3114(4)(a) and the function of a self-insurer, we conclude that it is permissible in this context to include a self-insured entity such as Enterprise within the meaning of the term "insurer" as used in MCL 500.3114(4)(a). MCL 500.3101(4); MCL 500.3101d(1) and (2); see also *Allstate Ins Co v Elassal*, 203 Mich App 548, 554; 512 NW2d 856 (1994) (stating that the "no-fault act explicitly treats a self-insurer as an insurer, with 'all the obligations and rights of an insurer' " and further noting that "self-insurance, as certified by the Secretary of State, is the functional equivalent of a commercial insurance policy, with the purpose of either form being to compensate victims properly"), quoting MCL 500.3101(4).

However, this conclusion does not finish our analysis. We must also address Enterprise's argument that the priority provision in MCL 500.3114(4)(a) does not even apply because, according to Enterprise, it was exempt from the mandatory no-fault security requirements with respect to the vehicles involved in the accidents at issue. Enterprise argues that because the vehicles at issue were not "required to be registered in this state," it was not obligated to maintain the no-fault security mandated under MCL 500.3101(1) on those vehicles. Enterprise further argues that it is a nonresident entity and that the vehicles at issue were not operated in Michigan for an aggregate of more than 30 days in the relevant calendar year in each case, thus also negating any requirement to maintain no-fault security as set forth in MCL 500.3102(1). That statute provides as follows:

> A nonresident owner or registrant of a motor vehicle or motorcycle not registered in this state shall not operate or permit the motor vehicle or motorcycle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits pursuant to this chapter. [MCL 500.3102(1).]

Consequently, Enterprise maintains that pursuant to *Parks*, 426 Mich at 203-207, it cannot be responsible for paying the no-fault benefits at issue in this case because the priority provisions in MCL 500.3114 cannot be triggered when the particular vehicle at issue is not required to be covered by the security described in § 3101(1) of the no-fault act.

In *Parks*, 426 Mich at 196-197, an employee was injured while working inside a trailer that was owned by his self-insured employer, that was not registered in Michigan, and that had not been operated in Michigan

for an aggregate of more than 30 days during that calendar year. The relevant issue in that case concerned the application of the priority provision implicated under such circumstances, which is contained in MCL 500.3114(3). *Id*. at 203. That statute provides that an "employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled *from the insurer of the furnished vehicle*." MCL 500.3114(3) (emphasis added). In *Parks*, our Supreme Court held "that an out-of-state vehicle not required to be registered in Michigan and not operated in this state for more than thirty days is not subject to the security provisions or § 3114(3) of the no-fault act and that when an employee is injured while an occupant of such a vehicle, the employee's personal insurer, if there is one, must pay the employee's personal protection benefits under § 3101(1)." *Parks*, 426 Mich at 196. The Court specifically explained that "the exception of an employee injured in an employer's vehicle contained in subsection 3 of § 3114 applies only in the case in which the insured vehicle is required to be registered in this state" and that "because the vehicle was not registered in this state and thus the exception of subsection 3 does not apply, we look to the general intention of the Legislature in § 3114(1) to provide compensation for liability through the injured person's personal insurer." *Id*. at 206.

We conclude that *Parks* is not controlling on the specific issue presented in the instant case for several reasons. First, the Court in *Parks* was primarily concerned with a different priority provision—§ 3114(3)—than the one at issue in the instant cases—§ 3114(4)(a). *Parks*, 426 Mich at 196. Although the *Parks* Court

addressed § 3114(4) in a footnote, the Court merely stated that

> [t]hose injured while *occupants* of motor vehicles must look to the rules provided in subsections 1, 2, and 3 before applying the priorities listed in subsection 4. The implication of the phrase "owner *or* registrant" was not extensively argued. But we assume subsection 4 does not apply because we read the phrase "owner or registrant of the vehicle occupied" within subsection 4 to be part of the more complete requirement as stated in § 3101(1): "The owner or registrant of a motor vehicle *required to be registered in this state*" (emphasis added). [*Id*. at 203 n 3.]

We note that the *Parks* Court merely *assumed* this to be true without actually analyzing or deciding this issue. Moreover, there was no need to reach Subsection (4) in *Parks* because the issue in that case became whether the self-insured employer was first in priority under Subsection (3) or, if not, the employee's personal insurer was first in priority under Subsection (1). *Id*. at 196, 203, 206. Subsection (4) only comes into play if there is no available insurer under Subsection (1). *Titan Ins Co*, 312 Mich App at 301. The *Parks* Court's brief statement regarding Subsection (4) was thus nonbinding obiter dictum. *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 160 n 7; 871 NW2d 530 (2015) ("Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication.") (citation and quotation marks omitted). We further note that "motor vehicle" is specifically defined for purposes of the no-fault act to mean "a vehicle, including a trailer, that is operated or designed for operation on a public highway by power other than muscular power and has more than 2 wheels." MCL 500.3101(2)(i). For these reasons, we conclude that *Parks* does not bind this Court to reach a certain result with respect to the meaning of Subsection

(4)(a) and, contrary to Enterprise's argument, *Parks* is not dispositive in resolving the instant priority dispute.

Second, the language of § 3114(3) explicitly ties the insurer's priority status to whether it insured "the furnished vehicle," while the language of § 3114(4)(a) instead ties the insurer's priority status to whether it insured the vehicle's "owner or registrant." With respect to Subsection (3), *Parks* instructs that if the employer was not required to maintain no-fault security on the vehicle at issue, then the employer is not liable for paying PIP benefits under Subsection (3). *Parks*, 426 Mich at 206-207. However, as we have previously discussed, Subsection (4)(a) assigns liability to the insurer of the vehicle's *owner or registrant* without regard for whether no-fault security was actually maintained on the particular vehicle itself. *Farmers Ins Exch*, 272 Mich App at 113. Therefore, this distinction in language between Subsections (3) and (4)(a) matters, and *Parks* is not persuasive or controlling on the issue of ascertaining the meaning of Subsection (4)(a).

Third, and as we have already alluded to during the course of our analysis, considering that Subsection (4)(a) makes the insurer of the vehicle's owner or registrant the focus (rather than the insurer of the vehicle itself), the questions whether the vehicles at issue were required to be registered in Michigan or were covered by no-fault security are completely irrelevant for purposes of determining priority when that determination is to be made under MCL 500.3114(4)(a).

Next, Enterprise makes an additional argument that it is not first in priority for the independent reason that it is not an "insurer" as that term is used in § 3114(4)(a). In making this argument, Enterprise relies on the *Parks* Court's statement that for purposes of MCL 500.3163(1), "status as a self-insurer does not place it in the category of '[a]n insurer authorized to transact

automobile liability insurance and personal and property protection insurance in this state . . . .' " *Parks*, 426 Mich at 208. MCL 500.3163(1) provides, in full, as follows:

> An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that any accidental bodily injury or property damage occurring in this state arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident who is insured under its automobile liability insurance policies, is subject to the personal and property protection insurance system under this act.

However, the *Parks* Court's conclusion on this issue is not as sweeping as Enterprise asserts. The statutory rule is that a self-insurer will be treated as an insurer under the no-fault act wherever the context permits. See MCL 500.3101(4). Thus, the fact that our Supreme Court has held that a self-insurer will not be treated as an "insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state" under § 3163(1) does not equate to a finding that a self-insurer cannot be treated as an "insurer" under § 3114(4)(a). We have already explained why the context of § 3114(4)(a) permits treating a self-insurer as an "insurer" under that statutory provision based on the self-insurer's obligation to provide "security equivalent to that afforded by a policy of insurance" under MCL 500.3101(4).[8] We therefore reject Enterprise's argument that it is not an "insurer" in this context.

In this case, Enterprise is higher in priority than Farmers under § 3114(4)(a) because Enterprise was

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[8] Our conclusion is further supported by comparing MCL 500.3101(4), which has already been quoted in this opinion, with MCL 500.3101(3). MCL 500.3101(3) provides as follows:

self-insured and therefore was the insurer of the vehicles' owner and registrant; *Parks* does not compel a different result.[9]

IV. CONCLUSION

We hold that in the case of a qualified self-insurer under Michigan's no-fault act, the priority provision in MCL 500.3114(4)(a) refers to that self-insurer as the insurer of the motor vehicle's "owner or registrant," regardless of whether the particular vehicle involved in an accident was required to be covered by no-fault security under MCL 500.3101(1) or MCL 500.3102(1). Accordingly, in both Docket No. 339624 and Docket No. 339815, we reverse because Enterprise was higher in priority pursuant to MCL 500.3114(4)(a) and Farmers was entitled to summary disposition in its favor. We remand in both cases for further proceedings consistent with this opinion.[10]

> Security required by subsection (1) may be provided under a policy issued by an authorized insurer that affords insurance for the payment of benefits described in subsection (1). A policy of insurance represented or sold as providing security is considered to provide insurance for the payment of the benefits.

[9] Enterprise also relies on this Court's unpublished decision in *Heichel*, unpub op at 5-6, which, in analyzing § 3114(5), relied on *Parks* to hold that "[a] vehicle that does not need to be registered in Michigan cannot trigger the application of the priority provisions set forth in MCL 500.3114." In so holding, the panel in *Heichel* concluded that EAN Holdings was not liable for paying first-party no-fault benefits to a motorcyclist who had been in an accident with a car that had been rented from Enterprise but was owned by EAN Holdings, registered in North Carolina, and had been in Michigan less than 30 days. *Id*. at 2-3. Nonetheless, as previously mentioned, we are not bound by unpublished decisions of this Court, MCR 7.215(C)(1), and we do not find the *Heichel* decision to be persuasive for the same reasons that we conclude that our decision in the instant appeal is not governed by *Parks*.

[10] In light of our resolution of this issue, the remaining arguments by Farmers regarding Enterprise's residency are moot, and we decline to

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Appellant, having prevailed in full, is entitled to costs. MCR 7.219(A).

CAVANAGH, P.J., concurred with BORRELLO, J.

REDFORD, J. (*dissenting*). I respectfully dissent from the majority's decision. I would affirm the trial courts' orders granting summary disposition in favor of defendants Enterprise Leasing Corporation of Detroit, LLC, and EAN Holdings, LLC, in Docket No. 339624 and in favor of Enterprise Leasing Company in Docket No. 339815.[1] Both this Court's and our Supreme Court's decisions establish that the no-fault insurance sections that require coverage, MCL 500.3101(1)[2] and MCL 500.3102(1),[3] do not apply to either vehicle in the two

address them. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

[1] I refer to these defendants collectively as "Enterprise."

[2] MCL 500.3101(1) provides:

> The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security is only required to be in effect during the period the motor vehicle is driven or moved on a highway. Notwithstanding any other provision in this act, an insurer that has issued an automobile insurance policy on a motor vehicle that is not driven or moved on a highway may allow the insured owner or registrant of the motor vehicle to delete a portion of the coverages under the policy and maintain the comprehensive coverage portion of the policy in effect.

[3] MCL 500.3102(1) provides:

> A nonresident owner or registrant of a motor vehicle or motorcycle not registered in this state shall not operate or permit the motor vehicle or motorcycle to be operated in this state for an

matters at bar because they were out-of-state vehicles, they were not required to be registered in Michigan, and they were not operated in Michigan for more than 30 days in any given year. Consequently, MCL 500.3114(4) does not require that Enterprise, as the self-insured owner of the vehicles, provide the no-fault benefits in this case. This result is consistent with this Court's decision in *Covington v Interstate Sys*, 88 Mich App 492; 277 NW2d 4 (1979), and our Supreme Court's decision in *Parks v Detroit Auto Inter-Ins Exch*, 426 Mich 191; 393 NW2d 833 (1986), two cases that arose from facts similar to the matters at bar.

In *Covington*, a case involving an employee who suffered injuries in an accident while driving his employer's truck that was registered and licensed in another state and self-insured by his employer, this Court explained:

> According to the express language of [MCL 500.3101(1)] only those vehicles required to be registered in this state are subject to the requirements of the no-fault act. It is uncontroverted that the truck plaintiff was driving at the time of the accident was neither registered in this state, nor required to be registered in this state. Consequently, it did not fall within the class of vehicles covered by this section of the no-fault act. [*Covington*, 88 Mich App at 494.]

This Court clarified that under MCL 500.3102(1), the only other coverage section of the no-fault act, because the vehicle the plaintiff drove at the time of the accident had not been operated in Michigan for more than 30 days in any given year, the no-fault coverage provided by that section was also inappli-

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aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits pursuant to this chapter.

cable. *Id*. Consequently, because "neither coverage section of the no-fault act is applicable to the truck in question, the truck was not a covered vehicle under the no-fault act and plaintiff is not entitled to no-fault benefits from defendant." *Id*. at 494-495.

In *Parks*, 426 Mich at 196-197, an employee suffered an injury while unloading his employer's trailer that was registered and licensed in another state and self-insured by his employer. The trailer had been operated in Michigan for only a few days. The issue before our Supreme Court concerned which of three insurers was required to pay the plaintiff's personal protection insurance benefits: his personal auto insurer; his employer, as a self-insurer; or the Assigned Claims Facility under MCL 500.3171 *et seq*. *Id*. at 198. The plaintiff's insurer contended that the nonresident vehicle owner bore liability under MCL 500.3114, regardless of whether the no-fault act required the owner to maintain security on the vehicle. *Id*. at 201. Our Supreme Court approvingly applied the analysis of the no-fault act as articulated by this Court in *Covington* and explained:

> From a clear reading of the no-fault act and the reasoning of the cited case law, we find the following: First, the plain language of § 3101(1) subjects only those vehicles required to be registered in this state to the mandatory security requirements. The fact that a vehicle is actually covered by an insurance policy, or that the owner of the vehicle is self-insured, does not alter whether the vehicle itself need or need not conform to the requirements of the act. Second, the policy of the Legislature was to provide a method whereby persons injured in automobile accidents would be readily provided relief from the results of their injury. Third, the primary method of accomplishing this result, from the general rule in § 3114(1), is that one looks to one's own insurer for no-fault benefits unless one of the statutory exceptions

> applies. Fourth, the exception of an employee injured in an employer's vehicle contained in subsection 3 of § 3114 applies only in the case in which the insured vehicle is required to be registered in this state. Fifth, because the vehicle was not registered in this state and thus the exception of subsection 3 does not apply, we look to the general intention of the Legislature in § 3114(1) to provide compensation for liability through the injured person's personal insurer. [*Id*. at 206.]

Our Supreme Court made clear in *Parks* that if the vehicle involved in the accident does not need to be registered in Michigan, the priority provisions set forth in MCL 500.3114 do not apply.[4]

In reviewing the majority opinion, I do not disagree with my colleagues that *if* MCL 500.3114(4) applied in this case, as *Farmers Ins Exch v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 106; 724 NW2d 485 (2006), found MCL 500.3114(5) to apply in that case, then reversal would be appropriate. However, the facts, analysis, and holding of *Parks* and *Covington* lead to a contrary result.

In *Parks* and *Covington*, the motor vehicles involved were not registered in the state of Michigan, had not operated in the state for more than 30 days aggregate, and were owned by self-insured entities. In those cases, the courts concluded that because neither MCL 500.3101 nor MCL 500.3102 applied to the vehicles in question, the priority provisions of MCL 500.3114 did

[4] As is indicated in the majority opinion, the issues at bar were addressed in *Heichel v Geico Indemnity Co*, unpublished per curiam opinion of the Court of Appeals, issued March 1, 2016 (Docket Nos. 323818 and 324045), lv den 500 Mich 921 (2016). The *Heichel* panel followed *Parks*'s instruction that the priority provisions of MCL 500.3114 only apply if the insured vehicle was required to be registered in Michigan.

not apply and the self-insured out-of-state owners were not required to pay no-fault first-party benefits.

In *Farmers*, 272 Mich App at 108, the operator of a motorcycle was injured when he was struck by an uninsured van driven by Lynn Smith. On the day of the accident, the van was uninsured because of a failure to pay the insurance premium.[5] The van was owned by Lynn Smith and John Petiprin. Petiprin also owned another vehicle that was insured by Farm Bureau Insurance Company. Farm Bureau Insurance Company refused to pay the motorcyclist's no-fault first-party benefits. The Assigned Claims Facility assigned the case to the plaintiff, Farmers Insurance Exchange. The plaintiff brought suit to compel the defendant to pay the no-fault first-party benefits. The trial court granted summary disposition in favor of the plaintiff, *id*. at 109, and the Court of Appeals upheld that decision "[b]ecause the trial court properly construed MCL 500.3114(5)(a) to require that an insurer that insures an owner or registrant who owns the motor vehicle involved in an accident with a motorcycle is first in priority to pay no-fault benefits to the injured person," *id*. at 107.

In my opinion, *Parks and Covington* control this case. Because the vehicles involved in the accidents in the two cases at bar were registered and licensed in another state and were not operated in Michigan for more than 30 days in any given year, the self-insured owners were not required by the no-fault act to provide first-party no-fault benefits to the injured occupants of the motor vehicles involved in the two collisions. Therefore, as *Parks* directs, the priority provisions set forth in MCL 500.3114 do not apply, the owners of the

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[5] The clear implication of this statement in the *Farmers* case is that the van in question was a vehicle to which MCL 500.3101 applied.

vehicles cannot be held liable, and plaintiffs' no-fault claims should be covered by the insurers assigned the claims as provided under the no-fault act. For these reasons, I would affirm.

SEIFEDDINE v JABER

Docket No. 343411. Submitted April 3, 2019, at Detroit. Decided April 16, 2019, at 9:05 a.m.

In 2016, Michael A. Seifeddine filed in the Wayne Circuit Court, Family Division, a complaint for divorce from Batoul Jaber. Jaber filed a counterclaim requesting enforcement or specific performance of the parties' Islamic marriage certificate, claiming that the marriage certificate was a binding contract requiring Seifeddine to pay her $50,000 as a mahr, which, under Islamic law, is a gift of money or property a man must make to the woman he marries. The parties' judgment of divorce entered in 2018. In the judgment of divorce, the court, Melissa A. Cox, J., enforced the mahr provision in the parties' Islamic marriage certificate. Seifeddine appealed as of right the court's award of $50,000 to Jaber as well as the court's property-division analysis.

The Court of Appeals *held*:

1. Civil courts may not decide matters involving religious doctrine, but when considering property issues in divorce proceedings, a civil court may review religious marital agreements if the court applies neutral principles of law. When examining a religious document, a civil court must take special care to scrutinize the document in purely secular terms and not rely on religious precepts. In this case, the trial court expressly and repeatedly stated that it was not applying religious principles or doctrines but was instead applying Michigan common law regarding contracts. The record made it clear that the court applied the common law regarding contracts and that it determined that each of the elements for establishing a valid contract was met. Although the court allowed each party to present testimony from an imam regarding the cultural implications of the Islamic marriage certificate, the court emphasized that it would not rely on that testimony to determine whether a contract existed. The court applied neutral principles of contract law that did not require consideration of religious doctrine. Therefore, the court did not err by using Michigan common law related to contracts to review the parties' Islamic marriage certificate and enforce the mahr provision.

2. The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. Although mathematical equality is not required in the division of the marital estate, the trial court must clearly explain any significant departure from congruence. Seifeddine argued that when the court awarded $50,000 to Jaber, it failed to analyze the property-distribution factors commonly considered in the division of a marital estate. However, the court did not award the $50,000 to Jaber as part of any division of marital property. The $50,000 award was rendered separately from the division of marital assets; the court addressed the award separately from the property distribution in both the 2017 opinion following trial and the 2018 judgment of divorce.

Affirmed.

DIVORCE — RELIGIOUS DOCUMENTS PERTAINING TO MARRIAGE — ISLAMIC LAW — CONTRACT OBLIGATING HUSBAND TO PAY WIFE A SUM OF MONEY.

A civil court may examine religious marital agreements if it does not apply religious doctrines or principles but instead applies neutral principles of law derived from Michigan common law; a court may examine, using the common law regarding contracts, an Islamic marriage certificate that requires a mahr, which is a gift of money or property a man must make to the woman he marries; if the court determines that each of the elements for establishing a valid contract are met, the court may enforce the mahr provision.

Arthur S. Brand and *Carl Bloetscher III* for Michael A. Seifeddine.

Warner Norcross & Judd LLP (by *Gaëtan Gerville-Réache* and *Roquia K. Draper*) for Batoul Jaber.

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

PER CURIAM. Plaintiff appeals as of right a judgment of divorce. On appeal, plaintiff presents arguments challenging the trial court's enforcement of a provision in the parties' Islamic marriage certificate requiring

plaintiff to pay $50,000 to defendant. Plaintiff also challenges the trial court's property-distribution analysis. We affirm.

Plaintiff challenges whether the trial court applied neutral principles of law in determining that the mahr[1] provision in the parties' Islamic marriage certificate constituted a contract requiring plaintiff to pay $50,000 to defendant. Plaintiff's arguments are devoid of merit.

"The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). Issues of constitutional law are likewise reviewed de novo. *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017). In a divorce case, this Court reviews the trial court's factual findings for clear error. *McNamara v Horner (After Remand)*, 255 Mich App 667, 669; 662 NW2d 436 (2003). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. "This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses." *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

The First Amendment of the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" US Const, Am I. The First Amendment applies to the states through the Fourteenth Amendment. *Winkler*, 500 Mich at 337 n 4. Civil courts may not decide religious doctrinal matters.

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[1] Under Islamic law, a mahr is "[a] gift of money or property that must be made by a man to the woman he marries." *Black's Law Dictionary* (11th ed).

See *Jones v Wolf*, 443 US 595, 602; 99 S Ct 3020; 61 L Ed 2d 775 (1979); *Winkler*, 500 Mich at 337-338. But the United States Supreme Court has held that in the context of resolving a church property dispute, a civil court may review religious documents if the court applies neutral principles of law. See *Jones*, 443 US at 602-604. By applying neutral principles of law, civil courts avoid "entanglement in questions of religious doctrine, polity, and practice." *Id*. at 603. Therefore, when examining a religious document, "a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts . . . ." *Id*. at 604.

Relying on *Jones*, appellate courts in other states have persuasively concluded that religious marital agreements may be examined when a court applies neutral principles of law.[2] In *Avitzur v Avitzur*, 58 NY2d 108, 114-115; 446 NE2d 136 (1983), the New York Court of Appeals held that the secular terms of a Ketubah[3] agreement, which was entered into before the marriage ceremony, could be enforced in civil court. After the parties were divorced civilly, the plaintiff, who wished to obtain a religious divorce, sought to enforce a provision of the Ketubah requiring the parties to appear before a rabbinical tribunal having authority to resolve issues of Jewish tradition and Jewish law. *Id*. at 112. Accepting the plaintiff's allegations as true for the purposes of the defendant's motion

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[2] This Court is not bound by the decisions of other states' courts, but such decisions may be considered for their persuasive value. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559 n 38; 705 NW2d 365 (2005).

[3] Under Jewish law, a Ketubah is "[a] prenuptial agreement, signed by at least two independent witnesses, in which a husband promises to support his wife and to pay her a certain sum of money if the couple divorces." *Black's Law Dictionary* (11th ed).

to dismiss, the *Avitzur* court concluded that the Ketubah constituted a marital contract in which the parties had agreed "to refer the matter of a religious divorce to a nonjudicial forum." *Id*. at 113-114. Such an agreement was "closely analogous to an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties." *Id*. at 114. The Ketubah "should ordinarily be entitled to no less dignity than any other civil contract to submit a dispute to a nonjudicial forum, so long as its enforcement violates neither the law nor the public policy of this State." *Id*. The defendant argued that enforcement of the Ketubah in civil court would unconstitutionally entangle the civil court in religious matters. *Id*. The *Avitzur* court rejected that argument, cited *Jones*, and stated that the case could "be decided solely upon the application of neutral principles of contract law, without reference to any religious principle." *Id*. at 115.

> In short, the relief sought by plaintiff in this action is simply to compel defendant to perform a secular obligation to which he contractually bound himself. In this regard, no doctrinal issue need be passed upon, no implementation of a religious duty is contemplated, and no interference with religious authority will result. . . . To the extent that an enforceable promise can be found by the application of neutral principles of contract law, plaintiff will have demonstrated entitlement to the relief sought. [*Id*.]

In *Odatalla v Odatalla*, 355 NJ Super 305, 309-312; 810 A2d 93 (Ch Div, 2002), the New Jersey Superior Court cited *Jones* as well as *Avitzur* and concluded that a mahr agreement contained with an Islamic marriage license could be enforced. "As in *Jones*, *supra*, no doctrinal issue is involved—hence, no constitutional infringement." *Id*. at 310.

> Furthermore, the Mahr Agreement is not void simply because it was entered into during an Islamic ceremony of marriage. Rather, enforcement of the secular parts of a written agreement is consistent with the constitutional mandate for a "free exercise" of religious beliefs, no matter how diverse they may be. If this Court can apply "neutral principles of law" to the enforcement of a Mahr Agreement, though religious in appearance, then the Mahr Agreement survives any constitutional implications. Enforcement of this Agreement will not violate the First Amendment proscriptions on the establishment of a church or the free exercise of religion in this country. [*Id*. at 311.]

In this case, plaintiff argues that the trial court erred by enforcing the mahr provision in the Islamic marriage certificate because the Legislature has not prescribed a method to resolve religious issues. However, the trial court expressly and repeatedly stated that it was *not* applying religious principles or doctrines but was instead applying Michigan common law regarding contracts. It is abundantly clear from the record that the trial court applied Michigan common law regarding contracts and determined that each of the elements for establishing a valid contract was met.[4] Plaintiff does not challenge any particular element establishing the existence of a contract. Nor does plaintiff cite any authority for his contention that a neutral principle of law must be derived from a statute rather than from Michigan common law when examining a religious document. A party may not simply announce a position and leave it to this Court to make the party's arguments and search for authority to support the party's position. *Wilson v Taylor*, 457 Mich

[4] "A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015).

232, 243; 577 NW2d 100 (1998). Failure to adequately brief an issue constitutes abandonment. *McIntosh v McIntosh*, 282 Mich App 471, 484; 768 NW2d 325 (2009). In any event, the persuasive analyses in *Avitzur* and *Odatalla* reflect that neutral principles of law may be derived from a state's common law of contracts. Plaintiff's argument is devoid of merit.

Plaintiff next argues that the trial court erred by relying on *Avitzur* because the religious agreement in that case called for the submission of postmarital disputes to a rabbinical tribunal, avoiding any judicial involvement in religious doctrine. In contrast, plaintiff argues, the trial court in this case applied Islamic principles to find that a contract existed. To support his contention that the trial court applied religious principles, plaintiff refers to the fact that the trial court heard testimony from two imams,[5] one presented by each party. Plaintiff's argument lacks merit and reflects his misunderstanding of the analysis in *Avitzur*. Although the content of the marital agreement in *Avitzur* differed from that of the contract in this case, the relevant part of the holding in *Avitzur* was that the case could "be decided solely upon the application of neutral principles of contract law . . . ." *Avitzur*, 58 NY2d at 115. The same conclusion is reached in this case because the trial court applied neutral principles of contract law that did not require consideration of religious doctrine. See *id*. Although the trial court allowed each party to present testimony from an imam regarding the cultural implications of the Islamic marriage certificate, the trial court repeatedly emphasized that it would *not* rely on that testimony to determine whether a contract existed and that the court would

[5] An imam is "the prayer leader of a mosque." *Merriam-Webster's Collegiate Dictionary* (11th ed).

instead apply Michigan law. This is exactly what the trial court did when it decided the contract issue. The record thus refutes plaintiff's assertion that the trial court decided the case on the basis of religious principles.

Plaintiff next argues that the Islamic ceremony standing alone is not recognized as a legal marriage in Michigan, and he claims that the parties' subsequent civil ceremony was somehow ineffective (even though he signed the marriage certificate). This argument fails for multiple independent reasons. Initially, plaintiff has waived this issue by failing to include it in his statement of questions presented. *River Investment Group, LLC v Casab*, 289 Mich App 353, 360; 797 NW2d 1 (2010); MCR 7.212(C)(5). Further, plaintiff fails to clarify why he thinks the purported absence of a legal marriage is relevant to the issues he has raised on appeal. He provides no cogent argument explaining how his contractual obligation to pay $50,000 is contingent on the existence of a legal marriage. The trial court found that the consideration for the $50,000 mahr was the Islamic marriage ceremony and the party that followed it. Plaintiff fails to acknowledge or address the trial court's finding on this point. Plaintiff also fails to provide an analysis of the contractual language to support any contention that his obligation to pay $50,000 was contingent on a legal marriage. Plaintiff cannot leave it to this Court to make his arguments for him. *Wilson*, 457 Mich at 243. His failure to adequately brief the issue constitutes abandonment. *McIntosh*, 282 Mich App at 484. Plaintiff also fails to discuss the trial court's pretrial ruling denying plaintiff's motion for a declaratory judgment stating that the parties were never legally married. The trial court determined, on the basis of a presumptively valid civil marriage certificate and other evidence, that the

parties were legally married. When an appellant fails to address the basis of a trial court's decision, this Court need not even consider granting relief. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

Plaintiff next makes an argument purporting to challenge the trial court's property-distribution analysis. Plaintiff's argument lacks merit. A trial court's factual findings regarding property distribution are reviewed for clear error. *Berger v Berger*, 277 Mich App 700, 717; 747 NW2d 336 (2008). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made." *Id*. Substantial deference is afforded to the trial court's factual findings. *Id*. "If the trial court's findings of fact are upheld, this Court must decide whether the trial court's dispositional ruling was fair and equitable in light of those facts. This Court will affirm the lower court's discretionary ruling unless it is left with the firm conviction that the division was inequitable." *Id*. at 717-718.

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances." *Id*. at 716-717. Although mathematical equality is not required in the division of the marital estate, the trial court must clearly explain any significant departure from congruence. *Id*. at 717.

> Trial courts may consider the following factors in dividing the marital estate: (1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life situation of the parties, (6) the necessities and circumstances of the parties, (7) the parties' earning abilities, (8) the parties' past relations and conduct, and (9) general principles of equity. [*Id*.]

Plaintiff asserts that the trial court failed to analyze these property-distribution factors when awarding $50,000 to defendant. However, the trial court did not award the $50,000 to defendant as part of any division of marital property. Rather, the $50,000 award was rendered separately from the division of marital assets. Defendant had filed a counterclaim requesting enforcement or specific performance of the Islamic marriage certificate, which defendant claimed was a binding contract requiring plaintiff to pay $50,000 to defendant. In its October 31, 2017 opinion and order, as well as the March 29, 2018 divorce judgment, the trial court addressed this contractual issue in a section separate from the property-distribution section. Trial courts speak through their written judgments and orders. *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). Plaintiff's argument on this issue is premised on a misunderstanding of the basis for the trial court's award of $50,000 to defendant. Because plaintiff's argument misapprehends and fails to address the basis of the trial court's decision, plaintiff is not entitled to relief. *Derderian*, 263 Mich App at 381.

Plaintiff also refers to the trial court's declination to award spousal support. But the trial court's declination to award spousal support had nothing to do with plaintiff's appellate contention that the trial court was required to analyze the property-distribution factors in connection with the award of $50,000 to defendant. Admittedly, the trial court referred to the $50,000 award as a factor in its conclusion that no award of spousal support was necessary, but plaintiff cites no authority establishing that there was anything improper about this aspect of the trial court's reasoning. As the trial court correctly noted, the property awarded to the parties is a factor that should be

considered when deciding whether to award spousal support. See *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003). Although the $50,000 was not awarded as part of a division of marital assets, plaintiff identifies no reason to conclude that it was improper for the trial court to consider the $50,000 award when deciding whether to award spousal support. It is also notable that the trial court's reasoning in this regard favored plaintiff because it led to the trial court's decision that plaintiff was not required to pay spousal support.

Affirmed. As the prevailing party, defendant may tax costs. MCR 7.219.

LETICA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ., concurred.

CREGO v EDWARD W SPARROW HOSPITAL ASSOCIATION

Docket No. 338230. Submitted October 3, 2018, at Lansing. Decided April 16, 2019, at 9:10 a.m.

Kelley Crego filed a medical malpractice action in the Ingham Circuit Court against Edward W. Sparrow Hospital Association, Sparrow Health System, Shirley Lima, M.D., and Amber McLean, D.O., asserting that she suffered a perforated bowel during a surgical procedure performed by Lima and McLean and that Edward W. Sparrow Hospital Association and Sparrow Health System (collectively, Sparrow) were vicariously liable for the conduct of Lima and McLean. Plaintiff submitted with her complaint an affidavit of merit by Dr. Steven D. McCarus, M.D., a licensed allopathic physician who specialized in obstetrics and gynecology. McLean, a licensed osteopathic physician who specialized in obstetrics and gynecology, moved to dismiss, arguing that the affidavit failed to meet certain statutory requirements and that McCarus was therefore not qualified to testify as to the requisite standard of care; Sparrow joined in the motion. The court, Rosemarie E. Aquilina, J., rejected McCarus's affidavit and granted McLean's motion, reasoning that the affidavit did not meet the requirements of MCL 600.2912d(1) and MCL 600.2169(1)(b)(*i*) because McCarus did not engage in the practice of the same health profession in which McLean was licensed given that McCarus was an allopathic physician, not an osteopathic physician like McLean; the court also dismissed plaintiff's claims against Sparrow to the extent those claims were based on a theory of vicarious liability for McLean's conduct. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 600.2912d(1) provides that a medical malpractice plaintiff must file with the complaint an affidavit of merit signed by a health professional whom the plaintiff's attorney reasonably believes meets the requirements for an expert witness under MCL 600.2169. In that regard, MCL 600.2169(1)(a) provides that in a medical malpractice action, a person may not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in Michigan or

another state, and if the party against whom or on whose behalf the testimony is offered is a specialist, the proferred expert must specialize at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered; however, if the party against whom or on whose behalf the testimony is offered is a specialist who is board-certified, the expert witness must be a specialist who is board-certified in that specialty. In other words, under MCL 600.2169(1)(a), if a defendant physician is a specialist, the plaintiff's expert witness must have specialized in the same specialty as the defendant physician at the time of the alleged malpractice. Although a proposed expert must also hold the same board certifications as the party against whom the testimony is offered, the expert does not have to match all the defendant physician's specialties; instead, the plaintiff's expert only has to match the one most relevant specialty, that is, the specialty the physician defendant was engaged in during the alleged malpractice. MCL 600.2169(1)(b)(*i*), in turn, provides that during the year immediately preceding the date of the occurrence that is the basis for the claim or action, the expert must have devoted a majority of his or her professional time to the active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and if that party is a specialist, the active clinical practice of that specialty. If an expert satisfies the MCL 600.2169(1)(a) matching-credentials requirement, MCL 600.2169(1)(b)(*i*) then requires the expert to have devoted a majority of his or her professional time to the active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed *and*, if that party is a specialist, the active clinical practice of that specialty. The Legislature's use of the conjunctive "and" in MCL 600.2169(1)(b)(*i*) clarifies that if a specialist is involved, the one-year clinical-practice requirement pertains to that specialty. By employing the word "and," the Legislature did not intend to require one year of active clinical practice in the same health profession and in the same specialty; that is, it can be inferred that the Legislature assumed that if the expert's specialty matched that of the defendant physician, then the two health professionals necessarily practice in the same health profession. An expert's ability to describe the standard of care or practice in a board-certified specialty in a particular field or discipline is not dependent on whether the physician is an osteopathic or allopathic physician; thus, MCL 600.2169(1)(b)(*i*) does not require one year of active clinical practice in the same health profession

and the same specialty, but, rather, only in the same specialty. This interpretation is consistent with *Woodard v Custer*, 476 Mich 545 (2006), in which the Court suggested that "the same health profession" language in that provision is only implicated when a defendant physician is not a specialist. The interpretation is also consistent with MCL 600.2169(2)(c)—which requires a court to evaluate the length of time the expert witness has been engaged in the active clinical practice of the health profession *or* the specialty—because with respect to the MCL 600.2169(1)(b)(*i*) "active clinical practice" requirement, the Legislature only required that an expert engage in the active clinical practice of the relevant specialty for the requisite period.

2. In this case, McCarus met the MCL 600.2169(1)(a) requirement of matching credentials because McCarus was board-certified in obstetrics and gynecology like McLean, and the standard of practice or care associated with performing a laparoscopic hysterectomy was set by reference to the practice of that specialty. McCarus also met the MCL 600.2169(1)(b)(*i*) one-year clinical-practice requirement because in the year preceding plaintiff's hysterectomy, he devoted a majority of his professional time to the active clinical practice of obstetrics and gynecology. Plaintiff's argument that McCarus was not qualified under MCL 600.2169(1)(b)(*i*) to offer testimony regarding the practice or care of that specialty because he was licensed as an allopathic physician instead of an osteopathic physician—and therefore did not practice within "the same health profession" as McLean—was without merit because the issue of whether McLean and McCarus practiced in "the same health profession" did not have to be resolved given that they practiced in the same specialty. McLean and Sparrow's reliance on caselaw interpreting MCL 600.2169(1)(b)(*i*) was misplaced because the provision's "specialist" and "specialty" language was not triggered or factually at issue in those cases. Accordingly, the trial court erred by ruling that McCarus's affidavit of merit failed to satisfy MCL 600.2169(1)(b)(*i*) and by granting McLean's motion to dismiss.

Reversed.

LETICA, J., dissenting in part and concurring in part, agreed with the majority's conclusion that the trial court's order should be reversed but disagreed with its reasoning. Even though McCarus practiced the same specialty as McLean during the relevant period, McCarus was not qualified to offer standard-of-care testimony in the case because the physicians did not practice in "the same health profession" given that McCarus was an allopathic physician and McLean was an osteopathic physician.

Woodard was not binding on this case because the Court granted the application in that case to address the "specialty" language in MCL 600.2169, not to address "the same health profession" language of the statute. Instead, *Woodard* only recognized that (1) MCL 600.2169(b)(*i*) requires, among other things, that the expert must be engaged in the active clinical practice of the same specialty practiced by the defendant physician at the time of the alleged malpractice and (2) a nonspecialist must only engage in the active clinical practice of the same health profession in which the defendant is licensed; *Woodard* did not hold that "the same health profession" requirement was inapplicable to a specialist. The Legislature's use of the conjunctive term "and" in MCL 600.2169(1)(b)(*i*) indicated that if the defendant physician was a specialist, the expert would have to satisfy both requirements: active clinical practice in the same health profession and in the same specialty. The majority's interpretation of the provision rendered the introductory language in MCL 600.2169(1)(b)(*i*) surplusage with regard to physicians who specialize. *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488 (2006), and its progeny controlled the outcome of this case. Although McCarus and McLean were both board-certified and specialized in obstetrics and gynecology, they were licensed to practice medicine under different parts of the Public Health Code, MCL 333.1101 *et seq*., and were therefore subject to different licensing requirements and regulations; the different requirements suggested that the Legislature did not intend osteopathic medicine and allopathic medicine to be treated as the same health profession. For that reason, Judge LETICA would have affirmed the trial court's conclusion that McCarus was not actively engaged in the same health profession in which McLean was licensed. However, the trial court erred by granting the motion for dismissal because under MCL 600.2192d(1), plaintiff's counsel could have reasonably believed that McCarus was qualified to offer standard-of-care testimony against McLean. For that reason, Judge LETICA agreed with the majority that the trial court's dismissal order should be reversed.

WITNESSES — EXPERT WITNESSES — MEDICAL MALPRACTICE — WORDS AND PHRASES — SAME HEALTH PROFESSION.

MCL 600.2912d(1) provides that a medical malpractice plaintiff must file with the complaint an affidavit of merit signed by a health professional whom the plaintiff's attorney reasonably believes meets the requirements for an expert witness under MCL 600.2169; MCL 600.2169(1)(b)(*i*) requires that during the year immediately preceding the date of the occurrence that is the

basis for the claim or action, the expert must have devoted a majority of his or her professional time to the active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and if that party is a specialist, the active clinical practice of that specialty; if an expert satisfies the MCL 600.2169(1)(a) matching-credentials requirement, MCL 600.2169(1)(b)(*i*) requires the expert to have devoted a majority of his or her professional time to the active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty; an expert's ability to describe the standard of care or practice in a board-certified specialty in a particular field or discipline is not dependent on whether the physician is an osteopathic or allopathic physician; MCL 600.2169(1)(b)(*i*) does not require one year of active clinical practice in the same health profession *and* the same specialty, but, rather, only in the same specialty.

Mark Granzotto, PC (by *Mark Granzotto*) and *McKeen & Associates, PC* (by *Brian J. McKeen* and *David T. Tirella*) for Kelley Crego.

Johnson & Wyngaarden, PC (*Robert M. Wyngaarden* and *Michael L. Van Erp*) for Edward W. Sparrow Hospital Association and Sparrow Health System.

Collins Einhorn Farrell PC (by *Michael J. Cook*) for Amber McLean, D.O.

Before: CAVANAGH, P.J., and MARKEY and LETICA, JJ.

MARKEY, J. In this medical malpractice action, plaintiff appeals by delayed leave granted the trial court's order dismissing her claim against defendant Amber McLean, D.O. To the extent that plaintiff's claims against defendants Edward W. Sparrow Hospital Association and Sparrow Health System were based on vicarious liability arising from Dr. McLean's conduct,

the court also summarily dismissed those claims.[1] The trial court rejected plaintiff's affidavit of merit executed by Steven D. McCarus, M.D., determining that the affidavit failed to satisfy the requirements of MCL 600.2912d(1) and MCL 600.2169(1)(b)(*i*). The court concluded that Dr. McCarus and Dr. McLean did not engage in the practice of the "same health profession" for purposes of MCL 600.2169(1)(b)(*i*), because McLean is a doctor of osteopathy and McCarus is a doctor of allopathy—that is, a doctor of medicine. Considering that the alleged malpractice concerns a laparoscopic hysterectomy, the relevant field of medicine implicated in this case is the specialty of obstetrics-gynecology. Because McLean and McCarus are both board-certified obstetrician-gynecologists (OB-GYNs), we hold that the trial court erred by rejecting plaintiff's affidavit of merit. The fact that McLean is a licensed osteopathic physician, a D.O., and McCarus is a licensed allopathic physician, an M.D., is not pertinent in analyzing MCL 600.2169(1)(b)(*i*). It is irrelevant because the specialty of obstetrics-gynecology governs the standard of practice or care under MCL 600.2169(1)(a). This in turn means that the only question to answer under MCL 600.2169(1)(b)(*i*) is whether McCarus, during the year immediately preceding the alleged act of malpractice, devoted a majority of his professional time to the active clinical practice of obstetrics-gynecology. There is simply no dispute that McCarus did so. Accordingly, we reverse the trial court's ruling granting summary disposition of those claims related to McLean's alleged malpractice in performing the laparoscopic hysterectomy.

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[1] Plaintiff's claims against defendant Shirley Lima, M.D., were not affected by the trial court's order granting McLean's motion to dismiss.

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The construction of MCL 600.2169 presents a question of law subject to de novo review. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). "[T]his Court reviews a trial court's rulings concerning the qualifications of proposed expert witnesses to testify for an abuse of discretion." *Id*. A trial court abuses its discretion when its decision falls outside the range of principled and reasonable outcomes. *Id*. Additionally, "[a] trial court necessarily abuses its discretion when it makes an error of law." *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016).

"When interpreting a statute, the primary rule of construction is to discern and give effect to the Legislature's intent, the most reliable indicator of which is the clear and unambiguous language of the statute." *Perkovic v Zurich American Ins Co*, 500 Mich 44, 49; 893 NW2d 322 (2017). Such language must be enforced as written, "giving effect to every word, phrase, and clause." *Id*. Further judicial construction is only permitted when statutory language is ambiguous. *York Charter Twp v Miller*, 322 Mich App 648, 659; 915 NW2d 373 (2018). When determining the Legislature's intent, statutory provisions are not to be read in isolation; rather, they must be read in context and as a whole. *In re Erwin Estate*, 503 Mich 1, 11; 921 NW2d 308 (2018).

MCL 600.2912d(1) requires a medical malpractice plaintiff to "file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169." And MCL 600.2169 provides, in relevant part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) . . . [D]uring the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.[2]

In *Woodard*, 476 Mich at 558-559, our Supreme Court construed the language in MCL 600.2169(1)(a), observing:

> Although specialties and board certificates must match, not *all* specialties and board certificates must match. Rather, § 2169(1) states that "a person shall not give expert testimony on the *appropriate* standard of practice or care unless . . . ." (Emphasis added.) That is, § 2169(1) addresses the necessary qualifications of an expert witness to testify regarding the "*appropriate* stan-

[2] Plaintiff does not claim that McCarus's affidavit satisfied Subsection (1)(b) under the teaching provision in Subsection (1)(b)(*ii*), which we have omitted. Plaintiff instead relies on McCarus's active clinical practice as an OB-GYN to satisfy the Subsection (1)(b) requirement.

> dard of practice or care," not regarding an inappropriate or irrelevant standard of medical practice or care. Because an expert witness is not required to testify regarding an inappropriate or irrelevant standard of medical practice or care, § 2169(1) should not be understood to require such witness to specialize in specialties and possess board certificates that are not relevant to the standard of medical practice or care about which the witness is to testify. . . .
>
> Further, § 2169(1) refers to "the same specialty" and "that specialty." It does not refer to "the same specialties" and "those specialties." That is, § 2169(1) requires the matching of a singular specialty, not multiple specialties.

"[I]f a defendant physician is a specialist, the plaintiff's expert witness must have specialized in the same specialty as the defendant physician at the time of the alleged malpractice." *Woodard*, 476 Mich at 560-561. Moreover, under MCL 600.2169(1)(a), a proposed expert witness must hold the same board certification as the party against whom the testimony is offered. *Id*. at 562-563. But "the plaintiff's expert does not have to match all of the defendant physician's specialties; rather, the plaintiff's expert only has to match the one most relevant specialty." *Id*. at 567-568. And the one most relevant specialty is "the specialty engaged in by the defendant physician during the course of the alleged malpractice . . . ." *Id*. at 560.

In this case, the requirements of Subsection (1)(a) were satisfied because both doctors are board-certified OB-GYNs. Indeed, the only "specialty" implicated in this case is obstetrics-gynecology, and the application of MCL 600.2169(1)(a) requires matching credentials in that specialty field. There is no assertion that Subsection (1)(a) requires McCarus to be an osteopathic physician like McLean. And the relevant standard of practice or care associated with performing the

laparoscopic hysterectomy is set by reference to the practice of obstetrics-gynecology.[3] Because plaintiff's affidavit of merit complies with Subsection (1)(a) of MCL 600.2169, the next step in the analysis, and the focal point of this appeal, concerns whether Subsection (1)(b)(*i*) was satisfied.

The parties appear to agree that McCarus's affidavit of merit satisfied the one-year clinical-practice component of MCL 600.2169(1)(b)(*i*) but only in regard to whether McCarus practiced obstetrics-gynecology during the one-year period. Defendants proceed to argue that Subsection (1)(b)(*i*) was not fully satisfied because the one-year clinical-practice provision had to also be established in connection with the health profession of osteopathic medicine, and McCarus is an allopathic physician. We conclude that defendants and the trial court have misconstrued the demands of Subsection (1)(b)(*i*) of MCL 600.2169.

When examining Subsection (1)(b)(*i*) in context and together with Subsection (1)(a), it becomes evident that if matching credentials in satisfaction of Subsection (1)(a) are established, the very same question of matching credentials is not reexamined or revisited when analyzing compliance with Subsection (1)(b)(*i*). Rather, if Subsection (1)(a) is established by showing matching credentials—here, board certification in the specialty of obstetrics-gynecology—the next step in the analysis entails a determination under Subsection (1)(b) as to whether the plaintiff's expert actually

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[3] McCarus averred in a separate affidavit that was prepared in response to defendants' motion for summary disposition that McLean was required "to follow the . . . nationally recognized and nationally accepted Standard of Care for all Board-Certified OB-GYN's [sic], regardless if [she is an M.D. or D.O.]" This to us is a very important fact, and, indeed, the reality in the practice of medicine.

practiced or taught in the specialty matched under Subsection (1)(a) for the requisite period. Therefore, in this case, the only pertinent question regarding compliance with Subsection (1)(b)(*i*) is whether McCarus devoted a majority of his professional time to the active clinical practice of obstetrics-gynecology during the year immediately preceding the alleged act of medical malpractice. The answer to that question is undoubtedly "Yes."

The crux of our analysis of the interplay between Subsection (1)(a) and Subsection (1)(b) of MCL 600.2169 is that if the practice of a particular specialty must be examined in relation to Subsection (1)(a) and the standard of care, then the pertinent inquiry for purposes of Subsection (1)(b), assuming Subsection (1)(a) is satisfied, is whether the proposed expert taught or practiced *in the specialty field* for the one-year the statute requires. Subsection (1)(b) does not require re-evaluation of whether there are matching credentials. Whether a defendant and a plaintiff's expert practiced in the "same health profession," as that terminology is used in Subsection (1)(b)(*i*), need only be resolved when a specialty, board-certified or otherwise, is not implicated under the facts of a particular case.

Once again, MCL 600.2169(1)(b)(*i*) provides that a health professional proffered as an expert must have devoted a majority of his or her time during the year immediately preceding the date of the alleged malpractice to "[t]he active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed *and*, if that party is a specialist, the active clinical practice of that specialty." (Emphasis added.) Defendants place great reliance on use of the conjunctive "and" in

Subsection (1)(b)(*i*), maintaining that it reveals the Legislature's intent to require one year of active clinical practice in the same health profession *and* in the same specialty. It is true that the use of the term "and" generally indicates that two statutory clauses linked by the term must both be satisfied. *In re Koehler Estate*, 314 Mich App 667, 681-682; 888 NW2d 432 (2016). But this Court has also warned that the general rule should not be applied when it renders the construction dubious and there is clear legislative intent to the contrary. *Id*. at 682; *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50-51; 575 NW2d 79 (1997).

In our view, the use of the word "and" was simply the Legislature's attempt to clarify at the end of Subsection (1)(b)(*i*) that if, in fact, a specialist is involved, the one-year clinical-practice requirement pertains to the specialty. We think it highly unlikely that the Legislature even envisioned or contemplated a scenario in which a specialty is successfully matched, yet there is a distinguishing feature in regard to the health professions practiced by the expert and the party.[4] Stated otherwise, it is fair to surmise that the Legislature operated under the assumption that if specialties match, then the two health professionals at issue necessarily practice in the same health profession. Therefore, we cannot conclude that the Legislature's use of the word "and" in MCL 600.2169(1)(b)(*i*) reveals an intent to require active clinical practice for the requisite period in some field or discipline other than the matching specialty. Whether a board-certified OB-GYN is a D.O. or an M.D. is entirely meaningless for the purpose of describing the standard of practice or

[4] To be clear, we are proceeding on the assumption that osteopathic and allopathic physicians do not practice the same health profession. We take no substantive stance on that question.

care. The case at hand involves alleged malpractice in the performance of a laparoscopic hysterectomy, a medical procedure which falls squarely within the specialty of obstetrics-gynecology. When Subsection (1)(b)(*i*) is considered in context and together with Subsection (1)(a), defendants' position cannot be sustained.

Furthermore, indirectly and implicitly, the *Woodard* Court answered the question posed to this panel in the instant appeal. Discussing MCL 600.2169(1)(b), the Court stated:

> MCL 600.2169(1)(b) provides that if the defendant physician is a specialist, the expert witness must have "during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either . . . the active clinical practice of that specialty [or] [t]he instruction of students in an . . . accredited health professional school or accredited residency or clinical research program in the same specialty." Once again the statute refers to "the same specialty" and "that specialty," implying that only a single specialty must be matched. In addition, § 2169(1)(b) requires the plaintiff's expert to have "devoted a majority of his or her professional time" to practicing or teaching the specialty in which the defendant physician specializes. As we explained above, one cannot devote a "majority" of one's professional time to more than one specialty. Therefore, in order to be qualified to testify under § 2169(1)(b), the plaintiff's expert witness must have devoted a majority of his professional time during the year immediately preceding the date on which the alleged malpractice occurred to *practicing or teaching the specialty* that the defendant physician was practicing at the time of the alleged malpractice, i.e., the one most relevant specialty. [*Woodard*, 476 Mich at 565-566 (alterations in original; emphasis added).]

Notably missing from the last sentence in this passage is any reference to an additional requirement

that the plaintiff's expert and the defendant physician practice in the "same health profession."[5] And the following footnote in *Woodard* adds further support:

> If the defendant physician is not a specialist, § 2169(1)(b) requires the plaintiff's expert witness to have "during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either . . . [t]he active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed [or] [t]he instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed . . . ." [*Id*. at 565 n 11 (alterations in original).]

This footnote suggests that the "same health profession" language is only implicated when a specialist is not involved.

The caselaw cited by defendants and the trial court is simply inapposite relative to the precise issue posed in this appeal. In *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 496-497; 711 NW2d 795 (2006), the Court indicated that OB-GYNs could not offer expert testimony regarding the alleged negligence of a nurse midwife because OB-GYNs do not practice in the same health profession as required by MCL 600.2169. *McElhaney* did not involve a defendant who was a "specialist." The same can be said with respect to *Brown v Hayes*, 270 Mich App 491; 716 NW2d 13 (2006), rev'd in

[5] We fully appreciate that the *Woodard* Court was addressing the issue of multiple specialties; however, the Court nonetheless devoted a section of its opinion to Subsection (1)(b), and the Court's omission of the "same health profession" language when speaking of a specialist is telling. *Woodard*, 476 Mich at 565-566.

part on other grounds 477 Mich 966 (2006), which involved a failed attempt to rely on an expert who was a physical therapist when the defendants were occupational therapists. And in *Bates v Gilbert,* 479 Mich 451; 736 NW2d 566 (2007), the defendant was an optometrist, and the plaintiff sought, unsuccessfully, to rely on an affidavit of merit by an ophthalmologist. Again, the defendant in that case was not a specialist. All these cases focused exclusively on the "same health profession" language in MCL 600.2169(1)(b)(*i*) because the "specialist" and "specialty" language in that same provision had not been triggered; no party was a specialist. In the instant case, McLean is a specialist in obstetrics and gynecology.

Finally, we take note of the language in MCL 600.2169(2), which, in the process of determining the qualifications of an expert witness, requires a court to evaluate "[t]he length of time the expert witness has been engaged in the *active clinical practice* or instruction of the health profession *or* the specialty." MCL 600.2169(2)(c) (emphasis added). This language reinforces our view that with respect to the "active clinical practice" requirement in MCL 600.2169(1)(b)(*i*), the Legislature only demanded that an expert engage in the active clinical practice of the relevant specialty for the requisite period—no more, no less. Accepting defendants' construction of MCL 600.2169(1)(b)(*i*) would render the statute internally inconsistent when taking into consideration the language in MCL 600.2169(2)(c). See *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) (explaining that words in a statute should not be construed in isolation but must be read together to harmonize their meaning and that words and clauses should not be divorced from those which precede and those that follow); *Messenger v Dep't of Consumer & Indus Servs*, 238 Mich App 524,

533; 606 NW2d 38 (1999) (stating that we should interpret a statute in a manner that achieves harmony between and among specific provisions in the statute).

In sum, we hold that the trial court erred by ruling that McCarus's affidavit of merit failed to satisfy the requirements of MCL 600.2169(1)(b)(*i*). In light of our ruling, we need not entertain arguments regarding the "reasonable belief" provision in MCL 600.2912d(1).

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, plaintiff may tax costs under MCR 7.219.

CAVANAGH, P.J., concurred with MARKEY, J.

LETICA, J. (*dissenting in part and concurring in part*). I respectfully disagree with the majority's reading of MCL 600.2169(1)(b)(*i*) and would affirm the trial court's determination that an allopathic physician[1] is not qualified to offer standard-of-care testimony against an osteopathic physician[2] because, despite their common board-certified specialty, they are licensed differently. Nevertheless, I agree that the trial court's order dismissing with prejudice plaintiff Kelley Crego's complaint against defendant Amber McLean, an osteopathic physician, and defendants Edward W. Sparrow Hospital Association and Sparrow Health System must be reversed because Crego's attorney could have reasonably believed that the allopathic

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[1] An allopathic physician or medical doctor (M.D.) is licensed to engage in the practice of medicine under Part 170, MCL 333.17001 *et seq*., of the Public Health Code, MCL 333.1101 *et seq*.

[2] An osteopathic physician or doctor of osteopathy (D.O.) is licensed to engage in the practice of osteopathic medicine and surgery under Part 175, MCL 333.17501 *et seq*., of the Public Health Code.

physician (plaintiff's expert, Steven D. McCarus, M.D.) satisfied the requirements of MCL 600.2169 when filing the affidavit of merit (AOM).[3]

I. EXPERT QUALIFICATION UNDER MCL 600.2169

A plaintiff initiating a medical malpractice action must file with the complaint "an [AOM] signed by an expert who the plaintiff's attorney reasonably believes meets the requirements of MCL 600.2169." *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004) (emphasis omitted). See also MCL 600.2912d(1). MCL 600.2169(1), in turn, sets forth the criteria a proposed expert witness must satisfy in order to testify regarding the appropriate standard of practice or care. *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016). In pertinent part, MCL 600.2169(1) reads:

> In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis

[3] Plaintiff's claims against defendant Shirley Lima, M.D., were not affected by the summary disposition order.

> for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.
>
> (c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) Active clinical practice as a general practitioner.
>
> (*ii*) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.

In this case, Crego asserted a claim of medical malpractice against McLean, a board-certified obstetrician-gynecologist. The AOM attached to Crego's complaint was signed by McCarus, who is board-certified in the same specialty. As recognized by the majority, the parties do not appear to dispute that McCarus's specialization and board certification satisfy the requirements of Subdivision (a) or that McCarus spent the majority of his professional time in the year preceding the alleged malpractice in

the active clinical practice of obstetrics and gynecology. The crux of the parties' disagreement turns on whether McCarus can satisfy the requirements of Subdivision (b)(*i*);[4] specifically, the question is whether he was engaged in the active clinical practice of the "same health profession" in which McLean is "licensed." See MCL 600.2169(1)(b)(*i*).

The majority accepts Crego's argument that the "same health profession" language of Subdivision (b)(*i*) is applicable only in cases involving a nonspecialist defendant.[5] And, like Crego, the majority highlights the following excerpt from *Woodard v Custer*, 476 Mich 545, 565 & n 11; 719 NW2d 842 (2006):

> MCL 600.2169(1)(b) provides that if the defendant physician is a specialist, the expert witness must have "during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either . . . the active clinical practice of that specialty [or] [t]he instruction of students in an . . . accredited health professional school or accredited residency or clinical research program in the same specialty."[11]
>
> [11] *If the defendant physician is not a specialist*, § 2169(1)(b) requires the plaintiff's expert witness to have "during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either . . . [t]he *active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed* [or] [t]he instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which

[4] Because McCarus's AOM does not indicate that he engaged in instruction of students during the relevant time, Subdivision (b)(*ii*) is not at issue.

[5] As Crego failed to present this argument below, I would review it for plain error affecting her substantial rights. *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007).

> the party against whom or on whose behalf the testimony is offered is licensed . . . ." [Emphasis added; alterations in original.]

The majority concludes that McCarus is qualified to offer standard-of-care testimony against McLean because he practiced the same specialty at the relevant time, regardless of whether allopathic medicine and osteopathic medicine are the "same health profession." I respectfully disagree.

The primary issue in *Woodard* was the degree to which an expert's specialization, certification, and relevant experience must match that of the defendant when multiple specialties, subspecialties, or certificates of special qualification are involved. *Id*. at 554-557, 578-579. Indeed, in granting the applications for leave to appeal in *Woodard* and its companion case, the Court directed the parties to brief, among other items, "whether MCL 600.2169(1)(b) requires an expert witness to practice or teach the same subspecialty as the defendant"; "whether MCL 600.2169 requires an expert witness to match all specialties, subspecialties, and certificates of special qualification that a defendant may possess, or whether the expert witness need only match those that are relevant to the alleged act of malpractice"; "the proper construction of the words 'specialist' and 'that specialty' in MCL 600.2169(1)(a) and MCL 600.2169(1)(b)(*i*)"; and "the proper construction of 'active clinical practice' and 'active clinical practice of that specialty' as those terms are used in MCL 600.2169(1)(b)(*i*)." *Id*. at 556 n 2, 557 n 3 (quotation marks and citations omitted). It is clear from these directives and the discussion in *Woodard* that the Supreme Court was focused on interpreting the "specialty" language in MCL 600.2169. Because the *Woodard* Court was not called upon to interpret the "same health profession" language of the statute, the above-quoted passage from *Woodard* does not have precedential value

with respect to this issue. See *Riverview v Michigan*, 292 Mich App 516, 523; 808 NW2d 532 (2011) ("A matter that a tribunal merely assumes in the course of rendering a decision, without deliberation or analysis, does not thereby set forth binding precedent."). Instead, I read the above-quoted passage as recognizing (1) that MCL 600.2169(1)(b)(*i*) requires, *among other things*, that the expert be engaged in the active clinical practice of the same specialty practiced by the defendant and (2) that a nonspecialist—who by necessity cannot engage in the active clinical practice of a specialty—need only engage in the active clinical practice of the same health profession in which the defendant is licensed. Unlike the majority, I do not read *Woodard* as holding that the "same health profession" requirement is inapplicable to a specialist.

This conclusion is further supported by well-recognized principles of statutory construction. It is axiomatic that a court's driving purpose in statutory interpretation is to discern and give effect to the intent of the Legislature as expressed by the plain or statutorily defined meaning of the language itself. *Grossman*, 470 Mich at 598; *Brown v Hayes*, 270 Mich App 491, 497; 716 NW2d 13 (2006), rev'd in part on other grounds 477 Mich 966 (2006). When the language is unambiguous, it must be enforced as written. *Grossman*, 470 Mich at 598. And if at all possible, " '[e]very word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory . . . .' " *People v Pinkney*, 501 Mich 259, 288; 912 NW2d 535 (2018), quoting *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980) (alteration in original).

MCL 600.2169(1)(b)(*i*) provides that an expert must have spent a majority of his or her professional time in "[t]he active clinical practice of the same health profession in which the party against whom or on whose

behalf the testimony is offered is licensed *and*, if the party is a specialist, the active clinical practice of that specialty." (Emphasis added.) As recognized by the majority, "and" is a conjunctive term. See *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 33; 732 NW2d 56 (2007), overruled in part on other grounds by the separate opinions of WEAVER, J., CAVANAGH, J., and KELLY, C.J., in *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455 (2010). Thus, its use in this context indicates that "if the party is a specialist," the expert must satisfy *both* requirements—that is, active clinical practice in the same health profession *and* the same specialty. In fact, when introduced, the underlying bill included the word "or."[6] Later, however, the Legislature opted to replace the disjunctive word "or" with the conjunctive word "and." Interestingly, the majority points to the use of the word "or" in MCL 600.2169(2) to suggest there is an internal consistency, but what I glean from this is that the Legislature chooses "or" when it opts to do so.

Moreover, accepting the majority's reading that the clause following the word "and" controls would render the introductory language in Subdivision (b)(*i*) surplusage as to physicians who specialize. This is a result that I endeavor to avoid. *Pinkney*, 501 Mich at 283 n 59, 288. In addition, the majority's reading wrongly assumes that no other licensed health professional may specialize when both nurses and den-

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[6] As introduced, the pertinent portion of 1993 SB 270 amending MCL 600.2169(1)(b) read:

> (*i*) THE active clinical practice of ~~medicine or osteopathic medicine and surgery or the active clinical practice of dentistry, or to~~ the SAME HEALTH PROFESSION IN WHICH THE DEFENDANT IS LICENSED *OR*, IF THE DEFENDANT IS A SPECIALIST, THE ACTIVE CLINICAL PRACTICE OF THAT SPECIALTY OR A RELATED, RELEVANT AREA OF PRACTICE. [Emphasis added.]

tists can. See MCL 333.17210(1) (authorizing a specialty certification for nurses with advanced training in certain "health profession specialty fields"); MCL 333.16608 (identifying "prosthodontics, endodontics, oral and maxillofacial surgery, orthodontics, pediatric dentistry, periodontics, or oral pathology" as fields in which a dentist may specialize). See also *Cox v Hartman*, 322 Mich App 292; 911 NW2d 219 (2017) (distinguishing between a nurse practitioner and a registered nurse); *Decker v Flood*, 248 Mich App 75, 78, 83-84; 638 NW2d 163 (2001) (holding that a dentist who routinely performed root canals and was a " 'doctor of dental surgery' . . . [as well as] a member of the American Association of Endodontists" was not qualified to offer expert testimony or provide an AOM on the standard of practice applicable to a general-practitioner dentist who was allegedly negligent when he performed a root canal).

Finally, the language at issue in MCL 600.2169(1)(b)(*i*) ("the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed") also appears in both MCL 600.2169(1)(b)(*ii*) and (c)(*ii*). I read these identical words as having the same meaning throughout this statute.

Crego further posits that our focus should be on the "health profession" language, which MCL 333.16105(2) describes as "a vocation, calling, occupation, or employment performed by an individual acting pursuant to a license or registration issued under this article." Crego then suggests that McCarus and McLean share the same occupation, i.e., that of an obstetrician-gynecologist. Again, Crego ignores the qualifying language "performed by an individual acting pursuant to a license or registration issued under this article," and our task is to give meaning to every word the Legislature uses.

Turning to the balance of Crego's claim of error with respect to this issue, *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488; 711 NW2d 795 (2006), controls. MCR 7.215(J)(1). In that case, the plaintiff alleged that he was injured at birth as a result of negligence on the part of a nurse midwife employed by the defendant hospital, and the plaintiff proffered proposed standard-of-care testimony from two obstetrician-gynecologists. *McElhaney*, 269 Mich App at 489, 495-496. This Court affirmed the trial court's determination that the proposed physician experts were not qualified to testify against the nurse midwife because they did not practice in the same health profession as the nurse midwife as required by MCL 600.2169(1)(b)(*i*). *Id*. at 496. In reaching that conclusion, this Court reasoned that the nurse midwife was licensed to practice in nursing under MCL 333.17211 and certified in nurse midwifery under MCL 333.17210, while the proposed experts were "physicians" as defined in the Public Health Code.[7] *Id*. The Court acknowledged that "it may appear reasonable that a physician with substantial educational and professional credentials should be able to testify about the standard of care of a nurse who works in a closely related field" but concluded that it was "constrained by the plain words of the statute that the expert witness must practice in the 'same health profession.' " *Id*. at 497.

Shortly after *McElhaney*, another panel of this Court considered a similar issue in the context of expert testimony offered by a physical therapist in support of an occupational-therapist defendant.

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[7] See former MCL 333.17001(1)(c), as amended by 1990 PA 248 (defining the term "physician" as "an individual licensed under this article to engage in the practice of medicine"). Although "physician" is now defined by Subdivision (f), the definition remains the same in substance. See current MCL 333.17001(1)(f).

Brown, 270 Mich App at 493-494. The *Brown* Court observed that the Public Health Code defined the term "health profession" as "a vocation, calling, occupation, or employment performed by an individual acting pursuant to a license or registration issued under this article." *Id*. at 501, quoting MCL 333.16105 (quotation marks omitted). Given this broad definition, the *Brown* Court opined that despite the disparity between the license required of a physical therapist under Part 178 of the Public Health Code and the registration required of an occupational therapist under Part 183 of the Public Health Code, *Brown*, 270 Mich App at 498, both the proposed expert and the defendant were in the same "vocation, calling, occupation, or employment" because it was undisputed that they both engaged in so-called "work-hardening therapy," *id*. at 501-502 (quotation marks omitted).[8] Nonetheless, the *Brown* Court recognized that *McElhaney*, 269 Mich App at 497, had already held "that two people cannot be engaged in the 'same health profession' for the purposes of this statute unless each has an identical license under the Public Health Code." *Brown*, 270 Mich App at 502. Bound by that precedent, the *Brown* Court concluded that the physical-therapist expert was not qualified under MCL 600.2169(1)(b) to testify regarding the standard of care applicable to an occupational therapist. *Id*. at 502-503.

Later, in *Bates v Gilbert*, 479 Mich 451; 736 NW2d 566 (2007), our Supreme Court seemingly agreed with

[8] According to an uncontested affidavit provided by the defendant's proposed expert, "both occupational therapists and physical therapists receive training in work-hardening techniques, . . . they often work side by side in work-hardening therapy programs, and . . . there is no difference between the work performed by an occupational therapist and a physical therapist in a work-hardening therapy program." *Brown*, 270 Mich App at 501-502.

this Court's consideration of licensing to determine compliance with MCL 600.2169. There, the plaintiff supported her complaint alleging medical malpractice against an optometrist with an AOM signed by an ophthalmologist. *Id*. at 453. The Supreme Court determined that the plaintiff's counsel could not have reasonably believed that ophthalmology was the " 'same health profession' " as optometry. *Id*. at 460-461. As explained in *Bates*, optometry is defined and regulated by Part 174 of the Public Health Code and involves nonphysicians who "examine the human eye to ascertain defects or abnormal conditions that can be corrected or relieved by the use of lenses." *Id*. at 459-461. Ophthalmologists, on the other hand, are physicians who engage in the practice of medicine, regulated under Part 170 of the Public Health Code. *Id*. at 460. Thus, although ophthalmologists provided similar care in that they "treat diseases of the eye," ophthalmology could not be considered the same health profession as optometry for purposes of expert qualification under MCL 600.2169. *Id*. at 460-461.

In this case, two physicians who admittedly hold a board certification from the same national organization[9] and practice in the same specialty are licensed under different parts of the Public Health Code. McCarus is licensed under Part 170, which governs the practice of medicine and defines a "physician" as "an individual who is licensed or authorized under this article to engage in the practice of medicine." MCL 333.17001(1)(f). It further defines the "practice of medicine" as "the diagnosis, treatment, prevention, cure, or

[9] The American Board of Medical Specialties (ABMS) recognizes 24 primary medical specialties, including obstetrics and gynecology, and the American Osteopathic Association recognizes 18 primary medical specialties, including obstetrics and gynecology. The ABMS certified McCarus, an allopathic physician, as a specialist in obstetrics and gynecology.

relieving of a human disease, ailment, defect, complaint, or other physical or mental condition, by attendance, advice, device, diagnostic test, or other means, or offering, undertaking, attempting to do, or holding oneself out as able to do, any of these acts." MCL 333.17001(1)(j). In contrast, McLean is licensed under Part 175, governing osteopathic medicine and surgery, which defines a "physician" as "an individual who is licensed or authorized under this article to engage in the practice of osteopathic medicine and surgery." MCL 333.17501(1)(d). Part 175 also provides the following definition for the "practice of osteopathic medicine and surgery":

> [A] *separate, complete, and independent school of medicine and surgery* utilizing full methods of diagnosis and treatment in physical and mental health and disease, including the prescription and administration of drugs and biologicals, operative surgery, obstetrics, radiological and other electromagnetic emissions, and placing special emphasis on the interrelationship of the musculoskeletal system to other body systems. [MCL 333.17501(1)(f) (emphasis added).]

This definition and the placement of provisions concerning osteopathic medicine in a different part than those applicable to the general "practice of medicine" suggest that the Legislature did not intend that osteopathic medicine and allopathic medicine be treated as the same health profession.[10] Therefore, given the different licensing and regulations applicable to McLean as an osteopathic physician and to McCarus as an allopathic physician, I would hold that the trial court did not err by ruling that McCarus was not actively engaged in the

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[10] Part 180 of the Public Health Code also provides licensing to yet a third type of physician—a podiatric physician. See MCL 333.18001(c).

"*same health profession in which [McLean] is licensed* . . . ." See MCL 600.2169(1)(b)(*i*) (emphasis added). Because McCarus did not satisfy the conditions of MCL 600.2169(1)(b)(*i*), the trial court correctly determined that he was unqualified to provide standard-of-care testimony against McLean.

I recognize that this Court has previously held that an osteopathic physician board-certified in family practice was qualified under MCL 600.2169 to testify as an expert against an allopathic physician, who was a general practitioner "as long as MCL 600.2169(1)(c)(*i*) or (*ii*) is also satisfied." *Robins v Garg (On Remand)*, 276 Mich App 351, 359-360; 741 NW2d 49 (2007). Because the expert's "family practice" was a "general practice" and because the expert "was engaged in general practice medicine . . . for the year preceding the date of the alleged malpractice," this Court determined that "he was qualified under MCL 600.2169(1)(c), and that plaintiff's [AOM] complied with MCL 600.2912d(1)." *Id*. at 360-361. On the other hand, this Court also recognized that if the defendant was board-certified in family practice and the proposed expert was a general practitioner, the proposed expert would not be qualified to testify under MCL 600.2169(1)(a) because he would not be a board-certified specialist like the defendant. *Id*. at 360 n 3. My conclusion here is not inconsistent with *Robins* because MCL 600.2169(1)(b) explicitly conditions its application "[s]ubject to subdivision (c)," and MCL 600.2169(1)(c)(*i*), unlike MCL 600.2169(1)(b)(*i*) and (*ii*), contains no requirement of licensure in the same health profession.[11]

[11] While the statutory language dictates this result, I recognize that allopathic physicians far outnumber their osteopathic counterparts and, therefore, securing an expert for a medical malpractice matter involving a specialist with an osteopathic licensure might prove challenging.

II. REASONABLE BELIEF REGARDING EXPERT QUALIFICATION

Crego also argues that the trial court erred by dismissing the claims arising from McLean's conduct because her trial counsel reasonably believed that McCarus was qualified to offer standard-of-care testimony against McLean. I agree.

As already noted, a plaintiff commencing a lawsuit alleging medical malpractice must attach an AOM to his or her complaint. MCL 600.2912d(1); *Grossman*, 470 Mich at 598. While an expert may not offer testimony at trial concerning the standard of practice or care in the absence of strict compliance with the requirements of MCL 600.2169, MCL 600.2192d(1) recognizes that at the time the AOM is prepared, the plaintiff and his or her attorney have only limited information available from which to determine the credentials of the defendant and, correspondingly, the credentials required of the proposed expert. *Grossman*, 470 Mich at 598-599. Therefore, because the expert who signs the AOM must be selected without the benefit of full discovery, MCL 600.2912d(1) allows "considerable leeway in identifying an expert affiant" at the AOM stage of the proceedings. *Bates*, 479 Mich at 458. Yet the flexibility afforded by MCL 600.2912d(1) is not without limits. "[P]laintiff's counsel must invariably have a *reasonable belief* that the expert satisfies the requirements of MCL 600.2169." *Id*. In determining the reasonableness of counsel's belief, courts consider the information available to counsel at the time the AOM was prepared, including publicly available information, *Grossman*, 470 Mich at 599-600, and relevant statutes and caselaw, *Bates*, 479 Mich at 461.

Despite my disagreement with Crego's reading of the above-quoted language from *Woodard*, it is ac-

cepted by the majority and appears reasonable. Moreover, *Robins*, 276 Mich App at 359-360, although decided under MCL 600.2169(1)(c), is published authority supporting the propriety of an osteopathic physician furnishing an AOM against an allopathic physician. The trial court was correct that *Bates*, *McElhaney*, and *Brown* are well established, but none of them involved physicians as defendants. In fact, this question appears to be one of first impression even though the statute has been in existence since 1993. Given these circumstances and the underlying facts, I would conclude that Crego's counsel could have reasonably believed that his proposed expert satisfied the requirements of MCL 600.2169 and that the AOM was proper.

For this reason, I agree that the trial court's order of dismissal must be reversed and the case remanded for further proceedings.

PEOPLE v HAYNIE

Docket No. 340377. Submitted April 9, 2019, at Detroit. Decided April 16, 2019, at 9:15 a.m. Leave to appeal sought.

Brad S. Haynie was convicted in the Macomb Circuit Court after the jury returned a verdict of guilty but mentally ill of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84. The court, Jennifer M. Faunce, J., sentenced defendant to 67 to 120 months' imprisonment. Defendant's conviction stemmed from his assault of his mother, Patricia Haynie. Defendant had been cooking dinner for Patricia when he suddenly appeared terrified, rushed toward Patricia, took away her cane, and assaulted her. Defendant told Patricia that her eyes were big black coals and that he needed to twist her arms into knots and lift her up and shake her until Lucifer let go of her and her eyes returned to normal. Defendant was arrested and charged with assault with intent to commit murder, MCL 750.83. At trial, defendant argued that the court should instruct the jury on the lesser included offenses of AWIGBH, aggravated assault, and assault and battery. The court agreed to add an instruction on AWIGBH, but it refused to instruct on aggravated assault or assault and battery. Following his conviction, defendant appealed.

The Court of Appeals *held*:

1. Lesser included offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense. Assault and battery is not a lesser included offense of assault with intent to murder because all the elements of misdemeanor assault and battery are not contained within the greater offense of assault with intent to murder. The elements of assault with intent to murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. Comparatively, an assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery, and a battery is an intentional, unconsented, and harmful or offensive touching of the person of another, or of something closely connected with the person. Rather than a lesser included offense, assault and battery

is a cognate offense of assault with intent to murder. MCL 768.32(1) does not permit instructions on cognate offenses. Because assault and battery contains an element that assault with intent to murder does not contain—a harmful or offensive touching—the trial court properly determined that an instruction on assault and battery was not appropriate.

2. A requested instruction on a lesser included offense is not proper unless a rational view of the evidence would support conviction of the lesser offense, and in this case, even if assault and battery was a lesser included offense of assault with intent to murder, a rational view of the evidence did not support such an instruction. There must be more than a modicum of evidence to show that the defendant could have been convicted of the lesser included offense. A defendant's intent is central to the determination whether an assault and battery instruction should be given in a particular case, and intent can be inferred from the act, means, or manner employed to commit the offense. Defendant told Patricia what he had to do to free her from Lucifer—twist her arms into knots and lift her up and shake her until Lucifer let go of her and her eyes returned to normal. Defendant acted accordingly and then knocked Patricia unconscious. A victim's injuries are relevant in determining whether a rational view of the evidence supports an instruction on assault and battery. When the police arrived at defendant's condominium, Patricia's face was covered with blood. A responding police officer believed Patricia may have crawled to the door. Her head wound required at least 16 staples to close. Because of the brutality of the assault, no rational view of the evidence could support a finding of simple assault and battery.

3. Under MCL 768.21a(1), legal insanity requires proof that as a result of mental illness or mental retardation the defendant lacked substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. MCL 330.1400(g) defines mental illness 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. Three expert witnesses testified in support of defendant's insanity defense. One expert testified that defendant had a mental illness, was operating from his delusions, and was not in contact with reality at the time of the assault. Another expert testified that defendant had damage to his brain's left temporal lobe and frontal lobe, that this brain damage likely existed on the day of the assault, and that it could have contributed to defen-

dant's behavior. The third expert testified that if defendant had drunk alcohol on the day of the assault, it likely contributed to the assault but that the assault was not the product of alcohol because defendant had delusions and bizarre behaviors while he was sober. The prosecution focused on one of the conclusions an expert had drawn about defendant: defendant liked to manipulate others for his own gratification. The prosecution suggested that this indicated that defendant could have simply lied to the experts during their evaluations of him. There was additional evidence that defendant was not legally insane at the time of the assault. Patricia testified that defendant had acted normally before the assault, that while he was cooking dinner he got food from the freezer, defrosted it, retrieved spices from the cabinets, and had several pans cooking on the stove. One of the police officers testified that defendant cooperated with him after the assault and that defendant complied with the officer's commands during his arrest. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support the jury's determination that defendant was not legally insane at the time of the assault.

Affirmed.

GLEICHER, J., dissenting, would have held that assault and battery is a lesser included offense of assault with intent to commit murder. In *Hanna v People*, 19 Mich 316 (1869), the Supreme Court held that assault was a lesser included offense of assault with intent to commit murder. The Supreme Court explained that assaults are substantially and in effect divided by the statute into degrees. MCL 768.32(1) entitles a defendant, indicted for an offense consisting of different degrees, to a requested instruction on a lesser included offense if (1) the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and (2) a rational view of the evidence supports the instruction. The Supreme Court reinvigorated *Hanna* in *People v Cornell*, 466 Mich 335 (2002), and both cases remain good law, unlike the case cited by the majority, *People v Ross*, 73 Mich App 588 (1977), which was undermined by *Cornell*. An instruction on the lesser included offense of assault and battery was merited in this case because a rational view of the evidence supported a conviction of simple assault and battery. The majority erred by concluding that the brutality of the injuries precluded a conviction of assault and battery because no quantum of injury is necessarily associated with an assault and battery. What distinguishes an assault and battery from an assault with intent to commit murder is the

perpetrator's intent, not the severity of injury. There was testimony indicating that defendant did not intend to kill or even grievously wound Patricia, testimony that would have permitted a jury to convict defendant of assault and battery or guilty but mentally ill of assault and battery.

CRIMINAL LAW — ASSAULT WITH INTENT TO MURDER — LESSER INCLUDED OFFENSES — ASSAULT AND BATTERY.

Lesser included offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense; assault and battery is not a lesser included offense of assault with intent to murder because all the elements of assault and battery are not contained within the greater offense of assault with intent to murder (MCL 750.81; MCL 750.83).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, and *Joshua D. Abbott*, Chief Appellate Attorney, for the people.

Cecilia Quirindongo Baunsoe for defendant.

Before: JANSEN, P.J., and METER and GLEICHER, JJ.

JANSEN, P.J. Defendant appeals as of right his jury-trial conviction of guilty but mentally ill of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84. Defendant was sentenced to 67 to 120 months' imprisonment. We affirm.

I. RELEVANT FACTUAL BACKGROUND

This case arose out of defendant's assault of his mother, Patricia Haynie, in his condominium. Patricia had been sitting on the couch while defendant cooked dinner. The two had joked and teased each other while defendant cooked. A short time later, defendant walked to the kitchen counter and put down the knife that he had been using. Defendant looked at Patricia with a terrified look on his face and said, "[M]om, I've got to

save you, Lucifer has you, your eyes are big black coals." Defendant rushed toward Patricia and snatched the cane out of her hands that she was using to try to keep defendant away. Defendant told Patricia that he was "going to have to twist [her] arms into knots and lift [her] up and shake [her] until he got Lucifer to let go of [her] and [her] eyes came back to normal," and he did just that. Defendant let go of Patricia, who called 911 before defendant grabbed her again. Patricia bit defendant, who then punched her, and she lost consciousness.

Defendant was arrested and charged with assault with intent to commit murder, MCL 750.83. At trial, defendant argued that the trial court should give jury instructions for the lesser included offenses of AWIGBH, aggravated assault, and assault and battery. The prosecution agreed that an instruction for AWIGBH was proper but argued that the trial court should not give instructions for aggravated assault or assault and battery. The trial court agreed with the prosecution. As stated, the jury found defendant guilty but mentally ill of the lesser included offense of AWIGBH.

II. JURY INSTRUCTIONS

Defendant first argues that the trial court erred by refusing to give a jury instruction for the lesser included offense of assault and battery. We disagree.

"Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

"A defendant has the right to have a properly instructed jury consider the evidence against him or her, and it is the trial court's role to clearly present the case to the jury and to instruct it on the applicable law." *People v Henderson*, 306 Mich App 1, 4; 854 NW2d 234 (2014) (quotation marks and citation omitted). "The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). "Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense." *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004), quoting *People v Mendoza*, 468 Mich 527, 532 n 3; 664 NW2d 685 (2003). See also *People v Nyx*, 479 Mich 112, 121; 734 NW2d 548 (2007) (opinion by TAYLOR, C.J.) ("[A]n offense is only inferior when all the elements of the lesser offense are included within the greater offense.") Comparatively, "MCL 768.32(1) does not permit cognate lesser instructions." *Cornell*, 466 Mich at 357.

Moreover, "[a]n inferior-offense instruction is appropriate only when a rational view of the evidence supports a conviction for the lesser offense." *Mendoza*, 468 Mich at 545. A trial court's failure to give a lesser-included-offense instruction is harmless error if "the evidence did not clearly support a conviction for the lesser included [offense]." *Cornell*, 466 Mich at 365-366. "There must be more than a modicum of evidence" to show that the defendant could have been

convicted of the lesser included offense. *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996).

This Court has previously determined that assault and battery is not a lesser included offense of assault with intent to murder. *People v Ross*, 73 Mich App 588, 592; 252 NW2d 526 (1977). Because *Ross* was decided by this Court before November 1, 1990, it is not binding authority. MCR 7.215(J)(1). We now reaffirm *Ross* to the extent that it concludes assault and battery is not a lesser included offense of assault with intent to murder. Rather, we conclude that misdemeanor assault and battery is a cognate offense of assault with intent to commit murder because all the elements of misdemeanor assault and battery are not included within the greater offense of assault with intent to murder.[1] Indeed, "[t]he elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005) (quotation marks and citations omitted). Comparatively, assault is "either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227,

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[1] Contrary to the dissent's assertion, we do not seek to contravene our Supreme Court's opinions in *Hanna v People*, 19 Mich 316, 320-322 (1869), *People v Prague*, 72 Mich 178, 180; 40 NW 243 (1888), and *Cornell*, 466 Mich at 357. We take no issue with our Supreme Court's holding that a defendant is entitled to request that the jury be instructed on all lesser included offenses so long as " 'all the elements of the lesser offense are included in the greater offense,' " *Nyx*, 479 Mich at 120, quoting *Mendoza*, 468 Mich at 533, and "a rational view of the evidence would support it," *Cornell*, 466 Mich at 357. However, we do take issue with the dissent relying merely on the syllabus of *Hanna*, which is now 150 years old and factually dissimilar, to suggest that the majority disagrees with established Michigan jurisprudence.

234; 701 NW2d 136 (2005). Battery is "an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *Id*. (quotation marks and citations omitted). In short, assault and battery contains an element that assault with intent to murder does not contain, i.e., a harmful or offensive touching. Therefore, the trial court's determination to not give a lesser-included-offense instruction for assault and battery was proper.

Moreover, even if we were to conclude that assault and battery was a lesser included offense, we disagree with the dissent that the facts of this case would support such an instruction. As noted earlier in this opinion, a rational view of the evidence must support an instruction on a lesser included offense. "There must be more than a modicum of evidence" to show that defendant could have been convicted of assault and battery. *Cheeks*, 216 Mich App at 479-480. Our review of the evidence in this case simply does not reflect that a misdemeanor assault and battery was committed. As noted by the dissent, defendant's intent is central to this determination. Defendant's intent can be inferred from "the act, means, or the manner employed to commit the offense." *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). The victim's injuries are also relevant. *People v Dillard*, 303 Mich App 372, 378; 845 NW2d 518 (2013), abrogated on other grounds by *People v Barrera*, 500 Mich 14 (2017).

At trial, Patricia testified that defendant told her that he was "going to have to twist [her] arms into knots and lift [her] up and shake [her] until he got Lucifer to let go of [her] and [her] eyes came back to normal." Defendant then took her hands, lifted her off

the couch, and shook her twice. After the second shake, defendant punched Patricia and knocked her unconscious. When Deputy Brandon Cleland arrived at defendant's condominium, he saw that Patricia's face was covered in blood, and he believed that she might have crawled to the door. Patricia's head wound required 16 or 17 staples to close. Detective Anthony Stone, an evidence technician, took pictures of the scene of the assault after defendant was arrested. By the couch where Patricia was assaulted, Detective Stone photographed a metal bar that had wood on it and horseshoes on either end. The wood on the bar was "splintered," and there were "red stains" on the cracked portion of the bar. There were also bloodstains on the couch. Because of the brutality of the assault, no rational view of the evidence could support a finding of simple assault and battery.[2]

Given the foregoing, we conclude that the trial court did not err by refusing to give an instruction on assault and battery.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was sufficient evidence to prove his insanity defense. We disagree.

Defendant does not challenge the sufficiency of the evidence regarding the elements of his AWIGBH convic-

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[2] The dissent takes issue with our conclusion that "no rational view of the evidence could support a finding of simple assault and battery." However, the dissent relies solely on Patricia's belief that her son did not intend to kill or grievously wound her when he attacked her in concluding that a rational view of the evidence supported defendant's request for an assault and battery instruction. However, Patricia's belief regarding her son's intent is irrelevant and is contrary to her own testimony that defendant *intended* to twist her arms and shake her until "Lucifer . . . let go of [her]." See *Hawkins*, 245 Mich App at 458; *Dillard*, 303 Mich App at 378.

tion; rather, he contends that there was sufficient evidence to prove his insanity defense. This Court treats such an argument as a sufficiency-of-the-evidence issue. See *People v McRunels*, 237 Mich App 168, 181-182; 603 NW2d 95 (1999). "A challenge to the sufficiency of the evidence in a jury trial is reviewed de novo, viewing the evidence in the light most favorable to the prosecution, to determine whether the trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Gaines*, 306 Mich App 289, 296; 856 NW2d 222 (2014).

"In the criminal law, a person is presumed to be sane." *People v Walker*, 142 Mich App 523, 525; 370 NW2d 394 (1985). "It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense." MCL 768.21a(1). "The defendant has the burden of proving the defense of insanity by a preponderance of the evidence." MCL 768.21a(3). The prosecution must prove every element of the crime beyond a reasonable doubt, but the prosecution is not required to rebut an affirmative defense. *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000).

Legal insanity requires "proof that, as a result of mental illness or being mentally retarded as defined in the mental health code, the defendant lacked 'substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or [to] conform his or her conduct to the requirements of the law.' " *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001), quoting MCL 768.21a(1). A mental illness is "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). "[I]f a defendant

produces sufficient evidence of the elements of the defense, then the question whether the defendant has asserted a valid defense is for the jury to decide." *People v Kolanek*, 491 Mich 382, 411-412; 817 NW2d 528 (2012).

At trial, defendant presented Dr. Iren Assar, Dr. Emily Escott, and Dr. Michael Abramsky as expert witnesses. Dr. Assar testified that she determined defendant had a mental illness from his medical records and Patricia's account of the assault. Those medical records noted his history of bipolar disorder and schizophrenia and also contained reports of his delusions—defendant believed that his neighbor, Fred Yaks, was trying to kick defendant out of his condominium; that Yaks was burying dead bodies; and that a masonic order was interfering in defendant's life. Dr. Assar also talked with defendant about the day of the assault. Defendant told Dr. Assar that he began drinking alcohol in the basement to stop the voices in his head. When defendant came out of the basement, he saw Yaks on the porch and he saw Patricia in a chair, rocking back and forth while chanting. However, defendant reported that he did not have any memory of the assault, and he believed that Yaks assaulted Patricia. Dr. Assar believed on the basis of his statements during the assault that defendant lacked the capacity to appreciate the nature and consequences of actions. Defendant's statements during the assault, that he needed to get Lucifer out of Patricia and that she was not his mother, indicated that defendant was "operating from his delusions," that he "was not in contact with reality," and that he believed what he did was necessary.

Dr. Escott testified that she gave defendant a neuropsychological evaluation, and based on the scores

from the evaluation, she believed he had damage to his brain in the left temporal lobe and part of the frontal lobe. Dr. Escott further testified that people with damage to the left temporal lobe often suffer from hallucinations and delusional thoughts, and damage to the frontal lobe is associated with difficulty with executive functions, planning, and decision-making. Additionally, it was likely that defendant had this brain damage on the day of the assault, and the brain damage could have contributed to his behavior.

Dr. Abramsky testified that in his opinion defendant was legally insane at the time of the assault based on defendant's history of mental illness and his statements during the assault. Dr. Abramsky also testified that although defendant drank alcohol on the day of the assault and it likely contributed to the assault, the assault was not the product of the alcohol because defendant had delusions and "bizarre behaviors" while he was sober. Dr. Abramsky further testified that he believed defendant did not know the difference between right and wrong at the time of the assault because he did not know what was real and what was not real.

While defendant presented three experts whose testimony supported the conclusion that defendant was legally insane at the time of the assault, the prosecution impeached the witnesses by calling into question the reliability of their assessments through the possibility that defendant lied to the doctors. The prosecution questioned the reliability of the experts' opinions by highlighting a result of Dr. Escott's evaluation in which she reported that part of defendant's personality was that he "like[d] to manipulate others for his own gratification[.]" The prosecution used Dr. Escott's finding to try to undermine the reliability of the experts'

opinions by questioning whether defendant could simply be lying to the experts during their evaluations. The prosecution also highlighted that the experts' testimony regarding defendant's state of mind represented only the experts' opinions and not provable facts.

It is the jury's role, not this Court's, to weigh the evidence and the credibility of witnesses. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012). There was also evidence that defendant was not legally insane; Patricia testified that defendant acted normally before the assault. While defendant cooked dinner, he got food from the freezer, defrosted the food, retrieved spices from the cabinets, and had several pans cooking on the stove. In addition, Deputy Cleland also testified that defendant cooperated with him after the assault when Deputy Cleland commanded defendant to come out of the basement, turn around, get on his knees, and place his hands behind his back. And Dr. Assar testified that defendant reported that he was drinking the day of the assault, which was supported by the three bottles of alcohol in the condominium.

The trial court instructed the jury that it was free to believe or disbelieve the opinions of the experts:

> Experts are allowed to give opinions in court about matters they are experts on. However, you do not have to believe an expert's opinion, instead, you should decide whether you believe it and how important you think that is. When you decide whether you believe an expert's opinion, think carefully about the reasons and facts he or she gave her [sic] for her opinion, or his opinion, and whether those facts are true.

"[J]urors are presumed to follow their instructions . . . ." *People v Stevens*, 498 Mich 162, 177; 869 NW2d 233 (2015) (quotation marks and citation omit-

ted). The verdict shows that the jury followed the trial court's instructions. The jury did not believe the experts' opinions that defendant was legally insane at the time of the assault. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support the jury's determination that defendant was not legally insane at the time of the assault.

Affirmed.

METER, J., concurred with JANSEN, P.J.

GLEICHER, J. (*dissenting*). The majority holds that assault and battery is not a lesser included offense of assault with intent to commit murder and that no rational view of the evidence in this case could support a conviction for assault and battery. I respectfully dissent from both holdings.

I

Advancing no analysis, the majority reaffirms this Court's holding in *People v Ross*, 73 Mich App 588, 592; 252 NW2d 526 (1977), that "[a]ssault and battery is not an offense necessarily included within the crime of assault with intent to murder." *Ross*'s reasoning rested on a 1975 case called *People v Ora Jones*, 395 Mich 379; 236 NW2d 461 (1975). But *Ora Jones* is no longer the law. The case that overruled it—*People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002)—instructs that a much older Michigan case, *Hanna v People*, 19 Mich 316 (1869), correctly describes the process for determining whether a crime is a lesser included offense. And *Hanna* holds that assault and battery *is* a lesser included offense of assault with intent to commit murder. *Hanna*, 19 Mich at 322-323.

In *Cornell*, the Supreme Court examined this state's lesser-included-offense jurisprudence, found it in disarray, and retethered the law to the language of a statute first enacted in 1846. That statutory language remains substantially similar, in relevant part, today:

> [U]pon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense. [MCL 768.32(1).]

Based on the statute, the *Cornell* Court concluded that a defendant is entitled to a requested instruction on a necessarily included lesser offense "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Cornell*, 466 Mich at 357.

Our Supreme Court recently reaffirmed *Hanna*'s contribution to lesser-included-offense calculations, noting that "*Cornell* returned MCL 768.32(1) to its original construction as given by this Court in *Hanna*[.]" *People v Jones*, 497 Mich 155, 165; 860 NW2d 112 (2014). *Hanna* answers the question presented in this case.

According to the opinion's syllabus, John Hanna was charged with assault with intent to commit murder after he beat John Shine with a piece of iron. *Hanna*, 19 Mich at 317. Over Hanna's objection, the prosecuting attorney requested that the court charge the jury on assault and battery in addition to assault with intent to commit murder. *Id*. The jury acquitted Hanna of assault with intent to commit murder but convicted him of assault and battery. *Id*. Hanna appealed. The

Supreme Court held that assault was a lesser included offense of "assaults with various degrees of aggravation," including assault with intent to commit murder:

> [A]ssaults are substantially and in effect divided by the statute into degrees; and . . . an indictment for any of the higher grades, or assaults with various degrees of aggravation, must include the inferior degree of simple assault; or, if the higher degree is charged, including a battery, as in the present case, the simple assault and battery are included, and . . . the defendant may be convicted of the included offense under this section. [*Id*. at 322-323.]

The Supreme Court reaffirmed *Hanna*'s holding in *People v Prague*, 72 Mich 178, 180; 40 NW 243 (1888), and has never retreated from it.[1]

By reinvigorating *Ross* the majority contravenes our Supreme Court's opinions in *Hanna*, *Prague*, and *Cornell*. But that isn't the majority's only error.

II

Logical and legal principles dictate that in this case, the judge should have instructed the jury on the lesser included offense of assault and battery. Under *Cornell*, the question to be answered is: does assault with intent to commit murder (the charged greater offense) require the jury to find a disputed factual element that is not

[1] The majority faults me for "relying merely" on *Hanna*'s syllabus. The majority is in error. Only the facts surrounding Hanna's prosecution were drawn from the syllabus. The holding and analysis are contained within the opinion of the Court. Further, I am unaware of any rule of law directing that the clear and unambiguous holding of a case decided by our Supreme Court 150 years ago may be disregarded due to its age. I had thought that the rule of stare decisis requires us to adhere to the law as given to us by the Supreme Court, regardless of when the governing case was decided. The majority's quarrel with relying on a case "now 150 years old" is ultimately inconsequential, as the Supreme Court reinvigorated *Hanna* only 17 years ago in *Cornell*.

part of assault and battery (the asserted lesser included offense)? The answer is yes, and the disputed element is intent to kill.

The majority holds that "[b]ecause of the brutality of the assault, no rational view of the evidence could support a finding of simple assault and battery." I respectfully disagree, as there is no quantum of injury necessarily associated with an assault and battery. An assault and battery can result in horrific injuries, including death. For example, in *People v Datema*, 448 Mich 585; 533 NW2d 272 (1995), the Supreme Court held that a conviction for involuntary manslaughter may be premised on an assault and battery. Rather than the severity of injury, what distinguishes an assault and battery from an assault with intent to commit murder is the perpetrator's intent. The former crime requires proof that the defendant intended to commit a battery. To prove assault with intent to commit murder, the prosecutor must convince the jury that the defendant intended to kill the victim.

Defendant's intent was at the center of this case. Although the prosecution charged defendant with harboring an intent to kill his mother, the jury found him guilty but mentally ill of the lesser included offense of assault with intent to do great bodily harm less than murder. Defendant's mother testified that she believed her son did not intend to kill her, or even to grievously wound her:

> *Q*. Do you think he intended to cause you great bodily injury?
>
> *A*. Never. He's gone out of his way his whole life, even as a toddler, to keep me from any kind of pain.

In my view, this testimony would have permitted a jury to convict defendant of assault and battery, or guilty

but mentally ill of assault and battery. Defense counsel's request for an assault and battery instruction should have been granted, as a rational view of the evidence supported it. I would reverse defendant's conviction on this ground and remand for a new trial.

PEOPLE v RODRIGUEZ

Docket No. 338914. Submitted March 12, 2019, at Detroit. Decided April 18, 2019, at 9:00 a.m.

Ricardo Rodriguez, Jr., was convicted after a jury trial in the Oakland Circuit Court of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*); possession of marijuana, MCL 333.7403(2)(d); and unarmed robbery, MCL 750.530. After Rodriguez's codefendant, Tonya Tique-Diaz, had unsuccessfully attempted to break the windows in Arnulfo Rojas's truck with a tire iron, Rodriguez took the tire iron and succeeded in breaking three windows in the truck. Rodriguez then threatened to take out his knife and stab Adrian Valentin, who had been inside the truck, if Valentin did not give Rodriguez everything Valentin had. Valentin threw his bracelet and $200 to Rodriguez, and Rodriguez left. The police later conducted a warrantless search of the apartment Rodriguez shared with Tique-Diaz and discovered marijuana and cocaine. Denise Karen Langford-Morris, J., sentenced Rodriguez as a fourth-offense habitual offender, MCL 769.12, to 2 to 15 years of imprisonment for his conviction of possessing less than 25 grams of cocaine; to 249 days in jail, time served, for his conviction of possessing marijuana; and to 8 to 20 years of imprisonment for his conviction of unarmed robbery. Rodriguez appealed his sentences and the trial court's conclusion that he consented to the search of his apartment.

The Court of Appeals *held*:

1. Under Offense Variable (OV) 2, MCL 777.32, points are assessed for a defendant's possession or use of a potentially lethal weapon during the commission of a crime. Although there was no evidence that Rodriguez possessed or used a knife during the robbery, there was evidence that he possessed and used a tire iron during the robbery. A tire iron is a potentially lethal weapon. Therefore, the trial court did not err by assessing one point under OV 2 for Rodriguez's use of a tire iron during the robbery.

2. Under OV 7, MCL 777.37, points are assessed when a victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. The

trial court scored 50 points for OV 7, not for sadism, torture, or excessive brutality, but for Rodriguez's similarly egregious conduct that was designed to substantially increase the fear and anxiety Valentin suffered during the robbery. Conduct scored under OV 7 is conduct engaged in by a defendant that goes beyond the minimum required to commit the offense and that was intended to make a victim's fear or anxiety greater by a considerable amount. The elements of unarmed robbery are (1) a felonious taking of property from another (2) by force or violence or assault or putting in fear (3) while unarmed. There was no question that Rodriguez's use of a tire iron during the course of the robbery went beyond the minimum required to commit the offense. But Rodriguez's use of the tire iron, without more, did not support the assessment of 50 points for OV 7. Rodriguez took no action that rose to the level of egregious conduct similar to sadism, torture, or excessive brutality designed to substantially increase Valentin's fear and anxiety. Therefore, the trial court erred when it scored 50 points for OV 7.

3. Under OV 9, MCL 777.39, points are assessed for the number of victims placed in danger of physical injury or death or property loss during the commission of the crime. Rojas's truck was parked outside his apartment, and Rojas stood outside and watched the robbery. Because Rojas was outside his apartment in close proximity to the robbery, the trial court properly counted Rojas as a victim for purposes of scoring OV 9.

4. Under OV 12, MCL 777.42, points are assessed for contemporaneous felonious acts. Rodriguez and the prosecution stipulated, and the trial court agreed, that OV 12 would be scored at zero points. The failure to assess zero points for OV 12 appeared to be an administrative error, and that error, in conjunction with the scoring error in OV 7, changed defendant's guidelines minimum sentence range, necessitating remand for resentencing.

5. Searches conducted without a warrant are ordinarily unreasonable under the Fourth Amendment of the United States Constitution and under Article 1, § 11 of the Michigan Constitution, but voluntary consent is an exception to the warrant requirement. Rodriguez argued that he refused consent to search the apartment he shared with Tique-Diaz, but a deputy at the scene testified that Rodriguez consented to the search. The Court of Appeals defers to a trial court's credibility determination. In this case, the trial court did not accept Rodriguez's version of the facts, and appellate deference to that determination was appropriate. Rodriguez further argued that Tique-Diaz's consent to search the apartment was invalid because it was the product of coercion and duress. But the trial court found credible a deputy's testimony that he did not

threaten Tique-Diaz in connection with obtaining her consent to search the apartment. Therefore, the trial court did not err by determining that Rodriguez and Tique-Diaz voluntarily consented to the warrantless search of their apartment.

Defendant's convictions affirmed, unarmed-robbery sentence vacated, and matter remanded for resentencing.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Matthew A. Fillmore*, Assistant Prosecuting Attorney, for the people.

F. Mark Hugger for Ricardo Rodriguez, Jr.

Before: MURRAY, C.J., and GADOLA and TUKEL, JJ.

MURRAY, C.J. Defendant appeals as of right his jury-trial convictions for possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*); possession of marijuana, MCL 333.7403(2)(d); and unarmed robbery, MCL 750.530. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 2 to 15 years' imprisonment for the possession-of-less-than-25-grams-of-cocaine conviction; to 249 days, time served,[1] for the possession-of-marijuana conviction; and to 8 to 20 years' imprisonment for the unarmed-robbery conviction. We affirm defendant's convictions, vacate his sentence for unarmed robbery, and remand for resentencing.

This case arises out of the unarmed robbery of Adrian Valentin. Valentin was inside Arnulfo Rojas's truck that was parked in front of Rojas's apartment. Codefendant

[1] The judgment of sentence lists defendant's sentence for possession of marijuana as 365 days. However, at sentencing, the trial court sentenced defendant to 249 days, time served. We attribute the 365-day sentence in the judgment of sentence to a clerical error.

Tonya Tique-Diaz approached the truck and attempted to break the truck's windows with a tire iron. After she was unsuccessful, defendant took the tire iron from Tique-Diaz and broke three of the truck's windows. Defendant then demanded that Valentin give him everything he had or else defendant would take out his knife and stab Valentin. Valentin threw defendant $200 and his bracelet before defendant left.

Defendant's appeal challenges his sentences, as well as the trial court's conclusion that he provided police with consent to search the apartment he shared with Tique-Diaz. We now turn to those challenges.

I. OFFENSE VARIABLES

With respect to sentencing, defendant argues that the trial court erred because Offense Variables (OVs) 2, 7, 9, and 12 should all be assessed zero points. We agree with respect to OVs 7 and 12, but conclude that no errors were made with respect to OVs 2 and 9.

We first recognize the always important standards of review. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (citations omitted).

A. OV 2

Defendant argues that OV 2 should be assessed zero points, instead of one point, because MCL 777.32 requires that a defendant possess or use a potentially lethal weapon, and here, there was no evidence that

defendant possessed or used a knife. Defendant is correct that there was no evidence he used or possessed a knife. But there was evidence he possessed and used a tire iron during the robbery, and that clearly suffices for the scoring of one point under OV 2.

"MCL 777.32 scores the 'lethal potential of the weapon possessed or used.' " *People v Hutcheson*, 308 Mich App 10, 16; 865 NW2d 44 (2014), quoting MCL 777.32(1). "If '[t]he offender possessed or used any other potentially lethal weapon' . . . besides a harmful biological substance or device, a harmful chemical substance or device, an incendiary or explosive device, a fully automatic weapon, a firearm, or a cutting or stabbing weapon, one point should be assessed." *Hutcheson*, 308 Mich App at 16, quoting MCL 777.32(1)(e) (alteration in original). "If '[t]he offender possessed or used no weapon,' zero points should be assessed." *Id*. at 17, quoting MCL 777.32(1)(f) (alteration in original). This Court has said before that a tire iron is "a potentially dangerous weapon." *People v Rollins*, 33 Mich App 1, 10; 189 NW2d 716 (1971). The trial court did not err by assessing one point under OV 2 based on defendant's use of a tire iron during the robbery.

B. OV 7

We next turn to defendant's argument that the trial court erred by assessing 50 points under OV 7 because his conduct toward Valentin during the robbery did not rise to the level of sadism, torture, excessive brutality, or similarly egregious conduct.

MCL 777.37(1)(a) provides that 50 points be assessed when " '[a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a

victim suffered during the offense.' " *People v Rosa*, 322 Mich App 726, 743; 913 NW2d 392 (2018), quoting MCL 777.37(1)(a). " 'OV 7 is designed to respond to particularly heinous instances in which the criminal acted to increase [a victim's] fear by a substantial or considerable amount.' " *Id*., quoting *People v Glenn*, 295 Mich App 529, 536; 814 NW2d 686 (2012) (alteration in original), rev'd on other grounds by *Hardy*, 494 Mich at 434. Because of the language "during the offense" used in MCL 777.37(1)(a), the focus of OV 7 is "solely on conduct occurring during the [sentencing] offense." *People v Thompson*, 314 Mich App 703, 711; 887 NW2d 650 (2016). "Regardless, even if OV 7 did not contain language that expressly limits the judge's consideration to conduct that occurred during the sentencing offense, OV 7 certainly does not specifically provide that a sentencing court may look outside the sentencing offense to past criminal conduct in scoring OV 7." *Id*.

Focusing solely on the conduct that occurred during defendant's unarmed robbery of Valentin, we must determine whether Valentin "was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety [Valentin] suffered during the offense." MCL 777.37(1)(a). Neither party asserts that "sadism," "torture," or "excessive brutality" are at issue, and the facts in no way suggest that those terms would be applicable.[2] As a result, we must determine only whether Valentin

[2] "Sadism" is statutorily defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). Our Court in *Glenn*, 295 Mich App at 533, defined torture to mean "the act of inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer cruelty." (Quotation marks and citation omitted.) Likewise, the *Glenn* Court defined "excessive brutality" as "savagery or cruelty beyond even the 'usual' brutality of a crime." *Id*.

was treated with conduct "similarly egregious" to sadism, torture, or excessive brutality that was "designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a).[3]

In making this determination, we must consider "whether the defendant engaged in conduct beyond the minimum required to commit the offense" and, if so, "whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Hardy*, 494 Mich at 443-444. Here, defendant was convicted of unarmed robbery which requires proof beyond a reasonable doubt that defendant committed (1) a felonious taking of property from another (2) by force or violence or assault or putting in fear (3) while unarmed. *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). There is no question that defendant engaged in conduct that went beyond the minimum required to commit the offense by using a tire iron during the course of the robbery of Valentin. With that conclusion, we now turn to whether defendant's conduct was intended to make Valentin's fear or anxiety greater by a considerable amount, *Hardy*, 494 Mich at 444, while keeping in mind the legislative command that this conduct must have been similarly egregious to sadism, torture, or excessive brutality.

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[3] We recognize that in *Rosa*, 322 Mich App at 743, our Court quoted the current version of MCL 777.37(1)(a), containing the mandatory "similarly egregious conduct" language, but then proceeded to cite *Hardy*, 494 Mich at 443, to the effect that " 'a defendant's conduct does not have to be similarly egregious to sadism, torture, or excessive brutality for OV 7 to be scored at 50 points . . . .' " Of course, that statement from *Hardy* is now irrelevant because of the subsequent legislative amendment (made in response to *Hardy*) that added the "similarly egregious" language. See 2015 PA 137. That 2015 legislative amendment essentially put into place the *Glenn* Court's interpretation of OV 7.

The closest decision addressing facts similar to those in the present case is *People v Hornsby*, 251 Mich App 462; 650 NW2d 700 (2002). In *Hornsby*, the trial court assessed 50 points for OV 7 because it found evidence of "terrorism," a term that was contained in a prior version of MCL 777.37(1)(a) and which was defined as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." *Hornsby*, 251 Mich App at 468 (quotation marks and citation omitted).[4] The Court concluded that the trial court's decision was not an abuse of discretion because during the armed robbery defendant "did more than simply produce a weapon and demand money"; defendant cocked the weapon and repeatedly threatened the employees during the course of the robbery. *Id*. at 469. In most other decisions addressing OV 7, the facts underlying the crime, whether falling under the definitions of sadism, torture, or excessive brutality, involved the defendant engaging in extreme and horrific actions. See *People v Hunt*, 290 Mich App 317, 324-325; 810 NW2d 588 (2010), and cases cited therein. More recently, in *Rosa*, 322 Mich App at 744, we upheld the trial court's assessment of 50 points for OV 7 because defendant's strangulation and suffocation of, and threats to, the victim constituted excessive brutality.

Despite the somewhat significant factual similarities between this case and *Hornsby*, *Hornsby* was decided under a substantially different statutory provision. Although the statute in *Hornsby* and the current version both contain language regarding "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense," the statute then, unlike the

[4] Although the term "terrorism" was removed from MCL 777.37, the corresponding definition was not. See House Legislative Analysis, HB 4463 (April 28, 2015).

current version, did not contain the requirement that the conduct be "similarly egregious" to conduct that falls within sadism, torture, or excessive brutality. And that, we conclude, is a significant difference. Therefore, *Hornsby* does not control the outcome of this appeal.

Here, although defendant threatened[5] Valentin when demanding the money and other belongings, he did no more. Valentin immediately turned over what was demanded, and defendant took no action that could rise to the level of egregious conduct similar to sadism, torture, or excessive brutality designed to substantially increase Valentin's fear and anxiety. Although use of the tire iron was not necessary for the conviction of unarmed robbery, its use, without more, did not rise to a level that would require an assessment of 50 points for OV 7.

C. OV 9

Turning to his next argument, we reject defendant's contention that the trial court erred by assessing 10 points under OV 9 because there was only one victim in the robbery.

OV 9 accounts for the number of victims. *People v Mann*, 287 Mich App 283, 285; 786 NW2d 876 (2010). Ten points are assessed under OV 9 when "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c). A victim is one who is placed in danger of injury or death when the offense was committed. *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). Points assessed under

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[5] According to Valentin, defendant threatened to pull out a knife and stab him if he did not comply with defendant's demands. A threat that puts a victim in fear can satisfy a necessary element of unarmed robbery. *Johnson*, 206 Mich App at 125-126.

OV 9 must be based solely on the defendant's conduct during the sentencing offense. *People v McGraw*, 484 Mich 120, 133-134; 771 NW2d 655 (2009).

After defendant left Rojas's apartment, he took the tire iron from Tique-Diaz, smashed the windows of the truck that Valentin was hiding in, and then robbed Valentin. Evidence showed that Rojas stood outside his apartment and watched the robbery. Because Rojas was outside his apartment, in close proximity to the robbery, the trial court properly counted Rojas as a victim. *People v Gratsch*, 299 Mich App 604, 624; 831 NW2d 462 (2013) ("[A] close proximity to a physically threatening situation may suffice to count the person as a victim."), vacated in part on other grounds 495 Mich 876 (2013). Therefore, the trial court did not err by assessing 10 points under OV 9.

D. OV 12

Defendant and the prosecution agree that at sentencing the parties stipulated, and the trial court agreed, that zero points would be assessed under OV 12, MCL 777.42. Thus, the failure to assess zero points for OV 12 appears to be an administrative error. In conjunction with the error in scoring OV 7, this administrative error changes defendant's guidelines minimum sentence range. Defendant's sentencing offense of unarmed robbery is a Class C offense. MCL 777.16y. With a prior record variable total score of 80 points and an original OV total score of 71 points, defendant's guidelines minimum sentence range, as a fourth-offense habitual offender, was 58 to 228 months. MCL 777.64. However, had the trial court properly assessed zero points for OVs 7 and 12, his total OV score would have been 16 points, resulting in a guidelines minimum sentence range of 36 to 142 months. *Id*. Because the scoring error alters

defendant's guidelines minimum sentence range, remand for resentencing is required. *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006).

II. CONSENT TO SEARCH

We now turn to defendant's argument that the trial court erred by denying his motion to suppress. Defendant offers two grounds in support of his position. First, he argues that there was no valid consent given for police officers to search his and Tique-Diaz's apartment because he did not give consent. Second, he argues that Tique-Diaz's consent was the product of coercion and duress. We disagree with both arguments.

This Court reviews for clear error a trial court's findings of fact made after a suppression hearing, but reviews de novo the ultimate decision on a motion to suppress. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). "A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that the trial court made a mistake." *People v Dillon*, 296 Mich App 506, 508; 822 NW2d 611 (2012).

"The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000), citing US Const, Am IV; Const 1963, art 1, § 11. "The touchstone of these protections is reasonableness; not all searches are constitutionally prohibited, only unreasonable searches." *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). Ordinarily, searches conducted without a warrant are unreasonable. *Id*. "There are, however, a number of exceptions to the warrant requirement, including voluntary consent." *Id*.

Consent permits a warrantless search so long as it "is unequivocal, specific, and freely and intelligently given." *People v Beydoun*, 283 Mich App 314, 337; 770 NW2d 54 (2009) (quotation marks and citation omitted). Whether consent is valid depends on the totality of the circumstances. *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003). Importantly, it is not necessary that a person know of the right to withhold consent for the person's consent to be voluntary. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). "The trial court's decision regarding the validity of the consent to search is reviewed by this Court under a standard of clear error." *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001) (quotation marks and citation omitted).

Although defendant argues that he did not consent to the search because he refused to give consent to Deputy Burney, Deputy Burney testified that he asked defendant for his consent, and defendant provided it. The trial court determined, on the basis of the testimony at the evidentiary hearing (including, obviously, defendant's testimony that conflicted with Deputy Burney's) and a DVD recording from Deputy Burney's police car, that defendant consented to the search. Defendant's argument is based solely on acceptance of his version of the facts, which the trial court did not accept. And because we, in large part, must defer to the trial court's credibility determinations, *People v Roberts*, 292 Mich App 492, 503-504; 808 NW2d 290 (2011), we are compelled to conclude that the trial court did not err when it determined that defendant's consent was valid.

Defendant next argues that Tique-Diaz's consent was the product of coercion and duress.[6] If defendant is

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[6] It is not clear that defendant has standing to challenge Tique-Diaz's consent to search. Nevertheless, no one has raised this issue so we

correct, Tique-Diaz's consent would be invalid. *People v Bolduc*, 263 Mich App 430, 440; 688 NW2d 316 (2004). Defendant argues that Deputy Garcia's threat to Tique-Diaz to call Child Protective Services (CPS) to take away her children coerced her into consenting to the search. But again, the trial court concluded otherwise. Indeed, the trial court found credible Deputy Garcia's testimony that his statement to Tique-Diaz regarding calling CPS was not a threat. Deputy Garcia testified that he only told Tique-Diaz that she needed to call a family member to come to the apartment to look after her children, otherwise he would have to call CPS. This testimony, accepted as true by the trial court, established that Deputy Garcia's statement to Tique-Diaz was not a coercive tactic to obtain Tique-Diaz's consent to the search. It was, instead, a statement about what would inevitably happen if Tique-Diaz did not call a family member to watch her children. Therefore, the trial court did not err by determining that defendant and Tique-Diaz voluntarily consented to a search of their apartment.

Defendant's convictions are affirmed, his sentence for unarmed robbery is vacated, and this matter is remanded for resentencing. We do not retain jurisdiction.

GADOLA and TUKEL, JJ., concurred with MURRAY, C.J.

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assume for purposes of this appeal that he has standing to do so. See, e.g., *People v Gunn*, 48 Mich App 772, 777 n 3; 211 NW2d 84 (1973) ("[W]e will assume for the purpose of this appeal that the defendants have standing to challenge the legality of the witnesses' arrest and the subsequent search and seizure."); *People v Brown*, 132 Mich App 128, 129; 347 NW2d 8 (1984) ("For purposes of this appeal, we assume, without deciding, that defendant has standing to contest the validity of a search of a third party's premises.").

PEOPLE v CHANEY

Docket No. 341723. Submitted March 12, 2019, at Detroit. Decided April 18, 2019, at 9:05 a.m.

Darchelle M. Chaney was convicted of second-degree child abuse, MCL 750.136b(3), after a jury trial in the Wayne Circuit Court. While in Chaney's care, a three-year-old child sustained third-degree scalding burns from hot bath water. The child's injuries required more than a month of hospitalization and a number of debridement surgeries and skin graft procedures. At sentencing, the prosecution argued that Offense Variable (OV) 3 should be scored at 25 points based on the child's life-threatening or permanent incapacitating injuries. Chaney argued that although the child's injuries required medical care, they were not life-threatening or permanently incapacitating so that only 10 points should be assessed for OV 3. Mariam Saad Bazzi, J., agreed with the prosecution, scored OV 3 at 25 points, and sentenced Chaney to 2 to 15 years of imprisonment. Chaney appealed.

The Court of Appeals *held*:

OV 3, set forth in MCL 777.33, accounts for physical injury sustained by a victim—a score of 25 points is appropriate under MCL 777.33(1)(c) when a victim suffered life-threatening or permanent incapacitating injury, and a score of 10 points is appropriate under MCL 777.33(1)(d) when a victim suffered bodily injury requiring medical treatment. "Life-threatening" is defined in *Merriam-Webster's Online Dictionary* as capable of causing death, potentially fatal. Twenty-five points are appropriately assessed when a victim's *injury* is life-threatening; whether the defendant's *actions* placed the child in a life-threatening situation is not relevant to scoring OV 3. The victim in this case did not suffer a life-threatening injury. Medical records established that the victim suffered a serious injury requiring a lengthy hospitalization but there was no suggestion that the child's injury was potentially fatal. The fact that the child's injury required significant and ongoing medical treatment does not, by itself, establish a life-threatening injury. A life-threatening injury is an injury that in its normal course is potentially fatal. The trial court's conclusion that the child's injury was life-threatening was clearly erroneous; that

is, it was not supported by a preponderance of the evidence. And because the scoring error affected Chaney's guidelines minimum sentence range, Chaney was entitled to resentencing.

Reversed and remanded.

SENTENCING GUIDELINES — OFFENSE VARIABLE 3 — PHYSICAL INJURY — LIFE-THREATENING INJURY OR INJURY REQUIRING MEDICAL TREATMENT.

Offense Variable 3 (OV 3) accounts for physical injury to a victim; 25 points must be assessed under OV 3 for life-threatening or permanent incapacitating injury, while only 10 points are assessed under OV 3 for injury requiring medical treatment; whether the defendant's actions placed the victim in a life-threatening situation is not relevant, and the fact that a victim's injury required significant and ongoing medical treatment does not by itself establish a life-threatening injury; a life-threatening injury is an injury that in its normal course is potentially fatal (MCL 777.33).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Jon P. Wojtala*, Principal Attorney for Appeals, for the people.

Gerald Ferry for Darchelle M. Chaney.

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

PER CURIAM. Following a jury trial, defendant was convicted of second-degree child abuse, MCL 750.136b(3), and sentenced to 2 to 15 years' imprisonment. Defendant appeals, challenging the trial court's assessment of 25 points for Offense Variable (OV) 3. For the reasons stated in this opinion, we reverse and remand for resentencing.[1]

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[1] "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left

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OV 3 "is physical injury to a victim." MCL 777.33(1). In scoring OV 3, the focus is not on the defendant's actions; "rather, OV 3 assesses whether a *victim's injuries* were life-threatening." *People v Rosa*, 322 Mich App 726, 746; 913 NW2d 392 (2018). Accordingly, we need not recount the evidence underlying defendant's conviction or the competing theories of what took place. Suffice it to say that a three-year-old child, DM, suffered severe burns from hot bath water while in defendant's care.

DM was hospitalized with second-degree scalding burns on each leg, extending from the middle shin to the foot. Dr. Lydia Donoghue was DM's pediatric surgeon. Dr. Donoghue testified at trial that within a few days of presenting to Children's Hospital, DM's burns deepened and progressed to third-degree, full-thickness burns, requiring treatment. The testimony along with the medical records established that DM remained in the hospital for several weeks as a result of her injuries and that she underwent multiple debridement surgeries and skin grafts.

At sentencing, the prosecution argued that 25 points should be assessed for OV 3 because the injuries were either life-threatening or permanently incapacitating. The prosecution argued that DM sustained third-degree burns on seven percent of her body, was in the hospital for more than a month, had a feeding tube,

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with the definite and firm conviction that a mistake has been made." *People v Anderson*, 284 Mich App 11, 13; 772 NW2d 792 (2009) (quotation marks and citation omitted). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438.

was given morphine, and had been at risk for infection. Defense counsel argued that OV 3 should be scored at 10 points because the injuries were not life-threatening or permanently incapacitating but, rather, injuries that required medical care resulted from the incident. The trial court scored OV 3 at 25 points, finding that defendant's actions "threaten[ed] the life of that child."

II

Defendant contends that the evidence did not support a 25-point assessment for a life-threatening injury and that OV 3 should have been scored at 10 points for bodily injury requiring medical treatment. We agree.

OV 3 is scored at 25 points when "[l]ife threatening or permanent incapacitating injury[2] occurred to a victim[.]" MCL 777.33(1)(c). Ten points are assessed when "bodily injury requiring medical treatment occurred to a victim[.]" MCL 777.33(1)(d).

The goal of statutory interpretation is to give effect to the Legislature's intent, which is most reliably ascertained by examining the statute's words. *People v Flick*, 487 Mich 1, 10-11; 790 NW2d 295 (2010). The term "life-threatening," as used in MCL 777.33, is not defined by the statute. Accordingly, we may consult a dictionary to determine the ordinary meaning of that term. *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007). The *Merriam-Webster Online Dictionary* defines "life-threatening" as "capable of causing death : potentially fatal." See <https://www.merriam-webster.

[2] The trial court did not find that a permanent incapacitating injury occurred, nor did the prosecutor make that argument on appeal. Accordingly, we will address only whether the evidence established that a life-threatening injury occurred.

com/dictionary/life-threatening> (accessed April 15, 2019) [https://perma.cc/53YT-3F76].

As an initial matter, the trial court incorrectly relied on defendant's actions in assessing 25 points for OV 3. Whether defendant's actions placed the child in a life-threatening situation is irrelevant. As stated, in scoring OV 3 the question is whether the victim's *injuries* were life-threatening. *Rosa*, 322 Mich App at 746.

After reviewing the medical records, we conclude that the trial court clearly erred by finding that DM suffered a life-threatening injury. The medical records do not indicate that DM's injuries were potentially fatal. Nor did Dr. Donoghue testify to that effect. While DM suffered a serious injury requiring a lengthy hospitalization, no heroic measures were needed, and there is no suggestion in the records that DM's life was ever in danger. Her burn wounds required multiple procedures, but the medical records show that there were no complications and that she was in stable condition throughout her hospital stay. If the fact that DM's injuries required significant and ongoing medical treatment by itself established a life-threatening injury, MCL 777.33(1)(d) (10 points for bodily injury requiring medical treatment) would be rendered nugatory.[3] See *People v Pinkney*, 501 Mich 259, 282; 912 NW2d 535 (2018). Instead, we must give effect to the ordinary meaning of "life-threatening" by requiring

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[3] The term "requiring medical treatment" is necessarily broad. We have approved the assessment of 10 points for OV 3 when the degree of medical treatment required has been modest. See, e.g., *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011). In the absence of evidence showing that the victim's life was threatened, an injury requiring substantial medical treatment fits squarely within MCL 777.33(1)(d).

some evidence indicating that the injuries were, in normal course,[4] potentially fatal. In the absence of evidence suggesting that DM's life was placed at risk or more general evidence establishing that the injury suffered was by nature life-threatening, the trial court's finding was clearly erroneous, i.e., not supported by a preponderance of the evidence. See *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Defendant is entitled to resentencing because the trial court's erroneous scoring of OV 3 affected defendant's guidelines minimum sentence range. See *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

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

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

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[4] Certainly there are many conditions that if not treated can become life-threatening. Our review must take into account the effect of medical treatment.

PEOPLE v STRICKLIN

Docket No. 340614. Submitted February 5, 2019, at Grand Rapids. Decided April 18, 2019, at 9:10 a.m. Leave to appeal denied 504 Mich 967 (2019).

Collin J. Stricklin was arrested for operating a motor vehicle while intoxicated, MCL 257.625, after he had been pulled over for speeding, took a field sobriety test, and provided a preliminary breath test. The police officer who arrested Stricklin told him that he wanted Stricklin to undergo a blood test, and reading from a standard law enforcement form for blood testing, the officer explained that if Stricklin refused the blood test, his license would be suspended and six points would be added to his driving record. The officer also informed Stricklin that if he refused the test, the test could not be performed without a court order and that the officer could seek one. Stricklin consented to a blood draw, and the results indicated that he had been intoxicated at the time of his arrest. Stricklin moved in the 8th District Court, Tiffany A. Ankley, J., for suppression of the blood-test results, claiming that the blood draw was an illegal warrantless search prohibited by the Fourth Amendment because Stricklin's consent was coerced by the civil consequences that would have been imposed if Stricklin had failed to consent, specifically, the loss of his driver's license. A valid driver's license was important to Stricklin's livelihood and employment. The district court concluded that taking a blood sample was a search governed by the Fourth Amendment and for which a warrant was required in the absence of exigent circumstances. Holding that there were no exigent circumstances justifying the warrantless blood draw and that the officer had decided against the less-invasive administration of a breath test on the basis of his personal preference, the district court granted Stricklin's motion and ordered that the blood-draw evidence be suppressed. At the settlement conference following the district court's suppression order, the prosecution requested a stay of the proceedings, the request was denied, and the district court dismissed the case without prejudice. The prosecution appealed the district court's decision in the Kalamazoo Circuit Court. The circuit court, Pamela L. Lightvoet, J., affirmed the district court's order suppressing the blood-draw results, concluding that the warrantless search was not

supported by exigent circumstances and that nothing had prevented the officer from obtaining a search warrant. The prosecution appealed by leave granted.

The Court of Appeals *held*:

Taking a blood sample is a search governed by the Fourth Amendment of the United States Constitution. In order to obtain a blood sample consistently with the Fourth Amendment, law enforcement must obtain a warrant or satisfy an exception to the warrant requirement. Consent permits warrantless searches and seizures when the consent is unequivocal, specific, and freely and intelligently given. Stricklin argued that his consent was involuntary and that he was coerced into consenting by the threat of the sanctions that would have been imposed on him if he had refused to consent. However, Stricklin's consent to the warrantless search was not coerced or involuntary solely because Stricklin feared the economic consequences that would stem from the suspension of his license. Stricklin faced a choice between the lesser of two evils. A consent to the blood draw could have proved that Stricklin was driving drunk, and a drunk-driving conviction would have resulted in the loss of driving privileges, a fine, and possible jail time. On the other hand, Stricklin's refusal to consent to a blood draw would necessarily have resulted in a license suspension and points. Stricklin admitted that he had fully understood his choices under the implied-consent law and had made an informed, reasoned decision. Having had to make a choice between two undesirable options—that is, choosing one unfavorable option in order to avoid the other unfavorable option—did not render involuntary Stricklin's express consent to the blood draw and did not make his consent a product of coercion. Therefore, the circuit court erred when it affirmed the district court's suppression of the blood-draw evidence.

Reversed and remanded.

CONSTITUTIONAL LAW — SEARCH AND SEIZURE — EXCEPTIONS TO THE WARRANT REQUIREMENT — CONSENT — VOLUNTARINESS OF CONSENT IN LIGHT OF MANDATORY CIVIL CONSEQUENCES FOR FAILURE TO CONSENT.

A defendant's consent to a warrantless blood test is not involuntary or a product of coercion just because significant civil consequences will be imposed on the defendant under the Michigan Vehicle Code if he or she refuses to consent (US Const, Am IV; MCL 257.1 *et seq.*)

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jeffrey S. Getting*, Pros-

ecuting Attorney, and *Heather S. Bergmann*, Assistant Prosecuting Attorney, for the people.

Frederick J. Taylor for Collin J. Stricklin.

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

PER CURIAM. By leave granted,[1] the prosecution appeals the district court's suppression of blood-draw evidence after it held that defendant, Collin James Stricklin, was subject to a warrantless search during a suspected drunk-driving encounter with the police. Defendant was arrested and charged with operating while intoxicated in violation of MCL 257.625. It is uncontested that the arresting police officer informed defendant that under the implied-consent law, should he refuse consent to a blood draw, he would temporarily lose his license and be subject to the mandatory imposition of six points against his driving record.[2] After an evidentiary hearing, the district court suppressed the blood-draw evidence, concluding that law enforcement obtained it during an illegal warrantless search. The circuit court affirmed, concluding that defendant's alleged consent to the blood draw was involuntary and had been coerced because defendant drove for a living and feared the impact that losing his license would have on his economic livelihood. The prosecution now appeals, arguing that the district and circuit courts misapplied Fourth Amendment precedent and erred by concluding that defendant's express consent was involuntary. We agree and reverse.

Defendant moved to suppress evidence obtained from a blood draw, arguing that the blood draw was an illegal

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[1] *People v Stricklin*, unpublished order of the Court of Appeals, entered March 23, 2018 (Docket No. 340614).

[2] See MCL 257.625a through MCL 257.625g; MCL 257.320a.

warrantless search under the Fourth Amendment because defendant was threatened with the loss of his driving privileges if he refused consent. During oral arguments on defendant's motion, the prosecution contended that this was an issue of first impression for the court and maintained that the United States Supreme Court's decision in *Birchfield v North Dakota*, 579 US ___; 136 S Ct 2160; 195 L Ed 2d 560 (2016), did not apply because Michigan's implied-consent law only provides for civil penalties. Defense counsel assured the district court that defendant was "not in any way challenging the constitutionality of Michigan's Implied Consent Law or sanctions" but rather arguing only that the threat of sanctions affected the voluntariness of his client's consent to the blood draw and that *Birchfield* reaffirmed that the validity of consent is based on the "totality of the circumstances." Defense counsel fully acknowledged that *Birchfield* primarily addressed the legality of criminal penalties for refusing consent but asserted that the distinction was "a red herring" and "a distraction" because "[t]he issue is voluntariness and the severe implied consent sanctions can certainly or should certainly be considered" when assessing voluntariness.

The district court held an evidentiary hearing on the suppression motion. Police Officer Matthew Britton testified for the prosecution. On August 29, 2015, Officer Britton pulled over defendant for speeding. He performed an operating-while-intoxicated investigation, including a field sobriety test and a preliminary breath test. Given the results of this investigation, Officer Britton arrested defendant for operating while intoxicated. Subsequently, Officer Britton asked defendant to take an evidentiary chemical test. He read the instructions from standard form DI-177 to obtain defendant's consent. The form stated, in pertinent part:

> I am requesting that you take a chemical test to check for alcohol and/or controlled substances or other intoxicating substance[s] in your body. IF YOU WERE ASKED TO TAKE OR TOOK A PRELIMINARY BREATH TEST BEFORE YOUR ARREST, YOU MUST STILL TAKE THE TEST I AM OFFERING YOU.
>
> If you refuse to take this chemical test, it will not be given without a court order, but I may seek to obtain such a court order. Your refusal to take this test shall result in the suspension of your operator's or chauffeur's license and vehicle group designation or operating privilege, and the addition of six points to your driving record.

Defendant consented to take the blood test. When asked whether he believed that defendant understood his rights, Officer Britton answered, "I believe so." Officer Britton also agreed that defendant was fully aware that refusal would result in a suspension of his license and in six points being added to his driving record. Overall, Officer Britton described defendant as cooperative. Given the circumstances, he could not remember why he decided to ask for a blood test rather than a breath test, stating only that it was his personal preference.

Defendant testified on his own behalf. He said that at the time of his arrest he was working at Harold Ziegler Auto Group in a position that required a valid driver's license. In addition to working, he was also enrolled in classes in the Fire Academy at Kalamazoo Valley Community College. Defendant testified that he would need a driver's license to become a firefighter and that having a driver's license was "pretty important" to his livelihood and career.

Defendant recalled Officer Britton reading him his rights. Defendant testified that he was fearful "of not cooperating and the consequences" to his livelihood and

career. He did not feel as if he had any choice. On cross-examination, defendant admitted that the results of the chemical test indicated that he was drunk. He also acknowledged that he did have a choice to refuse to submit to the test and agreed that he consented to the blood test after the officer read him his rights. Defendant said that he "was mainly focused on being one hundred percent compliant" and was not concerned about whether the officer would obtain a warrant if he had refused chemical testing. Defendant acknowledged that his blood alcohol level could have been lower depending on how long it took the officer to obtain the warrant. He was also aware that a conviction for drunk driving would negatively impact his ability to have a driver's license.

After hearing these two witnesses, the district court issued its decision directly from the bench. It recognized that the taking of a blood sample is a search governed by the Fourth Amendment. The district court did not actually address whether or not it found defendant's consent involuntary or coerced, but rather reasoned that a warrant was necessary absent exigent circumstances. The district court held that there was no exigent circumstance present because the choice to draw blood rather than use a breath test was based only on the officer's personal preference. Accordingly, the district court suppressed the blood-draw evidence. At a settlement conference held the following week, the prosecution indicated that it was unable to proceed because of this unfavorable evidentiary ruling. It asked for a stay pending appeal. The district court stated that it was "not inclined to stay" because the case was already more than a year old, and it dismissed the case without prejudice.

The prosecution appealed in the circuit court. The circuit court agreed that no exigent circumstances

supported a warrantless search because the officer admitted that it was his personal preference to obtain a blood draw rather than a breath test and that nothing prevented him from obtaining a search warrant. With respect to whether defendant gave valid consent, the circuit court determined that the totality of the circumstances demonstrated that defendant's consent to the blood draw was involuntary because he testified that "he felt coerced by the potential sanctions for failing to comply with the officer's request" given that "having a license was important to his livelihood."

The prosecution now appeals in this Court, arguing that the district and circuit courts erred by concluding that defendant's express consent to the blood draw was not a valid exception to the Fourth Amendment's warrant requirement.

> We review de novo the circuit court's ultimate ruling on a motion to suppress evidence. However, we review its factual findings for clear error. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. We overstep our review function if we substitute our judgment for that of the trial court and make independent findings. [*People v Barbarich*, 291 Mich App 468, 471-472; 807 NW2d 56 (2011) (quotation marks and citations omitted).]

"But the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference[.]" *People v Woodard*, 321 Mich App 377, 382; 909 NW2d 299 (2017) (quotation marks and citation omitted; alteration in original). "We review de novo whether the Fourth Amendment was violated and whether the exclusionary rule applies." *Id*. at 382-383.

The circuit court erred by applying the exclusionary rule under the Fourth Amendment when it affirmed

the district court's suppression of the blood-draw evidence. We conclude that defendant's consent to the warrantless search was not coerced or involuntary under applicable precedent solely because of defendant's stated fear of the economic consequences that would stem from the suspension of his license under the implied-consent law.

In *Birchfield*, 579 US at ___; 136 S Ct at 2173, the United States Supreme Court held that the taking of a blood sample constituted a search and that in order to obtain a blood sample consistently with the Fourth Amendment, law enforcement must either obtain a warrant or satisfy an exception to the warrant requirement. The *Birchfield* Court held that because a blood test is highly intrusive, law enforcement may not conduct a blood test pursuant to the search-incident-to-a-lawful-arrest exception. *Id*. at ___; 136 S Ct at 2184. There are two remaining exceptions to the warrant requirement potentially relevant to this appeal: (1) the exigent-circumstances exception, i.e., whether exigent circumstances existed constituting an emergency that justified the warrantless blood draw and (2) the consent exception, i.e., whether the defendant's consent was valid. Both the district court and the circuit court held that the exigent-circumstances exception did not apply. The prosecution does not argue that this was error. The parties disagree over whether defendant validly consented to the warrantless blood draw.

"It is well established that a search is reasonable when the subject consents and that sometimes consent to a search need not be express but may be fairly inferred from context." *Id*. at ___; 136 S Ct at 2185 (citations omitted). "[V]oluntariness of consent to a search must be 'determined from the totality of all the

circumstances . . . .' " *Id*. at ___; 136 S Ct at 2186, quoting *Schneckloth v Bustamonte*, 412 US 218, 227; 93 S Ct 2041; 36 L Ed 2d 854 (1973).

Important to this Court's review is the fact that defendant does not purport to challenge the validity of the implied-consent laws, and for good reason. In *Birchfield*, the Supreme Court expressly recognized that it has repeatedly "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 579 US at ___; 136 S Ct at 2185. Indeed, all 50 states have enacted similar laws, and "[s]uspension or revocation of the motorist's driver's license remains the standard legal consequence of refusal." *Id*. at ___; 136 S Ct at 2169. In Michigan, our Supreme Court has recognized that "there is a strong public interest reflected" in the implied-consent law and that "society is aware of the need for effective laws to curtail drunken driving." *People v Perlos*, 436 Mich 305, 327; 462 NW2d 310 (1990).

"A consent to search permits a search and seizure without a warrant when the consent is unequivocal, specific, and freely and intelligently given." *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003). "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." *People v Chowdhury*, 285 Mich App 509, 524; 775 NW2d 845 (2009) (quotation marks and citation omitted). The prosecutor cannot satisfy this burden by simply showing the defendant's acquiescence to lawful authority. *Id*. Notably, the defendant's knowledge of the right to refuse "is not a prerequisite to effective consent" but is merely one factor in a totality-of-the-circumstances analysis. *Id*. (quotation marks and citation omitted).

In the seminal case of *Schneckloth*,[3] the United States Supreme Court held that the Fourth Amendment requires "that a consent not be coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth*, 412 US at 228. The Supreme Court noted that this determination, which is commonly referred to as "voluntariness," does not lend easily to a "talismanic definition," *id*. at 224, but rather "reflect[s] an accommodation of the complex of values implicated," *id*. at 224-225, and a need to "reconcil[e] the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion," *id*. at 229. The essential question is whether, under "the most careful scrutiny," *id*., the defendant's free will "has been overborne and [the defendant's] capacity for self-determination critically impaired," *id*. at 225, by official coercion. The Supreme Court recognized that some of the relevant factors in a totality-of-the-circumstances analysis for assessing the psychological impact on the accused include age, educational level, whether the accused is advised of his or her constitutional rights, the nature of the detention, and the use of physical punishment. *Id*. at 226.

In this case, the evidentiary record is sparse on details concerning the financial or psychological impact of the consent decision on defendant and how these factors may have affected his ability to exercise free will. There can be little doubt that by choosing first

[3] Although it related directly to the suppression of coerced confessions and not blood draws, the importance of *Schneckloth* is apparent. In *Birchfield*, the United States Supreme Court cited *Schneckloth* for its proposition that consent to a blood draw demands a voluntariness inquiry. See *Birchfield*, 579 US at ___; 136 S Ct at 2186. Likewise, Michigan appellate courts have regularly relied on *Schneckloth* to determine the validity of consent in chemical-testing cases. See, e.g., *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999).

to drive drunk, defendant left himself in a Catch-22 of choosing the lesser of two evils, at least from his point of view. If defendant consented to the blood draw, it could prove he was driving drunk, which would likely result in a drunk-driving conviction with its attendant loss of driving privileges, fine, and possible jail time. If defendant refused the blood draw, that choice would necessarily result in a license suspension and points.

This Court has previously held that "the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference[.]" *Woodard*, 321 Mich App at 382 (quotation marks and citation omitted; alteration in original). Whether the Fourth Amendment was violated and the exclusionary rule applies is subject to our de novo review. *Id*. at 382.[4] During the short evidentiary hearing, defendant essentially conceded that he understood his rights and the choice presented. While testifying that he felt as if he had no choice, defendant acknowledged that he understood that Officer Britton could obtain a warrant if defendant refused. He also testified that he understood the consequences of a drunk-driving conviction. We conclude that this is the testimony of someone who clearly understood and appreciated the relevant stakes when faced with two unfavorable choices, not no choice at all. Accordingly, defendant's express consent to the blood draw was a valid exception to the Fourth Amendment's warrant requirement.

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[4] We note that the district court failed to recognize that consent is an exception to the Fourth Amendment's warrant requirement and did not make any factual determination as to the voluntariness of defendant's consent. Because we conclude that the limited, established record could not possibly support a factual finding that defendant's consent was involuntary, a remand would be an exercise in futility.

A defendant may always consent to a warrantless search. Defendant admitted during the evidentiary hearing that he fully understood his choices under the implied-consent law and made an informed, reasoned decision. Having to make a choice between two undesirable options does not render defendant's express consent to the blood draw coerced and involuntary.

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

METER, P.J., and SAWYER and CAMERON, JJ., concurred.

PEOPLE v SAVAGE

Docket No. 339417. Submitted February 6, 2019, at Lansing. Decided April 23, 2019, at 9:00 a.m. Leave to appeal denied 505 Mich 865 (2019).

Broderick D. Savage was convicted following a jury trial in the Livingston Circuit Court, Michael P. Hatty, J., of armed robbery, MCL 750.529; unlawfully driving away a motor vehicle, MCL 750.413; felonious assault, MCL 750.82; carjacking, MCL 750.529a; and four counts of possession of a pneumatic gun during the commission of a felony (felony-firearm), MCL 750.227b(2). Defendant's convictions stemmed from an early morning robbery of a hotel in Hartland, Michigan. At the time, the only hotel employee working was a newly hired 19-year-old clerk. The hotel door was locked, but a masked man knocked on the door, seeking entry. Once inside, the masked man demanded money from the hotel's cash drawers, the hotel clerk complied, and the man took the money. The masked man also demanded the hotel clerk's purse, she again complied, and the man took her wallet and car keys. The man had what appeared to be a black semiautomatic handgun, and the hotel clerk feared for her life. After taking the money, wallet, and keys, the man told the hotel clerk to get on the ground, and she did. The man then sprayed her in the face with pepper spray and fled. The hotel clerk watched as her car drove away from the hotel, but she admitted that she could not tell if the same person who robbed the hotel took the vehicle. Police officers were called to the hotel and confirmed that the clerk had been sprayed with regular, over-the-counter oleoresin-capsicum-based pepper spray. Police arrested defendant in Flat Rock, Michigan, while in possession of the hotel clerk's car. Officers observed defendant wearing a mask, and the hotel clerk later identified it as the same mask worn by her assailant. Officers also found a pneumatic handgun painted to appear like an ordinary handgun under the driver's seat. The hotel clerk's wallet and keys were in the car. The police further found a container of pepper spray on defendant, along with $376 in cash. The jury convicted defendant, and the trial court scored Offense Variable (OV) 1 (aggravated use of a weapon) at 20 points and OV 2 (lethal potential of the weapon) at 15 points because the pepper spray used on the hotel clerk qualified as a "harmful

chemical substance." The trial court assigned 10 points for OV 10 (exploitation of a vulnerable victim) and five points for OV 12 (contemporaneous felonious criminal act). The trial court sentenced defendant, as a third-offense habitual offender, MCL 769.11, to prison terms of 20 to 40 years each for the armed-robbery and carjacking convictions, 5 to 10 years for the unlawfully-driving-away conviction, and four to eight years for the felonious-assault conviction, to be served concurrently to each other but consecutive to four concurrent prison terms of two years each for the felony-firearm convictions. Defendant appealed.

The Court of Appeals *held*:

1. Identity is an element of every offense. In challenging the evidence of his identity, defendant focused on inconsistencies between his physical appearance and the description that the hotel clerk initially gave police of the robber's height and skin color. Defendant also argued that the money recovered from him when he was arrested could not be tied to the money taken from the hotel. Defendant's arguments ignored substantial evidence that supported the jury's conclusion that he committed the charged offenses. Police found defendant in possession of the hotel clerk's car while he was wearing the mask used by the armed robber and while he was in possession of both pepper spray and the pneumatic handgun used in the robbery. Multiple other items of evidence tied to the robbery were found in defendant's possession, and cell-phone records placed defendant near the scene of the robbery around the time of the robbery. To the extent that there were conflicts between the hotel clerk's initial description of her assailant and defendant's actual appearance, it was up to the jury to consider those conflicts together with the remaining evidence relevant to the identity of the robber. Viewing the record in the light most favorable to the prosecution, the jury could have concluded beyond a reasonable doubt that defendant was the person who robbed the hotel and committed the other charged offenses.

2. A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. In this case, defendant argued that he was denied a fair trial because the prosecutor engaged in misconduct during closing argument by stating that defendant failed to answer the question about who owned the car despite answering almost all of the officer's other questions. Viewed in context, the prosecutor's comments were not an improper reference to defendant's decision not to testify at trial, nor were they an improper reference to defendant's decision not to answer a police officer's

question. The prosecutor's argument was a commentary on the pattern of defendant's responses to the police officer, which the jury could observe for itself, rather than on any invocation of defendant's Fifth Amendment right to remain silent or decision not to testify at trial. Accordingly, defendant's claim of error failed.

3. MCL 777.31(1)(b) provides, in relevant part, that OV 1 is scored at 20 points when the victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.31(2)(d) instructs the trial court to score OV 1 at 5 points if an offender used a chemical irritant, chemical irritant device, smoke device, or imitation harmful substance or device. MCL 750.200h(i) defines a "harmful chemical substance" as "a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants." MCL 750.200h(a) defines "chemical irritant" as a "solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other substances, can be used to produce an irritant effect in humans, animals, or plants." An "irritant effect" is not defined in statute, but *Stedman's Medical Dictionary* (28th ed) defines "irritant" as "a substance that causes inflammation and other evidence of irritation, particularly of the skin, on first contact or exposure, or as a reaction to cumulative contacts, not dependent on a mechanism of sensitization" and defines "irritation" as "[t]he evocation of a normal or exaggerated reaction in the tissues by the application of a stimulus." *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "injury" as "hurt, damage, or loss sustained." Comparing these definitions, the key distinction between a "harmful chemical substance" and a "chemical irritant" is whether the chemical substance can be used to cause "death, injury, or disease" in a person or, rather, can be used only to produce "an irritant effect" in that person. No binding precedent directly addressed what qualifies as a "chemical irritant" for purposes of scoring OV 1. Pepper spray is a chemical irritant. However, the various categories set out in OV 1 are not mutually exclusive, which is most readily reflected in the Legislature's requirement that the trial court determine which of the various conditions apply and assign the number of points attributable to the one that has the highest number of points under MCL 777.31(1). The effects of pepper spray qualify as an injury in humans for purposes of OV 1 and MCL 750.200h. Blinding of the eyes, paralysis of the larynx, and extreme pain clearly rise above

mere irritant effects and qualify as injuries, potentially even serious and debilitating injuries. However, in nearly all uses of pepper spray, the injuries are temporary, lasting anywhere from 20 minutes to a few hours to a day. There is nothing in the plain language of OV 1 to suggest that the Legislature intended that only a permanent injury qualify for the higher point score. Additionally, the Legislature has recognized in the firearms chapter of the Penal Code that the harm from pepper spray can result in an injury to a person. Accordingly, pepper spray is a harmful chemical substance, and the trial court did not err by scoring OV 1 at 20 points for defendant's use of the spray against the hotel clerk. Similarly, because OV 2 uses the same term ("harmful chemical substance") and relevant definitions as OV 1, the trial court did not err by scoring OV 2 at 15 points.

4. Because the central subject of OV 10 is the assessment of points for the exploitation of vulnerable victims, a trial court should assess points for OV 10 only when it is readily apparent that a victim was "vulnerable," i.e., was susceptible to injury, physical restraint, persuasion, or temptation. When determining whether "predatory conduct" is at issue, "vulnerability" does not have to be an inherent personal characteristic of the ultimate victim; instead, vulnerability may arise from external circumstances. Conduct can be considered predatory even if a defendant is not targeting a specific victim. A defendant places himself in a better position to rob someone by predatorily lying in wait, armed, and hidden from view and, therefore, directs his behavior at "a victim." In this case, the evidence that defendant robbed the hotel early in the morning and approached the hotel clerk at a time when she was working alone is akin to lying in wait, supporting a conclusion that defendant engaged in predatory conduct. The trial court could have scored OV 10 higher, and defendant very likely received a windfall by receiving only 10 points. Because the prosecutor took the position on appeal that the trial court correctly scored the guidelines, any error inured to the benefit of defendant, and because increasing the score by five points would not change the applicable guidelines range, the matter was not remanded for recalculation of this offense variable.

5. MCL 777.42(1)(d) provides that the trial court should assess five points if one contemporaneous felonious criminal act involving a crime against a person was committed. Under MCL 777.42(2)(a), for an act to qualify as a contemporaneous felonious criminal act, it must have occurred within 24 hours of the sentencing offense and has not and will not result in a separate

conviction. In this case, the trial court assessed 5 points for OV 12 because it concluded that defendant's contemporaneous criminal act of spraying the victim with pepper spray qualified as an uncharged criminal act that would not result in a separate conviction. The trial court did not clearly err by finding that the force or threat of force used to commit both the armed robbery and the carjacking was defendant's use of the pneumatic gun. Accordingly, defendant's claim on appeal that OV 12 was improperly scored was rejected.

6. A criminal defendant has a due-process right of access to certain information possessed by the prosecution. However, in this case, defendant provided no basis for concluding that defense counsel did not, in fact, possess evidence of the witness's 911 call and the police officers' dash camera videos. Further, defendant did not assert that these items of evidence would have been exculpatory; he merely asserted that these recordings may or may not have supported the testimony of the hotel clerk and the arresting officer. Accordingly, defendant was not entitled to relief.

Affirmed.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES 1 AND 2 — PEPPER SPRAY IS A "HARMFUL CHEMICAL SUBSTANCE."

MCL 777.31(1)(b) provides, in relevant part, that Offense Variable (OV) 1 (aggravated use of a weapon) is scored at 20 points when the victim was subjected or exposed to a harmful chemical substance; MCL 777.32(1)(a) provides, in relevant part, that OV 2 (lethal potential of a weapon possessed or used) is scored at 15 points when the offender possessed or used a harmful chemical substance; pepper spray is a "harmful chemical substance" for purposes of scoring OVs 1 and 2.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *William J. Vailliencourt, Jr.*, Prosecuting Attorney, and *William M. Worden*, Assistant Prosecuting Attorney, for the people.

Broderick D. Savage, *in propria persona*, and *Julie E. Gilfix* for defendant.

Before: SWARTZLE, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

SWARTZLE, P.J. On the one hand, pepper spray causes extreme burning, blinding of the eyes, and paralysis of the larynx, just to name a few of its intended debilitating effects. Each of these would qualify as an injury to a person, as that term is commonly understood. On the other hand, pepper spray's debilitating effects are almost always temporary, typically passing within 20 minutes to a few hours, with almost all effects wearing off after a day or so. Does the temporary nature of these debilitating effects mean that they are not "injuries," but rather just "irritant effects"? If injuries, then the trial court properly scored defendant's sentencing guidelines for offense variables 1 and 2; if irritant effects, then the trial court erred.

We conclude that our Legislature intended to include temporary injuries as well as permanent ones for purposes of offense variables 1 and 2, and therefore the trial court did not err. Finding no other basis to reverse, we affirm.

I. BACKGROUND

A jury convicted defendant of armed robbery, MCL 750.529; unlawfully driving away a motor vehicle, MCL 750.413; felonious assault, MCL 750.82; carjacking, MCL 750.529a; and four counts of possession of a pneumatic gun during the commission of a felony (felony-firearm), MCL 750.227b(2). Defendant's convictions followed from an early morning robbery of a hotel in Hartland, Michigan. At the time, the only hotel employee working was a newly hired 19-year-old female clerk. The hotel door was locked, but a masked man knocked on the door, seeking entry. Although she saw that the man was masked, the hotel clerk was afraid of what would happen to her if she ignored him, so she let him inside.

Once inside, the masked man demanded money from the hotel's cash drawers, the hotel clerk complied, and the man took the money. The masked man also demanded the hotel clerk's purse, she again complied, and the man took her wallet and car keys. The man had what appeared to be a black semiautomatic handgun, and the hotel clerk feared for her life. After taking the money, wallet, and keys, the man told the hotel clerk to get on the ground, and she did. The man then sprayed her in the face with pepper spray and fled. The hotel clerk watched as her car drove away from the hotel, but she admitted that she could not tell if the same person who robbed the hotel took the vehicle.

The police were called to the hotel. The hotel clerk initially told officers that the robber was "not Black" because she thought that his wrist, visible between the clothing and the gloves that he wore to conceal his identity, looked "tan" in color. She noted that the robber was a few inches taller than she is (her height is 5'3"). With regard to the chemical used on the hotel clerk, police officers confirmed that it was regular, over-the-counter oleoresin-capsicum-based pepper spray. The officer who arrived at the hotel testified that, based on his experience and training, the effects of the pepper spray could last "an hour, depending on if you reactivate it, it [sic] if you sweat, if you open up any glands, but typically, for vision and for respiratory, it's, I'd say, a minimum of 20 minutes." The officer confirmed that the victim did not suffer any life-threatening injuries, but she was in considerable pain. The officer used water to flush the chemical off the victim's face. The victim testified that it took a while for the effects of the pepper spray to subside, she was in pain for about 24 hours, but she suffered no "lasting effects."

Approximately six hours after the hotel robbery, police arrested defendant in Flat Rock, Michigan, while in possession of the hotel clerk's car. Officers observed defendant wearing a mask, and the hotel clerk later identified it as the same mask worn by her assailant. Officers also saw defendant place something under the driver's seat, where they later found a pneumatic handgun painted to appear like an ordinary handgun. The hotel clerk's wallet and keys were in the car, as well as items of clothing and a backpack that matched those worn by the robber as shown in the hotel surveillance video. The police further found a container of pepper spray on defendant, along with $376 in cash. Although the police arrested defendant in Flat Rock, over an hour's drive from the location of the robbery in Hartland, cell-phone records indicated that defendant's cell phone was used near Hartland around the time of the robbery. The police did not conduct forensic testing, such as fingerprint analysis or DNA testing. Defendant did not testify on his own behalf.

After the close of proofs, the prosecutor and defense counsel gave closing arguments. In his initial closing argument, the prosecutor discussed defendant's interactions with Flat Rock Police, including a videorecording of the encounter that was presented at trial. The prosecutor noted that the video showed defendant providing answers to most of the officer's questions, including why defendant was wearing a mask. The prosecutor then pointed out that defendant remained silent when the officer asked defendant, "Whose car is that?" The prosecutor used this interaction to argue that defendant was not honest in his responses to the officer.

During his closing argument, defense counsel argued extensively that, apart from perhaps unlawfully

driving away, defendant was innocent of all charges because another person could have stolen the hotel clerk's car and other belongings and given them to defendant. In rebuttal, the prosecutor argued that this defense theory was not believable, returned to defendant's interaction with the officer, and again played the video for the jury, highlighting defendant's lack of response to the police officer's question about where defendant obtained the car. The prosecutor then asked rhetorically:

> I want you to look at the evidence and instead of assuming what Mr. Savage might have said, or assuming what might have happened, go to what he didn't say, admitted he was asked the one question that could have answered all of this. Where did you get the car from?

After hearing the testimony and other evidence, the lawyers' arguments, and the trial court's instructions, the jury convicted defendant of armed robbery and the other charges noted earlier.

At sentencing, the trial court calculated defendant's advisory-guidelines range for the armed-robbery conviction, a class A offense. MCL 777.16y. With respect to the offense variables (OVs), the trial court scored OV 1 (aggravated use of a weapon) at 20 points and OV 2 (lethal potential of the weapon) at 15 points because the pepper spray used on the hotel clerk qualified as a "harmful chemical substance." The trial court assigned 10 points for OV 10 (exploitation of a vulnerable victim) and five points for OV 12 (contemporaneous felonious criminal act). Together with the other applicable variables, the trial court assigned defendant a total OV score of 100 points, placing defendant in OV Level VI (100+ points) on the applicable sentencing grid. MCL 777.62. The trial court assigned a prior

record variable (PRV) score of 35 points, placing defendant in PRV Level D (25-49 points). *Id*.

These scores put defendant in the D-VI cell, resulting in a sentencing-guidelines range of 171 to 285 months of prison. MCL 777.62. Because defendant was sentenced as a third-offense habitual offender, MCL 769.11, the upper limit of defendant's guidelines range was increased by 50%, MCL 777.21(3)(b), resulting in an enhanced sentencing-guidelines range of 171 to 427 months of prison. The trial court sentenced defendant to prison terms of 20 to 40 years each for the armed-robbery and carjacking convictions, 5 to 10 years for the unlawfully-driving-away conviction, and four to eight years for the felonious-assault conviction, to be served concurrently to each other, but consecutive to four concurrent prison terms of two years each for the felony-firearm convictions.

This appeal followed.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Defendant first challenges the sufficiency of the evidence to support his convictions. We review de novo a challenge to the sufficiency of the evidence. *People v Harverson*, 291 Mich App 171, 175-176; 804 NW2d 757 (2010). We review the evidence in the light most favorable to the prosecution and determine whether the jury could have found each element of the charged crime proved beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). "Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of [a] crime." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). We are also "required to draw all

reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant does not challenge any of the individual elements of the offenses of which he was convicted, but argues only that the evidence was insufficient to prove that he was the person who robbed the hotel and committed the other charged offenses. It is well settled that "identity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). In challenging the evidence of his identity, defendant focuses on inconsistencies between his physical appearance and the description that the hotel clerk initially gave police of the robber's height and skin color. Defendant also argues that the money recovered from him when he was arrested could not be tied to the money taken from the hotel.

Defendant's arguments ignore substantial evidence that supported the jury's conclusion that he committed the charged offenses. Police found defendant in possession of the hotel clerk's car while he was wearing the mask used by the armed robber and while he was in possession of both pepper spray and the pneumatic handgun used in the robbery. Multiple other items of evidence tied to the robbery were found in defendant's possession, and cell-phone records placed defendant near the scene of the robbery around the time of the robbery. To the extent that there were conflicts between the hotel clerk's initial description of her assailant and defendant's actual appearance, it was up to the jury to consider those conflicts together with the remaining evidence relevant to the identity of the robber. We "must defer to the fact-finder's role in determining the weight of the evidence and the credibility of the witnesses" and must resolve conflicts in the evidence in

favor of the prosecution. *Bennett*, 290 Mich App at 472. Viewing the record in the light most favorable to the prosecution, the jury could have concluded beyond a reasonable doubt that defendant was the person who robbed the hotel and committed the other charged offenses.

Additionally, although defendant complains that police conducted no forensic testing of the evidence found in the victim's car or at the hotel, "[a]bsent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process." *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Defendant does not argue that the police intentionally suppressed inculpatory evidence or acted in bad faith. His complaint that police conducted no forensic testing of the evidence was a matter for the jury to consider in its evaluation of the weight and strength of the evidence, but it does not render the evidence presented insufficient to support his convictions.

B. PROSECUTOR'S CONDUCT

Defendant next argues that he was denied a fair trial because the prosecutor engaged in misconduct during closing argument. He argues that the prosecutor's remarks during rebuttal closing about what defendant "might have said" but "didn't say," namely, answering the officer's question, "Where did you get the car from?" amounted to an improper comment on defendant's failure to testify. Because defendant did not object to the prosecutor's remarks at trial, we review this unpreserved claim for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Initially, we note that under this Court's jurisprudence, this is not a claim of "prosecutorial misconduct" (i.e., extreme or illegal conduct), but rather one of "prosecutorial error." See *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015). The test for prosecutorial error is whether the prosecutor committed error that "deprived defendant of a fair and impartial trial." *Id*. at 88. "A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010).

Viewed in context, the prosecutor's comments were not an improper reference to defendant's decision not to testify at trial, nor were they an improper reference to defendant's decision not to answer a police officer's question. See *People v Hackett*, 460 Mich 202, 213-215; 596 NW2d 107 (1999). During his closing statement, defense counsel argued that his client was innocent of all charges because another person could have stolen the victim's car and other belongings and given them to defendant. To rebut this, the prosecutor replayed the officer's video for the jury, highlighting the fact that defendant actually answered almost all of the officer's questions except for the question about who owned the car, and urging the jury to disregard the unsupported hypotheticals defense counsel had posed. Thus, the prosecutor's argument was directly responsive to defense counsel's argument; and it was a commentary on the pattern of defendant's responses to the police officer, which the jury could observe for itself, rather than on any invocation of defendant's Fifth Amendment right to remain silent or decision not to testify at trial. Accordingly, we reject defendant's claim of error.

We also reject defendant's related claim that defense counsel was ineffective for failing to object to the prosecutor's remarks. Because the remarks were not improper, defense counsel was not ineffective for failing to object to those remarks. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

C. SENTENCING

Defendant next argues that he is entitled to resentencing because of errors in the trial court's scoring of the sentencing guidelines. Defendant challenges the trial court's assessment of points for OVs 1, 2, 10, and 12.

1. STANDARDS FOR REVIEWING SENTENCING

At sentencing, trial courts must consult and consider the applicable sentencing-guidelines range, but the range is advisory only. *People v Steanhouse*, 500 Mich 453, 470; 902 NW2d 327 (2017). When reviewing the trial court's scoring of the sentencing guidelines, we consider whether the trial court's factual findings were clearly erroneous, and we review de novo its legal conclusions. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). A trial court may consider all record evidence when calculating the sentencing-guidelines range. *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012).

Our Legislature enacted the guidelines in statute, and therefore when we construe a particular guideline, we apply the familiar rules of statutory construction. We must "give effect to the Legislature's intent," and

we presume that the Legislature intended "the meaning clearly expressed." *D'Agostini Land Co, LLC v Dep't of Treasury*, 322 Mich App 545, 554; 912 NW2d 593 (2018). When a particular term is not defined in statute, we may look "to authoritative dictionaries for further guidance." *In re Redd Guardianship*, 321 Mich App 398, 407; 909 NW2d 289 (2017); see also *Woodard v Custer*, 476 Mich 545, 561; 719 NW2d 842 (2006) (referring to a specialized medical dictionary). "A statutory provision is ambiguous only if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning. Only when ambiguity exists does the Court turn to common canons of construction for aid in construing a statute's meaning." *D'Agostini*, 322 Mich App at 554-555 (cleaned up). Finally, we avoid construing a statute in such a way that part of the statute becomes "surplusage or nugatory." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012).

2. PEPPER SPRAY—A CHEMICAL IRRITANT OR A HARMFUL CHEMICAL SUBSTANCE?

Defendant challenges the trial court's assessment of 20 points for OV 1 based on his use of pepper spray against the hotel clerk. Defendant argues that pepper spray should be categorized as merely a "chemical irritant," rather than the more dangerous "harmful chemical substance," and therefore he should have been assessed only five points for OV 1. He also argues that the trial court erred in assessing any points under OV 2 for similar reasons. Defense counsel challenged this scoring at sentencing, and therefore the claims are preserved for appeal.

OV 1 addresses the "aggravated use of a weapon." MCL 777.31. The statute provides, in relevant part:

> (1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 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:
>
> * * *
>
> (b) The victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device ....20 points
>
> * * *
>
> (2) All of the following apply to scoring offense variable 1:
>
> * * *
>
> (d) Score 5 points if an offender used a chemical irritant, chemical irritant device, smoke device, or imitation harmful substance or device. [MCL 777.31.]

Thus, a trial court should assess 20 points for OV 1 when the victim was subjected or exposed to a "harmful chemical substance" or "harmful chemical device," MCL 777.31(1)(b), but it should assess only five points when the defendant instead used a "chemical irritant" or "chemical irritant device," MCL 777.31(2)(d). For the meaning of these terms, OV 1 incorporates by reference definitions from MCL 750.200h. MCL 777.31(3)(a).

Turning to MCL 750.200h, a "harmful chemical substance" is defined as "a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants." MCL 750.200h(i). For its

part, a "chemical irritant" is defined as a "solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other substances, can be used to produce an irritant effect in humans, animals, or plants." MCL 750.200h(a). A "harmful chemical device" and a "chemical irritant device" are simply devices designed or intended to release the respective chemical substance or irritant. MCL 750.200h(b) and (h). An "irritant effect" is not further defined in statute, so we turn to an authoritative medical dictionary, where "irritant" is defined primarily as "a substance that causes inflammation and other evidence of irritation, particularly of the skin, on first contact or exposure, or as a reaction to cumulative contacts, not dependent on a mechanism of sensitization." *Stedman's Medical Dictionary* (28th ed). "Irritation" is further defined as "[t]he evocation of a normal or exaggerated reaction in the tissues by the application of a stimulus." *Id*. Finally, an "injury" is commonly understood to mean "hurt, damage, or loss sustained." *Merriam-Webster's Collegiate Dictionary* (11th ed).

Comparing these definitions, the key distinction between a "harmful chemical substance" and a "chemical irritant" is whether the chemical substance can be used to cause "death, injury, or disease" in a person or, rather, can be used only to produce "an irritant effect" in that person. There is no binding precedent directly on point. In fact, very few published opinions of this Court have addressed what qualifies as a "harmful chemical substance" for purposes of scoring OV 1 and 2, and none has addressed what qualifies as a "chemical irritant" for purposes of scoring OV 1.

In *People v Blunt*, 282 Mich App 81; 761 NW2d 427 (2009), this Court considered whether heated cooking

oil, used as a weapon to commit an assault, qualified as a "harmful chemical substance" under OV 1. Reasoning that the statutory definition in MCL 750.200h referred to substances that "possess an inherent or intrinsic ability or capacity to cause death, illness, injury, or disease," *id*. at 86, the *Blunt* Court held that, even though cooking oil is a chemical substance, it cannot cause death, injury, or disease through its chemical or physical properties, *id*. at 87, and therefore does not qualify as a "harmful chemical substance," *id*. at 88. The *Blunt* Court held that the trial court erred in assessing 20 points for OV 1 and remanded for resentencing with an assessment of zero points for that OV. *Id*. at 89. Although instructive in understanding the meaning of the term "harmful chemical substance," this Court's decision in *Blunt* does not resolve the question presented here because that decision did not consider the meaning of the term "chemical irritant."

In *People v Ball*, 297 Mich App 121, 124; 823 NW2d 150 (2012), this Court held that heroin qualifies as a "harmful chemical substance" under OV 1 because heroin "is capable of causing death." The *Ball* Court clarified, however, that a "harmful chemical substance" must be used as a weapon to justify the assessment of points under OV 1. *Id*. at 125. Because the heroin in that case was not used as a weapon, the *Ball* Court held that the trial court erred in assessing 20 points for OV 1 and remanded for resentencing with an assessment of zero points for that OV. *Id*. at 126. Similar to the decision in *Blunt*, the decision in *Ball* does not resolve the issue here because there is no question that defendant used the pepper spray as a weapon.

In *People v Norris*, 236 Mich App 411; 600 NW2d 658 (1999), this Court concluded that pepper spray, mixed with military tear gas, qualified as a "dangerous

weapon" within the meaning of the armed-robbery statute. *Norris* is distinguishable from this case, however, for several reasons. First, the substances are different—*Norris* concerned a military-grade mixture of pepper spray and tear gas, whereas here, the substance is ordinary, over-the-counter pepper spray. Second, *Norris* addressed whether the prosecutor in that case presented sufficient evidence of all the elements of armed robbery, MCL 750.529, specifically, whether the chemical mixture qualified as a "dangerous weapon" within the meaning of that statute. The *Norris* Court noted that the nature of an object and the manner in which it is used determine whether it qualifies as a "dangerous weapon," and the Court noted that a "dangerous weapon" has been described as either (1) a weapon designed to be dangerous and capable of causing death or serious injury or (2) any other object capable of causing death or serious injury that the defendant used as a weapon. *Id*. at 414-415. Because the *Norris* Court considered the military mixture in the context of a sufficiency challenge, the Court reviewed the evidence in the light most favorable to the prosecution. *Id*. at 414. As noted earlier, we review the trial court's factual findings for clear error but its legal conclusions de novo.

In the absence of binding precedent, we next consider the nature and effects of pepper spray in light of the statutory language of OV 1. The active ingredient of pepper spray is oleoresin capsicum. The spray might also contain other chemicals, depending on whether it is delivered as a mist spray, aerosol spray, or some other form. Oleoresin capsicum is derived from common pepper plants, although that somewhat understates its potency. As explained by the United States Court of Appeals for the Sixth Circuit in *United States v Mosley*, 635 F3d 859, 862 (CA 6, 2011), a pepper's

"hotness" is measured in "Scoville" units. A jalapeno pepper typically measures about 5,000 Scoville units, a habanero pepper about 200,000 Scoville units, and one of the world's most potent peppers, the "Naga Viper," has reached 1,382,118 Scoville units. *Id*. In comparison, the oleoresin capsicum in ordinary pepper spray is distilled and concentrated to provide a relatively heavy dose that "routinely reaches 2 million Scoville units, and at least one commercially available brand boasts a 5.3 million Scoville unit resin." *Id*.

The effects of pepper spray are well established. It can cause irritation and inflammation when applied to the eyes, nose, throat, and skin. This can result in an extreme burning sensation that causes mucus to come from the nose, involuntary closing and blinding of the eyes, paralysis of the larynx and gagging or gasping for air, and the inability to speak. Inhalation of pepper spray has also been reported to exacerbate the effects of asthma on those who suffer from that condition. See, e.g., *id*.; *When Does Use of Pepper Spray, Mace, or Other Similar Chemical Irritants Constitute Violation of Constitutional Rights*, 65 ALR6th 93 (2011). These are not the side effects, but rather the intended effects of pepper spray. As the *Mosley* court explained, pepper spray "is *designed* to cause intense pain." *Mosley*, 635 F3d at 862 (cleaned up). Moreover, these effects are intrinsic to the application of concentrated oleoresin capsicum, see *id*., distinguishing this case from the heated cooking oil in *Blunt*, 282 Mich App at 86-89.

Pepper spray is, without doubt, a chemical irritant. See *Use of Pepper Spray*, 65 ALR6th 93. Acknowledging this does not, however, end the inquiry. The various categories set out in OV 1 are not mutually exclusive. This is most readily reflected in the Legislature's requirement that the trial court determine which of

the various conditions apply and assign "the number of points attributable to the one that has the *highest* number of points." MCL 777.31(1) (emphasis added). A chemical substance can be, in short, both an irritant and a harmful substance.

We have no hesitation in concluding that the effects of pepper spray, as described by the hotel clerk and officers in this case and recounted in caselaw, qualify as an "injury . . . in humans" for purposes of OV 1 and MCL 750.200h. Blinding of the eyes, paralysis of the larynx, and extreme pain clearly rise above mere irritant effects and qualify as injuries (i.e., "hurt, damage"), potentially even serious and debilitating injuries. Again, this is what pepper spray is designed to do—incapacitate a person with intense pain and involuntary physiological reactions.

With that said, in nearly all uses of pepper spray, the injuries are temporary, lasting anywhere from 20 minutes to a few hours to a day. The question becomes, then, whether the intended temporary nature of these injuries somehow removes pepper spray from the category of harmful chemical substance, thereby making it merely a chemical irritant? In other words, because pepper spray is designed to inflict temporary injury but not permanent injury, does this mean that the Legislature intended to exclude the spray from the category of harmful chemical substance? For several reasons, the answer is *No.*

First and foremost, there is nothing in the plain language of OV 1 to suggest that the Legislature intended that only a permanent injury qualify for the higher point score. Of the three afflictions listed in the definition of harmful chemical substance, only one—death—is inherently permanent. The other two—injury and disease—can be permanent, but also can be

temporary. The very fact that common experience confirms that persons routinely recover from many injuries and diseases in short order (e.g., a sprained ankle, a common cold) suggests that had the Legislature intended to limit harmful chemical substances to only those that cause permanent injury or disease, it would have explicitly said so.

Second, the Legislature has elsewhere recognized that the harm from pepper spray can result in an injury to a person. In the firearms chapter of the Penal Code, the Legislature has provided that pepper spray can lawfully be used as a self-defense device under certain circumstances. MCL 750.224d(5)(b). The Legislature specifically excluded from the definition of a self-defense device those devices that use "any gas or substance that will *temporarily* or permanently disable, incapacitate, *injure*, or harm a person . . . *other than the substance described*" in the statute, i.e., pepper spray. MCL 750.224d(1)(b) (emphasis added). By (i) recognizing that there are numerous devices that emit a gas or substance that can temporarily or permanently injure a person and (ii) prohibiting the use of those, but then (iii) carving out an exception for those devices that emit pepper spray, there is a strong inference that the Legislature recognized that pepper spray can, in fact, injure a person, even if just temporarily.

Third, our conclusion that pepper spray can injure a person is consistent with several decisions outside of this jurisdiction. For example, the federal appellate court in *Mosley* observed that pepper spray can "cause physical injury," "extreme pain," and "prolonged impairment of bodily organs." *Mosley*, 635 F3d at 861-862 (cleaned up). The court noted that misuse of pepper spray can even "constitute excessive force in violation

of the Fourth and Fourteenth Amendments." *Id*. at 862-863 (collecting cases). The court held, "In the final analysis, the use of pepper spray, a device chosen for self-defense precisely because it injures and incapacitates attackers, presents a serious potential risk of physical injury to another when used offensively." *Id*. at 864 (cleaned up); see also *Weaver v State*, 325 Ga App 51, 53; 752 SE2d 128 (2013) (affirming conviction for aggravated assault ("likely to result in serious bodily injury") based on the use of pepper spray); *State v Harris*, 966 So 2d 773; 42-376 (La App 2 Cir 9/26/07) (concluding that pepper spray caused "serious bodily injury" even though the injuries were not permanent).

Defendant counters that it is illogical to believe that the Legislature intended to assign a higher score for an offender who used pepper spray against a victim than one who used a short-barreled shotgun or pistol. See MCL 777.32(1)(c) and (d) (scoring for OV 2). "This is an argument from policy implication, rather than an argument from law." *D'Agostini*, 322 Mich App at 560. We could speculate on why the Legislature might want to punish the use of certain chemical weapons more harshly than traditional ones, but we will not do so. As this Court has observed, "It is not our place to divine *why* the Legislature" made particular policy choices when enacting a statutory scheme; it is our place only to determine what choices the Legislature actually made. *Id*.; see also *Johnson v Recca*, 492 Mich 169, 187, 196-197; 821 NW2d 520 (2012).

Finally, it has also been argued that, for purposes of the aggravated use of a weapon under OV 1, the Legislature created a lesser classification for chemical irritants that are not potent enough to be a harmful chemical substance. If pepper spray does not satisfy this lesser category, then what does? This is a variant

of the canon of statutory construction that courts should not construe a statute in a way that makes a provision nugatory. See *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009).

While not without some rhetorical force, we ultimately reject this argument as well. The language of OV 1 is not ambiguous, and therefore we need not turn to canons of construction for assistance in construing its meaning. *D'Agostini*, 322 Mich App at 558. Even assuming for the sake of argument that the language was ambiguous, there is no logical inconsistency in our reading that would necessarily make the "chemical irritant" category nugatory. There may be instances where a milder chemical substance is used by a defendant as a weapon, but rather than causing debilitating pain and injury, it causes only a minor irritation on the victim's skin. Simply put, a lack of imagination is not a valid canon of construction. Our reading does not foreclose another chemical substance from landing solely in that lesser category and, therefore, we have not read that category out of the statutory scheme.

Pepper spray is a harmful chemical substance, and the trial court did not err in scoring 20 points under OV 1 for defendant's use of the spray against the hotel clerk. Similarly, because OV 2 (lethal potential of the weapon possessed or used) uses the same term ("harmful chemical substance") and relevant definitions as OV 1, the trial court did not err in scoring 15 points under OV 2. MCL 777.32(1)(a).

3. DEFENDANT'S EXPLOITATION OF A VULNERABLE VICTIM

Defendant also challenges the trial court's assessment of 10 points for OV 10. MCL 777.40 provides the following instructions for scoring OV 10:

(1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) 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

(2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.

(3) As used in this section:

(a) "Predatory conduct" means preoffense conduct directed at a victim, or a law enforcement officer posing as a potential victim, for the primary purpose of victimization.

(b) "Exploit" means to manipulate a victim for selfish or unethical purposes.[1]

(c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

(d) "Abuse of authority status" means a victim was exploited out of fear or deference to an authority figure,

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[1] Effective March 28, 2019, the Legislature amended MCL 777.40(3)(b) to add the following sentence: "Exploit also means to violate section 50b of the Michigan penal code, 1931 PA 328, MCL 750.50b, for the purpose of manipulating a victim for selfish or unethical purposes." 2018 PA 652.

including, but not limited to, a parent, physician, or teacher.

Defendant argues on appeal that the trial court should have assessed zero points for OV 10 because he did not exploit one of the vulnerabilities listed in MCL 777.40(1)(b). Conversely, the prosecutor notes that the trial court could have assessed 15 points, rather than 10 points, because defendant engaged in predatory conduct. A review of the trial court record indicates that the trial court seemed to agree that the assessment of 15 points was appropriate, but, nonetheless, the trial court assessed only 10 points for OV 10.

Because the central subject of OV 10 "is the assessment of points for the exploitation of vulnerable victims," a trial court should assess points for OV 10 "only when it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation." *People v Cannon*, 481 Mich 152, 157-158; 749 NW2d 257 (2008). When determining whether "predatory conduct" is at issue, "vulnerability" does not have to be an inherent personal characteristic of the ultimate victim; instead, vulnerability may arise from external circumstances. *People v Huston*, 489 Mich 451, 463; 802 NW2d 261 (2011). For example, by "lying in wait" for a victim, a defendant makes the victim more susceptible to injury or physical restraint and, therefore, more "vulnerable." *Id*. at 466.

Predatory conduct does not encompass all types of preoffense conduct, but "only those forms of 'preoffense conduct' that are commonly understood as being 'predatory' in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or 'preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection.' " *Id*. at 462. Conduct can be

considered predatory even if a defendant is not targeting a specific victim. A defendant places himself in a better position to rob someone by "predatorily lying in wait, armed, and hidden from view" and, therefore, directs his behavior at "a victim." *Id*. at 463.

At sentencing, the trial court appeared to agree that the assessment of 15 points was appropriate, yet left the score at 10 points, stating, "I think it probably should be 15 but I'm leaving it at ten because of the . . . stalking kind of thing, the predatory conduct, but we'll leave it at that." The evidence that defendant robbed the hotel early in the morning and approached the hotel clerk at a time when she was working alone is akin to lying in wait, supporting a conclusion that defendant engaged in predatory conduct. Thus, based on this record, the trial court could have scored OV 10 higher, and defendant very likely received a windfall by receiving only 10 points. Because the prosecutor has taken the position on appeal that the trial court correctly scored the guidelines, any error inured to the benefit of defendant, and because increasing the score by five points would not change the applicable guidelines range, we decline to remand the matter for recalculation of this offense variable. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

4. CONTEMPORANEOUS FELONIOUS ACT

Defendant next challenges the trial court's assessment of five points for OV 12. MCL 777.42(1)(d) provides that the trial court should assess five points if "[o]ne contemporaneous felonious criminal act involving a crime against a person was committed." For an act to qualify as a contemporaneous felonious criminal act, it must have "occurred within 24 hours of the

sentencing offense" and "has not and will not result in a separate conviction." MCL 777.42(2)(a).

At sentencing, the prosecutor argued that the trial court should assess five points because of defendant's assault of the hotel clerk with pepper spray, reasoning that the charged offenses all related to defendant's use of the pneumatic gun. Defendant countered that, although pepper spray qualified as a "dangerous weapon" for purposes of the felonious-assault statute, a broken pneumatic gun did not qualify as a "dangerous weapon." Defendant maintained that "since pointing the broken airsoft gun could not constitute a felonious assault the jury must have . . . convicted . . . because of the pepper spray." In the alternative, defendant argued that, if the jury convicted defendant because he used the pneumatic gun to commit the felonious assault, that felonious act already formed the basis of one of his convictions, precluding the trial court from assessing points for a contemporaneous felonious criminal act. The trial court agreed with the prosecutor, finding that all of defendant's convictions were premised on defendant's use of the pneumatic gun. Therefore, the trial court concluded that defendant's contemporaneous criminal act of spraying the victim with pepper spray qualified as an uncharged criminal act that would not result in a separate conviction. Accordingly, the trial court assessed 5 points for OV 12.

On appeal, defendant argues that the trial court improperly scored OV 12 because the use of pepper spray formed the basis for the carjacking conviction and the offense variable does not apply to uncharged cognate offenses stemming from the same physical acts that formed the basis of a defendant's conviction. In support, defendant cites *People v Light*, 290 Mich App 717, 726; 803 NW2d 720 (2010), in which this Court

held that OV 12 could not be scored for uncharged larceny offenses where the defendant's robbery conviction "completely subsumed the larceny." This case is factually distinguishable from *Light*. Unlike the defendant in *Light*, who committed one act that comprised both the robbery of the victim and the underlying larceny, defendant in this case sprayed the victim in the face with pepper spray after he used the pneumatic gun to place her in fear and after she gave him her car keys.

The trial court did not clearly err in finding that the force or threat of force used to commit both the armed robbery and the carjacking was defendant's use of the pneumatic gun. See *Hardy*, 494 Mich at 438. Indeed, if the jury had not found that defendant used the pneumatic gun to commit the armed robbery, unlawfully driving away, felonious assault, and carjacking offenses, defendant could not have been convicted of four counts of felony-firearm. Accordingly, we reject defendant's claim on appeal that OV 12 was improperly scored.

5. JUDICIAL FACT-FINDING

Although not particularly clear, it appears that defendant also argues that the trial court engaged in impermissible judicial fact-finding at sentencing. This claim is wholly without merit, as the trial court sentenced defendant under the now-advisory sentencing guidelines, and judicial fact-finding is permissible. *People v Biddles*, 316 Mich App 148, 158-161; 896 NW2d 461 (2016).

D. DEFENDANT'S STANDARD 4 BRIEF

Finally, defendant filed a supplemental brief under Supreme Court Administrative Order No. 2004-6, 471 Mich c, cii (2004), Standard 4. Defendant appears to

argue that the case should be remanded for an evidentiary hearing or other relief due to the suppression of favorable evidence. Although defendant cites *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), to support his remand request, he does not raise a concurrent claim of ineffective assistance of counsel.

Defendant appears to argue that defense counsel should have been permitted to review a witness's 911 phone call to the Flat Rock Police Department and videos from the dash cameras of Flat Rock police officers and Michigan State Police troopers. A criminal defendant has a due-process right of access to certain information possessed by the prosecution. *Brady v Maryland*, 373 US 83, 87-88; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Yet, defendant provides no basis for concluding that defense counsel did not, in fact, possess this evidence. Further, defendant does not assert that these items of evidence would have been exculpatory. Defendant merely asserts that these recordings may or may not have supported the testimony of the hotel clerk and the arresting officer. Defendant also fails to discuss how any failure to provide this evidence was prejudicial in light of the other evidence presented at trial. It is not the role of this Court to make arguments and find authority to support defendant's assertions. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Accordingly, defendant is not entitled to relief with respect to his *Brady* arguments.

III. CONCLUSION

Pepper spray is designed to injure a person—temporarily. For purposes of sentencing, our Legislature distinguishes between chemical substances that cause an "injury" versus those that cause merely an "irritant effect." As explained, we conclude that a

temporary injury is still an injury, and therefore the trial court did not err in holding that pepper spray was a harmful chemical substance for purposes of OVs 1 and 2. Defendant's remaining claims of error are without merit.

Affirmed.

MARKEY and RONAYNE KRAUSE, JJ., concurred with SWARTZLE, P.J.

EPLEE v CITY OF LANSING

Docket No. 342404. Submitted February 7, 2019, at Detroit. Decided February 19, 2019. Approved for publication April 23, 2019, at 9:05 a.m.

Angela Eplee filed an action in the Ingham Circuit Court against the city of Lansing and the Lansing Board of Water and Light (the BWL), claiming that the BWL's rescission of the conditional offer of employment it had made to her violated MCL 333.26424(a) of the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq*., and that the rescission constituted a breach of contract. In 2017, the BWL conditionally offered plaintiff a position with its company subject to a drug test. When plaintiff submitted to the drug test, she informed the BWL supervisor who was her contact during the hiring process that she was a registered qualifying patient under the MMMA; plaintiff tested positive for tetrahydrocannabinol (THC) and negative for other controlled substances. Plaintiff e-mailed documentation of her status as a registered qualifying patient to the BWL supervisor. The supervisor informed plaintiff that she would not be hired, and the BWL subsequently sent a formal letter to plaintiff rescinding the offer of employment. When plaintiff's attorney notified the BWL that it could not rescind the offer of employment solely on the basis of her status as a registered qualifying patient, the BWL asserted that the offer had been rescinded because of the needs of the department for which plaintiff had been offered employment, not because of her status as a registered qualifying patient. Defendants moved for summary disposition of both claims. The court, William E. Collette, J., granted defendants' motion, reasoning that defendants were entitled to governmental immunity, that the conditional offer of employment did not constitute a contract of employment because it could be withdrawn at any time, and that it was an offer for a job that had no job security. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 691.1407(1) of the governmental tort liability act (the GTLA), MCL 691.1401 *et seq*., provides that a governmental agency is immune from tort liability if the governmental agency

is engaged in the exercise or discharge of a governmental function. The GTLA applies only when a party seeks tort liability, which encompasses all legal responsibility for civil wrongs except for those actions in which a party seeks compensatory damages for a breach of contract. To determine whether a cause of action imposes tort liability for purposes of the GTLA, courts must consider the nature of the duty that gives rise to the claim; no tort has occurred if the wrong alleged is premised on the breach of a contractual duty. However, if the wrong is based on some other legal wrong—that is, some other breach of a legal duty—then the GTLA may operate to bar the claim. In addition, a plaintiff may not maintain a private cause of action for money damages against a governmental entity premised on the violation of a statute if that statute does not provide for such a cause of action.

2. MCL 333.26424(a) provides that a qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with the MMMA; the word "penalty" applies to both civil and criminal penalties. The MMMA does not create affirmative rights, does not provide registered patients an independent right protecting the medical use of marijuana in all circumstances, and does not create a protected class for users of marijuana for medical purposes. Instead, MCL 333.26424(a) is an immunity provision that supersedes any other law that would penalize an individual for using marijuana in accordance with the act. To qualify for MCL 333.26424(a) immunity, an individual must demonstrate some preexisting entitlement or right or benefit that has been lost or denied before it can be said that the loss or denial of that benefit constitutes a penalty or the denial of a right or privilege under the MMMA. In Michigan, it is presumed that employment relationships are terminable at will by either party, for any reason or no reason at all. The presumption of at-will employment may be rebutted by proof of (1) a contract provision for a definite term of employment or one that forbids discharge absent just cause, (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal, or (3) a contractual provision, implied at law, in which an employer's policies and procedures create a legitimate expectation of job security in the employee. The withdrawal of a conditional offer of employment because of a prospective employee's medical use of marijuana in accordance

with the MMMA is not a "penalty" for purposes of MCL 333.26424(a) when there is no evidence that (1) the offered employment is not at will, (2) a contract exists for a definite term of employment, or (3) a contract exists prohibiting discharge without just cause.

3. It was not clear in this case whether plaintiff's MMMA-violation claim sought only to impose tort liability on defendants; the GTLA did not apply to plaintiff's MMMA-violation claim to the extent plaintiff sought declaratory, injunctive, or equitable relief because such relief did not impose tort liability. The resolution of plaintiff's MMMA-violation claim instead rested on whether the BWL's action of withdrawing its conditional offer of employment constituted a "penalty" in violation of MCL 333.26424(a); in other words, whether the BWL's withdrawal of the offer penalized plaintiff for using marijuana in accordance with the MMMA as a qualified patient with a registry identification card. In that regard, plaintiff failed to rebut the presumption that the offered position was terminable at will by the BWL because (1) the BWL offer of employment was conditional, (2) there was no evidence presented that the offered employment was not at-will, and (3) there was no evidence submitted that she had a contract with the BWL for a definite term of employment or prohibiting discharge without just cause. Given that the BWL would have been able to terminate plaintiff's employment at any time after her employment began for any reason or no reason, it logically followed that the BWL could rescind its conditional offer of employment at any time and for any reason or no reason at all. Defendants' status as public entities did not grant plaintiff a right or property interest in employment with the BWL because plaintiff did not allege that she was offered anything but at-will employment. Plaintiff therefore failed to demonstrate that she had any right or property interest in employment with the BWL and failed to demonstrate that there was any prohibition, statutory or otherwise, on the BWL's ability to withdraw its conditional offer of employment. Thus, plaintiff could not demonstrate that she would have certainly begun employment with the BWL but for her medical use of marijuana, and the BWL's withdrawal of plaintiff's conditional offer of employment did not constitute a "penalty" for purposes of MCL 333.26424(a). In other words, plaintiff could not show that she incurred a penalty or was denied such a right or privilege for purposes of MCL 333.26424(a) because the harm she suffered was the loss of an employment opportunity in which she had no right or property interest. The trial court did not err by granting defendants' motion for summary disposition of plaintiff's MMMA-violation claim.

4. Plaintiff did not allege that the offer of employment included a promise that it would be rescinded only for just cause. Therefore, the BWL could have withdrawn the offer of employment at any time—for any reason or no reason at all—and the trial court did not err by dismissing plaintiff's breach-of-contract claim.

Affirmed.

CONTROLLED SUBSTANCES — MARIJUANA — CONDITIONAL OFFER OF EMPLOYMENT — WITHDRAWAL OF OFFER BECAUSE OF MEDICAL USE OF MARIJUANA.

MCL 333.26424(a) of the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq.*, provides that a qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with the MMMA; to be protected by MCL 333.26424(a), an individual must demonstrate some preexisting entitlement or right or benefit that has been lost or denied before it can be said that the loss or denial of that benefit constitutes a penalty or the denial of a right or privilege under the MMMA; the withdrawal of a conditional offer of employment because of a prospective employee's medical use of marijuana in accordance with MMMA is not a "penalty" for purposes of MCL 333.26424(a) when there is no evidence that (1) the offered employment is not at will, (2) a contract exists for a definite term of employment, or (3) a contract exists prohibiting discharge without just cause.

Grand Rapids Cannabis Attorneys (by *Brandon Gardner*) for Angela Eplee.

Miller, Canfield, Paddock and Stone, PLC (by *Scott R. Eldridge* and *Kamil Robakiewicz*) for the city of Lansing and the Lansing Board of Water and Light.

F. Joseph Abood for the city of Lansing.

Marie Mireles for the Lansing Board of Water and Light.

Before: CAVANAGH, P.J., and BORRELLO and REDFORD, JJ.

PER CURIAM. This case involves allegations that defendants violated § 4[1] of the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq*., by rescinding a conditional offer of employment extended to plaintiff. Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and (8). For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

This action arises out of a conditional offer of employment that defendant Lansing Board of Water and Light (the BWL) extended to plaintiff and the BWL's subsequent decision to rescind that offer after plaintiff tested positive for tetrahydrocannabinol (THC) during a drug screen that was part of the hiring process. Plaintiff's claims against the BWL and defendant city of Lansing revolve around the following statutory language contained in § 4(a) of the MMMA, MCL 333.26424(a):

> A qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act . . . .

According to plaintiff's complaint, she was a qualifying patient under the MMMA with a valid registry identification card when she was interviewed on April 28, 2017, by the BWL for a full-time position. On May 1, 2017, the BWL made plaintiff a conditional offer of employment, which included as a condition

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[1] MCL 333.26424.

that plaintiff comply with the BWL's drug-testing policies. On May 2, 2017, plaintiff submitted to a drug screen in accordance with these policies. She also immediately informed David Douglas, a BWL supervisor and her contact person during the hiring process, that she was a registered qualifying patient under the MMMA. Plaintiff was informed on May 7, 2017, that the results of her drug screen were positive for THC and negative for any other controlled substances. According to the complaint, Douglas received plaintiff's drug-screen results on May 8, 2017, and "began discussion with the 'BWL team' on potentially adjusting their drug testing policy to hire [plaintiff]." On May 10, 2017, plaintiff e-mailed documentation of her status as a registered qualifying patient to Douglas. Two days later, Douglas informed plaintiff that she would not be hired by the BWL. Finally, on May 19, 2017, the BWL sent plaintiff a letter "rescinding her offer of employment without explanation."

Subsequently, after plaintiff's counsel sent Douglas a letter stating that plaintiff's employment offer could not be rescinded solely on the basis of her status as a registered qualifying patient, counsel for the BWL sent a letter to plaintiff's counsel, indicating that plaintiff's employment offer was withdrawn because of "the needs of the department" and denying that plaintiff's offer was rescinded on the basis of her status as a registered qualifying patient. Nonetheless, plaintiff alleged in her complaint that "[d]efendants rescinded [plaintiff's] offer because she tested positive for THC in violation of the [MMMA]."

On November 13, 2017, plaintiff filed a two-count complaint against defendants for violation of the MMMA and breach of contract.

In her complaint, plaintiff asserted that at all relevant times she was a registered qualifying patient in full compliance with the MMMA and that defendants constituted a "business or occupational or professional licensing board or bureau" that was prohibited from denying plaintiff any right or privilege, including civil penalty or disciplinary action, on the basis of her medical use of marijuana.[2] Plaintiff further alleged that defendants had "no legitimate business reason" to rescind her conditional offer of employment and that the conditional offer was rescinded solely because of her status as a registered qualifying patient, thereby, according to plaintiff, in violation of § 4(a) of the MMMA.

Regarding plaintiff's breach-of-contract claim, plaintiff alleged that she accepted defendants' conditional offer of employment and that defendants agreed to employ her in exchange for her "satisfaction of the conditional offer of employment." Plaintiff further alleged that she satisfied all conditions of the offer and that defendants breached the contract by illegally rescinding the conditional offer, referring, we suspect, to defendants' alleged violation of the MMMA in rescinding her conditional offer of employment.

In lieu of an answer, defendants moved for summary disposition under MCR 2.116(C)(7) and (8), arguing that plaintiff had failed to state a claim on which relief could be granted. Defendants first argued that summary disposition should be granted in their favor on plaintiff's MMMA claim for three reasons: (1) the claim was barred by governmental immunity because both defendants are political subdivisions of the state that

[2] We will use the more common spelling, "marijuana," throughout this opinion, despite the spelling used in the MMMA. See *Braska v Challenge Mfg Co*, 307 Mich App 340, 343 n 1; 861 NW2d 289 (2014).

are immune from tort liability and none of the exceptions to immunity applied, (2) the MMMA does not create a private cause of action authorizing suit for alleged violations of the act, and (3) the MMMA does not prohibit employers from maintaining zero-tolerance drug policies for their applicants and employees. Additionally, defendants argued that they were entitled to summary disposition of plaintiff's breach-of-contract claim because such a claim cannot be premised on the loss of at-will employment. Defendants also maintained that in the alternative, plaintiff's complaint demonstrated that defendants never breached the conditional offer because plaintiff had failed to satisfy the conditions of the offer: the offer was conditioned on the acceptable results of plaintiff's drug screen, and her positive test for THC constituted a drug-screen result that was not acceptable. Finally, defendants contended that the city was not a proper party to the lawsuit because it was not the prospective employer or the entity that had decided to withdraw the conditional offer of employment.

Plaintiff filed a response to the motion. First, plaintiff argued that her claim was not barred by governmental immunity because defendants were performing a proprietary function rather than a governmental function. Among other arguments, plaintiff maintained that defendants provided utilities to residents for the purpose of pecuniary profit. However, plaintiff contended that there was "simply not enough information at this time in the case" for the court to rule whether the BWL was engaged in a governmental or proprietary function because it was unclear without discovery whether the BWL was actually supported by taxes and fees.

Plaintiff also argued that governmental immunity did not apply because violating the MMMA is not a

governmental function. Plaintiff further argued that even if the MMMA did not prevent private employers from disciplining employees for marijuana use, this rule did not apply to defendants as *public*-entity employers. Plaintiff argued that defendants were "business bureaus" under § 4(a) and that defendants penalized plaintiff by denying her the privilege of employment, which had been granted through the conditional offer. According to plaintiff, the MMMA was intended to prohibit any penalty associated with the medical use or cultivation of marijuana in the context of public employment.[3] Plaintiff additionally argued that if the governmental tort liability act (the GTLA), MCL 691.1401 *et seq*., prohibited suit against defendants, then it was in conflict with and superseded by the MMMA because the MMMA does not allow zero-tolerance marijuana policies in public-employment settings.

Plaintiff finally made two additional cursory and conclusory arguments. First, plaintiff argued that she sufficiently pleaded her breach-of-contract claim because she had satisfied all conditions of the offer and defendants had "illegally" rescinded it. Next, plaintiff argued that the city was a proper party because members of the BWL are officers of the city under the Lansing City Charter.

A hearing was held on the motion. After hearing oral arguments consistent with the parties' respective written filings, the trial court granted summary disposition in favor of defendants. The trial court reasoned that both defendants were "immune from any type of law-

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[3] Here, it appears plaintiff is arguing that defendants are the types of entities prohibited by § 4(a) from denying any right or privilege to qualifying patients and that governmental immunity therefore did not protect defendants from suit.

suit like this," that the conditional offer of employment did not constitute a contract of employment because it could be withdrawn at any time, and that it was an offer for a "job that has no job security whatsoever."

This appeal followed.

II. STANDARDS OF REVIEW

A trial court's decision granting summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether governmental immunity applies is a question of law that this Court reviews de novo on appeal. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). Issues of statutory interpretation are also reviewed de novo. *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013).

"Under MCR 2.116(C)(7), summary disposition is appropriate when a claim is barred by governmental immunity." *Id*. at 376-377. A motion under MCR 2.116(C)(7) may be supported by documentary evidence, but filing supportive material is not required. *Maiden*, 461 Mich at 119. "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id*. "A party filing suit against a governmental agency bears the burden of pleading his or her claim in avoidance of governmental immunity." *In re Bradley Estate*, 494 Mich at 377.

A motion made pursuant to MCR 2.116(C)(8) "tests the legal sufficiency of the complaint," and a court only considers the pleadings. *Maiden*, 461 Mich at 119-120. "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. at 119. Summary disposition is proper under MCR 2.116(C)(8) "where the claims alleged are

so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (quotation marks and citation omitted).

III. ANALYSIS

At the center of this dispute is plaintiff's argument that the BWL was prohibited by § 4(a) of the MMMA from rescinding plaintiff's conditional offer of employment, after plaintiff tested positive for THC, because of her medical use of marijuana. This argument formed the underlying basis for both plaintiff's MMMA-violation claim and her breach-of-contract claim. The trial court, in granting defendants' motion for summary disposition, concluded that the action was barred by governmental immunity and that there was no enforceable contractual right to employment since the offer could be "withdrawn at any time."

We begin our analysis by considering the application of governmental immunity. In doing so, we must necessarily consider the precise nature of plaintiff's underlying argument in order to determine whether governmental immunity applies and whether plaintiff has even stated a cognizable claim in the first instance.

Section 7 of the GTLA provides that "[e]xcept as otherwise provided in this act, a governmental agency is immune from *tort liability* if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1) (emphasis added). The immunity granted by the GTLA applies "unless the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government." *Mack v Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002). Because governmental immunity is a "characteristic of government," a plaintiff must plead

in avoidance of governmental immunity when suing a unit of government. *Id*. at 212.

However, if a lawsuit against a governmental agency does not seek to impose "tort liability," then the GTLA does not apply. Our Supreme Court has held "that 'tort liability' as used in MCL 691.1407(1) of the GTLA encompasses all legal responsibility for civil wrongs, other than a breach of contract, for which a remedy may be obtained in the form of compensatory damages." *In re Bradley Estate*, 494 Mich at 371. Accordingly, "the GTLA does not bar a properly pleaded contract claim." *Id*. at 387. This is so because "[i]f the wrong alleged is premised on the breach of a contractual duty, then no tort has occurred, and the GTLA is inapplicable." *Id*. at 389.[4] Furthermore, the mere fact that the same underlying facts could also establish a tort cause of action does not bar recovery for a plaintiff who successfully pleads and establishes a nontort claim. *Id*. at 386. In addition, even if the wrong is premised on the breach of a legal duty other than a contractual one, the action still might not be seeking to impose tort liability if the remedy sought is declaratory or injunctive relief, rather than compensatory damages; in such a situation, governmental immunity would not be applicable. *Id*. at 389 & n 54. As pertinent here, our Supreme Court has explained as follows:

> [S]everal principles . . . will guide courts charged with the task of determining whether a cause of action imposes tort liability for purposes of the GTLA. Courts considering whether a claim involves tort liability should first focus on the nature of the duty that gives rise to the claim. If the wrong alleged is premised on the breach of a contractual duty, then no tort has occurred, and the GTLA is inappli-

[4] Notably, a plaintiff's damages in that situation would obviously be limited to contract damages. *In re Bradley Estate*, 494 Mich at 389 n 53.

> cable. However, if the wrong is not premised on a breach of a contractual duty, but rather is premised on some other civil wrong, i.e., some other breach of a legal duty, then the GTLA might apply to bar the claim. In that instance, the court must further consider the nature of the liability the claim seeks to impose. If the action permits an award of damages to a private party as compensation for an injury caused by the noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable. [*Id*. at 388-389.]

Furthermore, a plaintiff may not maintain a private cause of action for money damages against a governmental entity premised on the violation of a statute if that statute does not provide for such a cause of action because the GTLA provides immunity from tort liability "unless the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government." *Lash v Traverse City*, 479 Mich 180, 194-195, 197; 735 NW2d 628 (2007) (quotation marks and citation omitted). "Without express legislative authorization, a cause of action cannot be created in contravention of the broad scope of governmental immunity . . . ." *Id*. at 194 (quotation marks and citation omitted).

In this case, turning first to plaintiff's MMMA-violation claim, it is not clear as an initial matter that this claim sought only to impose "tort liability" on defendants. This claim was premised on plaintiff's allegation that defendants breached their statutory duty under the MMMA to refrain from subjecting her to any penalty or the denial of a right or privilege on the basis of her medical use of marijuana. "[W]hen a party breaches a duty stemming from a legal obligation, other than a contractual one, the claim sounds in tort." *In re Bradley Estate*, 494 Mich at 384. An allegation that a governmental agency violated a statutory duty may

constitute an attempt to impose tort liability for purposes of the GTLA. *Id*. at 391, 393-394. However, tort liability for purposes of the GTLA encompasses claims of noncontractual civil wrongs seeking compensatory damages, not those seeking declaratory or injunctive relief. *Id*. at 389 & n 54.

Although plaintiff's allegation in the instant case that defendants violated the MMMA constitutes an allegation of a noncontractual civil wrong, plaintiff's complaint is less than precise in describing the nature of the relief sought. Plaintiff's complaint requests damages, as well as declaratory, injunctive, and equitable relief without explanation or elaboration. Thus, to the extent that plaintiff sought declaratory, injunctive, or equitable relief, the GTLA is inapplicable to her claim that defendants violated the MMMA because plaintiff did not seek to impose "tort liability" for purposes of the GTLA. *Id*. at 389 n 54; see also *Lash*, 479 Mich at 195-196 (noting that a statute could be enforced against a governmental agency through an action seeking injunctive or declaratory relief, even if the Legislature did not provide for a private cause of action for monetary damages against a governmental agency for alleged violations of the statute).

Nevertheless, the dispositive issue in this case with respect to plaintiff's MMMA-violation claim is whether § 4(a) of the MMMA even provides plaintiff with a cause of action under the circumstances of this case. This analysis involves issues of statutory interpretation. When construing a statute, this Court considers the plain language of the statute and enforces clear and unambiguous language as written. *In re Bradley Estate*, 494 Mich at 377. If the language of a statute is clear and unambiguous, then the statute must be enforced as written and judicial construction

is not required or permitted. *Braska v Challenge Mfg Co*, 307 Mich App 340, 352; 861 NW2d 289 (2014). "Regarding voter-initiated statutes such as the MMMA, the intent of the electors governs the interpretation of the statute," and "[t]he statute's plain language is the most reliable evidence of the electors' intent." *Id*.

As previously noted, at the core of the dispute in this case is plaintiff's contention that because she tested positive for THC as a result of her medical use of marijuana, the BWL was absolutely prohibited from rescinding her conditional offer of employment. In making this argument, plaintiff argues that she has an independent, free-floating right to be free of violations of § 4(a) of the MMMA and that her status as a registered qualifying patient under the MMMA protects her from any adverse employment consequences once the employer becomes aware of her medical use of marijuana.[5]

Again, § 4(a) provides, in pertinent part, as follows:

> A qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act . . . .

[5] Plaintiff appears to presume that because the adverse employment action occurred after the BWL became aware of her medical use of marijuana, her medical use of marijuana *must* have been the cause of the BWL's action. Assuming without deciding that plaintiff is correct, this particular issue is irrelevant to the analysis: as will be explained later in this opinion, resolution of this appeal turns on whether plaintiff had any legal right or interest in a position with the BWL in the first instance because § 4(a) of the MMMA does not prevent her from losing that which she never was entitled to have in the first place.

This is an *immunity* provision; it does not create affirmative rights. "Section 4(a) of the MMMA grants a 'qualifying patient who has been issued and possesses a registry identification card' *immunity from* arrest, prosecution, or penalty 'for the medical use of marihuana in accordance with this act . . . .' " *Michigan v McQueen*, 493 Mich 135, 153; 828 NW2d 644 (2013) (emphasis added), quoting MCL 333.26424(a). However, "the MMMA does not provide carte blanche to registered patients in their use of marijuana." *People v Koon*, 494 Mich 1, 6; 832 NW2d 724 (2013); see also *id*. at 5-9 (explaining that the MMMA operates to "shield[] registered patients from prosecution" when the prosecution is based on a patient's medical use of marijuana, so long as that patient was in compliance with the MMMA). This Court has noted that the MMMA's immunity is conditioned on the use of marijuana being in accordance with the provisions of the MMMA and that "to the extent another law would penalize an individual for using medical marijuana in accordance with the MMMA, that law is superseded by the MMMA." *Braska*, 307 Mich App at 355.

Plaintiff asserts that our decision in *Braska* supports her arguments. In *Braska*, this Court addressed the issue "whether an employee who possesses a registration identification card under the [MMMA] is disqualified from receiving unemployment benefits under the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*., after the employee has been fired for failing to pass a drug test as a result of marijuana use." *Id*. at 343. The *Braska* Court held that although the claimants who tested positive for marijuana would have ordinarily been disqualified from receiving unemployment benefits under MESA because of their positive drug tests, the denial of unemployment benefits "constituted an improper penalty for the medical use of

marijuana under the MMMA" when there was no evidence that the positive drug tests were the result of anything but the medical use of marijuana in compliance with the MMMA. *Id*. at 356-357, 365.

In reaching this holding the *Braska* Court explained that resolution of the issue required a three-step analysis: "we must first determine (1) whether claimants met the threshold requirements for unemployment compensation under MESA, (2) whether claimants were nevertheless disqualified from receiving benefits under one of MESA's disqualification provisions, and (3), to the extent claimants were disqualified for testing positive for marijuana, whether the MMMA nevertheless provides immunity and supersedes MESA in this respect." *Id*. at 356. With respect to the first two steps, the Court determined that there was no dispute that the claimants had met the threshold requirements for unemployment benefits and that they ordinarily would have been disqualified under § 29(1)(m) of MESA, MCL 421.29(1)(m), from receiving benefits because of their drug test results. *Id*. 356-357.

Next, the *Braska* Court addressed the immunity provision in § 4(a) of the MMMA, stating that "none of the parties contends that claimants used medical marijuana in a manner that did not comply with the terms of the MMMA. Therefore, we must determine whether denial of unemployment benefits constitutes either imposition of a penalty or denial of a right or privilege." *Id*. at 358. This Court concluded that for purposes of the MMMA, the denial of unemployment benefits constituted a "penalty" based on the medical use of marijuana, explaining that

> [t]he MMMA does not define the term "penalty." In [*Ter Beek v Wyoming*, 495 Mich 1, 20; 846 NW2d 531 (2014)], in the context of the MMMA, our Supreme Court referred to

a dictionary to define the term to mean "a 'punishment imposed or incurred for a violation of law or rule . . . something forfeited.' " *Id*., quoting *Random House Webster's College Dictionary* (2000). Further, because the term "penalty" in MCL 333.26424(a) is modified by the phrase "in any manner," the immunity granted by the MMMA from penalties "is to be given the broadest application" and applies to both civil and criminal penalties. *Ter Beek v Wyoming*, 297 Mich App 446, 455; 823 NW2d 864 (2012), aff'd 495 Mich 1 (2014).

Applying this definition to the present case, we conclude that denial of unemployment benefits under § 29(1)(m) [of MESA] constitutes a "penalty" under the MMMA that was imposed upon claimants for their medical use of marijuana. As discussed earlier, none of the parties disputes that claimants met the threshold requirements for unemployment benefits under MCL 421.28. The only reason claimants were disqualified by the [Michigan Compensation Appellate Commission (MCAC)] from receiving benefits was because they tested positive for marijuana. In other words, absent their medical use of marijuana—and there was no evidence that claimants, all of whom possessed a medical marijuana card, failed to abide by the MMMA's provisions in their use—claimants would not have been disqualified under § 29(1)(m). Thus, because claimants used medical marijuana, they were required to forfeit their unemployment benefits. For this reason, the decision by the MCAC to deny claimants unemployment benefits amounted to a penalty imposed for the medical use of marijuana contrary to MCL 333.26424(a). Accordingly, because the MMMA supersedes MESA in this respect, the MCAC erred by denying claimants unemployment benefits. See MCL 333.26427(e) ("All other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana as provided for by this act.").

The Department argues that disqualification under § 29(1)(m) is not a "penalty." According to the Department, something cannot be forfeited unless one was entitled to it, and claimants were not entitled to unemployment

> benefits because MESA conditions the payment of benefits upon an individual's eligibility and qualification. We reject the Department's argument that, because claimants were disqualified under § 29(1)(m), they were not penalized. This argument *ignores the salient fact that claimants met the threshold requirements for unemployment benefits and were disqualified only because of their use of medical marijuana*. [*Braska*, 307 Mich App at 358-359 (emphasis added; fourth alteration in original).]

The *Braska* Court further emphasized that "[b]ut for claimants' use of medical marijuana, the MCAC would not have disqualified them for unemployment benefits," and the "disqualification clearly amounted to a penalty imposed on claimants for their medical use of marijuana that ran afoul of the MMMA's immunity clause." *Id*. at 360.

In this case, plaintiff argues on appeal that the withdrawal of the conditional offer of employment constituted a "penalty" under § 4(a) of the MMMA.[6]

Following the three-step analysis used in *Braska*, it is evident that an individual must show some preexisting entitlement or right or benefit that has been lost or denied—i.e., unemployment benefits under MESA in that case—before it can be said that the loss or

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[6] Plaintiff also implies that rescinding the offer could be considered the denial of a right or privilege for purposes of § 4(a) of the MMMA. However, plaintiff does not provide any cogent argument or legal authority to demonstrate how the BWL's conditional offer constituted a "right or privilege" to employment. Plaintiff merely asserts that she held such a right or privilege. Therefore, the issue whether a conditional offer of employment could ever constitute a "right" or "privilege" for purposes of the MMMA is abandoned. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) ("It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.") (quotation marks and citation omitted).

denial of that benefit constitutes a penalty or the denial of a right or privilege under the MMMA. In other words, in *Braska*, it was not the MMMA that provided the claimants' right to unemployment benefits; the claimants were entitled to unemployment benefits pursuant to the terms of MESA, and the MMMA operated to prevent those benefits from being denied when the denial was based on the medical use of marijuana in compliance with the MMMA. Under those circumstances, such a denial constituted an improper penalty.

In the instant case, however, plaintiff cannot point to any legal right that she had to be employed by the BWL. "Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 163; 579 NW2d 906 (1998) (opinion by WEAVER, J.); accord *id*. at 186 (MALLETT, C.J., concurring in part and dissenting in part). Such at-will employment relationships may be terminated "for any reason or no reason at all." *Rood v Gen Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993). However, the presumption of at-will employment may be sufficiently rebutted to impose limitations on an employer's right to terminate employment if proof is submitted of "either a contract provision for a definite term of employment, or one that forbids discharge absent just cause." *Lytle*, 458 Mich at 164 (opinion by WEAVER, J.); accord *id*. at 186 (MALLETT, C.J., concurring in part and dissenting in part). Three methods for proving such contractual terms have been recognized by courts: "(1) proof of a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause; (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a

contractual provision, implied at law, where an employer's policies and procedures instill a legitimate expectation of job security in the employee." *Id*. at 164 (opinion by WEAVER, J.) (quotation marks and citations omitted); accord *id*. at 186 (MALLETT, C.J., concurring in part and dissenting in part).

In this case, plaintiff alleged that the BWL gave her a "conditional offer of employment." Plaintiff never alleged that the offered employment was not at will, and she did not allege any facts even suggesting that the employment was not at will. Plaintiff has not alleged that she had a contract with the BWL providing for a definite term of employment or prohibiting discharge without just cause. Accordingly, plaintiff has not rebutted the presumption that the position offered to her by the BWL was terminable at the will of the BWL. *Id*. at 163-164 (opinion by WEAVER, J.). If the BWL would have been able to terminate plaintiff's employment at any time after her employment began for any or no reason, it logically follows that the BWL could rescind its conditional offer of employment at any time and for any or no reason at all. *Id*.; *Rood*, 444 Mich at 116.

Further, plaintiff's assertions regarding defendants' status as public entities do not and cannot serve as a legal basis on which this Court could find that plaintiff had any "right" or "property interest" in employment with the BWL. "A property right emanates from a contract or statute; public employment in and of itself is not a property interest automatically entitling an employee to procedural due process." *Bracco v Mich Technological Univ*, 231 Mich App 578, 587; 588 NW2d 467 (1998) (quotation marks and citation omitted; emphasis omitted). Additionally, although a contract or statute may provide a property right, "a public em-

ployee does not have a property right in continued employment when the position is held at the will of the employee's superiors and the employee has not been promised termination only for just cause." *Id*. (quotation marks and citation omitted). In this case, as previously noted, plaintiff has not alleged that she was offered anything but at-will employment, nor has she alleged that "just cause" was necessary before the BWL could rescind its offer of employment or terminate her employment had she actually started working for the BWL.

Accordingly, plaintiff has failed to demonstrate that she had any right or property interest of any manner in employment with the BWL. Plaintiff has also failed to demonstrate that there was any prohibition—statutory or otherwise—on the BWL's ability to withdraw—for any or no reason at all—its conditional offer of employment.

In this case, unlike the claimants in *Braska*, in which the entitlement to unemployment benefits was governed by a statutory scheme, plaintiff has not demonstrated that she had any legal right or interest in holding employment with the BWL. Furthermore, unlike the situation in *Braska* wherein the claimants could demonstrate that they would have been entitled to unemployment benefits but for their medical use of marijuana, *Braska*, 307 Mich App at 358-360, plaintiff in this case cannot show that she would have certainly begun employment with the BWL *but for* her medical marijuana use because the BWL at all times retained the ability to terminate her employment, including the offer of employment, for *any reason or no reason*, regardless of plaintiff's medical use of marijuana. Plaintiff therefore cannot demonstrate that the with-

drawal of the employment offer constituted a "penalty" for purposes of § 4(a) of the MMMA.

When viewed in its entirety, plaintiff's MMMA-violation claim is an attempt to use § 4(a) of the MMMA as a sword to obtain a protected right to employment rather than as the shield of protection that is the true function of § 4(a). But § 4(a) of the MMMA does not provide such a right. Notably, there is no language in this statute related to "employment." Moreover, as previously discussed, the statute does not create affirmative rights but instead provides *immunity from* penalties and the denial of rights or privileges based on the medical use of marijuana. In this case, plaintiff cannot show that she incurred such a penalty or was denied such a right or privilege because the harm she suffered was the loss of an employment opportunity in which she held absolutely no right or property interest.

In sum, the plain language of § 4(a) of the MMMA is clear that the statute does not provide for a cause of action when, as in this case, a plaintiff cannot demonstrate that he or she was "subject to arrest, prosecution, or *penalty in any manner, or denied any right or privilege* . . . for the medical use of marihuana in accordance with [the MMMA] . . . ." (Emphasis added.) The statute does not provide an independent *right* protecting the medical use of marijuana in all circumstances, nor does it create a protected class for users of medical marijuana. Plaintiff in this case has failed to allege facts showing that she suffered the type of harm contemplated under § 4(a), i.e., as applicable here, a "penalty." This statute therefore does not provide plaintiff a cause of action under these circumstances, and plaintiff has thus failed to state a claim on which relief could be granted. The trial court did not err by granting sum-

mary disposition in defendants' favor on plaintiff's MMMA-violation claim.[7]

We next turn to plaintiff's breach-of-contract claim. Although a properly pleaded breach-of-contract claim is not barred by governmental immunity, *In re Bradley Estate*, 494 Mich at 371, plaintiff has nonetheless failed to adequately plead a claim for breach of contract sufficient to withstand summary disposition under MCR 2.116(C)(8).

"[A]n employer's express agreement to terminate only for cause, or statements of company policy and procedure to that effect, can give rise to rights enforceable in contract . . . ." *Lytle*, 458 Mich at 167 (opinion by WEAVER, J.) (quotation marks and citation omitted); accord *id*. at 186 (MALLETT, C.J., concurring in part and dissenting in part). However, a plaintiff cannot maintain an action for breach of contract based on the termination of the plaintiff's employment if the plaintiff's allegations are insufficient to show that there was a promise limiting the employer's right to terminate the plaintiff's employment. *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 636; 473 NW2d 268 (1991) (opinion by RILEY, J.). As previously stated, employment relationships are generally presumed to be terminable at will and for any reason or no reason, and the presumption of at-will employment may be rebutted by submitting proof of a contract provision indicating either that employment is for a definite term or that discharge is forbidden without just cause. *Lytle*, 458 Mich at 163-164 (opinion by WEAVER, J.); *id*. at 186 (MALLETT, C.J., concurring in part and dissenting in part); *Rood*, 444

[7] Although this reasoning differs from the trial court's reasoning, we may affirm a trial court's summary-disposition ruling that reaches the correct result even if our reasoning differs. *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 449; 886 NW2d 445 (2015).

Mich at 116-117. Furthermore, "[c]ontractual liability is consensual," and a "basic requirement of contract formation is that the parties mutually assent to be bound." *Rood*, 444 Mich at 118.

Review of plaintiff's complaint reveals that she has failed to allege any facts to support a conclusion that the conditional offer of employment was not for at-will employment. Plaintiff failed to allege that the conditional offer made by the BWL included a promise that employment would be for a definite term or that employment could be terminated only for just cause. More specifically, plaintiff has not alleged that the offer included a promise that it would only be rescinded for just cause. Accordingly, the BWL could withdraw the offer of employment at any time, for any reason or no reason at all. *Id*. at 116.

Additionally, and as previously discussed, as applied to plaintiff's complaint, it is clear that § 4(a) of the MMMA does not create an affirmative right protecting the perceived employment rights of plaintiff. Plaintiff therefore cannot rely on § 4(a) of the MMMA to gain an enforceable contractual right to employment where no such right previously existed. Because plaintiff has not made allegations sufficient to show that there was a promise on the part of the BWL limiting its right to withdraw the offer or otherwise terminate plaintiff's employment, plaintiff has failed to state a claim for breach of contract on which relief could be granted. *Rowe*, 437 Mich at 636 (opinion by RILEY, J.). Consequently, the trial court did not err by granting summary disposition on this claim pursuant to MCR 2.116(C)(8).

Affirmed. No costs are awarded to either party. MCR 7.219(A).

CAVANAGH, P.J., and BORRELLO and REDFORD, JJ., concurred.

TOMASIK v STATE OF MICHIGAN

Docket No. 343453. Submitted April 2, 2019, at Lansing. Decided April 25, 2019, at 9:00 a.m. Leave to appeal denied 505 Mich 956 (2020).

Dennis L. Tomasik brought an action against the state of Michigan in the Court of Claims under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*., after his convictions for criminal sexual conduct were reversed by the Supreme Court in *People v Tomasik*, 498 Mich 953 (2015), and a new trial resulted in an acquittal. The state moved for summary disposition under MCR 2.116(C)(7). The Court of Claims, MICHAEL J. TALBOT, J., granted summary disposition to the state under MCR 2.116(C)(10), ruling that plaintiff had not satisfied the conditions for relief under MCL 691.1755 because his motion for a new trial had been granted on grounds other than new evidence. Plaintiff appealed.

The Court of Appeals *held*:

1. To establish that plaintiff qualified for compensation under the WICA, MCL 691.1755(1)(c) required him to prove the following by clear and convincing evidence: "New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial." The unambiguous grammatical structure of this provision requires an exonerated individual to prove each of the following: (1) new evidence shows that the individual did not commit the crime or participate as an accomplice or accessory, (2) new evidence results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and (3) new evidence results in dismissal of the charges or a finding of not guilty after retrial. The fact that similar language in the immediately preceding section, MCL 691.1754(1)(c), which sets forth the requirements for pleading under the WICA, uses the conjunction "or" rather than "and" does not give rise to any ambiguity in MCL 691.1755(1)(c), which sets forth the requirements for obtaining relief.

2. Plaintiff did not establish that the reversal of his convictions was based on new evidence. Because a court speaks through its written orders and judgments, it was not proper to consider the parties' arguments and the questions raised at oral argument when deciding this issue. The Supreme Court directed that the parties brief three issues, including whether the trial court erred in denying plaintiff's motion for a new trial based on two specific items of newly disclosed impeachment evidence. However, the Supreme Court did not direct plaintiff to brief any and all new evidence that plaintiff might choose to identify. On appeal in this case, plaintiff sought to include in his argument the testimony of 22 witnesses and several new exhibits that were shown to the jury for the first time on retrial. This other new evidence, however, was not the basis of plaintiff's motion for a new trial in the circuit court, nor was it the basis of plaintiff's multiple appeals and applications for leave to appeal in the Supreme Court. Even assuming that this other new evidence had been the basis of plaintiff's various appeals and applications, it was not the basis for the reversal of his convictions. In its order granting plaintiff's motion for a new trial, the Supreme Court plainly stated that a new trial was warranted because the trial court had abused its discretion by admitting a recording of the plaintiff's interrogation, and it expressly declined to address the other issues presented in the order granting leave to appeal. Accordingly, plaintiff did not prove that new evidence resulted in the reversal of his convictions. Contrary to plaintiff's argument, the Supreme Court did not necessarily base its order on new evidence, because the other error that the Court identified, which involved an officer impermissibly expressing an opinion of guilt and vouching for the complainant's credibility, can also rise to the level of an error that requires reversal, although the reversal is not automatic. Therefore, plaintiff's argument that the Supreme Court must have necessarily relied on the new evidence discussed by plaintiff's counsel at oral argument when it granted plaintiff a new trial was without merit.

3. Remanding the case for discovery was not warranted. Although the WICA does provide that a plaintiff may conduct discovery in a WICA action, as MCR 2.302(C) and related caselaw make clear, no party has an absolute right to conduct whatever discovery the party wants, especially when the record as it stands confirms that no amount of discovery could create a genuine issue of material fact. The Supreme Court's order plainly held that the Court would not address whether the trial court erred in denying plaintiff a second trial based on newly discovered evidence. No amount of discovery could alter this written holding. In any event, plaintiff's suggestion that discovery could be had from judicial officers and their staff on matters of judicial decision-making fails

under longstanding precedent which holds that a judge may not be compelled to testify concerning the mental processes used in formulating official judgments or the reasons that motivated that judge in the performance of his or her official duties.

Affirmed.

STATUTES — WRONGFUL IMPRISONMENT COMPENSATION ACT — REQUIREMENTS.

To establish an entitlement to compensation under the Wrongful Imprisonment Compensation Act, MCL 691.1751 *et seq*., a plaintiff must prove by clear and convincing evidence that new evidence shows that he or she did not commit the crime or participate as an accomplice or accessory, that new evidence resulted in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and that new evidence resulted in dismissal of the charges or a finding of not guilty after retrial; the existence of slightly differing language in the immediately preceding section, MCL 691.1754(1)(c), which sets forth the requirements for pleading under the WICA, does not give rise to any ambiguity in MCL 691.1755(1)(c), which sets forth the requirements for obtaining relief.

Chartier & Nyamfukudza, PLC (by *Mary Chartier* and *Takura Nyamfukudza*) and *Tieber Law Office* (by *F. Martin Tieber* and *Kristoffer W. Tieber*) for plaintiff.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Kathryn M. Dalzell*, Assistant Solicitor General, for defendant.

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

SWARTZLE, P.J. A jury convicted plaintiff Dennis Lee Tomasik of sexual assault, but following reversal by our Supreme Court, plaintiff received a new trial and was acquitted. Plaintiff sued the state of Michigan under the Wrongful Imprisonment Compensation Act, but the Court of Claims determined that he was not eligible for compensation because the Supreme Court's reversal was not based on new evidence. He challenges this holding, and thus we are faced with the question of

whether plaintiff has satisfied all of the conditions for relief under the act?

This seemingly straightforward question implicates principles of separation of powers, law of the case, expression of judicial holdings, and judicial immunity. As explained, we conclude that the Legislature and Supreme Court both meant what they plainly said, and this is fatal to plaintiff's claim for relief.

I. BACKGROUND

Plaintiff sued the state of Michigan for compensation under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*. The underlying criminal case has a lengthy appellate history, including three decisions of this Court and three decisions of our Supreme Court. Because resolution of this appeal hinges in part on whether new evidence resulted in the Supreme Court's reversal of plaintiff's criminal conviction, we will discuss the criminal case in detail. For clarification, although plaintiff was a "defendant" in the underlying criminal case, we refer to him as "plaintiff" even when discussing the criminal case.

A. FIRST CRIMINAL TRIAL AND APPEAL

In 2007, plaintiff first stood trial for allegedly committing repeated acts of sexual assault against a minor, T.J. At trial, T.J. claimed that plaintiff sexually assaulted him approximately eight years earlier, when T.J. was six years old. The jury convicted plaintiff of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and the trial court sentenced him to serve concurrent terms of 12 to 50 years in prison.

During pretrial, plaintiff had sought disclosure or *in-camera* review of "any and all" of T.J.'s counseling

records. Plaintiff asserted that T.J. had been in counseling since the age of five and had seen approximately eight counselors over the years. Plaintiff also asserted that when T.J. was 11, the latter had acted out sexually against a cousin. The trial court granted the motion in part, but limited the discovery to a one-year period related to the alleged sexual activity with the cousin. *People v Tomasik*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2010 (Docket No. 279161), pp 11-12.

After his convictions, plaintiff appealed to this Court and, as part of his appeal, moved for a remand to the trial court for a hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). The Court granted his motion and ordered the trial court to conduct an evidentiary hearing "to determine whether trial counsel rendered ineffective assistance of counsel when he failed to produce expert evidence to rebut the prosecutor's experts and failed to call [plaintiff] as a witness on his own behalf." *People v Tomasik*, unpublished order of the Court of Appeals, entered November 6, 2008 (Docket No. 279161).

While awaiting the *Ginther* hearing, plaintiff moved the trial court for a new trial and for disclosure of "any and all" of T.J.'s counseling records. The trial court denied the motion for a new trial, but it agreed to conduct an *in-camera* review of some of the counseling records. The trial court limited its review to those counseling records related to T.J.'s purported sexual activity with the cousin. After its review, the trial court denied disclosure of the records, and it further declined to review any other counseling records. The trial court held a *Ginther* hearing and concluded that trial counsel did not render ineffective assistance of counsel.

The case then returned to this Court for decision. Plaintiff made several claims on appeal, including: (1) the trial court erroneously admitted a recording of a police detective's statements that expressed an opinion of plaintiff's guilt and vouched for the victim's credibility; and (2) the trial court erroneously refused to conduct an *in-camera* review of all of T.J.'s counseling records. *Tomasik*, unpub op at 2-15. On the question of counseling records, the Court reviewed the trial court's decision under the standard articulated in *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). The Court affirmed the trial court's decision with respect to the counseling records, reasoning: "Given that [plaintiff] wanted the trial court to review all of T.J.'s counseling records and to disclose any evidence which could possibly suggest a false allegation by T.J., the trial court's decision that [plaintiff] was on a 'fishing expedition' fell within the range of reasonable and principled outcomes." *Id*. at 15. The Court rejected the other arguments and affirmed plaintiff's convictions. *Id*.

On application for leave to appeal, our Supreme Court vacated the judgment of this Court and remanded the case to the trial court for further proceedings under *Stanaway*. The order of remand specifically stated that "the trial court shall disclose to the [plaintiff] the March 26, 2003, report authored by Timothy Zwart of Pine Rest Christian Mental Health Services and the March 1, 2003, form authored by Denise Joseph-Enders. After disclosing these documents to the [plaintiff], the trial court shall permit the [plaintiff] to argue that a new trial should be granted." *People v Tomasik*, 488 Mich 1053, 1053-1054 (2011).

B. REMAND AND SUBSEQUENT APPEALS

On remand, the trial court disclosed to plaintiff the documents identified in the Supreme Court's 2011 order. Plaintiff then filed a motion for new trial, the trial court denied the motion, and plaintiff appealed. This Court described the new evidence that formed the basis of the motion for new trial, as well as the trial court's rationale for denying it:

> In this case, the records that were not disclosed to [plaintiff] during trial are a March 26, 2003 report authored by Zwart, and a March 1, 2003 form authored by Joseph-Enders. The report authored by Zwart indicated that T.J. lied consistently and relished doing so, was quick to blame adults when he got into trouble, and had difficulty with impulse control. It also indicated that T.J. appeared to believe some of his untruthful statements. The form completed by Joseph-Enders indicated that T.J. was deceitful and had had difficulties telling the truth for some time. It is not disputed that the documents not initially disclosed to [plaintiff] were favorable to his case. In this case, the trial court denied [plaintiff's] motion for a new trial because it determined that even if the documents were to have been disclosed to [plaintiff] during trial, the documents were not material because no reasonable probability existed that the result would have been different if the documents were disclosed to [plaintiff] during trial. We agree.
>
> * * *
>
> The evidence presented at trial demonstrated that T.J. was a troubled child who engaged in theft and deceit and had difficulty distinguishing fantasy from reality. [Plaintiff's] assertion that the information in the documents was different in kind than the evidence presented at trial is without merit. At trial, defense counsel pointed to evidence that showed that T.J. could not distinguish fantasy from reality, including reminding the jury that T.J. admit-

> ted during his testimony that he thought Batman was real, that T.J. lied, and that T.J. previously denied that he was sexually abused and disclosed the abuse only after he was charged with theft. [*People v Tomasik (After Remand)*, unpublished per curiam opinion of the Court of Appeals, issued November 29, 2011 (Docket No. 279161), pp 4-5, vacated in part, lv den in part 495 Mich 887 (2013).]

This Court concluded that the new evidence was "cumulative to the evidence presented during the trial" and that the documents "were not material because there is not a reasonable probability of a different result if the documents would have been disclosed to [plaintiff] during trial." *Id*. at 5. On the remaining claims, the Court adopted the reasoning of its original opinion in *Tomasik* and affirmed plaintiff's convictions and sentence. *Id*. at 5-6.

Plaintiff again sought leave to appeal in our Supreme Court. Rather than granting leave, the Supreme Court vacated in part the judgment of this Court. In doing so, it further ordered:

> We remand this case to the Court of Appeals for reconsideration, in light of *People v Musser*, 494 Mich 337 (2013), *People v Kowalski*, 492 Mich 106 (2012), and *People v Grissom*, 492 Mich 296 (2012), of the following issues: (1) whether the Kent Circuit Court erred by admitting the entire recording of the [plaintiff's] interrogation; (2) whether the circuit court erred in admitting Thomas Cottrell's expert testimony regarding Child Sexually Abusive Accommodation Syndrome under current MRE 702, and, if so, whether the error was harmless; (3) whether the circuit court erred in denying the [plaintiff's] motion for a new trial based on the newly disclosed impeachment evidence of the March 26, 2003 report authored by Timothy Zwart and the March 1, 2003 form completed by Denise Joseph-Enders; and (4) whether the [plaintiff's] trial counsel was ineffective by failing to object to the admission of the [plaintiff's] entire interrogation, by failing to object to Thomas Cottrell's testimony, and by failing to procure the expert testimony of

> Jeffrey Kieliszewski to challenge the testimony of Thomas Cottrell. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. [*People v Tomasik*, 495 Mich 887, 888 (2013).]

On second remand, this Court again affirmed plaintiff's convictions and sentences. *People v Tomasik (On Second Remand)*, unpublished per curiam opinion of the Court of Appeals, issued April 22, 2014 (Docket No. 279161), rev'd in part 498 Mich 953 (2015). In that decision, the panel considered whether the trial court abused its discretion by denying plaintiff's motion for a new trial "based on newly discovered impeachment evidence." *Id*. at 12. The Court concluded that the trial court had not abused its discretion:

> On remand, [plaintiff] argues that the disclosed reports, which established that T.J. lied on a consistent basis, seemed to believe his lies, and blamed others for his behavior, particularly adults, would have had a significant impact on the jury's deliberations, and likely would have resulted in a different verdict.
>
> We again conclude that the newly discovered evidence did not support a new trial. *Grissom* establishes that a new trial may be granted on the basis of impeachment evidence. However, in this case, "a material, exculpatory connection [does not] exist between the newly discovered evidence and significantly important evidence presented at trial." See *Grissom*, 492 Mich at 300. This case came down to a credibility contest between [plaintiff] and T.J. The reports at issue present additional evidence that T.J. was a habitual liar, but the jury received ample evidence to that effect and still chose to find T.J.'s allegations against [plaintiff] credible. We hold that the newly discovered evidence did not entitle [plaintiff] to a new trial. [*Id*. at 13-14.]

As the panel noted, the first trial amounted to a "credibility contest" between plaintiff and T.J. *Id*. at 14.

Plaintiff had several witnesses testify on his behalf and, while he did not testify on his own behalf, the jury heard the unredacted interview plaintiff had with police, during which plaintiff made repeated, forceful denials of any wrongdoing involving T.J.

After being denied relief, plaintiff filed a third application for leave to appeal in the Supreme Court. In that application, plaintiff raised several issues: (1) the trial court erroneously admitted the entire recording of plaintiff's interrogation into evidence; (2) the trial court erroneously admitted expert testimony regarding child-sexual-abuse accommodation syndrome into evidence; and (3) the trial court erroneously denied plaintiff's motion for new trial based on newly discovered evidence. The new evidence that plaintiff described in its application for leave to appeal was T.J.'s "treatment and educational records," i.e., the Zwart report and the Joseph-Enders form and questionnaire.

The Supreme Court granted the application for leave to appeal and directed that the parties brief the following issues:

> On order of the Court, the application for leave to appeal the April 22, 2014 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall include among the issues to be briefed: (1) whether the Kent Circuit Court erred by admitting the entire recording of the [plaintiff's] interrogation in light of *People v Musser*, 494 Mich 337 (2013), and, if so, whether admission of the evidence amounted to plain error; (2) whether the trial court erred in admitting Thomas Cottrell's expert testimony regarding child sexual abuse accommodation syndrome under current MRE 702, and *People v Kowalski*, 492 Mich 106 (2012), and, if so, whether admission of the testimony amounted to plain error; and (3) whether the trial court erred in denying the [plaintiff's] motion for a new trial based on the newly disclosed impeachment evidence of the March 26, 2003 report authored by Timo-

> thy Zwart and the March 1, 2003 form completed by Denise Joseph-Enders in light of *People v Grissom*, 492 Mich 296 (2012). [*People v Tomasik*, 497 Mich 977, 977-978 (2015) (italics added).]

Consistent with the order granting leave to appeal, the new evidence that plaintiff described in his brief was the "two critical counseling records," i.e., the Zwart report and the Joseph-Enders form and questionnaire.

Our Supreme Court held oral argument on the application and subsequently issued an order reversing this Court's judgment in part and remanding the case back to the trial court for a new trial. *People v Tomasik*, 498 Mich 953 (2015). Because the grounds on which the Supreme Court granted plaintiff a new trial are critical to resolution of plaintiff's appeal in this case, we include the decision here in full:

> On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we reverse in part the April 22, 2014 judgment of the Court of Appeals and we remand this case to the Kent Circuit Court for a new trial. The trial court abused its discretion by admitting the recording of the [plaintiff's] interrogation. See *People v Musser*, 494 Mich 337 (2013). Because nothing of any relevance was said during the interrogation, it was simply not relevant evidence, and thus was not admissible evidence. See MRE 401. The admission of this evidence amounted to plain error that affected the [plaintiff's] substantial rights and seriously affected the fairness, integrity or public reputation of judicial proceedings. See *People v Carines*, 460 Mich 750, 763 (1999). In a trial in which the evidence essentially presents a 'one-on-one' credibility contest between the complainant and the [plaintiff], the prosecutor cannot improperly introduce statements from the investigating detective that vouch for the veracity of the complainant and indicate that the detective believes the [plaintiff] to be guilty. On retrial, if the parties seek to admit expert testimony, the trial court

> shall conduct a *Daubert* hearing to ensure that the proposed testimony is both relevant and reliable as is required under MRE 702. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993). In light of this disposition, we decline to address the other issues presented in our order granting leave to appeal. [*Id*.]

Plaintiff was retried in the Kent Circuit Court, before the same judge who presided over his first criminal trial. Plaintiff recalls that the jury in the retrial "heard from 22 witnesses who had never been spoken to or called in the first trial" and saw several new exhibits that had not been presented earlier. The jury unanimously acquitted plaintiff of all charges. Plaintiff was released from prison on March 3, 2016, after 8 years, 11 months, and 3 days of imprisonment.

C. THE COURT OF CLAIMS

After his acquittal, plaintiff sued the state in the Court of Claims, seeking compensation under the WICA. In lieu of filing an answer, the state filed a motion for summary disposition under MCR 2.116(C)(7) (claim barred by immunity granted by law). The Court of Claims granted summary disposition to the state under MCR 2.116(C)(10) (no genuine issue of material fact). The Court of Claims held that plaintiff did not satisfy the conditions for relief under Section 5 of the WICA, MCL 691.1755, because our Supreme Court granted plaintiff a new trial on grounds other than new evidence.

Plaintiff appealed.

II. ANALYSIS

On appeal, plaintiff argues that the Court of Claims erred in dismissing his action in three separate ways. First, the Court of Claims misread the WICA to require

that a plaintiff prove by clear and convincing evidence that, among other things, the conviction was reversed or vacated based on "new evidence," as that term is defined in the act. As plaintiff reads the act, it is enough to show that new evidence ultimately resulted in a finding of not guilty, and the earlier reversal or vacation of the prior conviction can be on a basis other than new evidence. Second, even if the Court of Claims read the act correctly, plaintiff argues that his convictions were, in fact, reversed based on new evidence, and it is a misreading of the Supreme Court's order to conclude otherwise. Third and finally, plaintiff asserts that if there is question about what the Supreme Court's order meant, then he should be allowed to take discovery on the matter, including deposing justices and judicial staff.

Each of these arguments is without merit.

A. STANDARDS OF REVIEW AND STATUTORY CONSTRUCTION

This Court reviews de novo the Court of Claims' decision on summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is appropriate under MCR 2.116(C)(10) when, except as to damages, "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

This Court also reviews de novo questions of statutory construction. *People v Morey*, 461 Mich 325, 329; 603 NW2d 250 (1999). Based on several considerations, including the principle of separation of powers, the Court must give effect to the Legislature's intent. *Van Buren Co Ed Ass'n v Decatur Pub Sch*, 309 Mich App 630, 643; 872 NW2d 710 (2015). "The Legislature is presumed to intend the meaning clearly expressed,

and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms." *D'Agostini Land Co, LLC v Dep't of Treasury*, 322 Mich App 545, 554; 912 NW2d 593 (2018) (citation omitted). "A statutory provision is ambiguous only if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning." *People v Fawaz*, 299 Mich App 55, 63; 829 NW2d 259 (2012) (quotation marks and citation omitted). "Only when ambiguity exists does the Court turn to common canons of construction for aid in construing a statute's meaning." *D'Agostini Land*, 322 Mich App at 554-555.

B. REQUIREMENTS FOR COMPENSATION UNDER THE WICA

The Legislature enacted the WICA with the stated intention of "provid[ing] compensation and other relief for individuals wrongfully imprisoned for crimes." 2016 PA 343, title. While plaintiff certainly fits within the set of "individuals wrongfully imprisoned for crimes," the Legislature created a narrower subset of wrongfully imprisoned individuals who actually qualify for compensation. In other words, not all exonerated individuals are eligible for compensation under the WICA.

To qualify for compensation, Section 5 of the WICA requires that an individual show the following by clear and convincing evidence:

> (a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.
>
> (b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty. However, the plaintiff is not entitled to compensation under

> this act if the plaintiff was convicted of another criminal-offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial.
>
> (c) New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial. [MCL 691.1755(1).]

These are relatively stringent conditions for relief. If, for example, an individual's conviction is overturned on appeal, and the individual is subsequently acquitted on the basis of something other than new evidence—for example, a coerced confession in the first trial is precluded in the second—then that individual has no recourse under a fair reading of the WICA. Similarly, if an individual is acquitted of a serious charge but remains convicted of a relatively minor charge "arising from the same transaction," then that individual also has no recourse under the act, even if he could make a plausible argument that he was somehow *mostly* wrongfully imprisoned. These and other examples illustrate that not all exonerated individuals are entitled to compensation under the act.

In this case, whether plaintiff fits within the subset of exonerated individuals who are eligible for compensation depends on the meaning of Subdivision (c) above. Broken out, the subdivision requires that plaintiff prove that "[n]ew evidence":

- "demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction,"

- "results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and"
- "results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial."

Grammatically, there is no ambiguity in this statutory language. The noun phrase "new evidence" precedes a series of parallel clauses, each clause beginning with a parallel verb ("demonstrates," "results," and "results"), joined together by the coordinating conjunction "and." The noun phrase is the subject of each of the parallel verbs in Subdivision (c), and the language is structured as a syndeton in which all of the conjuncts (i.e., the three parallel clauses) must be satisfied for the test to be met. Thus, as a matter of straightforward grammar, Subdivision (c) requires an exonerated individual to prove each of the following: (i) new evidence shows that the individual did not commit the crime or participate as an accomplice or accessory; (ii) new evidence results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon; *and* (iii) new evidence results in dismissal of the charges or a finding of not guilty after retrial.

Plaintiff does not dispute that the subdivision says this. Instead, plaintiff takes a different tack and argues that, when compared to similar language in the immediately preceding section, an ambiguity arises. Specifically, Section 4 sets out the pleading requirements to initiate an action for WICA compensation. A plaintiff must file a verified complaint, and attached to that complaint, the plaintiff must include, among other things, documentation of the following:

> New evidence demonstrates that the plaintiff was not the perpetrator of the crime or crimes and was not an

> accessory or accomplice to the acts that were the basis of the conviction and resulted in a reversal or vacation of the judgment of conviction, dismissal of the charges, finding of not guilty, or gubernatorial pardon. [MCL 691.1754(1)(c).]

While similar to its counterpart in Section 5, this Subdivision (c) in Section 4, Subsection (1) is different in several material respects. Relevant here, the subdivision requires that a plaintiff attach documentation showing that "[n]ew evidence . . . resulted in a reversal or vacation of the judgment of conviction, dismissal of the charges, finding of not guilty, or gubernatorial pardon." This time, the parallel phrases are separated by the coordinating conjunction "or," the conjunction that creates alternatives, meaning that the satisfaction of any one of the conditions will be sufficient to meet the test. Thus, again as a matter of straightforward grammar, a plaintiff must attach to the verified complaint proof that new evidence resulted in at least one of the following: (i) reversal or vacation of the judgment; (ii) dismissal of the charges; (iii) finding of not guilty; *or* (iv) a gubernatorial pardon. Plaintiff does not dispute this reading either.

Where plaintiff takes issue is in reconciling the two provisions. Specifically, plaintiff argues that the two subdivisions cannot be reconciled, this creates an irreconcilable ambiguity, and because the WICA is intended to compensate those exonerated at trial, any ambiguity should inure to the benefit of exonerated individuals, not the state. In plaintiff's eyes, to obtain relief under the WICA, the individual must show only that "the new evidence must have resulted in a reversal or vacation of the judgment of conviction, *or* dismissal of the charges *or* a finding of not guilty *or* gubernatorial pardon."

We need not reach the equities of what should inure to whom, as there is no ambiguity in the statute in the first instance. As set forth above, each provision makes grammatical sense when considered in isolation, and plaintiff does not dispute this. Moreover, when read as a whole, *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1 (2009), each provision continues to make grammatical sense, as each provision is part of a section with a separate and distinct purpose. Section 4 sets forth requirements for pleading, while Section 5 sets forth requirements for relief.

On the one hand, it is commonplace to set a relatively low bar for the initial pleading stage, MCR 2.111(B), when notice pleading and key documents are typically sufficient to survive summary disposition under MCR 2.116(C)(8). A plaintiff will not typically have all of the evidence readily at-hand when filing a complaint, hence the opportunity for depositions, interrogatories, requests for admission, and other fact discovery in the mine-run of cases. See MCR 2.301 through MCR 2.316. On the other hand, to obtain relief, notice pleading and a key document are usually not enough. Rather, a plaintiff must present sufficient, reliable evidence on each of the elements of a claim, as well as evidence countering any affirmative defenses. Given this, it was reasonable for the Legislature to have intended to require more at the relief stage than at the pleading stage.

Plaintiff disagrees and asserted at oral argument that because the grounds for the original reversal or vacation and subsequent exoneration must be known to the individual at the time of filing a WICA action, it does not make sense to have requirements for pleading different than those for relief. This argument is belied by plaintiff's request for discovery in this case, see

infra Part II.D, as well as the observation that ours is a traditional notice-pleading jurisdiction. At base, plaintiff's argument is one grounded in public policy, and such argument is best made before the Legislature rather than the Judiciary. *Johnson v Recca*, 492 Mich 169, 187, 196-197; 821 NW2d 520 (2012); *D'Agostini Land*, 322 Mich App at 560. Frankly, it is unremarkable that the Legislature would use different language to express different meanings in different sections intended for different purposes.

C. NEW EVIDENCE

Plaintiff argues in the alternative that even if the WICA requires that the reversal be based on new evidence rather than some other reversible error, he has met this requirement. We turn, therefore, to the Supreme Court's written order of reversal.

Before considering the order, plaintiff asks that we review the oral argument and glean the Supreme Court's rationale for reversing his convictions from the questions asked of the parties as well as the arguments the parties made. The record of a case can certainly provide much-needed context to a dispute, as the "BACKGROUND" section of this opinion illustrates. With that said, it is a well-settled proposition that "a court speaks through its written orders and judgments, not through its oral pronouncements." *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). Plaintiff cites no appellate authority for the proposition that a court speaks through the questions that it asks of the parties during oral argument, let alone through the argument made by the parties during oral argument. We decline plaintiff's invitation to extend the law in this manner.

When our Supreme Court granted plaintiff's application for leave to appeal, it directed the parties to brief three issues. The third issue was "whether the trial court erred in denying the [plaintiff's] motion for a new trial based on the newly disclosed impeachment evidence of the March 26, 2003 report authored by Timothy Zwart and the March 1, 2003 form completed by Denise Joseph-Enders in light of *People v Grissom*, 492 Mich 296 (2012)." *Tomasik*, 497 Mich at 978. Thus, the question whether plaintiff was entitled to a new trial on grounds of "new evidence" was fairly before the Supreme Court.

Yet, the Supreme Court did not direct plaintiff to brief any and all "new evidence" that plaintiff might choose to identify. The Supreme Court restricted plaintiff to addressing whether the two specific items of newly disclosed evidence required the grant of a new trial. On appeal in this case, plaintiff attempts to argue a vastly larger universe of "new evidence" that was never referenced by our Supreme Court in its order granting leave to appeal. Plaintiff attempts to include in his argument the testimony of 22 witnesses and several new exhibits that were shown to the jury for the first time on retrial. This other new evidence, however, was not the basis of plaintiff's motion for a new trial in the circuit court, nor was it the basis of plaintiff's multiple appeals and applications for leave to appeal in the Supreme Court.

Even assuming that this other new evidence had been the basis of plaintiff's various appeals and applications, it was not the basis of the reversal of his convictions, and this is the critical phase for purposes of his WICA claim. In its order granting plaintiff's motion for a new trial, the Supreme Court plainly stated that a new trial was warranted because the

"trial court abused its discretion by admitting the recording of the [plaintiff's] interrogation." *Tomasik*, 498 Mich at 953. The Supreme Court further specified, "[W]e decline to address the other issues presented in our order granting leave to appeal." *Id*. Plaintiff simply cannot prove—let alone prove by clear and convincing evidence—that new evidence resulted in the reversal of his convictions.

Plaintiff asks us to read between the lines of the Supreme Court's order. According to this reading, even if the Supreme Court did not expressly state in its order that new evidence entitled plaintiff to a second trial, the Supreme Court must have based its order on that ground because a "*Musser* error" does not automatically entitle a party to a new trial. True, a *Musser* error—when an officer impermissibly expresses an opinion of guilt and vouches for the complainant's credibility—is not a structural constitutional error and, therefore, reversal is not automatic. *Musser*, 494 Mich at 348, 363. But such error can rise (and has risen) to the level of plain error affecting a criminal defendant's substantial rights—i.e., reversible error. See *id*. at 365-366. Moreover, as an intermediate appellate court reviewing an earlier higher court ruling, we are bound by principles of law of the case and judicial hierarchy to follow the plain meaning of the Supreme Court's order. See, e.g., *People v Eliason*, 300 Mich App 293, 312; 833 NW2d 357 (2013); *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001); *Rodriguez v Grand Trunk W R Co*, 120 Mich App 599, 603 n 3; 328 NW2d 89 (1982). Plaintiff's argument, that our Supreme Court must have necessarily relied on the new evidence discussed by plaintiff's counsel at oral argument when it granted plaintiff a new trial, is without merit.

D. REMAND FOR DISCOVERY

Finally, plaintiff requests that this Court vacate the opinion and order issued by the Court of Claims and remand the case for discovery. Plaintiff maintains that discovery could confirm that the Supreme Court did, in fact, reverse plaintiff's convictions based on new evidence, notwithstanding what the Supreme Court expressed in its written order.

The WICA does provide that the "plaintiff, the attorney general, and the prosecuting attorney for the county in which the plaintiff was convicted may conduct discovery in an action under this act." MCL 691.1754(5). Standing against this is the proposition that no party has an absolute right to conduct whatever discovery the party wants, especially when the record as it stands confirms that no amount of discovery could create a genuine issue of material fact. See, e.g., MCR 2.302(C); *Caron v Cranbrook Ed Community*, 298 Mich App 629, 645; 828 NW2d 99 (2012); *Marketos v American Employers Ins Co*, 185 Mich App 179, 197-198; 460 NW2d 272 (1990).

The Supreme Court's order plainly held that the Court would not address whether the trial court erred in denying plaintiff a second trial based on newly discovered evidence. No amount of discovery could alter or enlighten this written holding. In any event, plaintiff's suggestion that discovery could be had from judicial officers and their staff, past and present, on matters of judicial decision-making fails under centuries of precedent. As explained by the federal district court in *Bliss v Fisher*, 714 F Supp 2d 223, 224 (D Mass, 2010) (cleaned up), "The overwhelming authority . . . makes it clear that a judge may not be compelled to testify concerning the mental processes used in formulating official judgments or the reasons that

motivated him in the performance of his official duties." See also *United States v Morgan*, 313 US 409, 422; 61 S Ct 999; 85 L Ed 1429 (1941); *Fayerweather v Ritch*, 195 US 276, 307; 25 S Ct 58; 49 L Ed 193 (1904); *Robinson v Comm'r of Internal Revenue*, 70 F3d 34, 38 (CA 5, 1995); *In re Lickman*, 304 BR 897, 903-904 (Bankr MD Fla, 2004).

III. CONCLUSION

Pleading a case under the WICA is different than winning one. To obtain relief, an exonerated individual must prove, among other things, that the conviction was reversed or vacated on the basis of new evidence. Because plaintiff cannot show this, the Court of Claims appropriately granted summary disposition to the state of Michigan, and we affirm.

CAVANAGH and CAMERON, JJ., concurred with SWARTZLE, P.J.

PIKE v NORTHERN MICHIGAN UNIVERSITY

Docket No. 344083. Submitted April 2, 2019, at Lansing. Decided April 25, 2019, at 9:05 a.m. Leave to appeal denied 505 Mich 876 (2019).

Petra Pike brought an action against Northern Michigan University (NMU) and Peter Bosma in the Court of Claims, alleging negligence against NMU under the public-building exception to governmental immunity, MCL 691.1406, and gross negligence against Bosma, as well as NMU via vicarious liability, under MCL 691.1407(2). Bosma was an instructor employed by NMU and taught a class in a building on NMU's campus. Plaintiff was enrolled in the class, and during one class session, Bosma instructed the students to pair up to complete an activity on a rock-climbing wall. One student was instructed to climb the wall while blindfolded, relying solely on verbal instructions provided by the other student who remained on the ground. Students climbing the rock wall were not provided any training or safety equipment. Plaintiff was paired with another student and designated the climber. Plaintiff was allegedly given poor instructions by her partner and fell from the wall, striking her head and body on the ground. A notice of intent (NOI) to file a claim against NMU dated August 21, 2015, was mailed to the president of NMU and the Court of Claims. Only plaintiff's attorney signed the NOI. The NOI was filed with the Court of Claims on August 24, 2015. On December 1, 2017, plaintiff filed her complaint. In March 2018, defendants moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's NOI was insufficient because MCL 600.6431(1) required her to file an NOI "signed and verified by the claimant" and further arguing that the Court of Claims did not have jurisdiction over Bosma because he was an instructor, not a "state officer." Plaintiff argued that the requirements of MCL 600.6431(1) did not apply because her claim against NMU was brought under MCL 691.1406, which sets forth the applicable notice requirements, and those requirements were satisfied. Plaintiff further argued that the Court of Claims had jurisdiction over Bosma under MCL 600.6419(7) because Bosma was an employee of the state. The Court of Claims, MICHAEL J. TALBOT, C.J., granted defendants' motion for summary disposition, concluding that plaintiff failed to comply with MCL 691.1404 because her NOI was

filed with the Court of Claims more than 120 days after the injury occurred. The Court of Claims noted that although plaintiff did not present any argument as to whether her gross-negligence claim against NMU was also subject to dismissal for failure to comply with the 120-day notice requirement, in light of the overlap of the allegations, dismissal was proper for failure to provide the requisite notice. Further, the Court of Claims dismissed plaintiff's gross-negligence claim against Bosma because plaintiff failed to satisfy the signature and verification requirements of MCL 600.6431. The Court of Claims rejected defendants' argument that it lacked jurisdiction over Bosma. Plaintiff moved for reconsideration, which the Court of Claims denied. Plaintiff appealed.

The Court of Appeals *held*:

1. The governmental tort liability act, MCL 691.1401 *et seq*., generally provides immunity from tort liability to a governmental agency if the agency is engaged in the exercise or discharge of a governmental function. There are several exceptions to the broad grant of immunity; one exception is the public-building exception. Under MCL 691.1406, a governmental agency may be liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building under certain circumstances. A condition for recovery under MCL 691.1406 is the provision of notice, which states that notice to the state of Michigan shall be given as provided in MCL 691.1404. MCL 691.1404 provides that notice must be served on the governmental agency within 120 days from the time of injury, and in the case of the state, notice shall be filed in triplicate with the clerk of the Court of Claims, which constitutes compliance with the notice-of-intent filing requirement of MCL 600.6431. However, MCL 600.6431 of the Court of Claims Act, MCL 600.6401 *et seq*., states that no claim for property damage or personal injuries may be maintained "against the state" unless the claimant files with the clerk of the Court of Claims a notice of intention to file a claim or the claim itself within six months following the happening of the event giving rise to the cause of action. It is a well-established rule of statutory construction that when two applicable statutory provisions conflict, the one that is more specific to the subject matter prevails over the provision that is only generally applicable. In this case, because plaintiff's claim arises under the public-building exception to governmental immunity, the notice provisions in MCL 691.1404 and MCL 691.1406 are more specific to the subject matter and prevail over the notice provision in MCL 600.6431 that is only generally applicable to claims against the state. Accordingly, as the Court of Claims concluded, plaintiff's

failure to file her NOI in the Court of Claims within 120 days of sustaining her injuries was fatal to her claim, and summary dismissal was warranted.

2. MCL 600.6419(1)(a) provides, in relevant part, that the Court of Claims has exclusive jurisdiction over all claims and demands against the state or any of its departments or officers. MCL 600.6419(7) provides that as used in MCL 600.6419, "the state or any of its departments or officers" means this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties. In this case, because Bosma was a state employee, the Court of Claims had jurisdiction over this claim "against the state or any of its departments or officers." Plaintiff admitted that her notice was not signed and verified but argued that the claim against Bosma was not required to be signed and verified because MCL 600.6431 only applies to claims made against "the state." The rules of statutory construction generally require a court to infer that the Legislature intended to refer to three separate entities when it referred to (1) "the state," (2) "the state and any of its departments or officers," and (3) "the state or any of its departments, commissions, boards, institutions, arms or agencies." By referring first to "the state" and then its various subdivisions, the Legislature intended that a claim against "the state" be something different than a claim against a department, commission, board, institution, arm, or agency of the state. And there are no references anywhere in MCL 600.6431 to claims against individuals. The Legislature could have used—but did not use—the defined term "the state or any of its departments or officers" anywhere in MCL 600.6431. Therefore, by electing to use a different term, the Legislature did not intend to refer to the entities and people included in the MCL 600.6419(7) definition. Additionally, MCL 600.6419(7) specifically states that the definition of "the state or any of its departments or officers" only applies to "this section," i.e., the jurisdiction statute; it does not state that it applies to "this act," i.e., the entire Court of Claims Act. Therefore, the requirements of MCL 600.6431 did not apply to the gross-negligence claim against Bosma because it was not a claim against "the state." Accordingly, the Court of Claims order granting summary disposition in favor of Bosma was reversed.

Affirmed in part, reversed in part, and remanded to the Court of Claims.

SWARTZLE, P.J., concurring, agreed with the majority's decisions affirming summary disposition to NMU and reversing summary disposition to Bosma but wrote separately to explain that there was nothing illogical or improbable with the Legislature deciding not to apply the notice-of-intent requirement of MCL 600.6431 to state officials or employees. Notices of intent are for the benefit of the state and its subdivisions, not for the trial court or an individual state official or employee. Statutory notice-of-intent requirements do not usually apply to claims brought against individual state officials or employees, and no Michigan caselaw identifies policy reasons for applying notice-of-intent requirements against individual state officers or employees or suggests that notice-of-intent requirements are intended to benefit the trial court in some way. When the Legislature expanded the jurisdiction of the Court of Claims with 2013 PA 164 to include certain claims against state officials and employees, it did not, at the same time, alter the notice-of-intent requirement. Before 2013, claims against state officials and employees in the trial court (whether the circuit court or the Court of Claims) were not subject to the notice-of-intent requirement, and this remained unchanged after 2013 PA 164.

1. GOVERNMENTAL IMMUNITY — EXCEPTIONS — PUBLIC BUILDINGS — NOTICE — FILING REQUIREMENTS.

Under MCL 691.1406 of the governmental tort liability act, MCL 691.1401 *et seq*., a governmental agency may be liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building under certain circumstances; a condition for recovery under MCL 691.1406 is the provision of notice, which states that notice to the state of Michigan shall be given as provided in MCL 691.1404; MCL 691.1404 provides that notice must be served on the governmental agency within 120 days from the time of injury, and in the case of the state, notice shall be filed in triplicate with the clerk of the Court of Claims, which constitutes compliance with the notice-of-intent filing requirement of MCL 600.6431; when a plaintiff's claim arises under the public-building exception to governmental immunity, the notice provisions in MCL 691.1404 and MCL 691.1406 are more specific to the subject matter and prevail over the notice provision in MCL 600.6431 that is only generally applicable to claims against the state.

2. COURT OF CLAIMS ACT — CLAIMS AGAINST THE STATE — NOTICE — FILING REQUIREMENTS.

Under MCL 600.6431 of the Court of Claims Act, MCL 600.6401 *et seq*., no claim for property damage or personal injuries may be maintained against the state unless the claimant files with the clerk of the Court of Claims a notice of intention to file a claim or the claim itself within six months following the happening of the event giving rise to the cause of action; the notice requirements of MCL 600.6431 do not apply to claims against individuals because those claims are not claims against "the state."

Mouw & Celello, PC (by *Robert A. Pirkola*) for plaintiff.

Miller, Canfield, Paddock and Stone, PLC (by *Kurt P. McCamman* and *Philip E. Hamilton*) for defendants.

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

CAVANAGH, J. In this negligence action, plaintiff appeals as of right an order of the Court of Claims granting summary disposition to defendants, Northern Michigan University (NMU) and Peter Bosma, under MCR 2.116(C)(7) on the basis of governmental immunity. We affirm as to NMU, but we reverse as to Bosma and remand for further proceedings.

NMU is a public university in the Michigan university system and is primarily located in Marquette. One of the buildings on NMU's campus in Marquette is the Physical Education and Instructional Facility (the Facility). Bosma was an instructor employed by NMU; he taught a class designated as RE 251, called Adventure Activities, in which plaintiff was enrolled.

During class on April 23, 2015, Bosma instructed his students to use a rock-climbing wall. Students were paired up; one student was instructed to climb the rock wall while blindfolded, relying solely on verbal instruc-

tions provided by the other student who remained on the ground. Students climbing the rock wall were not provided any training or safety equipment, such as a helmet or harness. Plaintiff was paired with another student and designated the climber. Plaintiff was allegedly given poor instructions by her partner on the ground and fell from near the rock wall's top, striking her head and body on the ground.

A notice of intent (NOI) to file a claim against NMU dated August 21, 2015, was mailed to the president of NMU and the Court of Claims. Only plaintiff's attorney signed the NOI. The NOI was filed with the Court of Claims on August 24, 2015.

On December 1, 2017, plaintiff filed her complaint, alleging negligence against NMU under the public-building exception to governmental immunity, MCL 691.1406, and gross negligence against Bosma, as well as NMU via vicarious liability, under MCL 691.1407(2).

In March 2018, defendants moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's NOI was insufficient because MCL 600.6431(1) required her to file an NOI "signed and verified by the claimant"; thus, defendants argued, her claims must be dismissed. Further, defendants argued that the Court of Claims did not have jurisdiction over Bosma because he was an instructor, not a "state officer," and therefore he was entitled to summary dismissal under MCR 2.116(C)(1).

Plaintiff responded to defendants' motion for summary disposition, arguing that the requirements of MCL 600.6431(1) did not apply because her claim against NMU was brought under MCL 691.1406, which sets forth the applicable notice requirements, and those requirements were satisfied. Plaintiff ar-

gued that notice was timely served by mail on NMU's president as required by MCL 691.1406 and that this notice also constituted notice to the state of Michigan in the manner specified by MCL 691.1404, as prescribed by MCL 691.1406. Further, plaintiff argued that, as clearly stated in MCL 600.6419(7), the Court of Claims had jurisdiction over Bosma, who was an employee of the state.

Defendants filed a reply brief, arguing that MCL 691.1404 required plaintiff to file her NOI with the Court of Claims within 120 days from the date of the incident. But plaintiff admitted in her complaint that her NOI was filed with the Court of Claims on August 24, 2015, which was three days too late; 120 days from April 23, 2015, was August 21, 2015. Thus, defendants argued that, as explained in *Goodhue v Dep't of Transp*, 319 Mich App 526; 904 NW2d 203 (2017), notice was deficient and the case must be dismissed.

On April 24, 2018, the Court of Claims granted defendants' motion for summary disposition under MCR 2.116(C)(7), concluding that plaintiff failed to comply with MCL 691.1404 because her NOI was filed with the Court of Claims more than 120 days after the injury occurred. Notice of this action against the state had to be filed with the clerk of the Court of Claims within 120 days of the incident. The Court of Claims noted that although plaintiff did not present any argument as to whether her gross-negligence claim against NMU was also subject to dismissal for failure to comply with the 120-day notice requirement, in light of the overlap of the allegations, dismissal was proper for failure to provide the requisite notice. Further, the Court of Claims dismissed plaintiff's gross-negligence claim against Bosma because plaintiff failed "to satisfy MCL 600.6431's signature and verification require-

ments as to that count." The Court rejected defendants' argument that it lacked jurisdiction over Bosma as "entirely without merit" in light of MCL 600.6419(7) because Bosma was an employee of NMU.

Plaintiff moved for reconsideration, conceding that her NOI had not been "filed" with the Court of Claims by August 21, 2015, but asserting that MCL 691.1406 and MCL 691.1404 only required that the notice be "served" on the responsible agency, i.e., NMU, within 120 days and that it was so served by mail. Further, plaintiff argued that no notice of any kind was required to maintain a claim against Bosma because MCL 600.6431 only applies to claims "against the state" and Bosma is not "the state." Thus, plaintiff argued that summary disposition was improper as to plaintiff's claim against Bosma. The Court of Claims denied the motion for reconsideration. Plaintiff now appeals.

Plaintiff argues that NMU was not entitled to summary disposition because she complied with the notice requirements set forth in MCL 691.1404, as prescribed by MCL 691.1406, which was sufficient to constitute compliance with MCL 600.6431. We disagree.

This Court reviews de novo a trial court's grant of summary disposition as well as the "applicability of governmental immunity and the statutory exceptions to immunity . . . ." *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). Summary disposition under MCR 2.116(C)(7) is appropriate if a claim is barred because of immunity granted by law. *Id*. "The contents of the complaint must be accepted as true unless contradicted by the documentary evidence." *Id*. Any documentary evidence is viewed in the light most favorable to the nonmoving party. *Id*. A factual dispute about whether a plaintiff's claim is barred precludes summary disposition. *Id*. If there is no factual dispute,

a trial court must determine whether summary disposition is appropriate under MCR 2.116(C)(7) as a matter of law. *Id*. We also consider de novo issues of statutory interpretation. *Goodhue*, 319 Mich App at 530.

The governmental tort liability act, MCL 691.1401 *et seq*., generally provides immunity from tort liability to a "governmental agency" if the agency "is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). A "governmental agency" is defined by the act to include "this state or a political subdivision." MCL 691.1401(a). And "state" is defined to include this state and its agencies and departments, as well as a public university or college of this state. MCL 691.1401(g). Because NMU is a state university, it is generally entitled to tort immunity.

There are several exceptions to the broad grant of immunity, and one such exception is the public-building exception, MCL 691.1406. *Goodhue*, 319 Mich App at 531. Under the public-building exception, a governmental agency may be "liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building" under certain circumstances. MCL 691.1406. Consistently with the fact that "the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed." *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012). A condition for recovery under the public-building exception, MCL 691.1406, is the provision of notice as follows:

> [T]he injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

> The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the responsible governmental agency . . . . Notice to the state of Michigan shall be given as provided in [MCL 691.1404].

MCL 691.1406 states, "Notice to the state of Michigan shall be given as provided in [MCL 691.1404]." Because NMU is a state university, we turn to MCL 691.1404, which also provides that notice must be served on the governmental agency within 120 days from the time of injury caused by a defective highway, MCL 691.1404(1), and

> [i]n case of the state, such notice shall be filed in triplicate with the clerk of the court of claims. Filing of such notice shall constitute compliance with section 6431 of Act No. 236 of the Public Acts of 1961, being section 600.6431 of the Compiled Laws of 1948, requiring the filing of notice of intention to file a claim against the state. [MCL 691.1404(2).]

However, MCL 600.6431 of the Court of Claims Act, MCL 600.6401 *et seq.*, states that no claim for property damage or personal injuries may be maintained "against the state" unless the claimant files with the clerk of the Court of Claims "a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action." MCL 600.6431(1) and (3). In other words, rather than the 120-day notice requirements set forth in MCL 691.1404 and MCL 691.1406, the Court of Claims Act, MCL 600.6431, requires notice within six months of the injury-causing incident.

In *Goodhue*, this Court held that the requisite notice of claims made under the defective-highway and the public-building exceptions must be filed with the clerk of the Court of Claims within 120 days of the injury-

causing incident. *Goodhue*, 319 Mich App at 535-536. The plaintiff in *Goodhue* had argued that MCL 600.6431 stated that he had six months from the time of his injury to file his notice in the Court of Claims and, thus, his notice was timely filed. *Id*. The *Goodhue* Court rejected the plaintiff's argument, holding that the timing requirements set forth in MCL 600.6431 were not incorporated into MCL 691.1404(2). *Id*. at 536. Accordingly, the plaintiff had to file the requisite notice in the Court of Claims within 120 days from the time the injury occurred and, because he did not, his claims were barred by governmental immunity and properly dismissed under MCR 2.116(C)(7). *Id*. at 537.

In this case, plaintiff makes the same argument as the plaintiff in *Goodhue*, distinguishing between the 120-day notice requirements set forth in MCL 691.1404 and MCL 691.1406 and the six-month notice requirement set forth in MCL 600.6431(3). But we are bound to follow this Court's published precedent. MCR 7.215(C)(2). Further, it is a well-established rule of statutory construction that when two applicable statutory provisions conflict, the one that is more specific to the subject matter prevails over the provision that is only generally applicable. *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008), quoting *Jones v Enertel, Inc*, 467 Mich 266, 271; 650 NW2d 334 (2002). Because plaintiff's claim arises under the public-building exception to governmental immunity, the notice provisions in MCL 691.1404 and MCL 691.1406 are more specific to the subject matter and prevail over the notice provision in MCL 600.6431 that is only generally applicable to claims against the state. See *Jones*, 467 Mich at 271. Accordingly, as the Court of Claims concluded, plaintiff's failure to file her NOI in the Court of Claims within 120 days of sustaining her

injuries is fatal to her claim and, as in the case of *Goodhue*, summary dismissal was warranted under MCR 2.116(C)(7).

Next, plaintiff argues that defendant Bosma was not entitled to summary disposition under MCR 2.116(C)(7) for failure to comply with MCL 600.6431 of the Court of Claims Act because the requirements of that notice statute do not apply to state employees. We agree.

The Court of Claims has exclusive jurisdiction over all claims and demands "against the state or any of its departments or officers . . . ." MCL 600.6419(1)(a). MCL 600.6419(7) provides:

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

Because Bosma was a state employee, the Court of Claims had jurisdiction over this claim "against the state or any of its departments or officers."

As discussed earlier, under MCL 600.6431 of the Court of Claims Act, no claim for personal injuries may be maintained against "the state" unless timely notice is filed. Specifically, MCL 600.6431 states, in relevant part:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims

> either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, . . . which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
>
> (2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commission, boards, institutions, arms or agencies designated.
>
> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

The Court of Claims dismissed plaintiff's gross-negligence claim against Bosma for failure to comply with MCL 600.6431(1); specifically, the signature and verification requirements. MCL 600.6431(1) states that the claim or notice "shall be signed and verified by the claimant before an officer authorized to administer oaths." Plaintiff admits that her notice was not signed and verified but argues that the claim against Bosma was not required to be signed and verified because MCL 600.6431 only applies to claims made against "the state." Plaintiff contends that "the state" is not defined in the Court of Claims Act, MCL 600.6401 *et seq.*, and therefore its general definition, which would not include Bosma, should be used.

Plaintiff is correct that MCL 600.6431(1) expressly addresses maintaining a claim against "the state," *not* against "the state or any of its departments or officers," which is defined to include employees but only with respect to "this section," i.e., the jurisdiction statute,

MCL 600.6419—not the entire Court of Claims Act. In other words, "the state or any of its departments or officers" is a specially defined term, MCL 600.6419(7), but as denoted by the words "[a]s used in this section," the definition only applies to the term as used in the statute that confers jurisdiction on the Court of Claims, i.e., MCL 600.6419. Even the second reference in MCL 600.6431(1) is only to "the state or any of its departments, commissions, boards, institutions, arms or agencies . . . ." Conspicuously absent in the notice statute is any reference to officers, employees, members, volunteers, or other individuals.

The rules of statutory interpretation are well established. Our primary goal when interpreting a statute is to discern the Legislature's intent, and the specific language used is the most reliable evidence of its intent. *McCahan*, 492 Mich at 736. When the language of a statute is unambiguous, no judicial construction is permitted and the statute must be enforced as written in accordance with the plain and ordinary meaning of its words. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). Further,

> [w]hen the Legislature uses different words, the words are generally intended to connote different meanings. Simply put, "the use of different terms within similar statutes generally implies that different meanings were intended." 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 46:6, p 252. If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word. [*US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009).]

Thus, the rules of statutory construction generally require this Court to infer that the Legislature intended to refer to three separate entities when it referred to (1) "the state," (2) "the state and any of its departments or officers," and (3) "the state or any of its

departments, commissions, boards, institutions, arms or agencies." This interpretation is reinforced by considering Subsection (1) and Subsection (2) of MCL 691.6431 together. Like Subsection (1), Subsection (2) refers to "any department, commission, board, institution, arm or agency of the state . . . ." Subsection (2) also contains no references to any term that implies individual state actors. Moreover, these governmental groups are referred to as being "of the state," not "the state." Our interpretation is also supported by the Legislature's use of the disjunctive word "or" with regard to the filing of a written "notice of intention to file a claim against the state *or* any of its departments, commissions, boards, institutions, arms or agencies . . . ." MCL 600.6431(1) (emphasis added). "The Legislature's use of the disjunctive word 'or' indicates an alternative or choice between two things." *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 209; 895 NW2d 490 (2017) (quotation marks and citation omitted). By referring to first "the state" and then its various subdivisions, the Legislature clearly intended that a claim against "the state" be something different than a claim against a department, commission, board, institution, arm, or agency of the state. And, as noted earlier, there are no references anywhere in MCL 600.6431 to claims against individuals.

While it may be a logical argument that plaintiff's gross-negligence claim should be deemed a claim against "the state" to which MCL 600.6431 applies, we are not permitted to revise an unambiguous statute under the guise of interpretation to achieve a "logical" result. See *Lotoszinski v State Farm Mut Auto Ins Co*, 417 Mich 1, 10; 331 NW2d 467 (1982). In other words, "[a] court must not judicially legislate by adding into a statute provisions that the Legislature did not in-

clude." *In re Wayne Co Prosecutor*, 232 Mich App 482, 486; 591 NW2d 359 (1998), citing *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 421; 565 NW2d 844 (1997). The wisdom of a statute is a matter for the Legislature, and the law must be enforced by a court as written. See *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012).

The Legislature could have used—but did not use—the defined term "the state or any of its departments or officers" *anywhere* in MCL 600.6431. Therefore, this Court must assume that, by electing to use a different term, the Legislature did not intend to refer to the entities and people included in the MCL 600.6419(7) definition. See *US Fidelity*, 484 Mich at 14. And, again, MCL 600.6419(7) specifically states that the definition of "the state or any of its departments or officers" only applies to "this section," i.e., the jurisdiction statute; it does not state that it applies to "this *act*," i.e., the entire Court of Claims Act. Although it might seem improbable that the Legislature intended MCL 600.6431 to only apply to claims against "The State of Michigan," "[i]f this is not what the Legislature intended by its use of different terms in the two provisions, it is up to the Legislature to amend accordingly and it is not a matter for this Court." *Rymal v Baergen*, 262 Mich App 274, 299; 686 NW2d 241 (2004).

Therefore, the requirements of MCL 600.6431 did not apply to the gross-negligence claim against Bosma because it was not a claim against "the state." Accordingly, we reverse the order of the Court of Claims granting summary disposition in favor of Bosma. Because plaintiff did not challenge the dismissal of her vicarious-liability claim against NMU, we do not consider this matter. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Affirmed in part, reversed in part, and remanded to the Court of Claims for proceedings consistent with this opinion. We do not retain jurisdiction.

CAMERON, J., concurred with CAVANAGH, JJ.

SWARTZLE, P.J. (*concurring*). I concur with the majority's decision affirming summary disposition to defendant Northern Michigan University under MCR 2.116(C)(7). I likewise concur with the majority's decision reversing summary disposition to defendant Peter Bosma, but I write separately to explain that there is nothing illogical or improbable with the Legislature deciding not to apply the notice-of-intent requirement of MCL 600.6431 to state officials or employees.

Generally speaking, notices of intent are for the benefit of the state and its subdivisions, not for the trial court or an individual state official or employee. As explained by former Justice LEVIN, "Statutes requiring notice of claim . . . mainly seek to provide a governmental authority with early warning so that it can assemble information in support of a defense on the merits while the evidentiary trail is still hot." *Dover & Co v United Pacific Ins Co*, 38 Mich App 727, 730; 197 NW2d 126 (1972) (LEVIN, J., concurring). Consistent with this, courts have long recognized that the purpose of the Court of Claims' notice-of-intent requirement is to "afford the state an opportunity to evaluate the claim and prepare for potential litigation." *Beasley v Michigan*, 483 Mich 1025, 1028 (2009) (CORRIGAN, J., dissenting); see also *Oak Constr Co v Dep't of State Highways*, 33 Mich App 561, 564; 190 NW2d 296 (1971). The provision "gives the state and its agencies time to create reserves and reduces the uncertainty of the extent of future demands," *Mays v Governor*, 323 Mich App 1, 44; 916 NW2d 227 (2018),

and "apprise[s] the governmental agency that an action is contemplated, so that [the agency] may take appropriate measures to gather evidence before the requisite information is lost," *In re Fair Estate*, 55 Mich App 35, 39; 222 NW2d 22 (1974).

Statutory notice-of-intent requirements do not usually apply to claims brought against individual state officials or employees. Michigan law applicable to governmental agencies and employees contains other notice-of-intent requirements, but such provisions apply only against the state or its subdivisions, not against individual employees. See, e.g., MCL 691.1404(1) (the notice provision applicable to the highway exception to governmental immunity), MCL 691.1406 (the notice provision applicable to the public-building exception to governmental immunity), and MCL 691.1419(1) (the notice provision applicable to the sewage-disposal-system-event exception to governmental immunity). Indeed, I am not aware of any judicial decision of this state identifying a policy reason for applying notice-of-intent requirements against individual state officers or employees.

I am also unaware of any judicial decision suggesting that notice-of-intent requirements are intended to benefit the trial court in some way. When a trial court accepts a notice-of-intent filing, it does not hire more staff in anticipation of the lawsuit or otherwise ramp up for the lawsuit. It quietly files the notice of intent away and awaits the filing (or not) of a lawsuit.

Thus, when the Legislature expanded the jurisdiction of the Court of Claims with 2013 PA 164 to include certain claims against state officials and employees, it makes sense that it did not, at the same time, alter the notice-of-intent requirement. Prior to amendment in 2013, claims against the state and its subdivisions in

the Court of Claims were subject to the notice-of-intent requirement, and this remained unchanged after 2013 PA 164. Similarly, prior to amendment in 2013, claims against state officials and employees in the trial court (whether circuit court or Court of Claims) were not subject to the notice-of-intent requirement, and this remained unchanged after 2013 PA 164. This seems consistent in my eyes, not illogical or improbable.

Accordingly, I concur in the majority's decision except as described above.

PEOPLE v BEARD

Docket No. 346383. Submitted March 13, 2019, at Detroit. Decided April 25, 2019, at 9:10 a.m. Leave to appeal denied 504 Mich 973 (2019).

Thomas R. Beard was convicted of domestic violence, third offense, MCL 750.81(5), after he pleaded *nolo contendere* in the Oakland Circuit Court. Beard committed the domestic-violence offense while he was on parole from a sentence for unarmed robbery, MCL 750.530. The court, Phyllis C. McMillen, J., sentenced Beard to one year in jail to be served consecutively to his parole violation. The judgment of sentence indicated that his jail sentence was to begin on the day he was sentenced. Beard was returned to prison to serve the remaining few months of his sentence for unarmed robbery, and when he was discharged from prison on August 17, 2018, he was transferred to the Oakland County jail to serve his jail term for domestic violence. On October 17, 2018, Beard moved to amend his judgment of sentence or to obtain a writ of habeas corpus because the jail administration had set the beginning date of his jail term as the day he had been discharged from his prison sentence, not the day he was sentenced for his domestic-violence conviction, as the judgment of sentence had indicated. After oral argument on the motion, the court agreed that Beard's sentence for domestic violence should have begun to run on the date of sentencing. The court granted Beard's motion and amended the judgment of sentence to provide that the domestic-violence sentence was consecutive to the parole violation and that time on the 365-day domestic-violence sentence was to begin accruing on the day Beard had been sentenced—February 15, 2018. The prosecution appealed by delayed leave granted.

The Court of Appeals *held*:

1. To determine the nature of a party's filing, a court must look beyond the party's labels and focus on the substance of the filing. The prosecution contended that Beard's motion should be construed as a motion to correct an invalid sentence, which MCR 6.429(B)(3)(a) indicates must generally be filed within six months of the date the judgment of sentence was entered. Accordingly, the prosecution argued that Beard's motion to

amend his judgment of sentence was untimely. But Beard's motion did not seek to correct an invalid sentence under MCR 6.429(B)(3)(a), and therefore, the motion did not need to be filed within six months of the judgment of sentence. Beard's motion actually sought to enforce the amended judgment of sentence as it was written—the jail sentence was to be consecutive to the remaining unarmed-robbery sentence and was to begin on the day of sentencing, February 15, 2018. However, the jail interpreted the judgment of sentence as indicating that Beard's sentence was to begin after he had completed his previous prison sentence, which would have been the day he arrived at the jail, August 17, 2018. Under these circumstances, Beard's motion was brought to address an oversight or omission in the judgment of sentence and was best viewed under MCR 6.435(A) as a motion to correct a mistake. A motion under MCR 6.435(A) may be brought at any time. Consequently, Beard's motion was not untimely.

2. Under MCL 768.27a(2), if a defendant is convicted and sentenced to a term of imprisonment for a felony committed while the defendant was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense. In other words, a parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he or she begins serving the term imposed for the subsequent offense. In this case, Beard committed and was convicted of a felony—domestic violence, third offense—while he was on parole for unarmed robbery. He was returned to prison to serve what remained on his term for unarmed robbery; that sentence was completed on August 17, 2018. Therefore, under MCL 768.7a(2), Beard's sentence for domestic violence should not have begun to run until August 17, 2018. Another statute, MCL 791.234(3), addresses parole eligibility for a defendant who has been sentenced to a term of imprisonment for a conviction resulting from an offense committed while the defendant was on parole from a sentence for a previous offense. MCL 791.234(3), discussed in *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569 (1996), provides that a defendant's new parole eligibility date is determined by adding the minimum terms for the previous and subsequent offenses and that the defendant's new maximum term is the sum of the maximum terms for each offense. The practical effect of MCL 791.234(3) is that the minimum term for the consecutive sentence begins to run immediately, and the defendant will become

eligible for parole after serving the combined minimum sentences. But MCL 791.234(3) does not apply to Beard's circumstances because he did not receive an indeterminate prison sentence for his conviction of domestic violence. Beard was sentenced to a fixed jail term from which he would not be eligible for parole. When a fixed jail sentence is imposed to run consecutively following an indeterminate prison sentence, the jail sentence does not begin to run until the defendant is paroled from the prison sentence or completes his or her maximum term of imprisonment. Therefore, the trial court erred by ruling that Beard's consecutive jail sentence began running on the date of sentencing.

Amended judgment of sentence vacated. Remanded for correction of the judgment of sentence.

PAROLE — FELONY CONVICTION WHILE ON PAROLE — CONSECUTIVE SENTENCING — FIXED JAIL TERM.

When a fixed jail sentence is imposed to run consecutively following an indeterminate prison sentence, the jail sentence does not begin to run until the defendant is paroled from the prison sentence or until he or she completes the maximum term of the prison sentence (MCL 768.7a(2)).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Joshua J. Miller*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Michael L. Mittlestat*) for Thomas R. Beard.

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

SHAPIRO, P.J. The prosecution appeals by leave granted[1] an amended judgment of sentence entered

[1] *People v Beard*, unpublished order of the Court of Appeals, entered December 7, 2018 (Docket No. 346383).

by the trial court. For the reasons stated in this opinion, we vacate the amended judgment of sentence.

I

While on parole for an unarmed-robbery conviction, defendant was arrested for domestic violence. He pleaded no contest to domestic violence, third offense, MCL 750.81(5), which is a felony.[2] On February 15, 2018, the trial court sentenced defendant to a year in jail. At sentencing, the court stated that the sentence was "consecutive to a parole violation." The judgment of sentence also stated, "Sentence consecutive to parole violation." (Capitalization omitted.) But the judgment of sentence provided that defendant's sentence would begin on February 15, 2018.

As a result of his parole violation, defendant returned to prison to serve the remaining few months of his prior sentence for unarmed robbery. He was discharged on August 17, 2018, and transferred to the Oakland County jail.

On October 17, 2018, defendant moved to amend the judgment of sentence or for the issuance of a writ of habeas corpus. Defendant explained that the Oakland County jail was interpreting the judgment of sentence to mean that his domestic-violence sentence began when he arrived at the jail on August 17, not on February 15 as provided by the judgment of sentence. Defendant requested that the trial court remove the "consecutive to parole violation" language from the judgment of sentence.

After hearing oral argument, the trial court agreed with defendant that his sentence for domestic violence

[2] The judgment of sentence erroneously cites MCL 750.81(4) as the offense for which defendant was convicted.

should have begun to run on the date of sentencing. Accordingly, it granted defendant's motion and amended the judgment of sentence to provide: "Sentence consecutive to parole violation. Defenant [sic] shall begin to accrue time on the 365 day sentence on February 15, 2018." (Capitalization omitted.)

II

A

As an initial matter, the prosecution argues that defendant's motion to amend the judgment of sentence was untimely. The prosecution did not raise this issue before the trial court but contends on appeal that the issue has not been waived because it pertains to the trial court's jurisdiction. The prosecution does not provide caselaw holding that a trial court lacks subject-matter jurisdiction to consider untimely posttrial motions. However, even if we accept this premise as true, we conclude that defendant's motion was not untimely.

The prosecution argues that defendant's motion should be construed as a motion to correct an invalid sentence, which generally must be filed within six months of the date the judgment of sentence was entered. See MCR 6.429(B)(3)(a). We conclude, however, that defendant's motion to amend the judgment of sentence is better understood as a motion to correct a clerical mistake, i.e., an error "arising from oversight or omission," which may be brought at any time. See MCR 6.435(A).

To determine the nature of a filing, we look beyond the party's labels and focus on the substance of the filing. See *Altobelli v Hartmann*, 499 Mich 284, 299; 884 NW2d 537 (2016). In this case, it is clear that defendant was not seeking to correct an invalid sen-

tence imposed by the trial court but rather was attempting to enforce the imposed sentence. The trial court agreed with defendant that the Oakland County jail's interpretation of the "sentence begins" date was incorrect and amended the judgment of sentence accordingly. Further, there was plainly an ambiguity in the original judgment of sentence because the imposed sentence was consecutive to the parole violation but also set to run from the date of sentencing. Indeed, both defendant and the prosecution requested an amendment of the judgment of sentence. For those reasons, we conclude that defendant's motion was brought to address an oversight or omission in the judgment of sentence and is thus best viewed as a motion to correct a mistake. As such, the motion was not untimely.

B

The prosecution also argues that the trial court misinterpreted MCL 768.7a(2) by amending the judgment so that defendant's jail sentence for the domestic-violence conviction ran from the date of sentencing. We agree.[3]

MCL 768.7a(2) requires consecutive sentencing for felonies committed while on parole:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

[3] We review de novo questions of law, including statutory interpretation. *People v Pace*, 311 Mich App 1, 4; 874 NW2d 164 (2015).

Accordingly, "[a] parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he serves the term imposed for the subsequent offense." *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Defendant committed a felony while he was on parole for unarmed robbery. He returned to prison to serve the remaining term of his imprisonment for unarmed robbery, which he completed on August 17, 2018. Therefore, per MCL 768.7a(2), defendant's jail sentence for domestic violence should not have begun to run until August 17, 2018.

The issue is complicated, however, by *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569; 548 NW2d 900 (1996), and the degree to which the holding in that case is applicable here. In *Wayne Co Prosecutor*, the Supreme Court held that for purposes of becoming eligible for parole, the minimum sentence for the offense committed while on parole effectively begins to run on the date of sentencing. *Id*. at 579-581. In that case, the prosecutor argued that the recently enacted MCL 768.7a(2) required a defendant to serve the entire remaining maximum sentence on the prior offense, plus the minimum sentence for the offense committed while on parole, before again becoming eligible for parole. See *id*. at 571-572, 574. This was at odds with MCL 791.234(3),[4] which provides that a defendant's new parole eligibility date is determined by adding the minimum terms for the previous and subsequent offenses, and that the defendant's new maximum term is the sum of the maximum terms for each offense:

> If a prisoner other than a prisoner subject to disciplinary time is sentenced for consecutive terms, whether

[4] At that time, MCL 791.234(3) was found at MCL 791.234(2).

> received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms, less the good time and disciplinary credits allowed by statute. The maximum terms of the sentences must be added to compute the new maximum term under this subsection, and discharge must be issued only after the total of the maximum sentences has been served less good time and disciplinary credits, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

The practical effect of MCL 791.234(3) is that the minimum term for the consecutive sentence begins to run immediately, and the defendant will become eligible for parole after serving the combined minimum sentences. See *Wayne Co Prosecutor*, 451 Mich at 580. The Supreme Court rejected the argument that MCL 768.7a(2) had implicitly repealed MCL 791.234(3). *Id*. at 575, 582. As the Court aptly summarized in *People v Idziak*, 484 Mich 549, 558; 773 NW2d 616 (2009):

> [I]n *Wayne Co Prosecutor*, we rejected the prosecutor's argument that MCL 768.7a(2) requires a parolee to serve his entire original *maximum* sentence, *plus* his new minimum sentence, before becoming eligible for parole, and held that the [Department of Correction's] practice of calculating the new parole eligibility date, as mandated by MCL 791.234(3), was consistent with MCL 768.7a(2).

Defendant argues that *Wayne Co Prosecutor* compels the conclusion that he should receive credit against his consecutive *jail* sentence while serving the balance of his incarceration on the parole violation. However, we do not read *Wayne Co Prosecutor* so broadly. That case concerned the timing of a defendant's eligibility for parole following imposition of a consecutive, indeterminate prison term. In this case, defendant did not

receive an indeterminate prison sentence with a minimum and maximum term. He was instead sentenced to a fixed jail term for which he is not eligible for parole,[5] and MCL 791.234(3) is therefore not applicable. Defendant's sentence is squarely controlled by MCL 768.7a(2).

In addition to *Wayne Co Prosecutor*, defendant relies on *Idziak*. However, *Idziak* held that parolees do not receive jail credit on the new offense for time served *before* sentencing. *Idziak*, 484 Mich at 562. Thus, *Idziak*'s holding does not lend additional support to defendant's position.

In sum, the trial court erred by ruling that defendant's consecutive jail sentence ran from the date of sentencing. When a jail sentence is made to run consecutively to an indeterminate prison sentence, the jail sentence does not begin to run until the defendant is paroled from the prison sentence or completes the maximum term of imprisonment.[6] Accordingly, defendant's jail sentence for the new offense did not begin to run until his release from prison.

Vacated and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

BECKERING and M. J. KELLY, JJ., concurred with SHAPIRO, P.J.

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[5] A defendant serving a jail sentence, whether concurrent or consecutive, remains eligible for good-time credit as provided for in MCL 51.282. However, an early release from jail based on good time earned is not a parole.

[6] Defendant had only a few months remaining on the maximum term of his unarmed-robbery conviction, so he did not have another opportunity for parole.

BERRYMAN v MACKEY

Docket No. 340879. Submitted March 5, 2019, at Detroit. Decided March 12, 2019, at 9:10 a.m.

Petitioner, James M. Berryman, petitioned the Lenawee Circuit Court for an ex parte personal protection order (PPO) against respondent, Wendell S. Mackey. The petition arose from an acrimonious relationship between petitioner—the former mayor of Adrian, Michigan—and respondent, who was active in publicly commenting on and writing about the political landscape in Adrian. At the time of the events giving rise to the PPO, respondent was a candidate for the city commission. Over 30 years earlier, in 1986, respondent was convicted of breaking into petitioner's flower shop in Adrian and sentenced to 6½ to 10 years' imprisonment. In the spring of 2017, respondent began writing a series of articles on an online blog that were critical of the way Adrian public officials governed the city. On June 19, 2017, petitioner and respondent engaged in a verbal exchange at a public meeting of the city commission. Following this exchange, respondent sent an e-mail to the Adrian city attorney on July 5, 2017, criticizing petitioner and the city commission for not adhering to rules of parliamentary procedure during its meetings. Petitioner and other members of the city commission were copied on this correspondence. On July 6, 2017, petitioner petitioned the trial court for the PPO against respondent, stating that the filing was prompted by the verbal exchange during the June 19 meeting and the July 5 e-mail. The trial court, Margaret M. S. Noe, J., granted petitioner's request for an ex parte PPO against respondent. After the court issued the PPO, respondent sent an e-mail to the Adrian city attorney and the Adrian chief of police on July 8, 2017, advising them of his political campaign schedule and asking that petitioner be informed of the schedule so that the two would not cross paths. Respondent moved to rescind the PPO. Judge Noe recused herself, and the State Court Administrative Office reassigned the matter. Following a three-day evidentiary hearing, the trial court, Patrick J. Conlin, Jr., J., denied respondent's motion to rescind the PPO and instead modified it. The modified PPO prohibited respondent from directly contacting or confronting petitioner but otherwise permitted respondent to

confront petitioner in the context of public speech and/or debate and to contact petitioner by phone, if necessary, as part of the political process. Respondent appealed.

The Court of Appeals *held*:

A trial court's decision whether to rescind a PPO is reviewed for an abuse of discretion. MCL 600.2950a(1) provides, in pertinent part, that a court shall not issue a PPO unless the petition alleges facts that constitute stalking as defined in MCL 750.411h. The individual petitioning the trial court for a PPO bears the burden of proof to demonstrate that the respondent's conduct amounted to stalking as defined in MCL 750.411h. MCL 750.411h(1)(d) defines "stalking" as a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411h(1)(c) defines "harassment" as conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Further, MCL 750.411h(1)(a) defines "course of conduct" as a pattern of conduct composed of a series of two or more separate noncontinuous acts evidencing a continuity of purpose, and MCL 750.411h(1)(e) defines "unconsented conduct" as any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. In this case, the trial court found three instances of respondent's conduct that it concluded amounted to stalking: respondent's comments at the June 19 hearing about blaming petitioner for going to prison and being a thorn in petitioner's side, the content of respondent's July 5 e-mail, and the content of respondent's July 8 e-mail. First, the trial court never found that respondent and petitioner's June 19 exchange constituted "unconsented contact" under MCL 750.411h(1)(e), and it was difficult to see how this contact was unconsented. The June 19 meeting was open to the public; petitioner, as a public official, was at the meeting in an official capacity, and respondent, as a member of the community, gave public comment at the meeting. The only possible unconsented contact came after respondent was done giving his comment, but this contact was precipitated by *petitioner* asking respondent to answer questions unrelated to the public meeting or other official business. The contact was not

initiated by respondent, nor was the contact continued without petitioner's consent. Further, respondent's comments at the meeting did not constitute "harassment" because a reasonable person would not feel threatened by respondent's conduct. The trial court here failed to take respondent's comments into context. Since respondent's release from prison, respondent had never contacted petitioner or otherwise acted inappropriately toward him; the first contact between them was at the June 19 meeting and initiated by petitioner. It therefore could not be concluded that respondent's comment about blaming petitioner for going to prison was threatening. Similarly, in context, respondent's comment that he was going to be a thorn in petitioner's side would not make a reasonable person feel threatened and would not otherwise constitute harassment. While in the months before this exchange respondent had been critical of petitioner's conduct, respondent's comments always focused on petitioner's actions in his official capacity as mayor. Accordingly, respondent's comments at the June 19 meeting did not constitute harassment and thus could not support a finding of stalking. As for the e-mails, the trial court's factual findings were minimal. The trial court concluded that petitioner could have felt threatened by the July 5 e-mail because it blamed petitioner for deviations from procedural rules at commission meetings and "perpetuate[d] [petitioner's] concern about personal matters being transcended from the political stage." However, nothing in the July 5 e-mail concerned "personal matters"; the e-mail focused exclusively on petitioner's role as the presiding officer at city commission meetings and outlined examples of when petitioner deviated from the rules he was supposed to follow. In light of the content of the July 5 e-mail, even if it was motivated by "personal matters being transcended from the political stage," the trial court made a mistake by finding that respondent's criticisms of petitioner's deviations from the rules of parliamentary procedure would cause a reasonable person to suffer emotional distress. Accordingly, the July 5 e-mail was not conduct that amounted to harassment and could not support a finding of stalking. With regard to the July 8 e-mail, the court merely concluded that the e-mail was "concerning," but the e-mail was clear that it was being sent because respondent was also running a political campaign and respondent wanted to make petitioner, in his official capacity, aware of respondent's campaign itinerary so that they would not appear at the same events. Nothing in the July 8 e-mail would cause a reasonable person to suffer the emotional distress required to constitute harassment, and therefore it was not conduct that could support a finding of stalking. Accordingly, because there was insufficient

evidence to conclude that respondent stalked petitioner, the trial court erred as a matter of law by failing to rescind the PPO.

Trial court's modified PPO vacated.

James M. Berryman *in propria persona*.

Wendell S. Mackey *in propria persona*.

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

PER CURIAM. Respondent appeals as of right a modified personal protection order (PPO) entered in favor of petitioner. For the reasons set forth in this opinion, we vacate the modified PPO.

I. FACTS AND PROCEDURAL HISTORY

This case arises from an acrimonious relationship between petitioner—the former mayor of Adrian, Michigan—and respondent. Respondent is active in publicly commenting on and writing about the political landscape in Adrian, and at the time of the events giving rise to the PPO, he was a candidate for the Adrian City Commission. Over 30 years earlier, in 1986, respondent was convicted of breaking into petitioner's flower shop in Adrian and sentenced to 6½ to 10 years' imprisonment. In the spring of 2017, respondent began writing a series of articles on an online blog—exposingadrian.com—that were critical of the way Adrian public officials governed the city.

On July 6, 2017, petitioner petitioned the trial court for an ex parte PPO against respondent. According to petitioner, this filing was prompted by a verbal exchange between petitioner and respondent at a city commission meeting and a later e-mail that respondent sent to city officials on July 5, 2017. The relevant

verbal exchange took place at a public meeting of the Adrian City Commission on June 19, 2017, after respondent commented on issues before the commission during the public-comment portion of the meeting. Petitioner initiated the following verbal exchange:

> [*Petitioner*]: Mr. Mackey, let me just, while you're there, ask you, are you the same Shane Mackey that robbed my flower shop back in 1986?
>
> [*Respondent*]: I certainly am.
>
> [*Petitioner*]: Are you?
>
> [*Respondent*]: Yes, I am.
>
> [*Petitioner*]: Okay. And then you wonder [what—]
>
> [*Respondent*]: I'm also the same Shane Mackey who you put in prison because you conspired with Judge Glaser as a young teenager for stealing teddy bears out of your store. And then I went to law school, and here I am.
>
> [*Petitioner*]: Okay. I just wanted to make sure that you're the same one that spent time in prison for that.
>
> [*Respondent*]: I'm sorry?
>
> [*Petitioner*]: You make those kind of accusations towards this commission, and yet—and yet, you took your time—
>
> [*Respondent*]: I was 19 years old. I'm 51 now. What else you got?
>
> [*Petitioner*]: Yeah.
>
> [*Respondent*]: What else you got? Because [it's gonna get] dirty, so go ahead and get it out there. Because [it's gonna get] dirty in this selection process.
>
> [*Petitioner*]: [No,] you're the one that continues to bring—to bring up things about this city commission and—
>
> [*Respondent*]: Such as—Such as—you're into the law[?] [S]uch as your criminal college deal?
>
> [*Petitioner*]: I just—

> [*Respondent*]: Follow the law, that's all I'm asking for. Because I did enough time in jail because of you, sir, because you [feel you're above] the law.
>
> [*Petitioner*]: Because you broke—Because you broke into my store.
>
> [*Respondent*]: And the guidelines were probation, and I went to prison because you had talked to Judge Glaser, that's what happened. And that's why I went to law school, because of you, sir, because you're a corrupt, dirty, crooked politician. You're a career politician. And so I'm here, I'm going to be a thorn in your side, and I'm not going away.
>
> And quite frankly, let me just say this: I've invested quite a bit of money into this community. And do you know why people don't invest downtown? Because it only works for three groups of people: Westfalls, Hickmans, and Kapnicks are the only ones getting money out of you guys. I would gladly invest downtown, but I can't. You know why? Because you're crooked. You're crooked.
>
> The sales pitch you gave tonight, it was pathetic, it's disingenuous. You sat there for seven years, and, oh, suddenly, it's all about safety and saving the babies from bricks falling out of the sky, isn't it? Quite frankly, when I talked to your counsel about liability, do you know what she said to me? We have insurance. You have insurance. So who cares at all?
>
> Anything else? Any other questions?
>
> [*Petitioner*]: No, you answered it.
>
> [*Respondent*]: Thank you. Have a good night.

Following this exchange, respondent sent an e-mail to the Adrian city attorney on July 5, 2017, criticizing petitioner and the city commission for not adhering to rules of parliamentary procedure during its meetings. Petitioner and other members of the city commission were copied on this correspondence.

On July 7, 2017, the trial court granted petitioner's July 6 request for an ex parte PPO against respondent.

After the court issued the PPO, respondent sent an e-mail to the Adrian city attorney and the Adrian chief of police on July 8, 2017, advising them of his political campaign schedule and asking that petitioner be informed of the schedule so that the two would not cross paths.

Respondent also moved to rescind the ex parte PPO. The judge who issued the ex parte PPO thereafter recused herself, and the State Court Administrative Office reassigned the matter to a judge from a neighboring county. Following a three-day evidentiary hearing, the trial court denied respondent's motion to rescind the PPO, but the court modified it. The modified PPO prohibited respondent from directly contacting or confronting petitioner but otherwise permitted respondent to "confront [petitioner] in the context of public speech and/or debate" and to contact petitioner by phone, if necessary, as part of the "political process."

Respondent now appeals as of right, arguing that the trial court erred by refusing to rescind the PPO.

II. STANDARD OF REVIEW

Because a PPO is an injunctive order, a trial court's decision whether to rescind a PPO is reviewed for an abuse of discretion. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). The trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id*. "A trial court necessarily abuses its discretion when it makes an error of law." *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016). The trial court's findings of fact are reviewed for clear error. *Hayford*, 279 Mich App at 325. A finding is clearly erroneous if the reviewing court is left with a definite and firm

conviction that a mistake has been made. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008).

III. ANALYSIS

Respondent argues that the trial court erred by entering a modified PPO rather than rescinding the PPO because his conduct did not meet the statutory requirements of MCL 750.411h. We agree.

The trial court's modified PPO was entered under MCL 600.2950a, which provides, in pertinent part:

> (1) Except as provided in [MCL 600.2950a(27), (28), and (30)], by commencing an independent action to obtain relief under this section, by joining a claim to an action, or by filing a motion in an action in which the petitioner and the individual to be restrained or enjoined are parties, an individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin an individual from engaging in conduct that is prohibited under . . . MCL 750.411h, 750.411i, and 750.411s. A court shall not grant relief under this subsection unless the petition alleges facts that constitute stalking as defined in section 411h or 411i, or conduct that is prohibited under section 411s, of the Michigan penal code, 1931 PA 328, MCL 750.411h, 750.411i, and 750.411s.

An individual against whom an ex parte PPO has been entered may petition to rescind the PPO. See MCL 600.2950a(13) and (14).

The individual petitioning the trial court for a PPO "bears the burden of proof." *Lamkin v Engram*, 295 Mich App 701, 706; 815 NW2d 793 (2012). Because petitioner's petition for an ex parte PPO was based on MCL 750.411h, petitioner was required to demonstrate that respondent's conduct amounted to stalking as defined by the statute. See *id*. In determining whether to issue a PPO, the trial court is not limited to the

petition itself but may consider additional testimony, documents, and "other evidence proffered to determine whether a respondent engaged in harassing conduct." *Id*. at 711, citing MCL 600.2950a.

MCL 750.411h(1) defines "harassment" and "stalking" in the following manner:

> (c) "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.
>
> (d) "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

MCL 750.411h(1) defines "course of conduct" and "unconsented contact" in the following manner:

> (a) "Course of conduct" means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose.
>
> * * *
>
> (e) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued.

In this case, when the trial court ruled to modify rather than rescind petitioner's PPO against respondent, it reasoned as follows:

So this is certainly an unusual case . . . . Technically, very interesting. Personally, having been through a campaign, I understand both of your positions in this. However, that's not really kind of—that's not my inquiry. My inquiry is to whether or not there has been a pattern of behavior, communication, contact that a reasonable person would take as threatening.

So I do find that there's cause to maintain the personal protection order. I am, however, going to modify it.

Just to put it on the record, although the lengthy social media reporting posts about Mr. Berryman's political dealings and/or his history in the community may, in fact, be a framework, I think, for how he may feel singled out, I've already stated, I believe, on the record during prior testimony, that alone that would not have been cause for me to issue a PPO. But I think that gets to a reasonable person question in whether or not [petitioner] personally felt threatened based on other actions.

However, I do believe that the June [19th], I think is the date of the public meeting, whereby Mr. Mackey identified that Mr. Berryman was the reason, along with Judge Glaser, that he went to prison, and even subsequent in the commentary, that, "I will remain a thorn in your side," I've already told you that that was the most concerning thing that I heard in terms of the statements made; and that, to me, I do believe was something that a reasonable person could feel threatened by.

Moving forward in a timeline, there were two other instances that caused me concern. While I would agree, Mr. Mackey, that the e-mail from July [5th] was tedious in its analysis of Robert's Rules of Order, I do, in my review of that e-mail, would note that all of the criticism about the misappropriation or misuse of the parliamentary procedure was identified as Mr. Berryman's fault. So I do also feel that in conjunction with the statements at the meeting from June [19th], that that e-mail would continue or perpetuate Mayor Berryman's concern about personal matters being transcended from the political stage. So I do

> think that [that] also is a further indication close in time that there was behavior that Mr. Berryman could have felt threatened by.
>
> And then we get into what—This is a little bit without statutory analysis. But the July 8th e-mail is equally or more concerning to the Court. It has not been brought to my attention, or there's been no request to have that be a violation of a personal protection order, an order to show cause why you should not be held in contempt for violating a PPO, but the content of that July 8th e-mail is actually more concerning to me than the content of the July [5th] e-mail. But taken in conjunction with the statements made on June [19th], I do find that Mr. Berryman has a legitimate cause for concern.
>
> So based on those instances, I am maintaining the personal protection order. I am modifying it accordingly. I'm actually not reading from the first one, so I'm just going to state, in a way, that I've modified it, [in a way] that I believe would accomplish your political candidacy.

In arguing that the trial court should have rescinded the PPO, respondent focuses on whether the evidence supports that he engaged in conduct prohibited by MCL 750.411h, thereby justifying the PPO. Respondent challenges the trial court's conclusion that he engaged in "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts," MCL 750.411h(1)(a) (defining "course of conduct"), that "would cause a reasonable individual to suffer emotional distress," MCL 750.411h(1)(c) (defining "harassment"), and therefore stalked petitioner under MCL 750.411h(1)(d). He contends that he did not stalk petitioner by (1) responding to petitioner's questioning during the June 19, 2017 city commission meeting and (2) sending e-mails (a) to the city commission on July 5, 2017, discussing the commission's apparent lack of compliance with rules of parliamentary procedure, and

(b) to the city attorney and chief of police on July 8, 2017, to inform them about respondent's political campaign schedule.[1]

First addressing the contact at the June 19, 2017 meeting, the trial court never found that respondent and petitioner's exchange constituted "unconsented contact" under MCL 750.411h(1)(e). See MCL 750.411h(1)(c) (defining "harassment" as including "repeated or continuing unconsented contact"). And it is difficult to see how this contact could be unconsented. The June 19 meeting was open to the public and included a portion for public comment. Petitioner, as a public official, was at the meeting in an official capacity. Respondent, as a member of the community, gave public comment at the meeting. Respondent's comments may have been critical of petitioner in his official capacity, but no one contends that they were inappropriate or otherwise constituted unconsented contact. The only possible unconsented contact came after respondent was done giving his comment. But this contact was precipitated by *petitioner* asking respondent to answer questions unrelated to the public meeting or other official business. While respondent's response to petitioner may have been, as petitioner worded it, "unnerving," that does not make the contact unconsented. "Unconsented contact" means "any contact with another individual that is initiated or contin-

[1] We note that MCL 600.2950a(1) states that "[a] court shall not grant relief under this subsection unless *the petition* alleges facts that constitute stalking as defined in [MCL 750.411h]" and that the July 8 e-mail was sent *after* the petition was filed and was thus not alleged in the petition. (Emphasis added.) Nonetheless, for purposes of this appeal, we will assume without deciding that the July 8 e-mail could constitute harassment under MCL 750.411h(1)(c) so as to support a finding of stalking under MCL 750.411h(1)(d) and satisfy the requirements of MCL 600.2950a.

ued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued." MCL 750.411h(1)(e). The June 19 contact was not "initiated" by respondent. Nor was the contact continued without petitioner's consent. Petitioner had numerous opportunities to end the contact after he asked his question and got his answer. Indeed, when respondent twice asked, "What else you got?" petitioner continued conversing with respondent and never indicated that he wished for the contact to end. It was not until respondent asked petitioner a third time if he had any other questions that petitioner said, "No," at which point the contact ended. For similar reasons, respondent's contact with petitioner was not continued "in disregard of [petitioner's] expressed desire that the contact be avoided or discontinued." Petitioner initiated the contact and never expressed a desire for the contact to be discontinued during the course of the contact. When petitioner ultimately did state that he had no further questions, the contact ended. Simply put, respondent's response to petitioner's question at the June 19, 2017 public meeting could not constitute "unconsented contact" under MCL 750.411h(1)(e).

Yet harassment is not limited to unconsented contact. See MCL 750.411h(1)(c) (defining "harassment" as "conduct directed toward a victim that includes, but is not limited to, . . . unconsented contact"). The trial court reasoned that respondent's remarks at the June 19 meeting constituted harassment because they were "something that a reasonable person could feel threatened by." The trial court was particularly concerned with respondent's statement that petitioner "was the reason . . . that he went to prison" as well as respondent's comment, "I'm going to be a thorn in your side . . . ."

But in discussing these statements, the court did not consider the surrounding context in which they were made. Respondent was sentenced in 1986 to a maximum of 10 years' imprisonment. Since his release, respondent never contacted petitioner or otherwise acted inappropriately toward him. In fact, the first contact between respondent and petitioner was at the June 19 meeting and, again, that contact was initiated by petitioner. Thus, it is difficult to understand how respondent blaming petitioner for going to prison was threatening; petitioner first became aware that respondent blamed him for going to prison *over 30 years after* respondent was sentenced, and in that time, respondent never contacted or otherwise confronted petitioner, and the first time that they spoke was when *petitioner* confronted respondent at a public meeting. In this context, namely that respondent never contacted petitioner in the 30 years since he was sentenced to prison and that the first and only contact between them was initiated by petitioner, we cannot agree that a reasonable person could feel threatened by respondent's conduct or that the conduct otherwise amounted to harassment under MCL 750.411h(1)(c).

Similarly, in context, respondent's comment that he was going to be a thorn in petitioner's side would not make a reasonable person feel threatened and would not otherwise constitute harassment. While in the months before this exchange respondent had been critical of petitioner's conduct, respondent's comments always focused on petitioner's actions in his official capacity as mayor. As for the remark at the meeting, it was immediately preceded by respondent's criticism of petitioner's conduct as a public servant and politician, and it was followed by respondent expressing his opinion of the effect of petitioner's public conduct on the local community. Thus, taken in context, respon-

dent's remark was not threatening but instead conveyed respondent's intent to remain vigilant in his scrutiny of petitioner's public conduct.

In sum, because the trial court did not consider in context respondent's comments about blaming petitioner for going to prison and being a thorn in petitioner's side, we are definitely and firmly convinced that the trial court made a mistake by finding that the comments would make a reasonable person feel threatened or otherwise suffer emotional distress. Accordingly, we conclude that the exchange at the June 19 meeting is not the type of conduct that constitutes harassment and therefore could not support a finding of stalking. See MCL 750.411h(1)(c) and (d).

As for the e-mails, the trial court cited two: one sent on July 5, and the other on July 8. But the trial court's factual findings about these e-mails were minimal. Significantly, the trial court never explained why the July 8 e-mail constituted harassment. Rather, the trial court merely concluded that the e-mail was "concerning." Assuming that "concerning" conduct is equivalent to harassment, it is unclear what was concerning with regard to the e-mail. The e-mail was sent to the Adrian city attorney and the Adrian chief of police the day after the ex parte PPO was issued. In the e-mail, respondent explained that he assumed that the PPO was issued to petitioner in his official capacity as mayor and that the city attorney was therefore petitioner's legal counsel. The e-mail was clear that it was being sent because respondent was also running a political campaign and respondent wanted to make petitioner, in his official capacity, aware of respondent's campaign itinerary so that they would not appear at the same events. There was nothing about the e-mail that "would cause a reasonable individual to suffer

emotional distress" thereby constituting harassment. MCL 750.411h(1)(c). The e-mail was sent so that respondent could *avoid* contact with petitioner, and it did not otherwise contain anything that would make a reasonable person feel threatened or suffer emotional distress. Accordingly, we are definitely and firmly convinced that the trial court made a mistake by finding that the July 8 e-mail was conduct constituting harassment, and therefore it was not conduct that could support a finding of stalking. See MCL 750.411h(1)(c) and (d).

Turning to the July 5 e-mail, the trial court concluded that petitioner "could have felt threatened" by the e-mail because it was direct in blaming petitioner for deviations from parliamentary procedures at city commission meetings and the e-mail "perpetuate[d] [petitioner's] concern about personal matters being transcended from the political stage." But nothing in the July 5 e-mail concerned "personal matters." The e-mail was sent to the Adrian city attorney and the entire city commission. The e-mail explained that it was sent in response to petitioner's representation about which set of parliamentary rules the city commission followed and that the procedures used during the meetings were sanctioned by the city attorney. The e-mail then focused on instances in which the commission violated the rules of parliamentary procedure that it supposedly followed. While the e-mail was direct in its criticisms of petitioner, the e-mail focused exclusively on petitioner's role as the presiding officer at city commission meetings. The e-mail outlined the parliamentary rules that meetings were supposed to follow and then gave examples of when petitioner deviated from those rules and the effects that those deviations had. But the e-mail also pointed to an instance in which the entire city commission deviated from the

rules and the effect that this deviation had. While the e-mail was lengthy, there was nothing inappropriate about it. A member of the public can undoubtedly express concerns about the manner in which public meetings are held, and that was all that this e-mail did. While respondent's criticisms of petitioner were pointed, they focused on technical breaches of the rules of parliamentary procedure and petitioner's role in those breaches in his official capacity as chair of city commission meetings. In light of the content of the July 5 e-mail, even if it was motivated by "personal matters being transcended from the political stage," we are definitely and firmly convinced that the trial court made a mistake by finding that respondent's criticisms of petitioner's deviations from the rules of parliamentary procedure would cause a reasonable person to suffer emotional distress. Accordingly, the July 5 e-mail was not conduct that amounted to harassment and therefore could not support a finding of stalking. See MCL 750.411h(1)(c) and (d).

In sum, the trial court found three instances of respondent's conduct that it concluded amounted to stalking, but for the reasons explained, none of that conduct was the type of conduct that constitutes harassment under MCL 750.411h(1)(c). Therefore, there was no evidence of harassment under MCL 750.411h(1)(c), nor was there evidence that respondent engaged in a "course of conduct," see MCL 750.411h(1)(a), "involving repeated or continuing harassment," MCL 750.411h(1)(d), so respondent could not have stalked petitioner under MCL 750.411h. And because there was insufficient evidence to conclude that respondent stalked petitioner, the trial court erred as a matter of law by not rescinding the PPO. See MCL 600.2950a; *Lamkin*, 295 Mich App at 706 (explaining that the petitioner is required to demonstrate that the

respondent's conduct amounted to stalking under MCL 750.411h). Thus, the trial court necessarily abused its discretion by not rescinding the PPO. *Pirgu*, 499 Mich at 274.

Given our disposition of respondent's initial issue on appeal, it is unnecessary to address respondent's additional claims that entry of the modified PPO violated his constitutional rights. The "widely accepted and venerable rule of constitutional avoidance counsels that [this Court] first consider whether statutory or general law concepts are instead dispositive." *Dep't of Health & Human Servs v Genesee Circuit Judge*, 318 Mich App 395, 407; 899 NW2d 57 (2016) (quotation marks and citation omitted).

The trial court's modified PPO is vacated.

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