MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

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COURT OF APPEALS

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COURT OF APPEALS CASES

FARLEY v CARP
WREN v SOUTHFIELD REHABILITATION COMPANY
ELLIS v HENRY FORD HEALTH SYSTEM

Docket Nos. 283405, 283418, 283726, 283727, 284319, and 284681. Submitted July 15, 2009, at Detroit. Decided January 5, 2010, at 9:00 a.m.

Elizabeth Farley, as personal representative of the estate of Franklin Farley, deceased, brought an action in the Wayne Circuit Court against Nevine M. Carp, M.D.; Advanced Cardiovascular Health Specialists, P.C.; Garden City Hospital, Osteopathic; and others, alleging medical malpractice. The court, Louis F. Simmons, Jr., J., denied a motion for summary disposition by Advanced Cardiovascular and Garden City Hospital that alleged that the action was not timely. Defendants subsequently moved for rehearing in light of the Supreme Court's decision in *Waltz v Wyse*, 469 Mich 642 (2004), but the trial court denied the motion. Advanced Cardiovascular and Garden City Hospital appealed separately by leave granted, and the appeals were consolidated by the Court of Appeals. 266 Mich App 566 (2005). The Court of Appeals held that *Waltz* applied retroactively and reversed and remanded the case to the trial court for entry of summary disposition in defendants' favor. The Supreme Court denied plaintiff's application for leave to appeal. 474 Mich 1020 (2006). The trial court, Robert J. Colombo, Jr., J., did not thereafter enter an order granting summary disposition in favor of defendants, but, instead, entered an order reinstating the case. Advanced Cardiovascular and Garden City Hospital appealed separately by leave granted.

Kirt Wren, as personal representative of the estate of Hiram Dent, deceased, brought a medical malpractice action in the Wayne Circuit Court against Southfield Rehabilitation Company, doing business as Great Lakes Rehabilitation Hospital; St. John Riverview Hospital; and Mohammed S. Siddiqui, D.O. The trial court, Robert J. Colombo, Jr., J., granted summary disposition in favor of defendants on the basis that the action was not timely filed. Plaintiff appealed, and the Court of Appeals affirmed in an unpublished opinion per curiam, issued March 13, 2007 (Docket No. 267024). The trial court thereafter granted plaintiff's motion for relief from the judgment and reinstated the case. Southfield Rehabilitation Company and St. John Riverview Hospital appealed separately by leave granted.

Labaron Ellis and Thomas J. Edmunds, as copersonal representatives of the estate of Saundra L. Edmunds, deceased, brought a medical malpractice action in the Wayne Circuit Court against Henry Ford Health System, doing business as Henry Ford Hospital; Sachin Goel, M.D.; and others. Defendants moved for summary disposition on the basis that the action was not timely filed. The trial court, Wendy M. Baxter, J., denied the motion. The court thereafter entered an order granting relief from that order and dismissed the action. Plaintiffs thereafter moved to reinstate the action, and the trial court, Cynthia D. Stephens, J., granted the motion. Defendants appealed by leave granted. The Court of Appeals consolidated the cases for purposes of argument and decision.

The Court of Appeals *held*:

1. The Court of Appeals decision in *Kidder v Ptacin*, 284 Mich App 166 (2009), controls the outcome of the *Wren* case, and its reasoning applies to the determination of the *Farley* and *Ellis* cases. *Kidder* held that relief from a judgment is not appropriate where the case has been dismissed in accordance with a directive of the Court of Appeals and the appellate process has been concluded. The *Kidder* principle also applies where the trial court has previously dismissed a case and no appeal has been taken and where the trial court has not yet complied with a directive of the Court of Appeals to dismiss the case.

2. If relief from judgment should not be granted under MCR 2.612(C)(1)(f) where a party sleeps on their appellate rights by failing to seek leave to appeal in the Supreme Court from an adverse ruling in the Court of Appeals, then relief from judgment is not appropriate where the party never even pursues an appeal from the trial court's ruling to the Court of Appeals.

3. Relief from judgment under MCR 2.612(C)(1)(f) is inappropriate where a party has not sought appellate review of a trial court's final order and the basis for relief from judgment is a subsequent appellate decision in a different case.

4. The trial court in *Farley* was required to follow the directions of the Court of Appeals to grant defendants summary disposition. Once the trial court complies with that directive, it is precluded from granting relief from judgment under the law of the case doctrine. The orders of the trial courts in all three cases that reinstated the cases must be vacated and the cases must be remanded for the entry of orders of summary disposition in favor of defendants.

Vacated and remanded.

BORRELLO, J., dissenting, stated his agreement with the majority that the Court of Appeals is bound by MCR 7.215(J)(1) to follow *Kidder* in *Wren* and *Ellis* but also stated his opinion that *Kidder* was wrongly decided and a conflict should be declared under MCR 7.215(J)(2). The majority errs by holding that *Kidder* controls the outcome in *Farley* because *Farley* is factually distinguishable from *Kidder* in that the *Farley* plaintiff availed herself of the appellate process while the plaintiff in *Kidder* failed to appeal the judgment of the Court of Appeals. It should be concluded that the trial court did not abuse its discretion by reinstating the *Farley* case because MCR 2.612(C)(1)(f) gives a trial court authority to relieve a party from a judgment.

1. JUDGMENTS — RELIEF FROM JUDGMENTS.

Relief from a judgment of a trial court is not appropriate where the case has been dismissed in accordance with a directive of the Court of Appeals and the appellate process has been concluded or where the trial court has yet to comply with the directive of the Court of Appeals to dismiss the case.

2. JUDGMENTS — RELIEF FROM JUDGMENTS.

Relief from a judgment should not be granted under MCR 2.612(C)(1)(f) where a party sleeps on their appellate rights by failing to seek leave to appeal in the Supreme Court from an adverse ruling in the Court of Appeals; relief from a judgment is not appropriate where the party never pursues an appeal from the trial court's ruling to the Court of Appeals.

3. JUDGMENTS — RELIEF FROM JUDGMENTS.

Relief from a judgment under MCR 2.612(C)(1)(f) is inappropriate where a party has not sought appellate review of the trial court's final order and the basis on which relief from the judgment is sought is a subsequent appellate decision in a different case.

McKeen & Associates, P.C. (by *Euel W. Kinsey*), for Elizabeth Farley.

Mindell, Malin, Kutinsky, Stone & Blatnikoff (by *Glenn H. Oliver*) for Kirt Wren.

Mark Granzotto, P.C. (by *Mark R. Granzotto*), and *The Thurswell Law Firm* (by *Judith A. Susskind*) for Labaron Ellis and Thomas J. Edmunds.

Plunkett Cooney (by *Robert G. Kamenec*) for Advanced Cardiovascular Health Specialists, P.C.

Feikens, Stevens, Kennedy & Galbraith, P.C. (by *Jeffrey Feikens*), for Garden City Hospital, Osteopathic.

Merry, Farnen & Ryan, P.C. (by *Cynthia E. Merry* and *John J. Schutza*), for St. John Riverview Hospital.

Ramar & Paradiso, P.C. (by *John J. Ramar*), for Southfield Rehabilitation Company.

Ramar & Paradiso, P.C. (by *Anthony J. Paradiso* and *Carmine G. Paterra*), for Henry Ford Health System and others.

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

SAWYER, J. This trio of cases provides us with the opportunity to determine the scope of the applicability of this Court's recent decision in *Kidder v Ptacin*,[1] which held that relief from a judgment was not appropriate where the case had been dismissed in accordance with a directive of this Court and the appellate process had been concluded. Although originally submitted as three separate cases, because of the common issue presented in light of *Kidder*, on our own motion we consolidated these cases for purposes of argument and decision. In these appeals, we hold that the *Kidder* principle also applies where the trial court had previously dismissed a case and no appeal had been taken and where the trial court had not yet complied with this Court's earlier directive.

Our decision in *Kidder* considered the application of the Supreme Court's decision in *Mullins v St Joseph*

[1] 284 Mich App 166; 771 NW2d 806 (2009).

Mercy Hosp[2] to cases that had been previously decided by this Court under *Waltz v Wyse*[3] resulting in summary dispositions in favor of the defendants in certain medical malpractice actions. The Supreme Court's order in *Mullins* had reversed this Court's holding that *Waltz* was to be given full retroactive effect. The Supreme Court's order in *Mullins*[4] held that *Waltz* was not to be applied to any action filed after the decision in *Omelenchuk v City of Warren*[5] in which the saving period had expired within 182 days after the decision in *Waltz*. In *Kidder*, this Court, in a prior unpublished opinion per curiam issued before the Supreme Court's order in *Mullins*, applied the decision in *Waltz*, concluding that the plaintiff's suit was not timely, and reversed and remanded the matter to the trial court with instructions to grant summary disposition to the defendants.[6] The trial court complied with this Court's directions and dismissed the case.[7] Thereafter, the Supreme Court entered its order in *Mullins*. Because the plaintiff in *Kidder* would have prevailed under the *Mullins* holding, the plaintiff in *Kidder* moved for relief from judgment, which the trial court granted and reinstated the plaintiff's case.[8]

The defendants appealed, arguing that, under the law of the case doctrine, the trial court was obliged to follow this Court's previous directions to dismiss the case. This Court agreed and again ordered the trial court to grant summary disposition in favor of the defendants.[9]

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[2] 480 Mich 948 (2007).

[3] 469 Mich 642; 677 NW2d 813 (2004).

[4] *Mullins, supra* at 948.

[5] 461 Mich 567; 609 NW2d 177 (2000).

[6] *Kidder, supra* at 168-169.

[7] *Id.* at 169.

[8] *Id.*

[9] *Id.* at 171.

The three cases before us present a variation on the facts of *Kidder*. In each case, we conclude that *Kidder* either directly controls the outcome of the case or that at least the reasoning in *Kidder* applies and judgment for defendants is appropriate.

Of the three cases, perhaps the easiest to resolve is *Wren* (Docket Nos. 283726 and 283727), because the procedural facts are essentially identical to *Kidder*. In both *Wren* and *Kidder*, this Court issued an opinion before the Supreme Court's order in *Mullins*, which applied *Waltz* retroactively and concluded that the cases were untimely filed.[10] Thus, both cases were concluded at the time the Supreme Court entered its order in *Mullins*, and the plaintiffs in both cases sought to have their cases reinstated in light of *Mullins*. In both cases, the trial court ultimately granted relief from judgment in light of *Mullins* and ordered the cases reinstated.[11] Given that *Wren* is in the same procedural posture as *Kidder*, *Kidder* directly controls the outcome of *Wren*. Therefore, we conclude that, in light of *Kidder*, the trial court erred by reinstating plaintiff's cause of action. We vacate the trial court's order in *Wren* reinstating this matter.

The situation in *Ellis* (Docket No. 284319) is somewhat different from *Kidder*, but we nonetheless believe that *Kidder* directs us to the same result. The difference

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[10] There is one distinction between *Wren* and *Kidder* in this regard: in *Kidder*, the trial court had ruled in the plaintiff's favor and the prior appeal was an interlocutory appeal by the defendants seeking to have the case dismissed, while in *Wren* the trial court had dismissed the case and plaintiff appealed to this Court in the prior appeal. But we see no meaningful distinction in this slightly different procedural posture in the prior appeals.

[11] Another similarity of both *Kidder* and *Wren* is that in neither case did the plaintiffs seek leave to appeal in the Supreme Court after losing in this Court.

in *Ellis* is that plaintiffs never sought to appeal the trial court's original decision to dismiss the case in light of the retroactive application of *Waltz*. That is, the procedural posture of *Ellis* at the time that the Supreme Court entered its order in *Mullins* was that the trial court had granted defendants' motion and dismissed the case, with plaintiffs not taking an appeal from that decision. The Supreme Court issued its decision in *Mullins* nearly a year later, prompting plaintiffs to file their motion to reinstate the case, which the trial court granted.

Technically speaking, the law of the case doctrine does not apply here because there is not a decision of a higher court that is now binding on the lower court.[12] Despite that fact, however, it is not tenable that plaintiffs in this case should prevail while the plaintiffs in *Wren* and *Ellis* lose. In *Kidder*,[13] we made the following observation:

> MCR 2.612(C)(1)(f) is likewise inapplicable. Just as "equity aids the vigilant, not those who sleep on their rights," *Falk v State Bar of Michigan*, 411 Mich 63, 113 n 27; 305 NW2d 201 (1981) (RYAN, J., joined by MOODY and FITZGERALD, JJ.) (quotation marks and citations omitted), so does the appellate process. See *Lothian v Detroit*, 414 Mich 160, 175; 324 NW2d 9 (1982) (denying relief to an appellant who, "wholly apprised of the facts which constituted his cause of action, chose to sleep on his rights until a subsequent appellate court decision roused him to action"). The instant defendants were neither parties to *Mullins* nor among those similarly situated parties whose cases were pending in the appellate process. Instead, as earlier indicated, the dismissal of plaintiff's case had become final (an effective judgment). The interests of justice truly militate

[12] See *Kidder*, *supra* at 170.

[13] *Id*. at 171.

> against allowing a defeated party's action to spring back to life because others have availed themselves of the appellate process.

If relief from judgment should not be granted under MCR 2.612(C)(1)(f) where a party sleeps on their appellate rights by failing to seek leave to appeal in the Supreme Court from an adverse ruling in this Court, then certainly relief from judgment is not appropriate where the party never even pursues an appeal from the trial court's ruling to this Court. To hold otherwise would allow plaintiffs' "action to spring back to life because others have availed themselves of the appellate process."[14]

We hold that relief from judgment under MCR 2.612(C)(1)(f) is inappropriate where a party has not sought appellate review of a trial court's final order and the basis for relief from judgment is a subsequent appellate decision in a different case. Accordingly, the trial court in *Ellis* erred by granting plaintiffs relief from judgment and reinstating their cause of action. We vacate that order and reinstate the trial court's original order dismissing the case with prejudice.

We finally turn to *Farley* (Docket Nos. 283405, 283418, and 284681), which presents the most distinct set of facts of this trio of cases. In *Farley*, there are two significant procedural differences from *Kidder* and *Wren*. First, in *Farley*, plaintiff did not sit on her appellate rights. After the adverse decision in this Court, she sought leave to appeal in the Supreme Court, which denied leave.[15] Second, the trial court never complied with this Court's directions on remand. That is, in our prior opinion, we directed the trial court to

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[14] *Kidder*, *supra* at 171.

[15] *Farley v Advanced Cardiovascular Health Specialists, PC*, 474 Mich 1020 (2006).

enter an order granting defendants summary disposition.[16] The trial court never complied with that directive. Thus, the trial court never granted plaintiff relief from judgment after the Supreme Court's decision in *Mullins* because there was no trial court judgment to grant relief from.

We do not believe that either of these distinctions, however, requires a different result. The fact that the Supreme Court denied leave to appeal means that our earlier decision is now the final adjudication in this case and may be enforced according to its terms.[17] Furthermore, we cannot endorse a process by which relief can be obtained because the lower court chose to simply ignore the clear directive of the appellate court, allowing the case to languish until there is a change in law to justify the result that the lower court would like to apply.[18]

Simply put, the trial court had no alternative in this case other than to comply with the direction of this Court in our previous opinion. And once the trial court so complies, as discussed above, it is precluded from granting relief from judgment under the law of the case doctrine.

The orders of the trial courts reinstating these cases are vacated. The matters are remanded to the respective trial courts with direction to enter orders of summary disposition in favor of defendants. We do not retain jurisdiction. Costs to defendants.

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[16] *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 568-570; 703 NW2d 115 (2005).

[17] *Detroit v Gen Motors Corp*, 233 Mich App 132, 140; 592 NW2d 732 (1998).

[18] See *Cox v Flint Bd of Hosp Managers (On Remand)*, 243 Mich App 72, 93; 620 NW2d 859 (2000), and *Sumner v Gen Motors Corp (On Remand)*, 245 Mich App 653; 633 NW2d 1 (2001) (discussing the need for finality in this Court's judgments).

SAAD, C.J., concurred.

BORRELLO, J. (*dissenting*). I respectfully dissent from the majority's opinion in these consolidated cases. While I agree with the majority that we are bound by MCR 7.215(J)(1) to follow *Kidder v Ptacin*, 284 Mich App 166; 771 NW2d 806 (2009), in *Wren* (Docket Nos. 283726 and 283727) and *Ellis* (Docket No. 284319), because I am of the opinion that *Kidder* was wrongly decided, I would declare a conflict under MCR 7.215(J)(2). Furthermore, I disagree with the majority that *Kidder* controls the outcome in *Farley* (Docket Nos. 283405, 283418, and 284681) because *Farley* is factually distinguishable from *Kidder*. Contrary to the result reached by the majority, I would conclude that the trial court did not abuse its discretion by reinstating plaintiff's case in *Farley*.

I believe that the majority's reliance on *Kidder* in *Farley* is misplaced because the facts in *Farley* are distinguishable from the facts in *Kidder*. MCR 2.612(C)(1)(f) authorizes relief from judgment for "[a]ny other reason justifying relief from the operation of the judgment." In *Kidder*, this Court ruled that MCR 2.612(C)(1)(f) was inapplicable because the plaintiff in that case failed to appeal the judgment of this Court. *Kidder*, *supra* at 169, 171. In declining to apply MCR 2.612(C)(1)(f), this Court stated:

> Just as "equity aids the vigilant, not those who sleep on their rights," *Falk v State Bar of Michigan*, 411 Mich 63, 113 n 27; 305 NW2d 201 (1981) (RYAN, J., joined by MOODY and FITZGERALD, JJ.) (quotation marks and citations omitted), so does the appellate process. See *Lothian v Detroit*, 414 Mich 160, 175; 324 NW2d 9 (1982) (denying relief to an appellant who, "wholly apprised of the facts which constituted his cause of action, chose to sleep on his rights until a subsequent appellate court decision roused him to action"). . . . The interests of justice truly militate against

> allowing a defeated party's action to spring back to life because others have availed themselves of the appellate process. [*Kidder*, *supra* at 171.]

As the majority notes, plaintiff in *Farley* did not sleep or sit on her appellate rights like the plaintiff in *Kidder*. To the contrary, plaintiff in *Farley* moved for reconsideration in this Court[1] and appealed this Court's decision to the Supreme Court, which denied leave to appeal.[2] Because plaintiff availed herself of the appellate process in *Farley*, *Kidder*'s reasoning for declining to apply MCR 2.612(C)(1)(f) is inapplicable here, and the interests of justice do not militate against allowing plaintiff to pursue her case. Rather, the interests of justice dictate a contrary result from that reached by my colleagues in the majority. Based on my review of the proceedings in the trial court, any reliance on *Kidder* to reverse the trial court's reinstatement of plaintiff's case in *Farley* is improper and unjust.

Although plaintiff's motion following the Supreme Court's decision in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948(2007), was technically a motion to lift a stay rather than a motion to reinstate the case, the trial court noted on the record that it had not imposed a stay and treated plaintiff's motion as a motion to reinstate the case. " 'This Court reviews for abuse of discretion a trial court's decision concerning a motion to reinstate an action.' " *Kidder*, *supra* at 170, quoting *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 138; 624 NW2d 197 (2000). The abuse of discretion standard recognizes " 'that there will be circumstances in which there will be no single correct outcome; rather, there

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[1] *Farley v Carp*, unpublished order of the Court of Appeals, entered July 22, 2005 (Docket Nos. 256776, 256799, and 257988).

[2] *Farley v Advanced Cardiovascular Health Specialists, PC*, 474 Mich 1020 (2006).

will be more than one reasonable and principled outcome.' " *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Unlike the majority, I would conclude that the trial court's reinstatement of plaintiff's case in *Farley* was not an abuse of discretion. Given the trial court's authority to relieve a party from a judgment under MCR 2.612(C)(1)(f) and the fact that plaintiff in *Farley* availed herself of the appellate process, I would conclude that *Kidder* is distinguishable and hold that the trial court's reinstatement of plaintiff's case in *Farley* did not fall outside the principled range of outcomes.

ATTORNEY GENERAL v
POWERPICK PLAYER'S CLUB OF MICHIGAN, LLC

Docket No. 283858. Submitted June 9, 2009, at Grand Rapids. Decided January 5, 2010, at 9:05 a.m.

The Attorney General brought an action in the Kent Circuit Court, George S. Buth, J., against PowerPick Player's Club of Michigan, LLC, seeking to enjoin an alleged public nuisance resulting from defendant's operation of what it characterizes as a professional lottery club. The Attorney General alleged that defendant's operations violated several antigambling statutes and therefore constituted an enjoinable public nuisance and that the operations violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. The Attorney General moved for summary disposition, alleging that there was no dispute with regard to the facts and that the only matter to be decided was what legal conclusions could be drawn from the facts. PowerPick also moved for summary disposition, asserting several affirmative defenses. The court denied the Attorney General's motion, concluding that there were a number of factual issues yet to be decided. The Attorney General appealed by leave granted.

The Court of Appeals *held*:

1. At the time of the circuit court's ruling there remained no genuine issue of material fact that would have precluded the grant of summary disposition with respect to the Attorney General's nuisance claim. The evidence did not present disputed issues of fact. The only question presented for resolution was whether PowerPick's operations, as described in the uncontroverted materials and documents presented to the circuit court, fell within the scope of the statutes cited by the Attorney General. This was purely a legal question for the court, not a factual question for the jury.

2. The Attorney General was entitled to judgment as a matter of law with respect to the nuisance claim because PowerPick's operations constituted an enjoinable nuisance. The order denying the Attorney General's motion for summary disposition with respect to the nuisance claim must be reversed.

3. PowerPick's PowerPool scheme contemplates the placement of bets under MCL 750.301. PowerPick registers those bets in

violation of MCL 750.304, and PowerPick possesses memoranda of bets in violation of MCL 750.306.

4. PowerPick's random assignment of customers to the individual PowerPools injects an additional element of uncertainty into a customer's chance of sharing in a winning ticket and the customers bet on the outcome of these random computerized assignments. This scheme is encompassed within the definition of betting.

5. The general prohibition against the sale of lottery tickets by unlicensed persons contained in MCL 432.27(1) encompasses for-profit, third-party transfers. PowerPick sells lottery tickets or shares at a price greater than that fixed by rule of the Michigan Lottery commissioner in violation of MCL 432.27(1).

6. PowerPick's periodic random drawings for Michigan Lottery scratch-off tickets constitute an illegal lottery within the meaning of MCL 750.372, and the MegaPools constitute an illegal gift enterprise within the meaning of MCL 750.372.

7. Although an unscratched instant lottery ticket generally has little or no actual monetary worth, it can have a great deal of potential value and thus may constitute a "prize" for purposes of considering the traditional elements of a lottery consisting of consideration, prize, and chance.

8. PowerPick violates the provisions of MCL 750.372 by setting up and managing the periodic drawings for scratch-off tickets and the MegaPools.

9. PowerPick's various gaming schemes violate the terms of MCL 432.27(1), MCL 750.301, MCL 750.304, MCL 750.306, and MCL 750.372. The lottery and gambling statutes were validly enacted to preserve the public safety, morals, and welfare. Harm to the public is presumed to flow from PowerPick's operations that violate these statutes. PowerPick's business operations, taken as a whole, constitute a public nuisance.

10. PowerPick's office in Comstock Park and the furniture, fixtures, and contents of the office constitute a nuisance as a matter of law.

11. PowerPick engages in gambling within the meaning of MCL 600.3801.

12. PowerPick's periodic drawings for scratch-off tickets constitute gambling under MCL 600.3801.

13. PowerPick owns, leases, conducts, or maintains the building in Comstock Park and uses it for the purpose of gambling within the meaning of MCL 600.3801, even if it does not hold the actual periodic drawings for the scratch-off tickets at the building.

The office in Comstock Park as well as the furniture, fixtures, and contents of the office constitute an enjoinable nuisance under MCL 600.3801.

14. The trial court erred by denying the Attorney General's motion for summary disposition with regard to PowerPick's affirmative defenses under MCR 2.116(C)(9).

15. The Attorney General did state a claim on which relief could be granted and properly pleaded and supported his allegations of nuisance and unlawful gambling.

16. PowerPick failed to support its claim that it was being treated differently than similarly situated entities. No equal protection violation was shown.

17. The equitable defense of laches was unavailable to PowerPick because it acted with unclean hands by violating MCL 432.27(1), MCL 750.301, MCL 750.304, MCL 750.306, and MCL 750.372. For the same reason, PowerPick was not entitled to assert the equitable defense of unclean hands.

18. PowerPick's affirmative defenses fail as a matter of law. The trial court should have granted the Attorney General's motion for summary disposition with regard to those affirmative defenses.

19. The trial court, on remand, must address the claim that PowerPick's operations violate the MCPA.

20. The order of the trial court must be reversed and the matter must be remanded to the trial court for the entry of a judgment in favor of the Attorney General with respect to the nuisance claim and for consideration of the MCPA claim.

Reversed and remanded.

HOEKSTRA, J., concurring in part and dissenting in part, agreed with the majority that PowerPick violates MCL 432.27(1), by reselling lottery tickets at a price greater than that fixed by the Michigan Lottery commissioner, that it violates MCL 750.372, because its random drawings for scratch-off tickets constitute an illegal lottery, that its MegaPools constitute an illegal gift enterprise, that PowerPick's affirmative defenses fail as a matter of law, and that it is appropriate to remand the case for consideration of the MCPA claims. Judge HOEKSTRA would, however, affirm the trial court's holding that factual issues remain with respect to whether the amount charged in addition to the cost of the purchased lottery tickets is a reasonable amount to pay for PowerPick's business expenses and profit or is in fact a second bet that buys the customer a chance to be assigned to a winning pool. Because these factual issues exist, it is premature to determine whether PowerPick's business operations and its office and furnishings constitute a nuisance. The case should be remanded

to also consider whether a violation of MCL 432.27(1) constitutes a public nuisance and, if so, whether, and to what extent, the violation is subject to the sanctions of MCL 600.3801. Although the majority correctly holds that the drawings for scratch-off tickets are gambling and that PowerPick can be sanctioned under MCL 600.3801, the case should be remanded for a determination regarding what assets, if any, are subject to the sanction.

1. MOTIONS AND ORDERS — SUMMARY DISPOSITION.

Summary disposition of all or part of a claim or defense may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact; 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; in general, a factual dispute exists when there is conflicting evidence concerning what happened, or when, where, or how something happened, or who was involved, or some other similar factual inquiry (MCR 2.116 [C][10]).

2. TRIAL — JULY TRIALS — ROLE OF JURY.

The proper role of a jury is to decide what the facts are and not what the facts mean.

3. WORDS AND PHRASES — BETTING.

The term "betting" in common speech means the putting of a certain sum of money or other valuable thing at stake on the happening or not happening of some uncertain event.

4. GAMING — BETTING.

The legislative goal behind the enactment of MCL 750.301 was the suppression of betting; the statute prohibits private betting between consenting parties and is not limited to combating only the effects of organized and commercialized gambling.

5. LOTTERIES — LICENSES — FOR-PROFIT, THIRD-PARTY TRANSFERS.

The Legislature, in enacting MCL 432.27(1), intended that the prohibition against sales of lottery tickets by persons who are not licensed agents is to be read broadly; the general prohibition against unlicensed sales or selling a ticket at a price greater than that fixed by the lottery commissioner encompasses for-profit, third-party transfers.

6. LOTTERIES — TRADITIONAL ELEMENTS.

The traditional common-law elements of a lottery are consideration, prize, and chance; these essentials cannot be used to frustrate the

plain and ordinary meaning of the word lottery; a "lottery" is commonly defined as a gambling game or method of raising money in which a large number of tickets are sold and a drawing is held for prizes, or a drawing of lots, or any happening or process that is or appears to be determined by chance.

7. LOTTERIES — GIFT ENTERPRISES.

A gift enterprise is, among other things, a merchant's scheme to induce sales by giving buyers tickets that carry a chance to win a prize (MCL 750.372).

8. LOTTERIES — GAMBLING — PUBLIC HARM.

Michigan's lottery and gambling statutes were validly enacted to preserve the public safety, morals, and welfare; harm to the public is presumed to flow from violation of a valid statute enacted to preserve the public health, safety, and welfare.

9. GAMBLING — COMMON-LAW ELEMENTS.

The common-law elements of "gaming" or "gambling" are price or consideration, chance, and prize or award.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Donald S. McGehee* and *Melinda A. Leonard*, Assistant Attorneys General, for plaintiff.

Morganroth & Morganroth, PLLC (by *Mayer Morganroth* and *Jason R. Hirsch*), for defendant.

Before: JANSEN, P.J., and HOEKSTRA and MARKEY, JJ.

JANSEN, P.J. In this action brought to enjoin an alleged public nuisance, plaintiff Attorney General appeals by leave granted the circuit court's order denying his motion for summary disposition. We reverse and remand for further proceedings consistent with this opinion.

I

Defendant PowerPick Player's Club of Michigan, LLC, operates what it characterizes as a professional

lottery club. The Attorney General filed the present action alleging that PowerPick's operations violated several of Michigan's antigambling statutes and therefore constituted an enjoinable public nuisance. The Attorney General also alleged that PowerPick's operations violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*.

A

Contrary to the ruling of the circuit court, the material facts of this case are beyond serious dispute. Indeed, PowerPick, itself, confirms the majority of the relevant factual details of this case through its own exhibits and documentary evidence. PowerPick is a subsidiary of PowerPick America, LLC, which was started in Arizona in the mid-1990s by Andrew and Judy Amada. It has operated in Michigan since 2002. PowerPick's main business is pooling lottery players. On its website, under the heading "What is PowerPick all about," PowerPick describes the nature of its business in broad overview:

> PowerPick is about giving people HUNDREDS MORE chances of becoming a lottery jackpot winner through pools put together by PowerPick, and all you need is yourself. Our pools include many benefits . . . . We do everything for you, so you can start out sharing HUNDREDS of tickets instead of sharing just a few tickets! While the best example of pooling is the "office pool" where groups of players combine their dollars to share the tickets and share the winnings, with PowerPick, each person in the group ends up with dramatically more chances of becoming a big winner because of the large blocks of tickets that are purchased. Plus you will benefit from so many of our other free services . . . .
>
> PowerPick does all the work [for] you. One call can answer your questions and we can place your order by

> phone or mail. You can use a credit card, debit card or check over the phone. You won't be standing in line, forgetting to buy tickets or making last minute dashes to the store. It's simply the most powerful, exciting and convenient way of playing.

Customers join PowerPick by paying a nominal "one-time setup fee." Once a customer has joined, he or she may then select from PowerPick's various pooling packages. PowerPick uses a computer system to randomly assign each customer to a particular pool of the type that he or she has chosen. After the assignment is made, PowerPick mails the customer a confirmation certificate, listing all the numbers purchased for the particular pool. PowerPick operates several different types of pooling packages that its customers can choose to join.

PowerPick's primary pooling packages are called "PowerPools," which consist of Mega Millions pools, Classic Lotto 47 pools, Keno pools, and Fantasy 5 pools. According to PowerPick's website, the Mega Millions pools and Classic Lotto 47 pools consist of either 25 or 50 shares each. The Keno pools and Fantasy 5 pools consist of 10 shares each. After the participants in a particular PowerPool pay their money, PowerPick uses a portion of it to buy lottery tickets from a licensed Michigan lottery retailer.

The participants in the particular PowerPool then share any winnings on a pro rata basis. Thus, for example, if a customer buys one share in a 25-share PowerPool, he or she receives $1/25$ of any winnings for that particular pool. Similarly, if a customer buys three shares in a 50-share PowerPool, he or she receives $3/50$ of any winnings for that particular pool.

PowerPick operates other pools as well. For example, customers who have bought into one of PowerPick's main PowerPools may also participate in one or both of

the "Million Dollar Clubs" (MDCs). PowerPick offers a $50 MDC and $100 MDC. PowerPick's website describes the $100 MDCs as follows:

> We will purchase up to 5 blocks of 1,000 tickets . . . on EVERY drawing night the Mega Millions jackpot is estimated to be $100 MILLION or more. In addition you can purchase up to 3 shares in each block [pool], which makes your share of the prize 3 times greater!
>
> We will try to keep the number of shares in each pool to about 1,200 plus or minus about 100 to produce an approximate range of 1100 to 1300 shares, with 1100 being the absolute minimum. PowerPick receives any shares under 1100 that are not ordered. So, if there are 1,200 shares in the pool, then each prize will be divided 1,200 ways. And, of course, all the prizes, not just the jackpot, will be distributed.

PowerPick further describes how to participate in the $100 MDCs:

> All you do is sign up saying that you would like to share in 1,000 extra Mega Millions tickets each drawing night that the Mega Millions jackpot is $100 Million or higher. What does this cost? Just a Buck! You will own 1 share in 1,000 tickets for only $1 per drawing.

The $50 MDCs operate similarly except that PowerPick purchases 500 tickets, rather than 1,000 tickets, when the Mega Millions jackpot is more than $50 million but less than $100 million. PowerPick's website further describes the $50 MDCs:

> This club works identically the same as the $100 MDC, except that each pool is 500 tickets instead of 1,000 tickets and the number of shares in each pool is about half as many, so the number of shares in each pool will be approximately 600-700, with 600 being the absolute minimum. PowerPick receives any shares under 600 that are not ordered.

Unlike the participants in the PowerPools, the participants in the MDCs do not know how many other participants will be in their respective pool at the time they buy their tickets. According to Andrew Amada's deposition testimony, PowerPick decides how many players will be in an MDC pool only after considering how many shares have been bought. If more than 1,300 shares are bought, a second MDC pool is opened. The number of participants is then split evenly between the two MDC pools.

PowerPick also conducts what it calls "MegaPools." It describes the MegaPools on its website as follows:

> Each MegaPool is a separate pool of 100 Mega Millions tickets that are purchased every Tuesday and Friday night. This pool is a FREE bonus and is in addition to each player's PowerPool.
>
> * * *
>
> Each MegaPool is made up of approximately 700-1,400 players. Every active member with a PowerPool selection is included in a MegaPool!

Thus, every PowerPick customer is included in one of the MegaPools as an additional "FREE bonus" as long as he or she is participating in at least one PowerPool.

It also appears that PowerPick can purchase shares in any of its pooling packages just like any of its customers can. In this way, PowerPick, itself, receives a pro rata share of any money won by the particular pools in which it participates.

PowerPick conducts additional games of chance that it announces from time to time in its newsletter. For instance, in one game, newsletter readers were asked to count the "Shamrocks hidden" within the newsletter and send in their count. The newsletter announced that

"[t]he first three randomly drawn with the correct answer will each win 10 of the $10 Take Home Millions scratch tickets." PowerPick regularly awards Michigan Lottery scratch-off tickets as prizes in these periodic newsletter games.

PowerPick claims to be substantially similar to a typical office lottery club. But unlike the practice of a typical office lottery club, PowerPick does not use all the money it collects from its customers to buy lottery tickets. According to its website, only 51 percent of the money that PowerPick collects from its customers is used to buy lottery tickets. Forty-one percent goes to "[c]ompany operating costs" and eight percent is taken as PowerPick's profit. Further, as noted previously, PowerPick can supplement its profits by purchasing its own shares in the various pools that it operates. PowerPick, itself, receives a pro rata share of any winnings when it does so.

B

In March 2006, the Attorney General sent a letter to PowerPick, demanding that PowerPick

> cease and desist using the "Michigan Lottery" and "Mega-Millions" names and any versions of those names, cease and desist selling or reselling Michigan Lottery tickets or shares and providing Michigan Lottery tickets or shares as bonuses or awards to its customers, and that PowerPick disconnect, disable and discontinue its Michigan Web site for the reason that engaging in these activities violates [federal law] and the Michigan Penal Code.

The Attorney General pointed out that MCL 432.27(1) provides that "[a] person shall not sell a ticket or share at a price greater than that fixed by rule of the commissioner. A person other than a licensed lottery sales agent shall not sell lottery tickets or shares." The

Attorney General also noted that "MCL 750.301 prohibits accepting money with the understanding that money will be paid to any person contingent upon the happening of an uncertain event." The Attorney General went on to state:

> The Penal Code further prohibits buying and selling pools, MCL 750.304; publishing information concerning making bets or selling pools, MCL 750.305; keeping or occupying a building for gaming, MCL 750.302; possessing pool tickets, MCL 750.[3]06(1); promoting a lottery for money, MCL 750.372(1); and setting up or aiding in the setting up, managing, or drawing of a lottery or gift enterprise, *id*. The Penal Code also declares pool tickets a common nuisance, MCL 750.306(1).

PowerPick continued its operations, leading the Attorney General to issue a notice of intended action in September 2006. The notice contained the allegations set out in the cease and desist letter. The Attorney General then filed a complaint containing the same allegations. PowerPick answered the complaint and asserted several affirmative defenses, including failure to state a claim on which relief could be granted, equal protection guarantees, laches, and unclean hands.

The parties filed cross-motions for summary disposition. At a hearing in January 2008, the Attorney General asserted that there was no dispute as to the facts and that the only matter to be decided was what legal conclusions could be drawn from the facts. The Attorney General asked the circuit court to construe the applicable statutes and to consider the undisputed evidence from PowerPick's website and handbook, as well as the relevant deposition testimony. The Attorney General argued that PowerPick illegally collected wagers into pools and then sold interests in the pools. The Attorney General further argued that PowerPick's random drawings for scratch-off tickets constituted an illegal lottery and that PowerPick

illegally promoted both its own lottery and the Michigan Lottery for money in contravention of MCL 750.372. The Attorney General also argued that PowerPick was illegally selling shares in lottery tickets and possessed pool tickets in violation of MCL 750.306.

PowerPick argued that it was entitled to summary disposition, but also asserted that even if the court was not inclined to grant summary disposition in its favor, the court should at least deny the Attorney General's motion because there was "a clash of evidence." However, despite this assertion, PowerPick never specifically identified which evidence was in dispute. PowerPick's attorney argued that PowerPick had not promoted a lottery for money, but had simply promoted its own business. PowerPick pointed to a federal case in which its Arizona operation had been accused of violating federal lottery laws, but in which the federal court had ruled against the government on the ground that PowerPick was simply being compensated for services it provided to its customers. PowerPick asserted that it provided valuable services, such as eliminating the need for its customers to wait in line to buy lottery tickets, holding the lottery tickets in trust for its customers, and making sure that none of the lottery tickets was lost.[1] PowerPick further argued that it was not reselling lottery tickets, but was merely acting as the representative or agent of its customers in buying the tickets.

The Attorney General argued that the federal case cited by PowerPick was not comparable to the present situation because Michigan lottery law is different from federal lottery law.

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[1] PowerPick has also described other services that it allegedly provides for its customers, including organizing the pools, sending out confirmation certificates, checking tickets for winnings, mailing out winnings statements, and overseeing the collection and distribution of all winnings.

PowerPick then argued that the Attorney General's complaint should be dismissed on the basis of the doctrine of laches. This argument was premised on extensive correspondence among PowerPick, its attorney, the lottery commissioner, the Bureau of State Lottery, and the Attorney General's office. That correspondence had begun in November 2001, when PowerPick was first contemplating starting its Michigan operations. At that time, a consultant for PowerPick had sent Michigan's acting lottery commissioner a package of materials regarding PowerPick's proposed business operations. In the ensuing correspondence, PowerPick explained why it should be allowed to operate in Michigan, and the acting lottery commissioner, Bureau of State Lottery, and the Attorney General's office wrote back to PowerPick, asking for various information, expressing concerns, and giving explanations. PowerPick pointed to certain statements within some of the letters that, it argued, showed that the officials had led it to believe that its operation would not be illegal in Michigan. For instance, PowerPick pointed out that in one letter, the acting lottery commissioner had seemed to compare PowerPick's proposed operations to those of a legal lottery club. PowerPick also pointed to a letter in which one of the Michigan officials stated that PowerPick's "innovative lottery ticket pooling and agency relationship is very interesting." Finally, PowerPick pointed to a news report that discussed PowerPick's proposed operations and announced that "state lawyers haven't found anything wrong with PowerPick." The Attorney General argued that PowerPick could not prevail on its laches defense because it had shown no prejudice.

Lastly, PowerPick argued that the Attorney General had acted with unclean hands and that the Attorney General's actions violated the guarantee of equal pro-

tection because other similarly situated lottery clubs were operating in Michigan and had not been targeted by the Attorney General. The Attorney General's representative responded that these other lottery clubs were operating legally.

Following the parties' arguments, the circuit court ruled from the bench:

> All right. . . . [T]he Court does agree with [the Attorney General] that the [federal] Arizona case does not necessarily control this case and was brought by the postal service, it's Arizona law, and also that it's the legal meaning of the facts.
>
> However, the Court's of the opinion that there are a number of factual issues here which will have to be decided at trial and that defendant here has properly pled its affirmative defenses.

II

The Attorney General argues that the circuit court erred by denying his motion for summary disposition brought pursuant to MCR 2.116(C)(10). We agree with the Attorney General's argument insofar as it relates to his nuisance claim.

A

We review de novo the circuit court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition of all or part of a claim or defense may be granted 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." MCR 2.116(C)(10). "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).

B

We conclude that, at the time of the circuit court's ruling in this case, there remained no genuine issue of material fact that would have precluded the grant of summary disposition under MCR 2.116(C)(10) with respect to the Attorney General's nuisance claim. PowerPick and the circuit court were simply incorrect in their belief that the evidence presented disputed issues of fact. Indeed, the circuit court's ruling was internally inconsistent on this very issue. On the one hand, the circuit court agreed with PowerPick that what was at issue was "the legal meaning of the facts." But on the other hand, the court stated that "there are a number of factual issues." Of critical importance, the circuit court never identified exactly what these "factual issues" were. Nor did PowerPick identify any actual factual disputes.

PowerPick continues to maintain that "[d]etermining the meaning of the facts at issue is a quintessential jury question." But PowerPick is clearly confused about what constitutes a factual dispute and about the proper role of a jury. In general, a factual dispute exists when there is conflicting evidence concerning *what* happened, *when* something happened, *where* something happened, *how* something happened, *who* was involved, or some other similar factual inquiry. In this case, a jury question would have been presented, for instance, if there had been conflicting evidence concerning how defendant's business actually operated. But no such conflicting evidence was presented.

The proper role of a jury is to decide what the facts are—*not* what the facts mean. As aptly noted by the United States Court of Appeals for the Fourth Circuit in *Atlantic Purchasers, Inc v Aircraft Sales, Inc*, 705 F2d 712, 719 (CA 4, 1983):

> A jury . . . does not directly determine whether a litigant has contravened the statutes. Rather, the jury's function is to find the facts, and based on the jury's findings the court must then determine as a matter of law whether the defendant's conduct violated [the statutes]. [Quotation marks and citations omitted.]

The Attorney General correctly argues that what is at issue here is the *legal meaning of the undisputed facts*. The critical facts in this case consist of PowerPick's own description of its business operations in its player handbook, on its website, in its newsletters, in the deposition testimony of its owners and employees, and in the various other documents presented to the circuit court. The operations described in these materials and documents are somewhat complicated, but there is no dispute concerning what these materials and documents actually say or mean. The only question presented for resolution was whether PowerPick's operations—as described in the uncontroverted materials and documents presented to the circuit court—fell within the scope of the statutes cited by the Attorney General. This was a purely legal question, not a factual one. See *People v Rutledge*, 250 Mich App 1, 4; 645 NW2d 333 (2002) (observing that "[w]hether conduct falls within the statutory scope of a criminal statute is a question of law that is reviewed de novo on appeal").

C

We also conclude that because PowerPick's operations constituted an enjoinable nuisance, the Attorney General was entitled to judgment as a matter of law with respect his nuisance claim.

1

We first conclude that PowerPick's PowerPool scheme contemplates the placement of bets under MCL 750.301, that PowerPick "registers" these bets in violation of MCL 750.304, and that PowerPick possesses "memoranda of . . . bet[s]" in violation of MCL 750.306. In a typical office lottery club, *all* the money contributed by the participants is used to purchase commonly held lottery tickets. In other words, each member of a typical office lottery club is simply playing the Michigan Lottery—a legal lottery authorized by Michigan law, see Const 1963, art 4, § 41; MCL 432.1 *et seq*.—albeit in concert with the other members of the club. As such, each participant in a typical office lottery club places only one bet—a legal bet that the underlying lottery ticket or tickets will win. In contrast, each PowerPick customer who participates in a PowerPool actually places two bets each time he or she purchases lottery tickets through the PowerPick scheme. As will be explained more fully hereinafter, the customer places a legal bet on the underlying lottery tickets that PowerPick purchases for that customer's particular pool. But the customer also places a second bet, wagering that PowerPick will randomly assign him or her to a winning pool. It is this second bet that renders PowerPick's PowerPool scheme an illegal betting operation.

PowerPick admits that it uses only 51 percent of the money it collects from its customers to buy lottery tickets. In other words, PowerPick's customers pay an amount substantially in excess of the face value of the lottery tickets that PowerPick actually purchases. One reason for this is certainly the customers' desire to pay for PowerPick's alleged services.[2] But we conclude that

[2] As explained previously, PowerPick asserts that it provides several valuable services to its customers, such as eliminating the need for its

another reason for these payments substantially in excess of the face value of the lottery tickets is to *buy the chance* of being assigned to one or more winning pools by PowerPick.

PowerPick admits that it uses a computer system to randomly assign each customer to a particular pool of the type that he or she has chosen. These random assignments plainly introduce an additional element of chance into the PowerPick scheme. By way of example, assume that there are 200 PowerPick customers at any given time who have chosen the Keno PowerPool option. Further assume that each of these customers has purchased only one share. Because the Keno PowerPools consist of 10 shares each, PowerPick would create 20 Keno PowerPools with 10 shares each, randomly assigning each of the 200 customers to one of these pools. Rather than purchasing one large set of Keno tickets to be shared equally among all 200 customers, PowerPick will purchase 20 small sets of Keno tickets, and will assign one of these small sets to each of the 20 pools. Thus, any individual customer who has chosen the Keno PowerPool option will have a chance of sharing in a winning ticket *only* within the confines of the small set of Keno tickets held by his or her 10-share pool. In contrast, if PowerPick had purchased one large set of Keno tickets to be shared equally among all 200 customers, any individual customer would have had a much greater chance of sharing in a winning Keno ticket.

As can be seen, the random assignment of customers to the individual PowerPools clearly injects an addi-

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customers to wait in line, holding the lottery tickets in trust, ensuring that none of the lottery tickets is lost, sending out confirmation certificates, checking the tickets for winnings, mailing out winnings statements, and overseeing the collection and distribution of all winnings.

tional element of uncertainty into a customer's chance of sharing in a winning ticket. PowerPick's customers plainly "bet" on the outcome of these random computerized assignments. " 'Betting in common speech means the putting of a certain sum of money or other valuable thing at stake on the happening or not happening of some uncertain event.' " *Michigan ex rel Comm'r of State Police v One Helix Game*, 122 Mich App 148, 155; 333 NW2d 24 (1982), quoting *Shaw v Clark*, 49 Mich 384, 388; 13 NW 786 (1882). PowerPick's assignment of a customer to one PowerPool over another is clearly an "uncertain event" upon which money is put at stake. Customers do not only bet that the lottery tickets purchased by PowerPick will win; they also bet that their specific pool will hold the winning ticket or tickets. We conclude that a portion of the money paid by each PowerPick customer is put at stake in the hope that the customer will be randomly assigned to at least one pool that holds a winning ticket. Such a scheme is clearly encompassed within the definition of "betting." *One Helix Game*, 122 Mich App at 155.

Pursuant to MCL 750.301, "[a]ny person or his or her agent or employee who, directly or indirectly, takes, receives, or accepts . . . any money or valuable thing with the agreement, understanding or allegation that any money or valuable thing will be paid or delivered to any person . . . contingent . . . upon the happening of any event not known by the parties to be certain, is guilty of a misdemeanor . . . ." The legislative goal underlying MCL 750.301 was the suppression of betting. *Michigan ex rel Comm'r of State Police v Nine Money Fall Games*, 130 Mich App 414, 419; 343 NW2d 576 (1983). The statute prohibits private betting between consenting parties, and is not limited to combating only the effects of organized and commercialized gambling. *Oakland Co Prosecutor v 46th Dist Judge*, 76 Mich App

318, 325-326; 256 NW2d 776 (1977). After applying the plain statutory language, it is clear to us that PowerPick's PowerPools violate MCL 750.301. As discussed previously, PowerPick accepts money from its customers not only with the express understanding that lottery tickets will be purchased, *but also with the express understanding that a valuable prize will be paid out to any customer who is randomly assigned to a pool holding a winning lottery ticket*. MCL 750.301 directly prohibits the acceptance of money on the happening or not happening of such an uncertain event.[3]

PowerPick also "registers" these bets in violation of MCL 750.304. Pursuant to MCL 750.304, "[a]ny person or his or her agent or employee . . . who registers bets . . . is guilty of a misdemeanor . . . ." We have already explained that PowerPick accepts "bets" when its customers put money at stake for the chance of being randomly assigned to at least one pool that holds a winning ticket. See *One Helix Game*, 122 Mich App at 155. We conclude that by accepting these bets from its customers, randomly assigning its customers to pools in exchange for their bets, and sending out written confirmation certificates verifying these random assignments, PowerPick "registers bets" in violation of MCL 750.304.

We also conclude that PowerPick possesses "memoranda of . . . bet[s]" in violation of MCL 750.306. Under MCL 750.306, "[a]ll . . . memoranda of any . . . bet, manifold, or other policy or pool books or sheets are . . . declared a common nuisance and the possession of 1 or more of those items is a misdemeanor . . . ." The

[3] It is irrelevant that the underlying Michigan Lottery tickets are, themselves, issued as part of a legal lottery. See *People v Weithoff*, 51 Mich 203, 212; 16 NW 442 (1883). Even when a game is itself legal, "the betting upon the game . . . constitutes gaming, and those [who] game or gamble . . . thus bet." *Id*.

written confirmation certificates sent by PowerPick to its customers are, in essence, receipts. The certificates verify that the customers have been randomly assigned to one or more pools in exchange for their bets. PowerPick's confirmation certificates, which memorialize these betting transactions, therefore constitute "memoranda of . . . bet[s]" within the meaning of MCL 750.306. See *People v Taylor*, 89 Mich App 238, 242; 280 NW2d 500 (1979) (observing that MCL 750.306 prohibits the "possession of various written memoranda used in gambling operations").

2

PowerPick also violates MCL 432.27 by reselling lottery tickets to its customers and by charging a price greater than that fixed by the Michigan Lottery commissioner. MCL 432.27(1) provides:

> A person shall not sell a ticket or share at a price greater than that fixed by rule of the commissioner. A person other than a licensed lottery sales agent shall not sell lottery tickets or shares. This section shall not be construed to prevent a person from giving lottery tickets or shares to another as a gift.

PowerPick argues that it is merely an "agent" for its customers, and that it buys Michigan Lottery tickets directly on their behalf. Indeed, PowerPick asserts that because of this agency relationship, title in the lottery tickets passes directly from the state of Michigan to the individual customers at the time the tickets are purchased. We are unconvinced by PowerPick's argument in this regard, and conclude that PowerPick "sell[s] lottery tickets or shares" to its customers within the meaning of MCL 432.27(1). We find particularly persuasive the reasoning of the Attorney General in OAG,

1985-1986, No 6392, pp 382, 384 (October 7, 1986), which addressed a similar question arising under MCL 432.27(1):

> The final sentence of [MCL 432.27(1)], exempting gifts of lottery tickets, is of particular significance and indicates a clear legislative intent that the prohibition against sales by persons who are not licensed agents is to be read broadly. The fact that the Legislature expressly excluded gift transactions from the prohibition set forth in § 27(1) demonstrates that the Legislature viewed this prohibition as being sufficiently broad so as to include even gifts had they not been expressly excluded by that final sentence. If third-party transfers in the form of gifts would be barred in the absence of the express exemption in § 27(1), *certainly for-profit third-party transfers would also be barred*.
>
> This conclusion is further supported by application of the well-established maxim of statutory construction known as the *expressio uniu*[*s*] *est exclusio alterius*, i.e., that express mention in a statute of one thing implies the exclusion of other similar things. *See*, *e.g.*, *Stowers v Wolodzko*, 386 Mich 119, 133; 191 NW2d 355 (1971). The fact that the Legislature expressly exempted third-party transfers of lottery tickets which take the form of a gift, but did not expressly exempt for-profit third-party transfers such as that proposed here, manifests the legislative intent that the latter type of transaction not be permitted. [Emphasis added.]

"Although Attorney General opinions are not binding on this Court, they can be persuasive authority." *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 301; 662 NW2d 108 (2003); see also *Williams v Rochester Hills*, 243 Mich App 539, 557; 625 NW2d 64 (2000). We agree with the Attorney General's observation that the Legislature must have viewed the general prohibition of MCL 432.27(1) as sufficiently broad to encompass even gifts. Otherwise, if the Legislature had believed that gifts already fell outside the scope of the general prohibition,

the final sentence of MCL 432.27(1) would have been superfluous and unnecessary. It is a basic tenet of statutory construction that no language in a statute should be interpreted as unnecessary surplusage. *In re Kiogima*, 189 Mich App 6, 13; 472 NW2d 13 (1991); see also *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007). Indeed, courts presume that every statutory word and phrase has some meaning and must give effect to each provision of the statute if possible. *Danse Corp v Madison Hts*, 466 Mich 175, 182; 644 NW2d 721 (2002). "It is presumed that the Legislature is aware of the rules of statutory construction and has drafted its enactments accordingly." *Michigan Employment Security Comm v Westphal*, 214 Mich App 261, 264; 542 NW2d 360 (1995).

In light of this authority, it is clear that the Legislature would not have included the final sentence of MCL 432.27(1) if that provision had constituted mere surplusage. And if the Legislature believed that the general prohibition of MCL 432.27(1) was sufficiently broad to encompass gifts in the absence of the final sentence, it necessarily follows that the general prohibition of MCL 432.27(1) encompasses "for-profit third-party transfers," as explained in OAG, 1985-1986, No 6392, p 384. We agree with the reasoning of OAG, 1985-1986, No 6392, and therefore find it persuasive on this issue. See *Risk v Lincoln Charter Twp Bd of Trustees*, 279 Mich App 389, 398-399; 760 NW2d 510 (2008).

As noted in OAG, 1985-1986, No 6392, p 384, the Legislature intended "that the prohibition against sales by persons who are not licensed agents is to be read broadly." It is undisputed that PowerPick is not "a licensed lottery sales agent" and that PowerPick operates a for-profit business. When PowerPick accepts payments substantially in excess of the cost of the

lottery tickets it purchases, and then transfers those lottery tickets to its paying customers, it is engaged in what the Attorney General has described as "for-profit third-party transfers[.]" *Id*. We therefore conclude that PowerPick "sell[s] lottery tickets or shares" in violation of MCL 432.27(1).

Having determined that PowerPick "sell[s]" lottery tickets to its customers, it cannot be seriously disputed that PowerPick sells them "at a price greater than that fixed by rule of the commissioner" within the meaning of MCL 432.27(1). Indeed, although PowerPick describes itself as a simple "lottery club," it admits that it uses only 51 percent of the money collected from its customers to buy lottery tickets and that its customers pay an amount substantially in excess of the face value of the lottery tickets that are ultimately purchased. No further proof is necessary for us to conclude that PowerPick sells lottery tickets to its customers "at a price greater than that fixed by rule of the commissioner." MCL 432.27(1).

3

In addition, PowerPick's periodic random drawings for Michigan Lottery scratch-off tickets constitute an illegal lottery within the meaning of MCL 750.372, and PowerPick's MegaPools constitute an illegal gift enterprise within the meaning of MCL 750.372.

As an initial matter, we note that neither the term "lottery" nor the term "gift enterprise" is defined in MCL 750.372. We must give statutory words and phrases their commonly understood meanings. MCL 8.3a; *Lewandowski v Nuclear Mgt Co, LLC*, 272 Mich App 120, 126; 724 NW2d 718 (2006). When a term is not defined by statute, it is appropriate for this Court to look to dictionary definitions. *People v Stone*, 463 Mich

558, 563; 621 NW2d 702 (2001); *Stocker v Tri-Mount/Bay Harbor Bldg Co, Inc*, 268 Mich App 194, 199; 706 NW2d 878 (2005). "[B]ut 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." MCL 8.3a; see also *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 190; 740 NW2d 678 (2007). It is also appropriate for us to consider how a word or phrase has been defined in the previous caselaw. See *Roby v Mt Clemens*, 274 Mich App 26, 30; 731 NW2d 494 (2007).

The word "lottery" is "commonly defined as 'a gambling game or method of raising money in which a large number of tickets are sold and a drawing is held for prizes,' 'a drawing of lots,' and 'any happening or process that is or appears to be determined by chance . . . .' " *FACE Trading, Inc v Dep't of Consumer & Industry Services*, 270 Mich App 653, 666; 717 NW2d 377 (2006), quoting *Random House Webster's College Dictionary* (1997). Our Supreme Court has explained that "the essentials of a lottery [a]re 'consideration, prize, and chance.' " *Rohan v Detroit Racing Ass'n*, 314 Mich 326, 344; 22 NW2d 433 (1946), quoting *Glover v Malloska*, 238 Mich 216, 219; 213 NW 107 (1927); see also *People v Welch*, 269 Mich 449, 452; 257 NW 859 (1934). However, "[w]hile consideration, prize, and chance are often common factors found in a lottery, . . . the term 'lottery' must be construed broadly." *FACE Trading, Inc*, 270 Mich App at 667. " '[T]he word "lottery" must be construed in the popular sense, with the view of remedying the mischief intended to be prevented, and to suppress all evasions for the continuance of the mischief.' " *Id*., quoting *People v McPhee*, 139 Mich 687, 690; 103 NW 174 (1905). "Thus, while the Supreme Court has indicated that the essentials of

a lottery generally are consideration, prize, and chance, these essentials cannot be used to frustrate the plain and ordinary meaning of the word 'lottery.' " *FACE Trading, Inc*, 270 Mich App at 668.

In *Sproat-Temple Theatre Corp v Colonial Theatrical Enterprise, Inc*, 276 Mich 127; 267 NW 602 (1936), our Supreme Court considered the traditional elements of consideration, prize, and chance to determine whether a drawing held at the defendants' theaters constituted a "lottery" under Michigan law. Each patron who purchased an admission ticket at the defendants' theaters was "given a coupon ticket bearing duplicate numbers . . . ." *Id*. at 128. When the patron entered the theater, "one-half of each coupon ticket [was] dropped in a barrel by the purchaser and the other half [was] retained by him[.]" *Id*. "[A]t an advertised time the barrel containing the coupon tickets was taken upon the stage of the theatre and several tickets were withdrawn therefrom. The person holding the coupon or stub with the number corresponding to the number on the ticket drawn from the barrel was given a valuable money prize." *Id*. at 128-129.

The plaintiffs argued that the drawings constituted an enjoinable "lottery" within the meaning of what is now MCL 750.372. *Sproat-Temple Theatre*, 276 Mich at 129. The defendants countered, contending that because each patron received a coupon ticket at no additional cost, there could be no "lottery." *Id*. In particular, the defendants argued that because "the patron pays nothing for a chance to receive the prize, no consideration runs from the public, and, therefore, the [lottery] statute is not violated." *Id*.

Our Supreme Court disagreed with the defendants, observing that " 'while the patrons may not pay, and the [defendants] may not receive, any direct consideration

[for the coupon tickets], there is an indirect consideration paid and received. The fact that prizes . . . are to be distributed will attract persons to the theatres who would not otherwise attend. In this manner those obtaining prizes pay consideration for them, and the theatres reap a direct financial benefit.' " *Id*. at 130-131, quoting *Society Theatre v City of Seattle*, 118 Wash 258, 260; 203 P 21 (1922). Accordingly, the Supreme Court affirmed the circuit court's order enjoining the defendants' scheme as an illegal lottery. *Sproat-Temple Theatre*, 276 Mich at 131.

The next year, a similar fact pattern was presented in *United-Detroit Theaters Corp v Colonial Theatrical Enterprise, Inc*, 280 Mich 425; 273 NW 756 (1937). Our Supreme Court again looked to the traditional elements of consideration, prize, and chance—this time for the purpose of determining whether a "screeno" game played at the defendants' theaters constituted a "lottery" within the meaning of what is now MCL 750.372. *United-Detroit Theaters*, 280 Mich at 427-429. A free screeno card was given to each patron who bought a ticket for admission to one of the defendants' theaters. *Id*. at 427. But unlike the coupon tickets at issue in *Sproat-Temple Theatre*, the screeno cards in *United-Detroit Theaters* were "not confined to purchasers of admission tickets . . . ." *United-Detroit Theaters*, 280 Mich at 427. Instead, free screeno cards were also available "upon request to any person in the foyer of the theater or to persons on the sidewalk in front of the theater." *Id*. Each screeno card contained a series of random numbers, which were arranged in rows and columns. The first person to match certain of the numbers on his or her screeno card with those displayed on the theater screen won a prize. *Id*.

The plaintiff, a competing theater owner, argued that the screeno game constituted an enjoinable "lottery" under the statute. *Id*. at 428. Although the screeno tickets were distributed for free and were available to patrons and nonpatrons alike, the Supreme Court relied on *Sproat-Temple Theatre* to find that the element of consideration had been established, observing that "the distribution of the tickets unquestionably attracted others to the theater who otherwise would not have attended and in this way the theater owner profited thereby. This is a sufficient consideration." *Id*. at 429.

Also unlike the facts of *Sproat-Temple Theatre*, a small amount of skill was apparently necessary to play the screeno game at issue in *United-Detroit Theaters*. Nevertheless, the *United-Detroit Theaters* Court found that the screeno game retained the element of chance, stating that "[a]n examination of the method used in the conducting of the game must convince any one that the element of skill as compared with the element of chance is slight." *Id*.

In light of this authority, we are compelled to conclude that PowerPick's periodic drawings for Michigan Lottery scratch-off tickets constitute a "lottery" within the meaning of MCL 750.372. PowerPick, through its newsletter, periodically invites its customers to participate in drawings for Michigan Lottery scratch-off tickets. As explained previously, one such contest asked PowerPick's customers to count the "Shamrocks hidden" within the newsletter and send in their count. The newsletter announced that "[t]he first three randomly drawn with the correct answer will each win 10 of the $10 Take Home Millions scratch tickets." In another recent game, newsletter readers were asked to count the total number of times the word "pumpkin" ap-

peared within the text and to submit their count. The newsletter went on to state:

> Anytime you see that word within the pages of this newsletter, whether it's singular or plural, capital letters or lower case, part of another word or standing alone . . . count it.
>
> * * *
>
> Remember that this is a bi-monthly drawing, so all entries received by November 30, 2009, will be eligible to win. On December 1, 2009, the winners will be randomly drawn from those who submitted the correct answer. The first 3 drawn with the correct answer will each win $100 worth of the Classic Casino instant tickets and you'll be well on your way to scratching off some winners. There is no purchase necessary to win, but you must be 18 years of age.

PowerPick's periodic drawings for Michigan Lottery scratch-off tickets clearly fall within the definition of a "lottery." These periodic drawings are not only " 'a drawing of lots,' " but are also a " 'process that is . . . determined by chance . . . .' " *FACE Trading, Inc*, 270 Mich App at 666, quoting *Random House Webster's*, *supra*. Moreover, these periodic drawings include all three traditional elements of a lottery. With respect to the element of consideration, although the periodic drawings are widely announced in PowerPick's newsletter and are available at no additional cost to the newsletter's readers, they are clearly used to induce people to become PowerPick customers or to remain PowerPick customers. In other words, the periodic drawings for Michigan Lottery scratch-off tickets "unquestionably attracted others to [PowerPick] who otherwise would not have [become PowerPick customers] and in this way [PowerPick] profited thereby. This is a sufficient consideration." *United-Detroit Theaters*, 280

Mich at 429; see also *Sproat-Temple Theatre*, 276 Mich at 130-131. With respect to the element of chance, it is true that some modicum of skill may be required for an individual to accurately count the "Shamrocks hidden" within the newsletter or the number of times the word "pumpkin" occurs within the text. However, despite the fact that an individual must first submit an accurate count to participate, PowerPick ultimately awards the scratch-off tickets on the basis of a random drawing. Accordingly, the drawings retain the essence of a game of chance, and "the element of skill as compared with the element of chance is slight." *United-Detroit Theaters*, 280 Mich at 429. PowerPick, itself, admits the third element—that a prize is awarded to the winners of the random drawings. Lest there be any doubt that a scratch-off lottery ticket can constitute a prize, we note that although an unscratched instant lottery ticket generally has "little or no actual monetary worth," it certainly can have a great deal of "*potential* value . . . ." See *McDougal v McDougal*, 451 Mich 80, 82; 545 NW2d 357 (1996) (emphasis in original). This, we think, is all that is required to constitute a prize. We conclude that PowerPick's periodic random drawings for Michigan Lottery scratch-off tickets are a "lottery" within the meaning of MCL 750.372.

The term "gift enterprise" has been used for more than 100 years in Michigan's statutes, see, e.g., *McPhee*, 139 Mich at 688-689; *People v Reilly*, 50 Mich 384, 387-388; 15 NW 520 (1883), and indeed appears to have acquired a particular meaning in the law, see MCL 8.3a. Black's Law Dictionary (7th ed) defines "gift enterprise" as, among other things, "[a] merchant's scheme to induce sales . . . by giving buyers tickets that carry a chance to win a prize." As noted previously, PowerPick's MegaPools are announced as "a FREE bonus and . . . in addition to each player's PowerPool." Each

PowerPick customer is automatically entered in one of the MegaPools for each Mega Millions drawing, as long as he or she is a participant in one of the main PowerPool packages.

These MegaPools, like the periodic drawings for scratch-off tickets described previously, are clearly used to induce people to become PowerPick customers or to remain PowerPick customers. Each PowerPick customer is entered into one of the MegaPools as "a FREE bonus," thereby receiving shares in a pool of Mega Millions tickets at no additional cost. PowerPick's MegaPools plainly constitute "[a] merchant's scheme to induce sales . . . by giving buyers tickets that carry a chance to win a prize." Black's Law Dictionary (7th ed). Therefore, we conclude that the MegaPools are a "gift enterprise" within the meaning of MCL 750.372.

Having determined that PowerPick's periodic drawings for Michigan Lottery scratch-off tickets constitute a "lottery" and that PowerPick's MegaPools constitute a "gift enterprise," we turn to the question whether PowerPick violates the provisions of MCL 750.372 by conducting and promoting these schemes. We conclude that it does.

It is unlawful in this state to "[s]et up or promote . . . any lottery or gift enterprise for money" and to "[a]id, either by printing or writing, or in any way be concerned in the setting up, managing, or drawing of a lottery or gift enterprise." MCL 750.372(1)(a) and (c). PowerPick violates these provisions through the operation of its periodic drawings for Michigan Lottery scratch-off tickets and its MegaPools. First, both the periodic drawings for scratch-off tickets and the MegaPools violate MCL 750.372(1)(a). We have already noted that these enterprises are intended to entice people to become or to remain *paying* customers of PowerPick.

Therefore, it cannot be seriously disputed that they are "[s]et up or promote[d] . . . for money" within the meaning of MCL 750.372(1)(a). Furthermore, both the periodic drawings for scratch-off tickets and the MegaPools were devised and are operated by PowerPick. Accordingly, by "setting up" and "managing" the periodic drawings for scratch-off tickets and the MegaPools, PowerPick unquestionably violates MCL 750.372(1)(c) as well.[4]

4

As our Supreme Court observed 40 years ago in *Attorney General, ex rel Optometry Bd of Examiners v Peterson*, 381 Mich 445, 465-466; 164 NW2d 43 (1969):

> At common law, acts in violation of law constitute a public nuisance. Harm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety and welfare. The attorney general, acting on behalf of the people, is a proper party to bring an action to abate a public nuisance or restrain unlawful acts which constitute a public nuisance.

PowerPick's various gaming schemes violate the terms of MCL 432.27(1), MCL 750.301, MCL 750.304, MCL 750.306, and MCL 750.372. Michigan's lottery and

[4] We fully acknowledge that the prohibition of lotteries and gift enterprises contained in MCL 750.372(1) "does not apply to a lottery or gift enterprise conducted by a person as a promotional activity that is clearly occasional and ancillary to the primary business of that person." MCL 750.372(2). However, a lottery or gift enterprise is not a "promotional activity" within the meaning of the statute if it "may be entered by purchasing a product or service for substantially more than its fair market value." *Id*. Because PowerPick's customers pay "substantially more than [the] fair market value" of the lottery tickets that PowerPick ultimately purchases, we conclude that the periodic drawings for scratch-off tickets and the MegaPools are not a "promotional activity." *Id*. Accordingly, these enterprises are not exempt from the provisions of MCL 750.372(1). MCL 750.372(2).

gambling statutes were validly enacted to preserve the public safety, morals, and welfare. See *Parkes v Recorder's Court Judge*, 236 Mich 460, 466-467; 210 NW 492 (1926); see also *Oakland Co Prosecutor*, 76 Mich App at 330. Indeed, "[t]he Legislature has the right to conclude that gambling is injurious to the morals and welfare of the people and it is clearly within the scope of the state police power to suppress gambling in all of its forms." *Id*. at 326. Because PowerPick's business activities violate these validly enacted statutes, "[h]arm to the public is presumed to flow" from PowerPick's operations. *Peterson*, 381 Mich at 465. We conclude that PowerPick's business operations, taken as a whole, constitute a public nuisance. *Id*.

5

We also conclude that PowerPick's office in Comstock Park and "the furniture, fixtures, and contents" of that office constitute a nuisance as a matter of law. The Legislature has declared that "[a]ny building, vehicle, boat, aircraft, or place used for the purpose of . . . gambling" is an enjoinable nuisance. MCL 600.3801. Moreover, "the furniture, fixtures, and contents of the building, vehicle, boat, aircraft, or place" are also declared to be an enjoinable nuisance. *Id*. The Legislature has specifically authorized the Attorney General to "maintain an action for equitable relief in the name of the state of Michigan . . . to abate said nuisance and to perpetually enjoin any person, his servant, agent, or employee, who shall own, lease, conduct or maintain such building, vehicle, boat, aircraft or place, from permitting or suffering such building, vehicle, boat, or aircraft or place . . . , or any other building, vehicle, boat, aircraft or place conducted or maintained by him to be used for [gambling]." MCL 600.3805.

It is first necessary to determine whether PowerPick's operations constitute "gambling" within the meaning of MCL 600.3801. We acknowledge that the word "gambling" is not defined in MCL 600.3801. However, at common law, the definition "require[d] the presence of three elements: (1) price or consideration, (2) chance, and (3) prize or reward." *Automatic Music & Vending Corp v Liquor Control Comm*, 426 Mich 452, 457; 396 NW2d 204 (1986).[5] We have no trouble concluding that PowerPick engages in "gambling" within the meaning of MCL 600.3801. We determined earlier that PowerPick's PowerPool scheme is a variety of "betting," *One Helix Game*, 122 Mich App at 155, and that it is prohibited under MCL 750.301. MCL 750.301, which prohibits betting on uncertain events, MCL 750.304, which prohibits among other things "registering bets," and MCL 750.306, which prohibits among other things possessing "memoranda of . . . bet[s]," are all contained within Chapter 44 of the Penal Code, MCL 750.301 *et seq*., which is entitled "Gambling." The particular placement of these provisions in the overall statutory scheme suggests that betting, registering bets, and keeping memoranda of bets are all forms of "gambling." See *Tallman v Dep't of Natural Resources*, 421 Mich 585, 600; 365 NW2d 724 (1984). Moreover, our Supreme Court has recognized that it would not be "an inaccurate or inappropriate use of language if all betting for money were to be spoken of and considered as gaming or gambling." *People v Weithoff*, 51 Mich 203, 210; 16 NW 442 (1883). We are persuaded that Power-

[5] The *Automatic Music & Vending* Court actually construed the word "gaming" rather than the word "gambling." *Automatic Music & Vending*, 426 Mich at 457. However, the Court explained that "the terms 'gaming' and 'gambling' are synonymous, [and] are used interchangeably." *Id*. at 457 n 1; see also *People v Weithoff*, 51 Mich 203, 210-211; 16 NW 442 (1883) (using the terms "gaming" and "gambling" interchangeably).

Pick's betting scheme plainly constitutes a variety of "gambling" within the meaning of MCL 600.3801.

We are similarly persuaded that PowerPick's periodic drawings for Michigan Lottery scratch-off tickets constitute "gambling" under MCL 600.3801. We previously concluded that PowerPick's periodic drawings for scratch-off tickets constitute a "lottery." The common-law elements of "gaming" or "gambling"—price or consideration, chance, and prize or reward, *Automatic Music & Vending*, 426 Mich at 457—are remarkably similar to the common-law elements of a "lottery"—consideration, prize, and chance, *Rohan*, 314 Mich at 344; *Glover*, 238 Mich at 219. Indeed, our Supreme Court has described a lottery as " 'a species of gambling . . . .' " *Rohan*, 314 Mich at 344 (citation omitted); see also *FACE Trading, Inc*, 270 Mich App at 666 (observing that " '[l]ottery' is commonly defined as 'a gambling game or method' "). We conclude that PowerPick's periodic drawings for scratch-off lottery tickets constitute "gambling" within the meaning of MCL 600.3801.

All that remains is to determine whether PowerPick "owns, leases, conducts, or maintains" "[a]ny building, vehicle, boat, aircraft, or place used for the purpose of . . . gambling" within the meaning of MCL 600.3801. We find that it does. It is undisputed that PowerPick leases or otherwise maintains an office in Comstock Park from which its Michigan business operations are carried out. PowerPick receives payments from PowerPool participants at its Comstock Park office, and accordingly accepts bets there. See *State, ex rel Washtenaw Co Prosecuting Attorney v Western Union Tel Co*, 336 Mich 84, 89; 57 NW2d 537 (1953). This is confirmed by PowerPick's own website, which directs potential PowerPick customers to "mail in your order" to "4673

West River Drive NE, Comstock Park, MI 49321." Moreover, PowerPick unquestionably manages and promotes its periodic drawings for Michigan Lottery scratch-off tickets from its Comstock Park office. Thus, even if PowerPick does not hold the actual drawings at its office, it nonetheless promotes its lottery from that place. See *People v Elliott*, 74 Mich 264, 268; 41 NW 916 (1889). We conclude that PowerPick's Comstock Park office is a building or place "used for the purpose of . . . gambling" under MCL 600.3801. Accordingly, PowerPick's Comstock Park office, as well as "the furniture, fixtures, and contents" of that office, constitute an enjoinable nuisance. MCL 600.3801.

6

The Attorney General was entitled to judgment as a matter of law with respect to his nuisance claim. Not only do PowerPick's betting, lottery, and gift enterprise schemes constitute an enjoinable public nuisance under the reasoning of *Peterson*, 381 Mich at 465,[6] but PowerPick's Comstock Park office, as well as "the furniture, fixtures, and contents" of that office, constitute an enjoinable nuisance under MCL 600.3801.

III

PowerPick raised several affirmative defenses to the

[6] We fully acknowledge that several of the statutes violated by PowerPick, including MCL 750.301, MCL 750.304, MCL 750.306, and MCL 750.372, are criminal in nature and are contained in the Penal Code, MCL 750.1 *et seq*. In general, equity will not enjoin the commission of a crime because a chancellor has no criminal jurisdiction. *United-Detroit Theaters*, 280 Mich at 429-430; see also *Western Union Tel Co*, 336 Mich at 90. However, when criminal acts independently rise to the level of nuisances, "the jurisdiction of a court of equity arises," *United-Detroit Theaters*, 280 Mich at 430 (quotation marks and citations omitted), and the acts may be enjoined, *Western Union Tel Co*, 336 Mich at 90.

Attorney General's complaint. Specifically, PowerPick contended that the Attorney General had failed to state a claim on which relief could be granted. It further asserted that the complaint should have been dismissed under the doctrines of equal protection, laches, and unclean hands. The Attorney General argues that the circuit court erred by denying his motion for summary disposition of these affirmative defenses pursuant to MCR 2.116(C)(9). We agree with the Attorney General.

A

The circuit court's ruling on a motion for summary disposition is reviewed de novo. *Dressel*, 468 Mich at 561. "Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim." *Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000). The motion should be granted "[i]f the defenses are ' "so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery[.]" ' " *Id*. (citations omitted).

B

We reject PowerPick's assertion that the Attorney General failed to state a claim on which relief could be granted. As noted previously, "[t]he attorney general, acting on behalf of the people, is a proper party to bring an action to abate a public nuisance or restrain unlawful acts which constitute a public nuisance." *Peterson*, 381 Mich at 465-466; see also *People ex rel Oakland Co Prosecuting Attorney v Kevorkian*, 210 Mich App 601, 607; 534 NW2d 172 (1995). A review of the pleadings reveals that the Attorney General properly pleaded and

supported his allegations of nuisance and unlawful gambling. PowerPick's claim in this regard must fail.

C

PowerPick also argued that the Attorney General's complaint should have been dismissed on the basis of the constitutional guarantee of equal protection. In particular, PowerPick asserted that it has been treated differently than similarly situated entities, which were allowed to continue operating in Michigan and had not been sued by the Attorney General. We disagree. PowerPick has failed to show that any other similarly situated entities are operating in Michigan. As explained earlier, whereas a typical office lottery club uses *all* the money contributed by its members to purchase commonly held lottery tickets, PowerPick admits that it uses only 51 percent of the money that it collects from its customers to buy lottery tickets. PowerPick has not demonstrated the existence of any other Michigan entity that charges its customers an amount substantially in excess of the face value of the lottery tickets purchased in this manner. Accordingly, PowerPick has failed to show that it has been treated differently than any other similarly situated entity. *People v Mouradian*, 110 Mich App 815, 822; 314 NW2d 494 (1981). " '[E]qual protection does not require the same treatment be given those that are not similarly situated.' " *Champion v Secretary of State*, 281 Mich App 307, 325; 761 NW2d 747 (2008), quoting *Alspaugh v Comm on Law Enforcement Standards*, 246 Mich App 547, 555; 634 NW2d 161 (2001).

D

We similarly reject PowerPick's assertion that the Attorney General's complaint should have been dis-

missed on the basis of laches. Laches is an affirmative defense based primarily on circumstances that render it inequitable to grant relief to a dilatory plaintiff. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). The doctrine of laches is triggered by the plaintiff's failure to do something that should have been done under the circumstances or failure to claim or enforce a right at the proper time. *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 583; 458 NW2d 659 (1990). "The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right." *Angeloff v Smith*, 254 Mich 99, 101; 235 NW 823 (1931). But "[i]t has long been held that the mere lapse of time will not, in itself, constitute laches." *Dep't of Treasury v Campbell*, 107 Mich App 561, 570; 309 NW2d 668 (1981). "The defense, to be raised properly, must be accompanied by a finding that the delay caused some prejudice to the party asserting laches and that it would be inequitable to ignore the prejudice so created." *Id*. The defendant bears the burden of proving this resultant prejudice. *Yankee Springs Twp*, 264 Mich App at 612.

As the Attorney General correctly points out, the early rule was that the government was " 'exempt from the consequences of its laches . . . .' " *Detroit v 19675 Hasse*, 258 Mich App 438, 445; 671 NW2d 150 (2003), quoting *Guaranty Trust Co v United States*, 304 US 126, 132; 58 S Ct 785; 82 L Ed 1224 (1938); see also *Chippewa Co Bd of Supervisors v Bennett*, 185 Mich 544, 564-565; 152 NW 229 (1915). However, this ancient rule has apparently been abrogated in Michigan, at least in part. See *Royal Oak Twp v School Dist No 7*, 322 Mich 397, 402-403; 33 NW2d 908 (1948). At least one panel of this Court has cited the *Royal Oak Twp*

decision for the proposition that "laches should . . . be . . . available to an individual responding to a government initiated action." *Dep't of Treasury*, 107 Mich App at 570.

Nevertheless, even if laches may be asserted against a governmental entity, we conclude that the equitable defense of laches was unavailable to PowerPick because PowerPick acted with unclean hands. Laches is an equitable doctrine. *Baerlin v Gulf Refining Co*, 356 Mich 532, 535; 96 NW2d 806 (1959); *Eberhard v Harper-Grace Hospitals*, 179 Mich App 24, 35; 445 NW2d 469 (1989). It is well settled that one who seeks equitable relief must do so with clean hands. *McCluskey v Winisky*, 373 Mich 315, 321; 129 NW2d 400 (1964); *Berar Enterprises, Inc v Harmon*, 101 Mich App 216, 231; 300 NW2d 519 (1980). A party with unclean hands may not assert the equitable defense of laches. *Attorney General v Thomas Solvent Co*, 146 Mich App 55, 66; 380 NW2d 53 (1985). Our Supreme Court has observed that a party who has "acted in violation of the law" is not "before a court of equity with clean hands," and is therefore "not in position to ask for any remedy in a court of equity." *Farrar v Lonsby Lumber & Coal Co*, 149 Mich 118, 121; 112 NW 726 (1907). Indeed, as stated in *Society of Good Neighbors v Mayor of Detroit*, 324 Mich 22, 28; 36 NW2d 308 (1949), a court of equity "will not lend its aid . . . to assist law violators." PowerPick's various gambling schemes violate the terms of MCL 432.27(1), MCL 750.301, MCL 750.304, MCL 750.306, and MCL 750.372, and PowerPick has thus acted with unclean hands. *Farrar*, 149 Mich at 121. As a consequence, it may not assert the equitable defense of laches. *Thomas Solvent*, 146 Mich App at 66.

E

For the same reason, PowerPick was not entitled to assert the equitable defense of unclean hands. A defendant with unclean hands may not defend on the ground that the plaintiff has unclean hands as well. To permit a defendant with unclean hands to defend on such a ground would contravene the ancient rule that "[h]e who hath committed iniquity shall not have equity . . . ." *Society of Good Neighbors*, 324 Mich at 28; see also *McCredie v Buxton*, 31 Mich 383, 388 (1875).

F

PowerPick's affirmative defenses fail as a matter of law. The circuit court should have granted the Attorney General's motion for summary disposition of the affirmative defenses under MCR 2.116(C)(9). *Dimondale*, 240 Mich App at 564.

IV

In ruling on the motion for summary disposition, the circuit court did not address the Attorney General's claim that PowerPick's operations violated the MCPA. In general, we will not address an issue on appeal that was not considered and decided below. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005); *People v Hall*, 158 Mich App 194, 199; 404 NW2d 219 (1987). Lest there be any confusion on the matter, we wish to make clear that PowerPick's operations constituted an enjoinable nuisance for the reasons stated above, irrespective of whether PowerPick's business practices also violated the MCPA. However, because the Attorney General sought civil fines, costs, and other specific relief under the MCPA, see MCL 445.905(1); MCL 445.905(4), we direct

the circuit court to consider and address the Attorney General's MCPA claim on remand.

V

We have concluded that PowerPick's operations and office constitute an enjoinable nuisance and that PowerPick failed to plead and assert any valid affirmative defenses. Therefore, the circuit court erred by denying the Attorney General's motion for summary disposition with respect to his nuisance claim. There remained no genuine issue of material fact that would have precluded the grant of summary disposition on this issue, and the Attorney General was entitled to judgment as a matter of law. On remand, the circuit court shall enter judgment in favor of the Attorney General with respect to his nuisance claim. This shall include the entry of any order that may be necessary to abate the nuisance and to enjoin PowerPick's continuing operations.

In contrast, the circuit court did not consider or address the Attorney General's MCPA claim. The circuit court shall consider this claim on remand.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs under MCR 7.219, a public question having been involved.

MARKEY, J., concurred.

HOEKSTRA, J. *(concurring in part and dissenting in part)*. I agree and join with the holdings of the majority in part II(C)(2) that PowerPick violates MCL 432.27(1) by reselling lottery tickets at a price greater than that fixed by the Michigan Lottery commissioner and part II(C)(3) that PowerPick violates MCL 750.372 because its random drawings for Michigan scratch-off lottery tickets consti-

tute an illegal lottery and that its MegaPools constitute an illegal gift enterprise. I also agree and join with the holding of the majority in part III that PowerPick's affirmative defenses fail as a matter of law. In addition, I agree that a remand is appropriate for consideration of the Attorney General's claims under the Michigan Consumer Protection Act, MCL 445.901 *et seq*.

However, I respectfully disagree with the majority's conclusion in part II(C)(1) that PowerPick's business practice of randomly assigning its customers to pools constitutes a second bet because the customer is "*buy*-[*ing*] *the chance* of being assigned to one or more winning pools," *ante* at 30 (emphasis in original), and this chance is one of the reasons why its customers pay an amount that is 51 percent greater than the face value of the tickets purchased. On the basis of its interpretation of PowerPick's practice of assigning its customers to pools, the majority holds that PowerPick receives bets contrary to MCL 750.301, registers bets contrary to MCL 750.304, and possesses memoranda of bets contrary to MCL 750.306. In contrast, although not disputing that it charges its customers 51 percent more than what it spends to purchase lottery tickets, PowerPick maintains that it is merely providing a service to its customers and that the amount greater than that used to purchase tickets represents its costs and profits. In my opinion, whether the amount charged in addition to the cost of the purchased lottery tickets is a reasonable amount to pay for PowerPick's business expenses and profits, or in part is a second bet that buys the customer a chance to be assigned to a winning pool, is a disputed question of fact that cannot be resolved on a motion for summary disposition. Consequently, on this specific issue, I would affirm the trial court's holding that factual issues remain.

I also respectfully disagree with the holdings of the majority in parts II(C)(4) and (5) that "PowerPick's business operations, taken as a whole, constitute a public nuisance," *ante* at 45, and that "PowerPick's office in Comstock Park and 'the furniture, fixtures, and contents' of that office constitute a nuisance as a matter of law," *ante* at 45. Because I believe that factual questions exist concerning whether PowerPick's business practice of assigning its customers into pools violates the provisions of the Michigan Penal Code at issue, any determination whether PowerPick's business operations and its office constitute a nuisance for such violations is premature. Moreover, whether PowerPick's violation of MCL 432.27(1) constitutes a public nuisance and, if it does, whether the violation is subject to the sanctions provided for in MCL 600.3801 are questions of first impression. In *Attorney General, ex rel Optometry Bd of Examiners v Peterson*, 381 Mich 445, 465; 164 NW2d 43 (1969), the Supreme Court noted that, "[a]t common law, acts in violation of law constitute a public nuisance" and that the Attorney General may sue to enjoin such nuisances. Therefore, although no court has addressed the issue, it is arguable that PowerPick's violation of MCL 432.27(1) renders its business a public nuisance. However, the *Peterson* Court qualified its holding by noting that "[h]arm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety and welfare." *Id*. at 465. Numerous cases hold that the criminal gambling statutes, such as MCL 750.301, MCL 750.304, and 750.306, were enacted to preserve public health, safety, and welfare. See, e.g., *Parkes v Recorder's Court Judge*, 236 Mich 460, 465-466; 210 NW 492 (1926); *Oakland Co Prosecutor v 46th Dist Judge*, 76 Mich App 318, 326; 256 NW2d 776 (1977). But whether MCL 432.27(1) was enacted to preserve public health, safety,

and welfare is not a settled question. Because the Attorney General only argued below that a violation of MCL 432.27(1) provided an additional reason for concluding that PowerPick's operation was a public nuisance, the issue whether MCL 432.27(1) was enacted to preserve public health, safety, and welfare was not raised in the trial court, nor was it briefed on appeal. Under these circumstances, I would remand to the trial court for initial consideration of whether a violation of MCL 432.27(1) constitutes a public nuisance and, if so, whether, and to what extent, the violation is subject to the sanctions of MCL 600.3801.

Finally, I agree with the holding of the majority in part II(C)(5) that PowerPick's drawings for scratch-off lottery tickets are "gambling" and, therefore, PowerPick can be sanctioned under MCL 600.3801. However, unlike the majority, I would also remand to the trial court for a determination of what, if any, assets are subject to the sanction provided by MCL 600.3801 for this particular violation.

NUCULOVIC v HILL

Docket No. 280216. Submitted January 7, 2009, at Detroit. Decided January 5, 2010, at 9:10 a.m.

Paska Nuculovic brought an action in the Macomb Circuit Court, Mary A. Chrzanowski, J., against Johnny D. Hill and SMART Bus, Inc., seeking damages for injuries sustained in a motor vehicle accident that occurred when a bus owned by SMART Bus and driven by SMART Bus employee Hill turned in front of the vehicle driven by plaintiff. Defendants moved for summary disposition, alleging that plaintiff failed to provide them notice of her claim within 60 days of the accident, as required by MCL 124.419. The trial court granted defendants' motion. Plaintiff appealed.

The Court of Appeals *held*:

1. No language in MCL 124.419 suggests that it applies only to claims involving bus passengers, or does not apply to claims involving injuries to nonpassengers, or that it only applies to common-carrier liability. The statute applies to all claims that may arise in connection with the transportation authority.

2. MCL 124.419 does not negate the liability established by MCL 257.401, which provides that the owner of a vehicle may be liable for the negligent operation of that vehicle. MCL 124.419 and MCL 257.401 are not mutually exclusive. The fact that SMART Bus may be subject to liability as the owner of a vehicle does not preclude the applicability of MCL 124.419, which prescribes a notice requirement for presenting a claim against a transportation authority.

3. The broad language of MCL 124.419 also encompasses plaintiff's claim against Hill because the claim arises from Hill's operation of the bus as an employee of SMART Bus.

4. Although SMART Bus had in its possession the police report of the accident and reports prepared by Hill and his supervisor, plaintiff did not "serve" (formally deliver to) SMART Bus notice of plaintiff's claim for injury as service is defined in the court rules. The trial court properly determined that the statutory notice requirement was not satisfied.

5. Even if the police reports in the possession of SMART Bus constituted notice of some kind of an occurrence, they did not constitute notice of a claim to defendants as required by MCL 124.419.

6. The trial court did not abuse its discretion by denying plaintiff's motion for reconsideration.

Affirmed.

BORRELLO, J., concurring in part and dissenting in part, stated his agreement with the majority on all issues except its analysis and conclusions regarding the notice and service of process requirements of MCL 124.419. A "claim" is defined by Black's Law Dictionary (8th ed) as the aggregate of operative facts giving rise to a right enforceable by a court. This definition refutes any suggestion that, in order to provide notice sufficient under MCL 124.419, plaintiff was required to specifically inform defendants that she intended to take legal action. Plaintiff's duty to provide written notice of the claim encompassed the duty to notify defendants of the operative facts giving rise to a right enforceable by a court. The police report and the incident reports provided legally sufficient notice. Statutory notice provisions like MCL 124.419 should not be so strictly construed as to render it impossible for an average citizen to comply. The majority errs in implying that in order to effectuate legally sufficient service under MCL 124.419, an injured party must fulfill the requirements of the court rules outlined in the majority's opinion, or must serve the entity by registered mail. The dictionary definitions of "notice" and "serve" are consistent with the notion of bringing knowledge to the attention of another and do not require delivery of a summons and complaint or service by registered mail. The order granting summary disposition should be reversed and the case should be remanded for further proceedings.

1. CONFLICT OF LAWS — METROPOLITAN TRANSPORTATION AUTHORITIES ACT — MOTOR VEHICLES — OWNER'S LIABILITY.

The provisions of MCL 124.419 and MCL 257.401 are not mutually exclusive; MCL 257.401 provides that the owner of a vehicle may be liable for the negligent operation of the vehicle; MCL 124.419 only prescribes a notice requirement for presenting a claim against a transportation authority and does not negate the liability established by MCL 257.401; the fact that a transportation authority may be subject to liability under MCL 257.401 as the owner of a vehicle does not preclude the applicability of MCL 124.419 to all claims that may arise in connection with the transportation authority.

2. ACTIONS — NOTICE — METROPOLITAN TRANSPORTATION AUTHORITIES ACT.

The Metropolitan Transportation Authorities Act requires notice of any claim against a transportation authority based upon injury to persons or property to be served upon the authority no later than 60 days from the occurrence through which such injury is sustained; under the court rules, where service is not done by mailing, service means delivery at a particular time and place; the term "service" is defined as the formal delivery of a writ, summons, or other legal process (MCR 2.102, 2.103, 2.104, 2.105; MCL 124.419).

Sommers Schwartz, P.C. (by *Samuel A. Meklir*), for plaintiff.

Zausmer, Kaufman, August, Caldwell & Tayler, P.C. (by *Carson J. Tucker*, *Mark J. Zausmer*, and *Scott R. Reizen*), for defendants.

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

WILDER, J. Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants. We affirm.

In September 2005, plaintiff was driving a vehicle north on Harper Avenue, at an intersection with a highway entrance ramp, when defendant Johnny D. Hill, driving a bus owned by defendant SMART Bus, Inc. (SMART), turned left in front of her vehicle, causing a collision. Plaintiff sued defendants in 2006, more than 60 days after the accident, alleging injuries resulting from the negligence of defendants.

Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10), on the ground that plaintiff failed to provide notice of her claim within 60 days of the accident, as required by MCL 124.419, a part of the Metropolitan Transportation Authorities Act, MCL 124.401 *et seq*. The trial court granted defendants' motion, and denied plaintiff's motion for reconsideration. This appeal ensued.

We review summary dispositions de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Questions of law, such as construction of a statute, are also reviewed de novo. *Morden v Grand Traverse Co*, 275 Mich App 325, 340; 738 NW2d 278 (2007).

Subrule (C)(7) permits summary disposition where the claim is barred by an applicable statute of limitations. In reviewing a motion under subrule (C)(7), a court accepts as true the plaintiff's well-pleaded allegations of fact, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted by the parties, to determine whether a genuine issue of material fact exists. *Id*. These materials are considered only to the extent that they are admissible in evidence. *In re Miltenberger Estate*, 275 Mich App 47, 51; 737 NW2d 513 (2007).

A motion for summary disposition under subrule (C)(8) tests the legal sufficiency of the pleadings alone. MCR 2.116(G)(5); *Johnson-McIntosh v Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). Where the parties rely on documentary evidence, appellate courts proceed under the standards of review applicable to a motion made under MCR 2.116(C)(10), *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007), or (C)(7).

A motion made under MCR 2.116(C)(10) tests the factual support for a claim, *Campbell v Kovich*, 273 Mich App 227, 229; 731 NW2d 112 (2006), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Healing Place*, 277 Mich App at 56. When

the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id*. But again, such evidence is only considered to the extent that it is admissible. MCR 2.116(G)(6); *Campbell*, 273 Mich App at 230. A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *Healing Place*, 277 Mich App at 56.

Here, the trial court considered defendants' motion under MCR 2.116(C)(7), (8), and (10), but did not indicate under which subrule it granted it. Because the trial court considered evidence beyond the pleadings, we review the motion as though it were granted under MCR 2.116(C)(7) or (10).

MCL 124.419 provides:

> All claims that may arise in connection with the transportation authority shall be presented as ordinary claims against a common carrier of passengers for hire: Provided, That *written notice of any claim based upon injury to persons or property shall be served upon the authority no later than 60 days from the occurrence* through which such injury is sustained and the disposition thereof shall rest in the discretion of the authority and all claims that may be allowed and final judgment obtained shall be liquidated from funds of the authority: Provided, further, That only the courts situated in the counties in which the authority principally carries on its function are the proper counties in which to commence and try action against the authority. [Emphasis added.]

"Shall" is mandatory. *Roberts v Farmers Ins Exch*, 275 Mich App 58, 68; 737 NW2d 332 (2007).

The Metropolitan Transportation Authorities Act does not define "claim." However, in *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 554; 640 NW2d 256 (2002), relying on Black's Law Dictionary (7th ed), the term "claim" was defined as the aggregate of operative facts giving rise to a right enforceable by a court. The statute at issue in this case requires that a claim be "based upon injury to persons or property . . . ." MCL 124.419. Here, it is undisputed that plaintiff did not provide notice of a court-enforceable right based on a personal injury within 60 days of the date of the accident.

Plaintiff contends that defendants should not have been able to rely on MCL 124.419 in support of their motion for summary disposition, because they did not timely raise reliance on MCL 124.419 as an affirmative defense. Because plaintiff did not challenge below defendants' right to assert this statute as an affirmative defense, on the ground that it was not timely raised, the issue is not preserved. We therefore reject plaintiff's unpreserved claim. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 510; 741 NW2d 539 (2007), quoting *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) (stating that " '[i]ssues raised for the first time on appeal are not ordinarily subject to review' " in a civil case). This Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 377; 761 NW2d 353 (2008). We do not find any of these exceptions to be applicable.

We next address plaintiff's various arguments that MCL 124.419 does not apply here. We hold that it does apply.

When construing a statute, we use well-established principles, and begin by consulting the specific statutory language. *Provider Creditors Comm v United American Health Care Corp*, 275 Mich App 90, 95; 738 NW2d 770 (2007). This Court gives effect to the Legislature's intent, as expressed in the statute's terms, giving the words of the statute their plain and ordinary meanings. *McManamon v Redford Charter Twp*, 273 Mich App 131, 135; 730 NW2d 757 (2006). "When the language poses no ambiguity, this Court need not look beyond the statute or construe the statute, but need only enforce the statute as written." *Id*. at 136. "This Court does not interpret a statute in a way that renders any statutory language surplusage or nugatory." *Id*.

Plaintiff argues that MCL 124.419 is intended to prevent claims by phantom bus passengers, and, therefore, does not apply to claims by persons involved in a motor vehicle accident with a bus, while a passenger or driver of another vehicle. Plaintiff also argues that MCL 124.419 should apply only to claims based on common-carrier liability. We disagree.

Plaintiff's arguments find no support in the language of the statute. The statute applies, unambiguously, to "*[a]ll claims that may arise in connection with the transportation authority* . . . ." MCL 124.419 (emphasis added). There is no language suggesting that it applies only to claims involving bus passengers, or does not apply to claims involving injuries to nonpassengers, or that it only applies to common-carrier liability. To accept plaintiff's interpretation would render nugatory the "[a]ll claims" language, which we lack authority to

do. *McManamon*, 273 Mich App at 136. We apply the statute as written,[1] and reject this claim of error.

We also reject plaintiff's argument that MCL 124.419 does not apply because the action is premised on SMART's liability as the owner of the vehicle, under the owner liability statute, MCL 257.401, and not on its status as a common carrier. Contrary to what plaintiff suggests, MCL 257.401 and MCL 124.419 are not mutually exclusive. MCL 257.401 provides that the owner of a vehicle may be liable for the negligent operation of that vehicle. MCL 124.419 does nothing to negate the liability established by MCL 257.401; it only prescribes a notice requirement for presenting a claim against a transportation authority. And as previously indicated, MCL 124.419 applies to "[a]ll claims that may arise in connection with the transportation authority . . . ." Thus, the fact that SMART may be subject to liability as the owner of a vehicle does not preclude the applicability of MCL 124.419.

Plaintiff also argues that to the extent MCL 124.419 applies, it applies only to claims against common carriers, and, therefore, would not apply to any claim against Hill, individually. In light of the statutory language indicating that the statute applies to "[a]ll claims that may arise in connection with the transportation authority," we must reject this claim as well. The broad language of the statute indicates that it encompasses plaintiff's claim against Hill, because the claim arises from Hill's operation of the bus as an employee of SMART.

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[1] Further, in *Trent v Suburban Mobility Auth for Regional Transportation*, 252 Mich App 247, 251-252; 651 NW2d 171 (2002), this Court held that the no-fault act, MCL 500.3101 *et seq*., supersedes the prescribed time period in MCL 124.419 with respect to first-party no-fault personal protection insurance benefits, but not for third-party claims of personal injury. The case at bar is a third-party action.

Plaintiff also argues that MCL 124.419 does not apply because SMART has excess insurance that provides coverage for claims over $1 million. Plaintiff observes that MCL 124.419 provides that claims "shall be liquidated from funds of the authority" and that the disposition of claims is within the discretion of the authority. Plaintiff argues that the availability of insurance necessarily limits SMART's authority regarding the disposition of a claim. We find it unnecessary to consider the merits of this argument, because plaintiff failed to show that there was an issue of fact concerning whether her claim might exceed $1 million, thereby triggering the availability of excess insurance. Further, plaintiff failed to show any potential availability of insurance for defendant Hill that would avoid the applicability of MCL 124.419. For these reasons, we reject plaintiff's arguments that MCL 124.419 is not applicable to this action.

Plaintiff also argues that, even if the notice requirement of MCL 124.419 is applicable, proper notice was given because SMART received a copy of the police report for the incident and because both Hill and his supervisor prepared reports regarding the accident. We disagree. MCL 124.419 requires that "written notice of any claim based upon injury" be served upon the authority within 60 days of the date of the accident.

The term "service" is not defined in MCL 124.419, but the concept of service of process is well clarified in our court rules. Service of process is addressed in MCR 2.102, 2.103, and 2.104. Where service is to be made on a public corporation, MCR 2.105(G) provides that "[s]ervice of process . . . may be made by serving a summons and a copy of the complaint on" various officials, officers, or members. When process is served on an individual, it may be done by "*delivering* a

summons and a copy of the complaint . . . ." MCR 2.105(A)(1) (emphasis added). The requirements for proof of service include a description of the facts of service, including the time, place, and manner of service. MCR 2.104(A)(3). Thus, under our court rules, where service is not done by mail, service means delivery at a particular time and place. MCR 2.105(A)(1); MCR 2.104(A)(3). And such service is usually done by a process server. MCR 2.103. Plaintiff has no evidence of any delivery of her claim, much less formal delivery such as by a process server. And plaintiff has no "proof of service" as that term is used in the law.

Under MCR 2.105(H)(1), "[s]ervice of process on a defendant may be made by serving a summons and a copy of the complaint on an agent authorized by written appointment or by law to receive service of process." Under subrule (H)(2), "[w]henever, pursuant to statute or court rule, service of process is to be made on a nongovernmental defendant by service on a public officer, service on the public officer may be made by registered mail addressed to his or her office." MCR 2.105(H)(2). Here, there is no evidence that SMART received any notice by registered mail.

Furthermore, while the process in which service is made is well-specified in the court rules, the word "service" is not defined in either our court rules or in the statute at issue here. Therefore, we may consult a legal dictionary to define an undefined term that has a specific legal meaning. *Snyder v Advantage Health Physicians*, 281 Mich App 493, 502; 760 NW2d 834, 839 (2008). In Black's Law Dictionary, the word "service" is defined as "[t]he *formal delivery* of a writ, summons, or other legal process . . . ." Black's Law Dictionary (8th ed), p 1399 (emphasis added).

As the trial court observed, while SMART had in its possession the police report and the reports prepared by Hill and his supervisor, plaintiff did not "serve" (formally deliver to) SMART notice of plaintiff's claim for injury as service is defined in our court rules. Therefore, the trial court properly determined that the statutory notice requirement was not satisfied, and properly granted defendants' motion for summary disposition on this basis.

We disagree with the dissent's conclusion that our analysis in this case should be affected by the Supreme Court's order in *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009), which denied leave to appeal this Court's opinion in *Chambers v Wayne Co Airport Auth*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 277900). The Supreme Court had originally reversed the decision of the Court of Appeals, 482 Mich 1136 (2008), but granted reconsideration, vacated its earlier order, and denied leave to appeal. 483 Mich 1081 (2009).

First, this Court's opinion in *Chambers* was unpublished, and as such, it has no precedential force. MCR 7.215(C)(1); *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 282-283; 769 NW2d 234 (2009). The Supreme Court's denial of leave to appeal, effectively affirming the result reached in that case, also has no precedential value. MCR 7.302(H)(3); *Tebo v Havlik*, 418 Mich 350, 363 n 2; 343 NW2d 181 (1984).

Second and more substantively, *Chambers* is distinguishable from the present case. In *Chambers*, the plaintiff alleged that he fell in a puddle of water at the LC Smith Terminal of the Wayne County Airport. An officer employed by defendant Wayne County Airport Authority was flagged down by passersby, and this

officer wrote up an incident report. Defendant Wayne County Airport Authority moved for summary disposition, arguing, in part, that the plaintiff failed to provide notice of the occurrence within 120 days as required by MCL 691.1406. The trial court denied the motion, and this Court affirmed.

MCL 691.1406 provides, in pertinent part:

> As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the 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, anything to the contrary in the charter of any municipal corporation notwithstanding. [Emphasis added.]

This Court concluded that the incident report prepared by the airport authority's employee was sufficient *notice of the occurrence* to satisfy the notice requirements of MCL 691.1406.

In the instant case, rather than requiring notice of an *occurrence*, MCL 124.419 specifically requires that notice of a *claim* be served on the SMART authority within 60 days of the accident. Therefore, even if the police reports in defendant SMART's possession constituted notice of some kind of an occurrence, they did not constitute notice of a *claim* to defendants. Plaintiff has failed to show that, from the police reports, the defendant authority had *any* way of knowing that plaintiff intended to file a *claim* for injury to her person or her property because of the 2005 collision, much less what

the *claim* would actually be. Thus, factually and as a matter of law, plaintiff has failed to satisfy the notice requirements of MCL 124.419.

Plaintiff also argues that the trial court erred by denying her motion for reconsideration. Plaintiff argued below that reconsideration was warranted, for reasons that we have previously addressed and rejected in this opinion. Because plaintiff failed to show that the trial court's original decision granting summary disposition was erroneous, the trial court did not abuse its discretion by denying plaintiff's motion for reconsideration. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

In light of our ruling that plaintiff failed to provide notice as required by MCL 124.419, defendant's alternative argument regarding governmental immunity is moot. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCL 7.219.

FORT HOOD, P.J., concurred.

BORRELLO, J. (*concurring in part and dissenting in part*). I concur with the majority's analysis of plaintiff's claims of error on all issues except its analysis and conclusions regarding the notice and service of process requirements mandated by MCL 124.419. I respectfully dissent from the majority's conclusions that the police report and incident reports failed to satisfy the notice requirement of MCL 124.419 and that defendants were not properly "served" pursuant to the plain language of the statute. On the basis of my reading of the notice requirement stated in MCL 124.419, the police report and two incident reports, which defendants possessed, constituted legally sufficient notice under MCL 124.419 and, accordingly, I would reverse the granting of sum-

mary disposition and remand the matter to the trial court for further proceedings.

MCL 124.419 requires that a common carrier of passengers be served "written notice of any claim[.]" My disagreement with the majority's conclusion regarding whether notice was proper under MCL 124.419 is based on this Court's holding in *Chambers v Wayne Co Airport Auth*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 277900), lv den 483 Mich 1081 (2009). Although unpublished opinions of this Court are not precedentially binding under the rule of stare decisis, MCR 7.215(C)(1), such opinions can be persuasive. I am persuaded by this Court's decision in *Chambers* because it is consistent with longtime legal precedent in this state, which recognizes that notice, when required of an average citizen for the benefit of a governmental entity, need only be understandable and sufficient to bring to the defendant's attention the important facts, *Brown v Owosso*, 126 Mich 91, 94-95; 85 NW 256 (1901), and that notice provided by an average citizen must be construed liberally in favor of the citizen. *Meredith v Melvindale*, 381 Mich 572, 579; 165 NW2d 7 (1969).

In *Chambers*, a panel of this Court held that an incident report taken by employee of defendant Wayne County Airport Authority satisfied the statutory notice requirement in the public building exception to governmental immunity, MCL 691.1406. *Chambers*, unpub op at 3. In so ruling, this Court stated:

> [I]t has nevertheless long been the case in Michigan that "notice," particularly where demanded of an average citizen for the benefit of a governmental entity, need only be understandable and sufficient to bring to the defendant's attention the important facts. *Brown v City of Owosso*, 126 Mich 91, 94-95; 85 NW 256 (1901). The notice itself, therefore, should be liberally construed in favor of "the

> inexpert layman with a valid claim" who "should not be penalized for some technical defect." *Meredith v City of Melvindale*, 381 Mich 572, 579; 165 NW2d 7 (1969). What constitutes "a notice" is not, in fact, defined in the governmental tort liability act. MCL 24.205(4), MCL 462.107(3), and MCL 565.802(i) define the term in various ways that do not seem relevant except insofar as they are consistent with the dictionary definitions, all of which pertain to *bringing knowledge to the attention of another*. [*Chambers*, unpub op at 2 (emphasis in original).]

Although *Chambers* involved notice under the public building exception and this case involves notice under MCL 124.419, I find the analysis set forth by our Court in *Chambers* persuasive and would apply the same reasoning to the notice requirement contained in MCL 124.419. The majority asserts that *Chambers* is distinguishable from the present case because of distinctions in the notice required in MCL 691.1406 and MCL 124.419. I find that the statutes, while not identical, are sufficiently similar to apply the reasoning in *Chambers* to this case because both statutes concern an average citizen's providing notice. Moreover, the same concerns underlying this Court's rationale for liberally construing notice provided by an average citizen under the public building exception also apply to MCL 124.419. The notice provided by an inexpert layman with a valid claim should be liberally construed whether the layman is providing notice under the public building exception or notice under MCL 124.419.

As stated above, MCL 124.419 requires, quite simply, "written notice of any claim[.]" The majority suggests that in order to satisfy the "written notice of any claim" requirement of MCL 124.419, defendants must have known that plaintiff intended to file a legal claim. A "claim" is defined as "[t]he aggregate of operative facts giving rise to a right enforceable by a court[.]" Black's

Law Dictionary (8th ed). Thus, the legal dictionary definition of the word "claim" refutes any suggestion that, in order to provide notice sufficient under MCL 124.419, plaintiff was required to explicitly inform defendants that she intended to take legal action. To the contrary, based on the definition of the word "claim," plaintiff's duty to provide "written notice of any claim" encompassed the duty to notify defendants of the operative facts giving rise to a right enforceable by a court. In this case, the police report and the incident reports informed defendants of the date and time of the injury, the nature of any injures, and myriad surrounding facts, all of which combined to provide legally sufficient notice of the aggregate of operative facts giving rise to a right enforceable by a court. The conclusion that a police report or an incident report satisfies the notice requirement of MCL 124.419, as long as they contain the operative facts giving rise to a right enforceable by a court, is consistent with the purpose of the notice provision in MCL 124.419, which, pursuant to the plain language of the statute, is to apprise a common carrier that a claim is being asserted against it arising from injuries to a person or property. Statutory notice provisions like the one in MCL 124.419 should not be so strictly construed as to render it impossible for an average citizen to comply. See *Brown*, *supra* at 94-95. Therefore, I would hold that the trial court improperly concluded that plaintiff failed to satisfy the notice requirement in MCL 124.419.

I additionally dissent from the majority's implication that in order to effectuate legally sufficient service under MCL 124.419, an injured party must fulfill the requirements of the court rules outlined in the majority's opinion, or must serve the entity by registered mail. Again, the plain language of MCL 124.419 imposes no such requirements. The Legislature is presumed to

have intended the meaning it plainly expressed. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). A court may not read something into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

As the panel in *Chambers* recognized, when a term is not defined in a statute, it is appropriate to refer to dictionary definitions. The dictionary definitions of the term "notice" all "pertain to *bringing knowledge to the attention of another*." *Chambers*, unpub op at 2 (emphasis in original). Black's Law Dictionary (8th ed) defines "serve" as "[t]o make legal delivery of (a notice or process)" or "[t]o present (a person) with a notice or process as required by law[.]" These definitions of "serve" are consistent with the notion of "*bringing knowledge to the attention of another*" and do not require, as the majority suggests, delivery of a summons and complaint or service by registered mail. Defendants do not contend, and the record does not support a finding, that defendants did not possess the police report and the two incident reports. Therefore, defendants' receipt of the police report, coupled with the incident reports, constituted legally sufficient service of notice pursuant to MCL 124.419.

On the basis of my analysis, because defendants' receipt of the police report or either incident report satisfied the written notice requirement and service of notice requirement set forth in MCL 124.419, I disagree with the majority that defendants were not properly "served" with legally sufficient notice of the incident under the plain language of MCL 124.419. Accordingly, I would reverse the grant of summary disposition in

favor of defendants and remand the matter for further proceedings consistent with this opinion.

On all other issues, I concur with the analysis and conclusions stated in the majority's opinion.

WARD v MICHIGAN STATE UNIVERSITY (ON REMAND)

Docket No. 281087. Submitted November 23, 2009, at Lansing. Decided January 7, 2010, at 9:00 a.m.

Carla and Gary Ward brought an action in the Court of Claims against Michigan State University, seeking damages for injuries sustained by Carla when she was struck by a hockey puck while attending a college hockey game at defendant's ice arena. Plaintiffs never served defendant notice of the occurrence of the injury or the alleged defect in the building that caused the injury, as required by MCL 691.1406. However, plaintiffs' attorney did send letters to the ice arena addressed to "Sir/Madam," but the letters did not indicate the specific cause or nature of the injury, the exact location and nature of any defect in the ice arena, or provide the names of any witnesses to the incident known to plaintiffs as required by MCL 691.1406. The Court of Claims, James R. Giddings, J., granted summary disposition to defendant with respect to the plaintiffs' claims based on the proprietary function exception to governmental immunity, MCL 691.1413, and denied summary disposition in favor of defendant with regard to plaintiffs' claims based on the public building exception to governmental immunity, MCL 691.1406. Defendant appealed with regard to the claims under the public building exception and plaintiffs cross-appealed with regard to the claims under the proprietary function exception. The Court of Appeals, OWENS, P.J., and SAWYER and MARKEY, JJ., affirmed the grant of summary disposition to defendant with regard to the proprietary function exception claim but reversed the denial of summary disposition to defendant with regard to the public building exception claim in an unpublished opinion per curiam, issued January 27, 2009 (Docket No. 281087). The Supreme Court, in lieu of granting leave to appeal, vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for reconsideration of defendant's appeal in light of the Supreme Court's order on reconsideration in *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009). In all other respects, leave to appeal was denied by the Supreme Court. 485 Mich 917 (2009).

On remand, the Court of Appeals *held*:

1. The Court of Claims erred by failing to grant defendant's motion for summary disposition of the public building exception claim because plaintiffs failed to serve defendant notice of the occurrence of the incident as required by MCL 691.1406 as a precondition to bringing suit under the public building exception to governmental immunity. Plaintiffs did not substantially comply with the statute. The statute does not require the governmental agency to show prejudice before the statute may be enforced. The Court of Claims' denial of defendant's motion for summary disposition of this claim must be reversed.

2. Although a provision of MCL 691.1406 does require that as a condition of liability for a defective building the governmental agency have actual or constructive knowledge of the defect before the incident, this provision does not diminish the separate requirement of the statute that the injured person serve a notice with the required information in the specified way, on the appropriate representative of the agency, and within 120 days as a condition to any recovery for injuries sustained by reason of any dangerous or defective public building.

3. Plaintiffs failed to show that defendant operated its ice hockey program primarily to generate a profit. Intercollegiate athletics is a governmental function of a state university or college that entitles it to governmental immunity. The Court of Claims properly granted summary disposition to defendant with regard to the proprietary function claim. The grant of summary disposition to defendant with regard to this claim must be affirmed.

Affirmed in part and reversed in part.

Church, Kritselis & Wybel, P.C. (by *James T. Heos*), for plaintiffs.

Michael J. Kiley for defendant.

ON REMAND

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

PER CURIAM. This case comes before the Court on remand for reconsideration after our Supreme Court vacated our previous opinion. See *Ward v Michigan State Univ*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2009 (Docket No.

281087), vacated and remanded 485 Mich 917 (2009). Defendant appeals by right the Court of Claims' denial of its motion for summary disposition under MCR 2.116(C)(7) and (8) with regard to plaintiffs' claims under the public building exception to governmental immunity. Plaintiffs cross-appeal, challenging the Court of Claims' grant of summary disposition to defendant as to plaintiffs' claims under the proprietary function exception to governmental immunity. On reconsideration, we again affirm the Court of Claims' grant of summary disposition to defendant regarding plaintiffs' claim in avoidance of governmental immunity under the proprietary function exception. But we reverse the trial court's denial of summary disposition to defendant regarding plaintiffs' claim under the public building exception.

In our prior opinion reversing the Court of Claims' denial of summary disposition to defendant regarding plaintiffs' claim under the public building exception, we relied in part on *Chambers v Wayne Co Airport Auth*, 482 Mich 1136 (2008) (*Chambers II*). That case reversed this Court's unpublished opinion per curiam, issued June 5, 2008 (Docket No. 277900) (*Chambers I*), for the reasons stated in Judge MURRAY's dissent. We reasoned in our prior opinion that because a peremptory order of our Supreme Court is binding precedent in this Court if it can be understood, *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002), we were bound by our Supreme Court's adoption of the dissent in this Court in *Chambers I* because it constituted binding precedent. However, on reconsideration, our Supreme Court subsequently vacated its order in *Chambers II* and denied defendant's application for leave to appeal this Court's decision in *Chambers I*. *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009) (*Chambers III*). The net result of *Chambers III*

was to negate the precedential effect of *Chambers II* and the dissenting opinion in *Chambers I*. Of course, the majority opinion in *Chambers I* also lacks precedential effect. MCR 7.215(C)(1).

Plaintiffs allege that on March 12, 2004, while attending a college hockey game at defendant's ice arena, a hockey puck struck and injured the principal plaintiff, Carla Ward. Plaintiffs contend that a defect, specifically the lack of Plexiglass protecting one section of spectators from the ice rink in defendant's building, caused the incident. One of defendant's employees apparently assisted plaintiff after she was injured and until an ambulance arrived to transport plaintiff for medical treatment. Critically, plaintiffs never served defendant with a notice of claim or information required by MCL 691.1406. Rather, plaintiffs' counsel on December 30, 2004, mailed a letter addressed to "Sir/Madam" at "MSU Munn Ice Arena, East Lansing, MI, 48823." In this letter, counsel advised that he represented the principal plaintiff "in the matter of personal injuries she sustained as a result of an automobile accident" on March 12, 2004. Plaintiffs' counsel mailed a second and similar letter on January 21, 2005. Both letters suggested that the matter be referred to defendant's insurance carrier and that counsel be contacted directly if defendant lacked insurance. The letters did not indicate the specific cause or nature of the injury, indicate the exact location and nature of any defect in the ice arena, or provide the names of any witnesses to the incident known to plaintiffs.

We review de novo both a trial court's grant or denial of a motion for summary disposition and questions of statutory interpretation. *Liptow v State Farm Mut Auto Ins Co*, 272 Mich App 544, 549; 726 NW2d 442 (2006). When the language of a statute is unambiguous, we

must assign the words the Legislature uses their plain meaning and apply the statute as written. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007).

Defendant argues that the Court of Claims erred by failing to grant its motion for summary disposition because plaintiffs failed to serve defendant notice of the occurrence of the incident as required by MCL 691.1406 as a precondition to bringing suit under the public building exception to governmental immunity. We must agree.

MCL 691.1406 provides, in pertinent part:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place. *As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building*, the 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, anything to the contrary in the charter of any municipal corporation notwithstanding. . . . Notice to the state of Michigan shall be given as provided in section 4.[1] [MCL 691.1406 (emphasis added).]

We conclude that MCL 691.1406 is clear and unambiguous. And we must enforce its plain language as written. *Rowland*, *supra* at 200, 202. First, the emphasized language above unambiguously requires compliance with the statute's notice requirements as a precondition to "any recovery for injuries sustained by reason of any dangerous or defective public building . . . ." Second, the statute plainly sets forth elements required for a compliant notice. The statute specifies who must serve the notice ("the injured person"), on whom the notice must be served ("any individual . . . who may lawfully be served with civil process directed against the responsible governmental agency"), what information the notice must contain ("the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant"), and the manner in which the notice must be served ("either personally, or by certified mail, return receipt requested"). Although the statute does not explicitly so provide, it patently implies that these elements of the required notice must be in writing. Here, plaintiffs failed to serve a notice compliant with the statute on defendant. Not only were the letters apparently not mailed certified, return receipt requested, they were not mailed to individuals who could accept civil process for defendant, did not contain the information required by the statute, and were not timely. Accordingly, the plain language of MCL 691.1406 re-

[1] Section 4 is the defective highway exception to governmental immunity, MCL 691.1404. See *Rowland*, enforcing its similar notice provision as written.

quires dismissal of plaintiffs' claims for injuries allegedly sustained by reason of an alleged defect in defendant's ice arena.

Plaintiffs' arguments to the contrary are unavailing. Citing *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996), plaintiffs argue that (1) they substantially complied with the notice requirement of MCL 691.1406 and (2) summary disposition is improper because defendant failed to establish it was prejudiced. *Brown*, *supra* at 365-366, reaffirmed the rule of *Hobbs v State Hwys Dep't*, 398 Mich 90; 247 NW2d 754 (1976), which required a showing of prejudice before a failure to comply with a notice provision would bar a claim against the government. Both *Brown* and *Hobbs* have been overruled. *Rowland*, *supra* at 200, 223. Further, there is nothing in the wording of MCL 691.1406 that requires the government to show prejudice before the statute may be enforced. Reading a prejudice requirement into the statute would be contrary to settled principles of statutory construction in general and the construction of exceptions to government immunity in particular. " '[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' " *Liptow*, *supra* at 554, quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Moreover, exceptions to governmental immunity are to be narrowly construed. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003).

The record does not support plaintiffs' argument that they substantially complied with the statute. As noted above, plaintiffs completely failed to comply with the notice requirement of the statute. The letters that plaintiffs' counsel mailed were not sent to a particular

individual but were addressed to defendant's ice arena and were apparently not sent certified, return receipt requested; they were not mailed to persons who could lawfully receive civil process on defendant's behalf; they did not contain the information the statute requires; and finally, the letters were mailed more than nine months after the incident, well beyond the 120-day notice period MCL 691.1406 requires. In essence, plaintiffs argue that we should ignore the statute's requirements because defendant may have acquired the information that the statute requires the injured party to convey in the notice by other means. Specifically, plaintiffs argue that the alleged defect was apparent and note that one of defendant's employees attended to plaintiff before she was transported for medical treatment. While the second sentence of MCL 691.1406 does require that as a condition of liability for a defective building the governmental agency have actual or constructive knowledge of the defect *before* the incident, this provision does not diminish the separate requirement of the last half of the statute that the injured person serve a notice with the required information in the specified way, on the appropriate representative of the agency, and within 120 days "[a]s a condition to any recovery for injuries sustained by reason of any dangerous or defective public building . . . ." MCL 691.1406.

Because in this case plaintiffs completely failed to comply with the notice requirement of MCL 691.1406, the Court of Claims erred by not granting defendant's motion for summary disposition regarding plaintiffs' claim under that exception to governmental immunity.[2]

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[2] Because defendant is entitled to summary disposition on the public building exception claim, we need not consider whether defendant was also entitled to summary disposition on the basis of plaintiffs' failure to provide the required notice under the Court of Claims Act. MCL 600.6401 *et seq*.

Next, we note that our Supreme Court's order remanded this case for our reconsideration of "defendant's appeal" in light of the Court's order in *Chambers III*. The Court's order, however, denied leave to appeal regarding the remaining question, which is plaintiffs' cross-appeal. But because our Supreme Court's order vacated our prior judgment, we adopt our prior opinion regarding plaintiffs' cross-appeal.

Plaintiffs assert on cross-appeal that defendant is not immune from tort liability because the principal plaintiff's injury resulted from a proprietary function. We disagree.

The governmental tort liability act (GTLA) provides that, in general, governmental agencies engaged in governmental functions are immune from tort liability. MCL 691.1407(1). The GTLA defines "governmental function" as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f).

In *Harris v Univ of Michigan Bd of Regents*, 219 Mich App 679; 558 NW2d 225 (1996), we held that according to well-established caselaw "this definition is to be broadly applied and requires only that 'there be *some* constitutional, statutory or other legal basis for the activity in which the governmental agency was engaged.' " *Id.* at 684 (citations omitted; emphasis in original). Also, we look to the general activity involved rather than the specific conduct engaged in when the alleged injury occurred. *Smith v Dep't of Pub Health*, 428 Mich 540, 609-610; 410 NW2d 749 (1987) (opinion by BRICKLEY, J.).

The GTLA provides an exception to governmental immunity when an agency is engaged in proprietary functions. MCL 691.1413 states as follows:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees. No action shall be brought against the governmental agency for injury or property damage arising out of the operation of proprietary function, except for injury or loss suffered on or after July 1, 1965.

To constitute a proprietary function an activity "(1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) it cannot be normally supported by taxes and fees." *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998). That the activity consistently generates a profit may show an intent to produce a profit. *Id*. But, that "is not sufficient to make the activity proprietary because generating a profit must be the *primary* motive." *Harris*, *supra* at 690 n 2 (citation omitted; emphasis in original). Where the profit is deposited and how it is spent are relevant factors in determining the primary purpose of the activity as well. *Coleman*, *supra* at 621. "[U]se of profits to defray the expenses of the activity itself indicates a nonpecuniary purpose." *Harris*, *supra* at 690 n 2 (citation omitted).

In *Harris*, we found that the University of Michigan was engaged in a governmental function under the GTLA in its operations of its athletic department and intercollegiate gymnastics team. We stated:

> Given the broad definition of a governmental function, and in light of the history of intercollegiate athletics at Michigan universities and colleges that has historic sup-

> port from the Michigan Legislature, we find that intercollegiate athletics is a governmental function for purposes of immunity. [*Id.* at 685].

Plaintiffs contend that times have changed since *Harris* and argue that defendant's expansion of athletic facilities, firing and hiring of specific coaches, and concern with the success of its teams show that defendant intends to financially profit from its athletics department. In short, plaintiffs make factual allegations about defendant's athletic program without making a meaningful legal argument. Plaintiffs allege that the department is profitable and claim that it receives $3,829,293 in revenue above its expenses, but defendant has offered an affidavit stating the ice hockey program specifically has been operating at a loss for the last 20 years. Plaintiffs also assert that the profits are used to sustain defendant, failing to recognize that "[a] governmental agency may conduct an activity on a self-sustaining basis without being subject to the proprietary function exception." *Harris*, *supra* at 690 (citation omitted).

We conclude that *Harris* requires us to hold that defendant's operation of its ice hockey program did not constitute a proprietary function. Further, regardless of *Harris*, plaintiffs have failed to show that defendant operated its ice hockey program primarily to generate a profit.

We affirm the grant of summary disposition to defendant as to the proprietary function claim but reverse the denial of summary disposition to defendant on the public building exception claim. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

MOSSING v DEMLOW PRODUCTS, INC

Docket No. 287643. Submitted December 9, 2009, at Detroit. Decided January 7, 2010, at 9:05 a.m.

Margaret Mossing brought an action in the Lenawee Circuit Court, Timothy P. Pickard, J., against Demlow Products, Inc., and James Demlow, alleging breach of contract, conversion, and a violation of MCL 600.2961 with regard to whether plaintiff was due commissions following the termination of the parties' business relationship. Defendants counterclaimed, raising affirmative defenses including accord and satisfaction. The trial court granted summary disposition in favor of defendants, deciding the accord and satisfaction issue in favor of defendant and stating that resolution of this issue disposed of all the claims and counterclaims. The trial court did not consider defendants' request for attorney fees and costs at that time. Plaintiff appealed and defendants cross-appealed the order granting summary disposition. Thereafter, the trial court entered a postjudgment order denying defendants' request for fees and costs. Defendants did not file a separate appeal from that order, but sought to challenge it as part of their cross-appeal from the order granting summary disposition. On appeal, plaintiff argued that there was no accord and satisfaction and that the Court of Appeals lacks jurisdiction to consider defendants' challenge to the postjudgment order denying their request for attorney fees and costs.

The Court of Appeals *held*:

Where a cross-appeal from an original judgment is filed in the Court of Appeals before the trial court enters an order denying an award of attorney fees and costs with regard to the original judgment, a separate appeal must be taken from the postjudgment order denying fees and costs. There was proper accord and satisfaction according to MCL 440.3311(4). The trial court did not err by granting summary disposition in favor of defendants on this issue.

Affirmed.

1. JUDGMENTS — POSTJUDGMENT ORDERS — ATTORNEY FEES — FINAL ORDERS.

A postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.265, or other law or court rule is a final judgment or final order (MCR 7.202[6][a][iv]).

2. APPEAL — POSTJUDGMENT ORDERS.

A separate appeal must be taken from a postjudgment order denying a defendant's request for an award of attorney fees and costs where, before the trial court entered the order denying fees and costs, the defendant filed a cross-appeal in the Court of Appeals with regard to the original judgment.

Garan Lucow Miller, P.C. (by *Robert D. Goldstein* and *Thomas R. Paxton*), for plaintiff.

Philip M. Moilanen, P.C. (by *Philip M. Moilanen*), for defendants.

Before: DONOFRIO, P.J., and SAWYER and OWENS, JJ.

PER CURIAM. Although the primary issue raised in this appeal is a rather straightforward application of the principle of accord and satisfaction, the cross-appeal raises an interesting jurisdictional question regarding whether a challenge to a postjudgment order denying attorney fees may be raised as part of a cross-appeal from the original judgment itself. We hold that where the cross-appeal from the original judgment was filed in this Court before the trial court entered the order denying an award of attorney fees and costs, a separate appeal must be taken from the postjudgment order denying fees and costs.

Plaintiff is an independent manufacturer's representative for suppliers of automobile parts. Defendant Demlow Products, Inc., is a manufacturer of wire forms that are used to build seats for automobiles. Plaintiff and defendants entered into a business relationship in 1991 and continued until June 2006. On June 21, 2006, defendants sent plaintiff a correspondence informing plaintiff that they were terminating their contract and stating that plaintiff would receive her commissions through June 30, 2006. Included with the correspon-

dence was a check for $7,364.94, and on the comment line was written, "JUNE 2006 FINAL PMT." Plaintiff's attorney responded and explained that plaintiff would be cashing the check for $7,364.94 with the understanding that the future commissions were still in dispute, and therefore the check would not be considered as a final payment.

When further payments were not forthcoming, plaintiff filed the instant action alleging breach of contract, conversion, and a violation of MCL 600.2961. Defendants filed a counterclaim and also raised various affirmative defenses, including accord and satisfaction. Ultimately, the trial court granted summary disposition in favor of defendants, concluding that there was no genuine issue of material fact on the issue of accord and satisfaction and that this issue disposed of all the claims and counterclaims. The trial court, however, separately considered the issue of defendants' request for an award of attorney fees and costs. Plaintiff filed a claim of appeal, and defendants filed a claim of cross-appeal, from the order granting summary disposition. Thereafter, the trial court entered its postjudgment order denying defendants' request for attorney fees and costs. Although this is considered a final order under MCR 7.202(6)(a)(iv) and may be appealed as of right, defendants did not file a separate appeal and merely raised their challenge to the denial of fees and costs as part of their cross-appeal.

We turn first to plaintiff's argument on appeal that there has been no accord and satisfaction of her claims because the notation on the check sent to plaintiff was insufficient to put her on notice that defendants intended a discharge of any and all claims. We disagree.

The trial court granted defendants' motion for summary disposition as to plaintiff's complaint on the basis

of MCR 2.116(C)(10) (no genuine issue as to any material fact). This Court reviews de novo the granting of such a motion.[1]

In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party.[2] Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law.[3] A litigant's mere pledge to establish at trial that a genuine issue of material fact exists is not sufficient to overcome summary disposition.[4]

MCL 440.3311, not the common law, applies to an accord and satisfaction involving a negotiable instrument such as a check.[5] MCL 440.3311(4) states:

> A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

Not only did defendants send a check containing the words "JUNE 2006 FINAL PMT." on the memo line, but it also was sent with correspondence indicating defendants' intention to terminate the contract. Upon receiving this check and correspondence, plaintiff's attorney sent a responding correspondence stating:

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[1] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002).

[2] *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

[3] *Id.* at 120.

[4] *Id.* at 121.

[5] *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 75-76; 711 NW2d 340 (2006).

> My client . . . received a check of $7364.94, representing a payment for June. The memo on the check also indicated that it was a final payment. As you know, the issue of future payment is in dispute in this matter and therefore, the check is being cashed with the understanding that it is not, in fact, a final payment . . . .

Plaintiff fully understood that the check was tendered for final payment. Not only did plaintiff acknowledge in this correspondence that it was for final payment, she cashed the check knowing that the check was intended to be for final payment. This was proper accord and satisfaction according to MCL 440.3311(4), and the trial court did not err by granting summary disposition on this issue.

Our resolution of the accord and satisfaction issue renders plaintiff's second issue on appeal and defendants' first and second issues on cross-appeal moot.

But defendants also argue on their cross-appeal a third and final issue concerning attorney fees and costs, which is not resolved by resolution of the accord and satisfaction issue. Defendants argue that the trial court erred by denying attorney fees and costs to defendants. Plaintiff responds that this Court lacks jurisdiction to consider this issue because defendants did not claim an appeal from the order denying fees and costs. We agree.

A postjudgment order awarding or denying attorney fees and costs is a "final order" under MCR 7.202(6)(a)(iv) that may be appealed as of right. But it is less than clear whether such an order must be separately appealed, or whether an issue involving the awarding or denying of fees and costs that is covered in a postjudgment order may be raised as part of an appeal, or in this case, cross-appeal, from an actual final judgment itself.

Plaintiff does not refer us to any controlling precedent on this issue, nor were we able to find any. The closest case on point, *Costa v Community Emergency Med Services, Inc*,[6] is not directly relevant. In *Costa*, the defendants appealed as of right an order denying their motion for summary disposition based upon governmental immunity. MCR 7.202(6)(a)(v) provides that an order denying summary disposition based upon governmental immunity is a final order and therefore immediately appealable as of right. The plaintiffs filed a cross-appeal, challenging the circuit court's denial of their motion for summary disposition based upon an argument that two of the defendants had failed to file an affidavit of meritorious defense as required by statute. Those defendants argued that this Court lacked jurisdiction to consider the cross-appeal because it went outside the limited scope of the appeal itself. This Court disagreed.

This Court acknowledged that the scope of the appeal as of right under MCR 7.202(6)(a)(v) was limited in that case to issues related to the denial of summary disposition based upon governmental immunity.[7] But this Court went on to conclude that a cross-appeal is not so limited. Citing MCR 7.207(A)(1), the *Costa* Court concluded that there is a general right to claim a cross-appeal and that the court rules do not limit the scope of that cross-appeal.[8] Indeed, the Court noted that "MCR 7.207 does not restrict a cross-appellant from challenging whatever legal rulings or other perceived improprieties occurred during the trial court proceedings."[9] The Court

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[6] 263 Mich App 572; 689 NW2d 712 (2004).

[7] *Costa*, *supra* at 583.

[8] *Costa*, *supra* at 583-584.

[9] *Id.* at 584.

went on to note that, even if the initial appeal is abandoned, the cross-appeal continues.

But *Costa* is hardly controlling on the issue before us. Not only does it deal with a different subrule of MCR 7.202(6), it also involved an order (denial of summary disposition) that is inherently interlocutory other than the fact that the court rule defines it as being a final order, while our case involves a postjudgment order. This leads to another difference in that the case at bar involves an order denying fees and costs that had not even been entered in the trial court until after the claims of appeal and cross-appeal were filed in this case. That is, defendants challenge on their cross-appeal an order that did not even exist at the time they filed the cross-appeal. Although the time line in *Costa* is unclear, presumably the order challenged in the cross-appeal had been entered (or certainly could have been entered) before the appeal and cross-appeal were filed.

The broad language in *Costa* might support the proposition that a postjudgment order denying fees and costs can be challenged as part of the appeal from the final judgment itself because it is part of "whatever legal rulings or other perceived improprieties occurred during the trial court proceedings."[10] But we conclude that it would be reading *Costa* and the court rules too broadly to conclude that a claim of cross-appeal invokes this Court's jurisdiction to challenge an order entered in the trial court after the claim of cross-appeal was filed in this Court.

Because we need not decide in this case whether a postjudgment order granting or denying an award of attorney fees and costs that is entered before a claim of cross-appeal is filed in this Court must nevertheless be

[10] *Id*.

separately appealed, we decline to do so. Rather, we hold in this case only that a separate appeal from such a postjudgment order must be filed when that order is entered in the trial court after the claim of cross-appeal is filed in this Court.

We recognize that failing to address the merits of this issue does a certain injustice in this case because defendants would very likely prevail on the merits given the mandatory, rather than discretionary, nature of the award of attorney fees and costs under MCL 600.2961(6) and that the trial court most likely erred by denying an award as to the claim raised under that statute. Nonetheless, we believe that we have no choice but to conclude that this Court's jurisdiction has not been properly invoked to allow us to review that order. Defendants had to have filed a claim of appeal from the order denying an award of fees and costs or, having failed to do that in a timely manner, filed an application for leave to appeal that order.

Affirmed. No costs, neither party having prevailed in full.

COUNTY ROAD ASSOCIATION OF MICHIGAN v GOVERNOR

Docket Nos. 288653 and 288691. Submitted December 8, 2009, at Lansing. Decided January 12, 2010, at 9:00 a.m.

The County Road Association of Michigan and the Chippewa County Road Commission brought an action in the Ingham Circuit Court, William E. Collette, J., against the Governor, the state, and various state agents and agencies, seeking to prevent or reverse the transfer, pursuant to executive order of the Governor, of certain revenue funds from the Michigan Transportation Fund to the state's general fund or various state departments in fiscal year 2001-2002 that were allegedly restricted from being transferred by Const 1963, art 9, § 9. Plaintiffs then amended their complaint to include allegations concerning fiscal year 2002-2003. The Michigan Public Transit Association and others intervened. Plaintiffs moved for a preliminary injunction with regard to certain transfers, which the trial court granted in part. Defendants appealed that order by leave granted, and the Court of Appeals reversed the injunction in part in an unpublished opinion per curiam, issued January 13, 2004 (Docket No. 245931). Plaintiffs also moved for a preliminary injunction with respect to the transfer of certain other funds, and the trial court granted the motion. Defendants appealed that order by leave granted, and the Court of Appeals vacated the preliminary injunction and remanded the matter to the circuit court for the entry of a judgment in favor of defendants. 260 Mich App 299 (2004). On application by the intervenors for leave to appeal, the Supreme Court ordered oral argument on the application, then affirmed the judgment of the Court of Appeals and remanded the matter to the circuit court for the entry of a judgment in favor of defendants. 474 Mich 11 (2005). After the appeals regarding the preliminary injunctions were resolved, the case proceeded to a bench trial. The trial court ordered the restoration of certain transferred funds and required the state to perform a new cost-allocation study to determine the cost of collecting certain constitutionally dedicated revenues. The trial court also denied any unaddressed pending motions, including defendants' motion for summary disposition that alleged that plaintiffs lacked standing to pursue the cause of action. Plaintiffs

and defendants appealed the trial court's final opinion and order, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Plaintiffs lack standing to pursue this cause of action.

2. The County Road Association of Michigan would have standing to bring this suit in the interest of its members if the members had standing as individual plaintiffs. However, its members lack standing.

3. Plaintiffs failed to establish that they suffered an injury in fact because they have not indicated that they suffered a particularized injury. The injury plaintiffs allege, that they received reduced distributions from the Michigan Transportation Fund and related funds, does not constitute an injury that is distinct from that suffered by the public at large.

4. Plaintiffs failed to establish that a causal connection exists between an injury and the conduct complained of, namely, a reduction in the distribution of Michigan Transportation Fund revenues to the county road commissions. Plaintiffs failed to satisfy the constitutional test for standing set forth in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001), and *Lujan v Defenders of Wildlife*, 504 US 555 (1992), and therefore have not established standing in this case.

5. Even if plaintiffs' lack of standing were not at issue, this cause of action would still be barred by the doctrine of sovereign immunity. All defendants in this case are state agents and agencies that are subject to sovereign immunity. The state has not waived its immunity and consented to be sued in this type of lawsuit by either an act of the Legislature or through the constitution. The trial court's order must be vacated and the case must be remanded to the trial court for dismissal of the cause of action.

Vacated and remanded for dismissal.

1. ACTIONS — STANDING.

Standing is not established by a party by merely indicating a subjective interest in the litigation; instead, a party must demonstrate an interest in the litigation that is distinct from that of the general public; standing requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large.

2. ACTIONS — STANDING — ELEMENTS.

The irreducible constitutional minimum of standing contains three elements; first, the plaintiff must have suffered an injury in fact,

which is an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical; second, there must be a causal connection between the injury and the conduct complained of, that is, the injury has to be fairly traceable to the challenged action of the defendants and not the result of the independent action of some third party not before the court; third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision; the party invoking jurisdiction bears the burden of establishing these elements.

3. ACTIONS — SOVEREIGN IMMUNITY — WAIVER OF IMMUNITY.

The state can only waive its immunity from suit and consent to be sued through an act of the Legislature or through the constitution.

4. GOVERNMENTAL IMMUNITY — CONSTITUTIONAL LAW.

Governmental immunity generally is not available in a state court action where it is alleged that the state violated a right conferred by the state constitution; a constitutional mandate to use transportation-related taxes and fees for transportation-related purposes does not necessarily constitute a right conferred by the state constitution.

Levine Law Group, PLLC (by *Michael C. Levine*), for plaintiffs.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *John F. Szczubelek*, Assistant Attorney General, for defendants.

Before: TALBOT, P.J., and O'CONNELL and DAVIS, JJ.

O'CONNELL, J. This case arises from plaintiffs' opposition to decisions by defendants, state agents and agencies, to reallocate certain revenues in fiscal years 2001-2002 and 2002-2003 in an attempt to balance the state budget. Plaintiffs filed suit to prevent the transfer of these funds, claiming that they were constitutionally dedicated. After a bench trial, the Ingham Circuit Court ordered the restoration of certain transferred funds and required the state to perform a new cost-allocation

study to determine the cost of collecting certain constitutionally dedicated revenues. Both plaintiffs and defendants appealed this order, and we consolidated the appeals. We conclude that plaintiffs lack standing to pursue this cause of action and, therefore, we vacate the trial court's order and remand for dismissal of this cause of action.

Plaintiff County Road Association of Michigan (CRAM) is a nonprofit corporation that represents the interests of the county road commissions or public works departments in all 83 Michigan counties.[1] The county road commissions receive distributions from the constitutionally mandated Michigan Transportation Fund (MTF) to maintain and construct roads within their respective counties.

On November 6, 2001, Governor John Engler issued Executive Order No. 2001-9, which was designed to reduce state expenditures by approximately $319 million.[2] One component of this executive order involved the transfer of approximately $144 million from various revenue funds to the state's general fund in the upcoming fiscal year.

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[1] Although plaintiff Chippewa County Road Commission apparently is a member of CRAM, it is listed as a separate plaintiff in this cause of action. Wayne County does not have a county road commission; apparently, it is the only county in Michigan in which the county's Department of Public Services oversees the county roads. The Wayne County Department of Public Services receives distributions from the Michigan Transportation Fund for road maintenance and related programs within Wayne County and is a member of CRAM.

[2] Pursuant to Const 1963, art 5, § 20, the Governor, with the approval of the appropriating committees in both houses of the Legislature, has the authority to reduce state expenditures when actual revenues for a fiscal year are expected to fall below the estimated revenues on which the appropriations for that fiscal year are based. In this case, the relevant appropriations committees in both houses of the Legislature concurred with the executive order in question.

Soon after this executive order was issued, plaintiffs filed a cause of action against the Governor and various state agents and agencies challenging the transfer of funds from the MTF on constitutional grounds. In particular, plaintiffs challenged the transfer of $40 million from the MTF to the Department of State (DOS), resulting in a transportation budget of $95.814 million for the 2001-2002 fiscal year, claiming that this transfer, combined with the amount previously appropriated to the DOS, created a total appropriation to the DOS that was in excess of what was necessary to cover expenses incurred in the collection of motor vehicle registration taxes and fees. In an amended complaint filed after the beginning of the 2002-2003 fiscal year, plaintiffs challenged the appropriation of $94.5 million from the MTF to the DOS, arguing that this appropriation also was more than was necessary to cover expenses for the collection of motor vehicle registration taxes and fees. Further, plaintiffs claimed that certain revenue that the DOS derived from the sale of data and information amassed from MTF funds must be used for transportation purposes.

Plaintiffs also challenged the transfer of $8 million from the MTF to the Department of Treasury (Treasury), claiming that this transfer was also "in excess of the expenses necessary for collection of specific taxes on motor vehicle and aviation fuels and that portion of the general sales tax imposed on motor vehicle fuel, parts and accessories designated by constitution for restricted transportation purposes." Further, plaintiffs challenged the appropriation of $10.225 million from the MTF to the Treasury for the 2002-2003 fiscal year, arguing that this appropriation was also "in excess of expenses necessary for collection of motor vehicle registration taxes and fees."

Further, plaintiffs challenged the transfer to the state general fund of $12.75 million of sales tax revenue appropriated to the Comprehensive Transportation Fund (CTF), as well as the transfer to the general fund of $2.25 million of revenue acquired from the issuance of operator's licenses and originally appropriated to the Transportation Economic Development Fund (TEDF), arguing that the Governor lacked the authority to reappropriate or transfer these funds by executive order and without appropriation by the Legislature because the use of these funds is restricted by Article 9, § 9 of the Michigan Constitution.

Plaintiffs also maintained that "[t]he Chippewa County Road Commission and all 83 Michigan counties have received reduced distributions from restricted transportation funds because of the improper transfers of restricted transportation funds as alleged." They asked not only that the funds that they claimed were improperly transferred from the MTF, CTF, and TEDF be transferred back, but they also requested that the Governor's reappropriation of these funds be declared unconstitutional and that the court "[e]njoin the Defendants from using MTF funds for purposes other than those permitted by Article IX § 9 and statute."

About the time plaintiffs filed their second complaint, they moved to enjoin the transfer of $40 million to the DOS or the state general fund for the fiscal year 2002-2003, which would be used to cover expenses incurred in the collection of sales taxes. The trial court granted their motion in part, issuing a preliminary injunction precluding defendants from transferring $20 million from the MTF to cover expenses incurred in the collection of sales taxes, determining that only $20 million of the disputed amount constituted unnecessary collection expenses. Defendants asked for and were

granted leave to challenge the injunction on appeal, and this Court reversed the injunction in part.[3] *Co Rd Ass'n of Michigan v Governor*, unpublished opinion per curiam of the Court of Appeals, issued January 13, 2004 (Docket No. 245931).

Plaintiffs also moved for, and the trial court granted, a preliminary injunction precluding defendants from transferring funds from the CTF to the DOS, Treasury, or state general fund, as appropriated by Executive Order No. 2001-9, or restoring these funds if already transferred. This Court granted leave to appeal, vacated the preliminary injunction, and remanded the matter to the circuit court for entry of a judgment in favor of the defendants.[4] *Co Rd Ass'n of Michigan v Governor*, 260 Mich App 299; 677 NW2d 340 (2004). Our Supreme Court affirmed this Court's decision, finding that certain sales tax revenues were not constitutionally dedicated for transportation-related purposes pursuant to

[3] This Court reversed the injunction with respect to amounts that plaintiffs claimed were overcharged sales tax collection expenses, noting that Const 1963, art 9, § 9 permits "the deduction of 'necessary collection expenses' in obtaining tax revenue that it otherwise dedicates to transportation purposes" and does not otherwise preclude the use of MTF allocations to collect these taxes if the collection of these taxes "incidentally further[s] other governmental functions." *Co Rd Ass'n of Michigan v Governor*, unpublished opinion per curiam of the Court of Appeals, issued January 13, 2004 (Docket No. 245931), at 3. This Court upheld the injunction with respect to the amount that the DOS charged the MTF "[w]ith respect to the cost of processing automobile dealer licensing, driver improvement programs, and driver's license appeals," because the DOS apparently alleged that it considered the funds used for these activities "necessary collection expenses," but did not explain "how the costs for these activities could possibly be reasonably characterized as expenses incurred in the collection of sales taxes." *Id.*, unpub op at 3-4.

[4] Defendants never raised the issue of standing when they sought leave to appeal the issuance of any of these injunctions and, accordingly, leave was never granted with respect to the issue of standing. Accordingly, this Court was not in a position to address standing in the earlier interlocutory appeals in this case.

Const 1963, art 9, § 9 and, therefore, were properly subject to the Governor's authority to reduce state expenditures. *Co Rd Ass'n of Michigan v Governor*, 474 Mich 11; 705 NW2d 680 (2005).

After the appeals concerning the preliminary injunction were resolved, this case proceeded to a bench trial. Proofs were presented, and the trial court issued a final opinion and order. In its final order, the trial court ordered that the state return $7.3 million from the general fund to the MTF to restore funds improperly appropriated or transferred to the DOS in fiscal year 2001-2002 to fund driver's license appeals, driver improvement programs, and licensing of automobile dealers, and to return $6.5 million to the MTF to restore funds improperly appropriated to the DOS for these purposes in fiscal year 2002-2003. The trial court then ordered that the state perform a new cost-allocation study that would reflect current costs associated with sales tax collections, apparently to govern future cost allocations. The trial court denied plaintiffs' claim that revenue generated from the sale of data amassed using MTF funds should be restricted to transportation-related uses, dismissed with prejudice all claims that it had not addressed (including defendants' claims regarding standing and immunity), and denied all unaddressed pending motions.

Surprisingly, however, the trial court never ruled on the issue of standing until it issued its final opinion and order in this case, although the issue had first been raised early on in these proceedings. Defendants first raised the issue in a motion for summary disposition filed in May 2002. Although plaintiffs filed a response to that motion in June 2002 and the trial court entertained a discussion on the issue during a motion hearing shortly thereafter, the trial court never issued an

order on the motion. Defendants resurrected their motion for summary disposition in January 2007, again claiming that plaintiffs lacked standing. Plaintiffs again responded, and the parties argued the issue at a motion hearing before the trial court. However, the trial court declined to address the issue until after it heard the proofs at trial, and defendants did not have an order regarding standing from which to appeal. After a bench trial, in its final order, the trial court summarily denied this motion for summary disposition in conjunction with all other unaddressed pending motions. It never indicated the reason for its decision on the record.

However, we conclude that plaintiffs' standing to bring this cause of action is the key issue in this case, and we agree with defendants' position that plaintiffs have failed to establish standing. For this reason, we vacate the trial court's order and remand for dismissal of this cause of action.[5]

Our Supreme Court has recognized that standing is essential to ensure a party's interest in the outcome of litigation, in order to ensure sincere and vigorous advocacy. *House Speaker v Governor*, 443 Mich 560, 572; 506 NW2d 190 (1993). Further, ensuring that a party has standing to present a case is essential to preserving the constitutional separation of powers. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004). In *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 735-738; 629 NW2d 900 (2001), our Supreme Court explained the importance of ensuring that a party had standing to present a case or controversy, in order to prevent usurpation of legislative and executive powers by the judicial branch:

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[5] The question of a party's legal standing is one of law that we review de novo. *American Family Ass'n of Michigan v Michigan State Univ Bd of Trustees*, 276 Mich App 42, 44-45; 739 NW2d 908 (2007).

It is important, initially, to recognize that in Michigan, as in the federal system, standing is of great consequence so that neglect of it would imperil the constitutional architecture whereby governmental powers are divided between the three branches of government.

Standing, as a requirement to enter the courts, is a venerable doctrine in the federal system that derives from US Const, art III, § 1, which confers only "judicial power" on the courts and from US Const, art III, § 2's limitation of the judicial power to "Cases" and "Controversies." In several recent cases, the United States Supreme Court has discussed the close relationship between standing and separation of powers. In *Lewis v Casey*, 518 US 343, 349; 116 S Ct 2174; 135 L Ed 2d 606 (1996), Justice Scalia, writing for the majority, said:

"[T]he doctrine of standing [is] a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches. It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." [Citations omitted.]

Lewis was foreshadowed in *Lujan v Defenders of Wildlife*, 504 US 555, 559-560; 112 S Ct 2130; 119 L Ed 2d 351 (1992), where Justice Scalia, again speaking for the Court, explained:

"[T]he Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. . . . One of those landmarks, setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III—'serv[ing] to identify those disputes which are appropriately resolved through the judicial process,'—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the

> core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." [Citations omitted.]
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> * * *
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> In Michigan, standing has developed on a track parallel to the federal doctrine, albeit by way of an additional constitutional underpinning. In addition to Const 1963, art 6, § 1 which vests the state "judicial power" in the courts, Const 1963, art 3, § 2 expressly directs that the powers of the legislature, the executive, and the judiciary be separate. Concern with maintaining the separation of powers, as in the federal courts, has caused this Court over the years to be vigilant in preventing the judiciary from usurping the powers of the political branches. Early on, the great constitutional scholar Justice THOMAS M. COOLEY discussed the concept of separation of powers in the context of declining to issue a mandamus against the Governor in *Sutherland v Governor*, 29 Mich 320, 324 (1874):
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> "Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties."

However, standing is not established by merely indicating a subjective interest in the litigation; instead, a party must demonstrate an interest in the litigation

that is distinct from that of the general public. In *House Speaker*, our Supreme Court explained:

> The concept of standing represents a party's interest in the outcome of litigation that ensures sincere and vigorous advocacy. However, a commitment to vigorous advocacy alone is not enough. Rather, "[s]tanding requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large." [*House Speaker*, *supra* at 572 (citation omitted).]

Although our Supreme Court's view of the circumstances needed to establish standing has been indeterminate in the past, see *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629; 537 NW2d 436 (1995), in 2001 in *Lee* our Supreme Court adopted the test for standing articulated by the United States Supreme Court in *Lujan v Defenders of Wildlife*, 504 US 555, 559-560; 112 S Ct 2130; 119 L Ed 2d 351 (1992). The *Lujan* test held:

> "[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'
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> "The party invoking . . . jurisdiction bears the burden of establishing these elements." [*Lee*, *supra* at 739-740, quoting *Lujan*, *supra* at 560-561 (citations omitted).]

In adopting the *Lujan* test, our Supreme Court explained, "[T]he *Lujan* test has the virtues of articulating clear criteria and of establishing the burden of

demonstrating these elements. Moreover, its three elements appear to us to be fundamental to standing; the United States Supreme Court described them as establishing the 'irreducible constitutional minimum' of standing."[6] *Lee*, *supra* at 740.

In *Nat'l Wildlife*, *supra* at 614-617, our Supreme Court reaffirmed its holding in *Lee* and, more importantly, explained both how and why a plaintiff must have a particularized injury in order to establish standing:

> The "judicial power" has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional

[6] When adopting the *Lujan* test to the facts of the case, the *Lee* Court determined that the plaintiffs failed to establish an injury in fact and, therefore, lacked standing. In *Lee*, the plaintiffs, who had not sought relief under the soldiers' relief fund act, MCL 35.21 *et seq*., had filed a cause of action to compel the Macomb County Board of Commissioners to establish a veterans' relief fund in accordance with the act. *Lee*, *supra* at 729. The plaintiffs had merely argued that "they 'should receive' and 'should have received, the benefit of the property tax levy required by MCL 35.21,' and that the failure to levy and collect the tax set forth in the soldiers' relief fund act 'has caused, and continues to cause, plaintiffs great harm and damage.' " *Id.* at 740. The *Lee* Court concluded that even if these assertions of wrongdoing were accepted as true, they could not satisfy the "injury in fact" requirement of standing because the plaintiffs had merely claimed that they suffered " 'great harm and damage' " as a result of the failure of the board of commissioners to levy the requested tax and, consequently, it was not "readily apparent how the collection of a tax pursuant to the act would have benefitted plaintiffs in a concrete and particularized manner." *Id.*

issues; and the emphasis upon proscriptive as opposed to prescriptive decision making.

Perhaps the most critical element of the "judicial power" has been its requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute, *Muskrat v United States*, 219 US 346; 31 S Ct 250; 55 L Ed 246 (1911), and one in which the plaintiff has suffered a "particularized" or personal injury. *Massachusetts v Mellon*, 262 US 447, 488; 43 S Ct 597; 67 [L Ed] 1078 (1923). Such a "particularized" injury has generally required that a plaintiff must have suffered an injury distinct from that of the public generally. *Id.*

Absent a "particularized" injury, there would be little that would stand in the way of the judicial branch becoming intertwined in every matter of public debate. If a taxpayer, for example, opposed the closing of a tax "loophole" by the Legislature, the legislation might be challenged in court. If a taxpayer opposed an expenditure for a public building, that, too, might be challenged in court. If a citizen disagreed with the manner in which agriculture officials were administering farm programs, or transportation officials' highway programs, or social services officials' welfare programs, those might all be challenged in court. If a citizen opposed new prison disciplinary policies, that might be challenged in court.

In each instance, the result would be to have the judicial branch of government—the least politically accountable of the branches—deciding public policy, not in response to a real dispute in which a plaintiff had suffered a distinct and personal harm, but in response to a lawsuit from a citizen who had simply not prevailed in the representative processes of government. To allow the judiciary to carry out its responsibilities in this manner is to misperceive the "judicial power," and to establish the judicial branch as a forum for giving parties who were unsuccessful in the legislative and executive processes simply another chance to prevail. To allow this authority in the judiciary would also be to establish the judicial branch as first among equals, being permitted to monitor and supervise the other branches,

and effectively possessing a generalized commission to evaluate and second-guess the wisdom of their policies. As the United States Supreme Court observed in *Mellon*:

"The administration of any statute . . . is essentially a matter of public and not of individual concern. . . . The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with the people generally. . . . To [allow standing under a different understanding] would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which we plainly do not possess." [*Id.* at 487-489.]

. . . As the United States Supreme Court observed in *Lujan* [*supra* at 576-577]:

"Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of the Congress and the Chief Executive. . . . To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art II, § 3. It would enable the courts, with the permission of Congress, 'to assume a position of authority over the governmental acts of another and co-equal department,' and to become 'virtually continuing monitors of the wisdom and soundness of Executive action.['] We have always rejected that vision of our role . . . ." [Citations omitted; emphasis in original.]

"We must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of Government 'are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' " *Flast v Cohen*, 392 US 83, 131; 88 S Ct 1942; 20 L Ed 2d 947 (1968)

(Harlan, J., dissenting), quoting *Missouri, Kansas & Texas R Co v May*, 194 US 267, 270; 24 S Ct 638; 48 L Ed 971 (1904).

In *Nat'l Wildlife*, *supra* at 630, our Supreme Court recognized that because the question of standing is a fundamental jurisdictional question and "a matter that may be raised at any time," the burden that must be met to establish that standing exists increases over the course of the proceeding. In *Nat'l Wildlife*, *supra* at 630-631, our Supreme Court, quoting *Lujan*, *supra* at 561, explained:

> "The party invoking federal jurisdiction bears the burden of establishing these elements [i.e., injury in fact, causation, redressibility]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.' In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.' " [Citations omitted.]
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> Thus, a plaintiff must include in the pleadings "general factual allegations" that injury will result from the defendant's conduct. If the defendant brings a motion for summary disposition, the plaintiff must further support the allegations of injury with documentation, just as he has to support the other allegations that make up his claim. Finally, when the matter comes to trial, the plaintiff must

> sufficiently support his claim, including allegations of injury, to meet his burden of proof. [*Nat'l Wildlife*, *supra* at 630-631.]

In *Michigan Ed Ass'n v Superintendent of Pub Instruction*, 272 Mich App 1, 5; 724 NW2d 478 (2006) (*MEA*), this Court, recognizing the clarity that our Supreme Court's holdings in *Lee* and *Nat'l Wildlife* provided with regard to the question of standing, held that even when a plaintiff had statutory standing to file a suit, that plaintiff must also establish that it meets the constitutionally imposed minimum requirements for standing set forth in *Lee* and *Lujan*. In *MEA*, the Michigan Education Association (MEA) filed suit to challenge the expenditure of funds by Bay Mills Community College (BMCC) to authorize charter schools. *Id.* at 3. The MEA claimed that because these charter schools were not public schools, the expenditure of funds to authorize these schools violated the state constitutional provision prohibiting public funding for nonpublic schools. *Id.* at 4. Although this Court concluded that MCL 600.2041(3) and MCR 2.201(B)(4) conferred standing on the MEA, the MEA still needed to satisfy the constitutional requirements in *Lujan* and *Lee* in order to establish standing. *Id.* at 12-13.

The MEA lacked standing in the case because it did not establish any of the elements of constitutional standing. This Court explained:

> First, plaintiff has neither alleged nor suffered the required "injury in fact." Plaintiff presented no evidence that it suffered an invasion of a legally recognized interest that is actual or imminent, not hypothetical or conjectural. Specifically, our review of the record reveals that plaintiff provides nothing beyond bare assertions that the public funding of BMCC's charter schools injures plaintiff's members, and does not identify an injury that is " 'concrete and particularized,' " and " ' "actual or imminent." ' " *Nat'l*

Wildlife, *supra* at 628, quoting *Lee*, *supra* at 739, quoting *Lujan*, *supra* at 560. Any alleged injury to plaintiff is based on conjecture and speculation.

Second, plaintiff has provided us nothing more than the simple assertion that BMCC's public funding reduces plaintiff's members' wages without any supporting evidence. While we can envision a scenario in the abstract in which BMCC's public funding does indirectly or even directly reduce the wages or wage increases of plaintiff's members, it takes more than imagination to establish the required causation element of standing. *Nat'l Wildlife*, *supra* at 628-629, quoting *Lee*, *supra* at 739, quoting *Lujan*, *supra* at 560.

Third, plaintiff has provided no substantive evidence that the alleged harm could even be " ' "redressed by a favorable decision." ' " *Nat'l Wildlife*, *supra* at 629, quoting *Lee*, *supra* at 739, quoting *Lujan*, *supra* at 561. Plaintiff offers no evidence to show that it is " ' "likely," ' " or even merely " ' "speculative," ' " that, if all public funds to BMCC schools are cut off, plaintiff's members' salaries will increase. *Nat'l Wildlife*, *supra* at 629, quoting *Lee*, *supra* at 739, quoting *Lujan* at 561. There is absolutely no way to predict with any degree of certainty how the public dollars earmarked for BMCC schools would be appropriated if BMCC funding was discontinued. Plaintiff has provided no evidence whatsoever that these monies would be directly funneled into plaintiff's members' salaries. Moreover, there is another possible scenario. Even if plaintiff were to prevail, the BMCC schools might switch to a different chartering organization, such as a school district or local community college, where they would again be eligible for public funding. Plaintiff has not provided, and we cannot ascertain, any means of redress by a favorable decision of this Court. *Nat'l Wildlife*, *supra* at 629. [*MEA*, *supra* at 5-7.]

In *American Family Ass'n of Michigan v Michigan State Univ Bd of Trustees*, 276 Mich App 42; 739 NW2d 908 (2007), the plaintiff, a nonprofit corporation organized " 'to promote the welfare of children through the

promotion and preservation of the traditional family,' " challenged Michigan State University's (MSU's) policy of providing benefits to same-sex partners, "alleging that this policy constitutes an illegal expenditure of state funds to define and recognize same-sex domestic partnerships in violation of [Const 1963, art 1, § 25] and state law governing marriage and divorce as set forth in MCL 551.1 *et seq*." *Id.* at 43-44. The plaintiff claimed that MSU's benefits policy advanced an interest contrary to the plaintiff's mission and was at odds with the policies that the plaintiff sought to promote. *Id.* at 44.

In addressing whether the plaintiff had standing to raise this issue, the *American Family* Court recognized that our Supreme Court had adopted the *Lujan* test for standing. *Id.* at 46. It also addressed our Supreme Court's holdings in *Lee* and *Nat'l Wildlife*, observing that in these cases our Supreme Court had recognized that failure to ensure that a party had standing to decide a particular issue would alter the function of judicial review to the point where the constitutional separation of powers would be threatened. *Id.* at 49. The Court, *id*. at 51-53, then concluded:

> Here, as in *MEA*, plaintiff alleged that, as a Michigan nonprofit corporation organized for civic purposes, it has standing under MCL 600.2041 and MCR 2.201(B) to institute the instant action. Plaintiff argues that our Supreme Court determined in *House Speaker* that the statutory grant of standing set forth in MCL 600.2041 and MCR 2.201(B)(4) is constitutional; therefore, it need not meet any additional requirements to establish standing. However, as discussed earlier, *Lee* expressly stated that the *Lujan* test for standing was to "be seen as *supplementing* the holding in *House Speaker*, as well as [the] Court's earlier standing jurisprudence . . . ." *Lee*, *supra* at 740 (emphasis added). And in *Nat'l Wildlife*, *supra* at 628-629, our Supreme Court reiterated and reaffirmed that plaintiffs *must* allege an actual or imminent, concrete and

particularized injury to establish standing, irrespective of any statutory authorization for bringing suit. Thus, as this Court explained in *MEA*, our Supreme Court has made clear that the minimum requirements set forth in *Lee* and *Lujan* are an absolute prerequisite to establishing standing and that those requirements supplement—that is, augment or add to—the requirements set forth in *House Speaker*. Therefore, we conclude that the trial court properly determined that plaintiff was required to establish that it had suffered an actual or imminent, concrete and particularized invasion of a legally protected interest, distinct from that of the public generally, as a result of defendant's benefits policy in order to have standing to institute the instant action.

Plaintiff asserts that, even under such a test, it has alleged a sufficient injury by asserting that defendant's recognition of same-sex domestic partnerships for benefits purposes conflicts with plaintiff's stated interest in and purpose of promoting and preserving the traditional family, marriage, and the welfare of children. However, plaintiff offers only a bare assertion that it is being injured by defendant's benefits policy. Plaintiff did not present any evidence to establish that it or its members are directly affected by defendant's benefits policy in an individualized and particularized manner or that defendant's benefits policy detrimentally affects plaintiff's [" ']substantial interest . . . in a manner different from the citizenry at large.' " *Lee*, *supra* at 738-739, quoting *House Speaker*, *supra* at 554. Indeed, plaintiff's only alleged injury is that defendant's provision of benefits to same-sex domestic partners is "at odds with that which [plaintiff] seeks to promote." Plaintiff essentially complains that defendant's benefits policy is an affront to the values that plaintiff and its members espouse and promote.[5] Accordingly, plaintiff has not established that it suffered a concrete and particularized, actual or imminent injury distinct from that of the citizenry at large, as required by *House Speaker*, *Lujan*, and *Lee*. Thus, plaintiff did not meet its burden of establishing standing, irrespective of whether it satisfied MCL 600.2041 and MCR 2.201(B). *MEA*, *supra*.

[5] In contrast, perhaps, to students who might assert that their costs of attendance are increased by defendant's expenditure of funds to provide benefits to same-sex domestic partners, or to married recipients of those benefits who might assert that their cost of benefits is increased by that expenditure, plaintiff's asserted injury is no different from that which could be asserted by persons, groups, or entities whose values or beliefs lead them to oppose affording any recognition or status to same-sex relationships. The standing of students or benefit recipients such as we describe here in contrast to plaintiff is not, of course, at issue, and we express no opinion regarding their standing.

Initially, we note that we do not question the validity of CRAM's standing to bring this suit on behalf of its members. "Nonprofit organizations . . . have standing to bring suit in the interest of their members where such members would have standing as individual plaintiffs." *Nat'l Wildlife*, *supra* at 629. CRAM has standing if it alleges that its members (the county road commissions of the state of Michigan) suffered either an actual injury or an imminent injury. *Id.* Instead, we hold that CRAM's *members*, the county roads commissions and public works departments, lack standing.

First, plaintiffs have failed to establish that they suffered an "injury in fact" because they have not indicated that they suffered a particularized injury. In their complaint, plaintiffs claim that "[t]he Chippewa County Road Commission and all 83 Michigan counties have received reduced distributions from restricted transportation funds because of the improper transfers of restricted transportation funds as alleged." Although the parties extensively debated the appropriateness of the contested transfers of funds before the trial court, plaintiffs provided little evidence concerning the dam-

ages that the road commissions suffered as a result of the reduction in funds. In their brief on appeal, plaintiffs respond to defendants' allegation that they did not suffer an injury that is "distinct from the public at large" by countering that they, not the public at large, have a statutory duty to maintain and operate the county road system and that they, not the public at large, were injured when they lost their share of the MTF funding to which they were entitled.

However, the injury plaintiffs allege—that they received reduced distributions from the MTF and related funds—does not constitute an injury that is distinct from that suffered by the public at large. First, our Supreme Court has long held that the construction and maintenance of local roads is not a local concern, but a matter of interest for the state at large. *Moreton v Secretary of State*, 240 Mich 584, 588; 216 NW 450 (1927). Further, plaintiffs' claimed injury is not distinct from that suffered by the public at large. The county road commissions are public entities created for a public purpose, namely, to construct, maintain, and operate designated roads within a particular county for the benefit of the public. See MCL 224.1 *et seq*. By receiving reduced distributions, the county road commissions "suffered" the same injury as that suffered by the public. With less money, the county road commissions could not engage in as many construction and maintenance projects, resulting in a direct injury to the public in the form of bad roads. Although a lack of funding might hinder the county road commissions' ability to fulfill their statutory duty to maintain and operate the county road system, it is the public that suffers as a result. Plaintiffs fail to establish that they suffered an injury distinct from the general public and, accordingly,

plaintiffs have failed to establish a particularized injury necessary to establish an injury in fact.

Further, plaintiffs have failed to establish that a causal connection exists between the injury and the conduct complained of, namely, a reduction in the distribution of MTF revenues to the county road commissions. Plaintiffs want this Court to assume that a reduced distribution of MTF funds to the county road commissions must have resulted in injury. This could be a reasonable assumption to make. However, because plaintiffs bear the burden of establishing standing, *Lee*, *supra*, it is reasonable to expect plaintiffs to provide more than a mere assumption of injury resulting from the alleged wrong to establish an element of constitutional standing. Assuming that plaintiffs received a lower allocation of MTF funds than expected, they still do not indicate how and to what extent this affected the county road commissions' budgets. For example, a county might have appropriated money to the county road commission to compensate for decreased MTF funding, perhaps by taking the money from existing funds or by passing a local tax levy for roads. Although such taxation or reappropriation of funds might hurt the county as a whole, a county road commission could not claim that it was harmed by the reduction in MTF funds if it received compensation for its loss in MTF funding from another source. Similarly, plaintiffs fail to explain how a decrease in money distributed into the other named funds resulted in a direct injury to the county road commissions. Consequently, plaintiffs have failed to satisfy the constitutional test set forth in *Lee* and *Lujan* and have not established standing in this case.

In addition, we note that even if plaintiffs' lack of standing were not at issue, this cause of action would still be barred by the doctrine of sovereign immunity. The question whether an entity has immunity is one of law, which we review de novo. *Ballard v Ypsilanti Twp*, 457 Mich 564, 567; 577 NW2d 890 (1998).

Michigan courts have long recognized that "[t]he State, as sovereign, is immune from suit save as it consents to be sued, and any relinquishment of sovereign immunity must be strictly interpreted." *Manion v State Hwy Comm'r*, 303 Mich 1, 19; 5 NW2d 527 (1942). "Sovereign immunity exists in Michigan because the state created the courts and so is not subject to them." *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002). See also *Sanilac Co Bd of Supervisors v Auditor General*, 68 Mich 659, 665; 36 NW 794 (1888) ("The state is not liable to suit except as it authorizes a suit, and this authority can be revoked at pleasure. This is such elementary doctrine that it only needs statement."). Although the terms "sovereign immunity" and "governmental immunity" have been used interchangeably, their meanings are different. *Ballard*, *supra* at 567. "Sovereign immunity refers to the immunity of the state from suit and from liability, while governmental immunity refers to the similar immunities enjoyed by the state's political subdivisions." *Id.* at 567-568. By being immune from suit, the state is immune from being "hailed into one of its courts without its consent." *Id.* at 568 n 1. The *Pohutski* Court noted:

> "*Sovereign* immunity is a specific term limited in its application to the State and to the departments, commissions, boards, institutions, and instrumentalities of the State. The reason is the State is the only sovereignty in our system of government, except as the States delegated part of their implicit sovereignty to the Federal government." [*Pohutski*, *supra* at 682, quoting *Myers v Genesee*

> *Co Auditor*, 375 Mich 1, 6; 133 NW2d 190 (1965) (opinion by O'HARA, J.) (emphasis in original).][7]

All defendants in this cause of action are state agents and agencies. Accordingly, they are subject to sovereign immunity.

Michigan courts have also recognized that immunity from suit can only be waived by an act of the Legislature, *Ballard*, *supra* at 568, or through a constitutional provision, see *Durant v Michigan*, 456 Mich 175, 205 n 31; 566 NW2d 272 (1997). Because governmental immunity is a characteristic of government, a plaintiff must plead its case in avoidance of governmental immunity. *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002).

Essentially, the state can only waive its immunity and, consequently, consent to be sued through an act of the Legislature or through the constitution. We have been unable to identify a statutory or constitutional provision under which the state has "consented" to this type of suit. The governmental tort liability act states:

> Except 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. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the

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[7] In contrast, in *Myers*, Justice O'HARA explained how "sovereign immunity" had morphed into the broader concept of "governmental immunity," stating:

> "Over the years, by judicial construction, this 'sovereign' immunity has been transmogrified into 'governmental' immunity and made applicable to the 'inferior' divisions of government, *i.e.*, townships, school districts, villages, cities, and counties, but with an important distinction. These subdivisions of government enjoyed the immunity only when engaged in 'governmental' as distinguished from 'proprietary' functions." [*Pohutski*, *supra* at 682, quoting *Myers*, *supra* at 8-9.]

> state from tort liability as it existed before July 1, 1965, which immunity is affirmed. [MCL 691.1407(1).]

However, this action does not sound in tort, because this is not an action for which plaintiffs seek, or can even directly acquire, relief. This Court has recognized that "[a] 'tort' is broadly defined as '[a] civil wrong for which a remedy may be obtained'. . . ." *Tate v Grand Rapids*, 256 Mich App 656, 660; 671 NW2d 84 (2003), quoting Black's Law Dictionary (7th ed). Plaintiffs claim that they are seeking a return of funds to the MTF and the TEDF, as well as injunctive relief that would govern future attempts to "unconstitutionally" transfer money away from these funds, but the wrongs that they assert do not provide them access to a remedy that they may directly obtain. Regardless, even if plaintiffs' cause of action did sound in tort, defendants' complained-of actions (implementing budgetary changes) constitute the discharge of a governmental function and, further, our Supreme Court has indicated that the governmental tort liability act was not designed to undermine " ' "the apparent assumption that the state and its agencies enjoyed a total sovereign immunity from tort liability . . . ." ' " *Pohutski*, *supra* at 687, quoting *Li v Feldt* (*After Remand*), 434 Mich 584, 600-601; 456 NW2d 55 (1990) (GRIFFIN, J., concurring in part and dissenting in part) (citations omitted).

Certain other constitutional and statutory provisions also waive the state's sovereign immunity and permit plaintiffs to bring specific causes of action against the states. See, e.g., *Durant*, *supra* at 205 n 31 (noting that the Headlee Amendment included a waiver of sovereign immunity from taxpayer suits to enforce the amendment's provisions); *Burdette v Michigan*, 166 Mich App 406, 408; 421 NW2d 185 (1988) ("Article I, § 17 of the 1963 Michigan Constitution provides that the state may

not deprive a person of property without due process of law. Constitutional due process guarantees prohibit the state from taking property for nonpayment of taxes without proper notice and opportunity for a hearing."). However, no constitutional or statutory provisions waive the state's sovereign immunity from suits concerning these types of budgetary appropriations.

As a general rule, " 'governmental immunity is not available in a state court action where it is alleged that the state violated a right conferred by the state constitution.' " *Jones v Powell*, 227 Mich App 662, 673; 577 NW2d 130 (1998), aff'd 462 Mich 329 (2000), quoting *Marlin v Detroit*, 177 Mich App 108, 114; 441 NW2d 45 (1989). See also *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987) ("Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action."). However, we do not believe that a constitutional mandate to use transportation-related taxes and fees for transportation-related purposes necessarily constitutes a "right conferred by the state constitution," especially when compared to the rights whose violation by the state was at issue in the cases in which this provision was applied. See *Duncan v Michigan*, 284 Mich App 246; 774 NW2d 89 (2009) (concerning the right to counsel); *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537; 688 NW2d 550 (2004) (concerning an unconstitutional taking of property); *Jones*, *supra* (concerning tort claims arising from an entry into a home without a warrant).

Further, plaintiffs, who are local governmental entities, not individuals, do not even have the rights that they allege were violated. A right must be "conferred" *on* an entity, and we are not aware of any circumstance

under which a constitutional or statutory "right" can be conferred upon a governmental body, as opposed to an individual. In fact, the Michigan Constitution was designed and created for the benefit of the *people* of this state, not for the benefit of a municipality or a county road commission. See Const 1963, art 1, § 1 ("All political power is inherent in the people. Government is instituted for their equal benefit, security and protection."). Therefore, as we explained earlier in this opinion, even if the state's actions did constitute a violation of a right conferred by the constitution, it is the individual taxpayers of this state, not local governmental entities, who would have standing to challenge the violation of a right conferred by the state constitution.

Similarly, it appears that the state did not afford county road commissions and similar entities consent to file suit against it with regard to this type of claim. In *Oakland Co Bd of Co Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590; 575 NW2d 751 (1998), our Supreme Court, in the context of discussing whether a county road commission could raise an equal protection claim against the state, explained:

> [A]s a creation of the Legislature, the road commission cannot assert an equal protection challenge against its creator, the state. The county road law provides for the creation of a county road commission and defines the powers and duties of the commission. See MCL 224.1 *et seq*. . . . . A county road commission "draws its legal life from the county road law and, as a creature of that legislation, the commission has no power save that which is legislatively conferred." *Arrowhead Development Co v Livingston Co Rd Comm*, 413 Mich 505, 512; 322 NW2d 702 (1982). [*Id.* at 608.]

Although plaintiffs claim that *Oakland Co* only prevents a county road commission from bringing an equal protection claim against the state, the rationale pro-

vided in *Oakland Co* is equally applicable to a determination that county road commissions, as creatures of statute, cannot bring a constitutional claim against the state.

Plaintiffs also claim that immunity from suit does not exist in this case because, if it did exist, the legislative and executive branches would have unchecked power to transfer any and all revenue constitutionally dedicated to the MTF to any state fund for any purpose, rendering Const 1963, art 9, § 9 meaningless and undermining the intent of the people of this state. This argument incorrectly presupposes that only the judiciary has the power to prevent the legislative and executive branches from improperly appropriating funds dedicated in the constitution for a particular purpose. Plaintiffs forget that the people of this state have the power of the vote, and they can use the ballot box to remove from office elected members of the legislative and executive branches whose actions are contrary to the will of the people. The desire of the public to have properly maintained roads is perhaps the most powerful incentive for legislators and executive branch elected officials to not dip too much into the MTF to fund other programs, because if the public is dissatisfied, these elected officials are in danger of losing their jobs. We vacate the trial court's order and remand for dismissal of this cause of action.

Vacated and remanded for dismissal.

HADDEN v McDERMITT APARTMENTS, LLC

Docket No. 286474. Submitted September 1, 2009, at Lansing. Decided January 12, 2010, at 9:05 a.m.

Kathryn Hadden brought an action in the Genesee Circuit Court, Geoffrey L. Neithercut, J., against McDermitt Apartments, LLC, seeking damages for injuries sustained when plaintiff, a tenant living on the second floor of defendant's apartment building, slipped and fell on black ice when using an outdoor stairway attached to the building. The court denied defendant's motion for summary disposition with regard to plaintiff's common-law premises liability claim and claims that defendant violated statutory duties to keep the stairway in reasonable repair, under MCL 554.139(1)(b), and to keep the stairway fit for its intended use, under MCL 554.139(1)(a). Defendant moved for reconsideration, arguing that application of the decision in *Allison v AEW Capital Mgt, LLP*, 481 Mich 419 (2008), issued the same day that the trial court denied the motion for summary disposition, would result in a different outcome on reconsideration. The trial court granted the motion, in part, and eventually held that, pursuant to *Allison*, defendant had no statutory duty to keep the stairway in reasonable repair under MCL 554.139(1)(b). The trial court further held that, under MCL 554.139(1)(a), defendant had a duty to keep the stairway fit for its intended use. The trial court also found the conclusion reached in *Allison*—that one to two inches of snow did not render a parking lot unfit for its intended use—distinguishable, noting that the facts in this case included black ice, not just snow, and the intended use of the stairway of easy ingress to and egress from the upstairs apartments was different from the use of the parking lot in *Allison*. Finally, the trial court held that plaintiff waived her arguments against defendant's open and obvious danger defense because she cited no caselaw supporting her position. Defendant appealed by leave granted with regard to the issue whether the trial court's decision to deny summary disposition regarding MCL 554.139(1)(a) was erroneous given its finding that there is a material distinction between the facts of this case and those in *Allison*.

The Court of Appeals *held*:

1. The primary purpose or intended use of a stairway is to provide pedestrian access to different levels of a building or

structure. MCL 554.139(1)(a) does not require perfect maintenance of a stairway. A stairway need not be in ideal condition, nor in the most accessible condition possible, but it must provide tenants reasonable access to different building levels.

2. The trial court properly determined that plaintiff produced enough evidence to create a material question of fact whether the stairway was fit for its intended use at the time of plaintiff's fall. Reasonable minds could conclude that the presence of black ice on a darkly lit, unsalted stairway—possibly caused or aggravated by overflowing ice water from overhead gutters in the presence of freezing rain—posed a hidden danger that denied reasonable access to different levels of the building and rendered the stairway unfit for its intended use. The trial court properly denied summary disposition with regard to whether the stairway was fit for its intended use.

3. This case is factually distinguishable from *Allison*.

Affirmed.

METER, J., dissenting, stated that *Allison* controls the outcome of this case and mandates that defendant should have been granted summary disposition. This case is not materially distinguishable from *Allison*. First, the principles from *Allison* apply not just to parking lots but to all common areas on leased premises, including the stairway at issue. Second, plaintiff's assertion of unfitness was based on alleged facts similar to those set forth in *Allison*, i.e., she relied solely on the alleged facts that the stairs were icy and that she fell. Finally, like the parking lot in *Allison*, the stairway here was suitable for its intended use. Plaintiff did not show that the condition of the stairway precluded her ability to use the stairway to access different levels of the building. The stairway was not rendered unfit for its purpose simply because of the presence of some amount of ice that required a careful navigation of the steps. The order of the trial court should be reversed and the case should be remanded to the trial court for the entry of a judgment in favor of defendant.

LANDLORD AND TENANT — COMMON AREAS — STAIRWAYS — STATUTORY DUTIES — BLACK ICE.

A lessor of leased residential property has a statutory duty to keep all common areas fit for the use intended by the parties to the lease; the primary purpose or intended use of a common area stairway is to provide pedestrian access to different levels of the building or structure; the statutory duty does not require perfect maintenance of such a stairway and the stairway need not be in an ideal condition, nor in the most accessible condition possible, but it

must provide reasonable access to different building levels; the presence of black ice on a darkly lit, unsalted stairway might pose a hidden danger that denies tenants reasonable access to different levels of a building and renders the stairway unfit for its intended use (MCL 554.139[1][a]).

Mindell, Malin, Kutinsky, Stone & Blatnikoff (by *Randall I. Stone*) for plaintiff.

Feuer & Kozerski, PC (by *Scott L. Feuer*), for defendant.

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

BECKERING, J. Defendant appeals by leave granted the trial court's order denying its motion for summary disposition with regard to plaintiff's claim that defendant breached its statutory duty under MCL 554.139(1)(a). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was a tenant in an upstairs apartment of defendant's building. After twice calling defendant to complain about the presence of snow and ice on an outdoor stairway attached to the building, plaintiff slipped and fell on black ice when using the stairway. She fractured her left hip.

Plaintiff sued defendant for breach of its common-law duty to use reasonable care as a premises owner and also its statutory duty as a landlord to keep the premises and common areas fit for their intended use and the premises in reasonable repair under MCL 554.139(1)(a) and (b). Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that the hazard was open and obvious, so it could not be held liable under a common-law premises liability theory. Defen-

dant also argued that it was not liable under MCL 554.139(1) because its statutory duty did not extend to snow and ice removal.

Initially, the trial court completely denied defendant's motion, but on the same day the trial court entered its order, our Supreme Court issued its decision in *Allison v AEW Capital Mgt, LLP*, 481 Mich 419; 751 NW2d 8 (2008). Defendant moved for reconsideration, arguing that applying *Allison* would change the outcome of the trial court's decision.

The trial court granted in part defendant's motion for reconsideration. It concluded, pursuant to the Court's holding in *Allison*, that defendant had no statutory duty to keep the stairway in reasonable repair under MCL 554.139(1)(b). However, under MCL 554.139(1)(a), defendant had a duty to keep the stairway fit for its intended use. The trial court found the conclusion reached in *Allison*—that one to two inches of snow did not render a parking lot unfit for its intended use—distinguishable. The facts here included black ice, not just snow, and the intended use of easy ingress to and egress from the upstairs apartments was different from that of the parking lot in *Allison*. The trial court noted that, by its own terms, the statute is to be "liberally construed," quoting MCL 554.139(3). Finally, the trial court concluded that plaintiff had waived her arguments against defendant's "open and obvious danger" defense because she cited no caselaw supporting her position.

In this Court, the only issue properly presented is whether the trial court's decision regarding MCL 554.139(1)(a) was erroneous given its finding that there is a material distinction between the facts here and those in *Allison*.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of*

Transp, 456 Mich 331, 337; 572 NW2d 201 (1998). Although we view substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion, the nonmoving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his or her case. *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161-162; 516 NW2d 475 (1994).

"MCL 554.139 provides a specific protection to lessees and licensees of residential property in *addition* to any protection provided by the common law." *Allison*, 481 Mich at 425 (emphasis in original). MCL 554.139 provides, in relevant part:

> (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.
>
> * * *
>
> (3) The provisions of this section shall be liberally construed . . . .

For common areas, "the lessor effectively has a contractual duty to keep the [area] 'fit for the use intended by the parties.' " *Allison*, 481 Mich at 429, quoting MCL 554.139(1)(a).

Our Supreme Court in *Allison* made it clear that an accumulation of snow and ice could implicate a landlord's duty to keep the premises and all common areas fit for the use intended. *Allison*, 481 Mich at 438.[1] In

[1] *Allison* also clarified that the "open and obvious danger" doctrine does not obviate a landlord's statutory duty under MCL 554.139. *Allison*, 481 Mich at 425.

Allison, at issue was whether "one to two inches of accumulated snow" in an apartment complex parking lot made the parking lot unfit for its intended use. *Id*. at 423. While the majority of justices agreed that the presence of snow and ice could make a parking lot unfit for its intended use, the Supreme Court held that the facts in *Allison* did not establish that tenants were unable to use the parking lot for its intended purpose:

> A parking lot is constructed for the primary purpose of storing vehicles on the lot. "Fit" is defined as "adapted or suited; appropriate[.]" *Random House Webster's College Dictionary* (1997). Therefore, a lessor has a duty to keep a parking lot adapted or suited for the parking of vehicles. A parking lot is generally considered suitable for the parking of vehicles as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles. A lessor's obligation under MCL 554.139(1)(a) with regard to the accumulation of snow and ice concomitantly would commonly be to ensure that the entrance to, and the exit from, the lot is clear, that vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles. Fulfilling this obligation would allow the lot to be used as the parties intended it to be used.
>
> In this case, in construing the meaning of these terms in the contract, neither of the parties has indicated that the intended use of the parking lot was anything other than basic parking and reasonable access to such parking. Plaintiff's allegation of unfitness was supported only by two facts: that the lot was covered with one to two inches of snow and that plaintiff fell. Under the facts presented in this record, we believe that there could not be reasonable differences of opinion regarding the fact that tenants were able to enter and exit the parking lot, to park their vehicles therein, and to access those vehicles. Accordingly, plaintiff has not established that tenants were unable to use the parking lot for its intended purpose, and his claim fails as a matter of law.

> While a lessor may have some duty under MCL 554.139(1)(a) with regard to the accumulation of snow and ice in a parking lot, it would be triggered only under much more exigent circumstances than those obtaining in this case. The statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot. Mere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes. [*Id*. at 429-430.]

While the *Allison* Court specifically referenced parking lots, the principles set forth apply to all common areas, including stairways. The primary purpose or intended use of a stairway is to provide pedestrian access to different levels of a building or structure. As with a parking lot, MCL 554.139(1)(a) does not require perfect maintenance of a stairway. The stairway need not be in an ideal condition, nor in the most accessible condition possible, but, rather, must provide tenants "reasonable access" to different building levels. See *Allison*, 481 Mich at 430. We must ascertain whether there could be reasonable differences of opinion regarding whether the stairway was fit for its intended use of providing tenants with reasonable access under the circumstances presented at the time of plaintiff's fall.

Plaintiff testified that she lived on the second floor of defendant's apartment building. In order to access her mailbox on the first floor, plaintiff used the stairway in question, which consisted of approximately 12 open steps located outside the building but covered by a roof. Plaintiff testified that the day before the fall, she left her apartment to check her mail and noted the presence of snow on all the stairs of the stairway. Although she was able to use the stairway without incident, plaintiff called defendant and complained to "Lori" about the

presence of snow and ice on the stairway.[2] She was told that "Scott" would take care of it when he had the time.

Plaintiff testified that on the day of the fall, before she had left her apartment, she again called and notified defendant about the presence of snow and ice on the stairway. Plaintiff produced weather data indicating that preceding her fall, temperatures were at or below freezing, and the area experienced episodes of light freezing rain and at one point "ice pellets." At approximately 1:00 p.m. on December 1, 2006, plaintiff left her apartment to check her mail. She noticed "lots of snow" that was "fresh," and that there was "more than a couple of inches" on the second floor as she walked toward the stairway. Plaintiff descended the stairway and checked her mailbox. Plaintiff's testimony was conflicting on the issue whether she noticed snow or ice on the stairway before her fall. On her way back up the stairway, plaintiff used the right side of the stairway so that she could use the handrail. As she reached the second step, plaintiff slipped and fell on ice, fracturing her left hip. She testified that she did not see the ice before her fall because it was black ice and the stairway was too dark. As she fell, however, plaintiff noticed that the gutters overhead were overflowing with water and icicles had formed. Plaintiff testified that there was no salt on the stairway at the time of her fall.

Defendant concedes that for purposes of this appeal, plaintiff's testimony must be accepted as true and the evidence presented must be viewed in the light most favorable to plaintiff. We agree with the trial court that plaintiff has produced enough evidence to create a

[2] While it appears plaintiff contradicted herself at times throughout her deposition, neither party produced the entirety of plaintiff's deposition; therefore, the facts cited are gleaned from the available testimony presented to this Court.

material question of fact whether the stairway was fit for its intended use at the time of plaintiff's fall. As stated earlier, the primary purpose of a stairway is to provide pedestrians reasonable access to different levels of a building or structure. Reasonable minds could conclude that the presence of black ice on a darkly lit, unsalted stairway—possibly caused or aggravated by overflowing ice water from overhead gutters in the presence of freezing rain—posed a hidden danger that denied tenants reasonable access to different levels of the apartment building and rendered the stairway unfit for its intended use.

This case is factually distinguishable from *Allison* because black ice on a stairway presents more than the "[m]ere inconvenience" posed by "one to two inches of snow" in a parking lot. See *Allison*, 481 Mich at 423, 430. Furthermore, as the Court stated in *Allison*, the primary use of a parking lot is to park cars. *Id*. at 429. Although the Court recognized that tenants must have reasonable access to their vehicles in a parking lot, i.e., they must be able to walk to the vehicles, *id*., tenants do not use a parking lot for its intended use by merely walking in the lot. Walking in a parking lot is secondary to the parking lot's primary use. In contrast, a tenant uses a stairway for its intended use solely by walking up and down it. Thus, the primary purpose of a stairway is for walking. Indeed, the primary purposes and, therefore, intended uses of a parking lot and a stairway are two different things.

Therefore, under all the circumstances presented here, the snow- and ice-covered stairway may not have been fit for its intended use at the time of plaintiff's fall. We agree with the trial court that this issue presents a material question of fact for the jury.

Affirmed.

MURPHY, P.J., concurred.

METER, J. (*dissenting*). I conclude that *Allison v AEW Capital Mgt, LLP*, 481 Mich 419; 751 NW2d 8 (2008), controls the outcome in this case and mandates that defendant be granted summary disposition. Accordingly, I respectfully dissent.

As noted by the majority, the only issue in this case involves the application of MCL 554.139(1)(a), which requires a landlord to ensure that common areas on leased premises are "fit for the use intended by the parties."

The Supreme Court in *Allison*, 481 Mich at 438, indicated that an accumulation of snow and ice can, in certain circumstances, implicate a landlord's duty to keep common areas fit for the use intended. However, the circumstances in *Allison* were not so egregious as to implicate the duty. *Id*. at 430. The Court stated:

> Plaintiff's allegation of unfitness was supported only by two facts: that the lot was covered with one to two inches of snow and that plaintiff fell. Under the facts presented in this record, we believe that there could not be reasonable differences of opinion regarding the fact that tenants were able to enter and exit the parking lot, to park their vehicles therein, and to access those vehicles. Accordingly, plaintiff has not established that tenants were unable to use the parking lot for its intended purpose, and his claim fails as a matter of law.
>
> While a lessor may have some duty under MCL 554.139(1)(a) with regard to the accumulation of snow and ice in a parking lot, it would be triggered only under much more exigent circumstances than those obtaining in this case. The statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot. Mere inconvenience of access, or the need to remove snow and ice

> from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes. [*Allison*, 481 Mich at 430.]

I simply cannot find this case materially distinguishable from *Allison*. First, as noted by the majority, the principles from *Allison* apply not just to parking lots but to all common areas on leased premises, including the stairway at issue here. Second, plaintiff's assertion of unfitness was based on alleged facts similar to those set forth in *Allison*, i.e., she relied solely on the alleged facts that the stairs were icy and that she fell.

Finally, like the parking lot in *Allison*, the stairway here was suitable for its intended use. The *Allison* Court stated that "[a] parking lot is generally considered suitable for the parking of vehicles as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles." *Id*. at 429. The Court added:

> A lessor's obligation under MCL 554.139(1)(a) with regard to the accumulation of snow and ice concomitantly would commonly be to ensure that the entrance to, and the exit from, the lot is clear, that vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles. Fulfilling this obligation would allow the lot to be used as the parties intended it to be used. [*Allison*, 481 Mich at 429.]

The Court ultimately concluded:

> We recognize that tenants must walk across a parking lot in order to access their vehicles. However, plaintiff did not show that the condition of the parking lot in this case precluded access to his vehicle. The Court of Appeals erred in concluding that, under the facts presented, the parking lot in this case was unfit simply because it was covered in snow and ice. [*Id*. at 430.]

Similarly, plaintiff in this case did not show that the condition of the stairway precluded her ability to use the stairway to access different levels of the building. Unlike the plaintiff in *Allison*, who fell on his first encounter with the parking lot, plaintiff in this case had already successfully negotiated the steps, not just one other time but *three* times, having encountered the same icy condition the previous day. The stairway was not rendered unfit for its purpose simply because of the presence of some amount of ice that required a careful navigation of the steps.

In my opinion, the present case is not materially distinguishable from *Allison* and I therefore conclude that defendant was entitled to summary disposition.[1]

I would reverse and remand this case for entry of judgment in favor of defendant.

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[1] I reject the majority's indication that *Allison* may somehow be distinguishable because "[w]alking in a parking lot is secondary to the parking lot's primary use." A person must be able to reasonably access his or her vehicle in order for a parking lot to be serviceable. The *Allison* Court explicitly recognized this. *Allison*, 481 Mich at 429. Finally, I note that this appeal solely involves the application of MCL 554.139(1)(a) and I therefore do not reach the question whether the staircase was "unreasonably dangerous," an inquiry related to a common-law premises liability claim. See, e.g., *Royce v Chatwell Club Apartments*, 276 Mich App 389, 391; 740 NW2d 547 (2007).

PARIS MEADOWS, LLC v CITY OF KENTWOOD

Docket No. 286978. Submitted December 2, 2009, at Grand Rapids. Decided January 12, 2010, at 9:10 a.m.

Paris Meadows, L.L.C., the developer of a condominium project in the city of Kentwood, petitioned for review of the city's assessment of property taxes on certain property designated as a "convertible area" on the subdivision plan and defined in the master deed as part of the "general common elements" of the condominium project, asserting that the property was not subject to taxation separate from the condominium units. The Kentwood Board of Review denied the appeal and affirmed the assessment. Paris Meadows appealed the decision to the small claims division of the Tax Tribunal, which granted the city's motion for summary disposition, noting that, because the master deed provided that Paris Meadows reserved the right to contract, convert, or expand the condominium project (including the disputed area) for six years after the master deed was filed, the disputed property was not a true common element until the six years ran. Paris Meadows appealed.

The Court of Appeals *held*:

1. The Tax Tribunal erred by concluding that Paris Meadows' reservation of rights to develop the disputed property rendered the property not a common element, and thus separately taxable. According to the language of the master deed and the Condominium Act, MCL 559.101 *et seq*., the disputed property was a common element, in which the coowners held an undivided, inseparable interest, and the fact that Paris Meadows retained the right to withdraw or develop the property for six years did not vitiate this fact.

2. The Condominium Act allows for the creation of a "convertible area," which can be either "a unit or a portion of the common element," wherein general or limited common elements or condominium units may subsequently be created. MCL 559.105(3).

3. The plain language of the Condominium Act prohibits the separate taxation of the disputed property except through the condominium units. MCL 559.137(5); MCL 559.161; MCL 559.231(1). The disputed property, as a common element, is subject

to ownership and taxation only through the individual condominium units, because the individual condominium units are owned and taxed as individual units plus their inseparable and appurtenant shares of the common elements. MCL 559.161. Property taxes may only be assessed against the individual units, not the total property of the project. MCL 559.231(1). No part of the project may be taxed separately from the units, even when the developer reserves development rights.

4. Because the owners of the disputed property are the coowners of the individual condominium units and, pursuant to MCL 211.3, where the owner of the property is known, the owner is the one to be taxed, it is unnecessary to determine whether the taxes could be assessed on the basis that Paris Meadows is the alleged agent of the coowners.

Reversed and remanded.

1. CONDOMINIUMS — WORDS AND PHRASES — COMMON ELEMENTS — CONDOMINIUM UNITS.

The "common elements" of a condominium project are the portions of the project other than the condominium units; a "condominium unit" is that portion of a project designed and intended for separate ownership and use, as described in the master deed, regardless of whether it is intended for residential, office, industrial, business, or recreational use, use as a time-share unit, or any other type of use (MCL 559.103[7], 559.104[3]).

2. CONDOMINIUMS — WORDS AND PHRASES — CONVERTIBLE AREAS.

The Condominium Act defines a "convertible area" as a unit or a portion of the common elements of the condominium project referred to in the condominium documents within which additional condominium units or general or limited common elements may be created in accordance with the act (MCL 559.105[3]).

3. CONDOMINIUMS — TAXATION.

Special assessments and property taxes shall be assessed against the individual condominium units identified as units of the condominium subdivision plan and not on the total property of the project or any other part of the project; each condominium unit, together with and inseparable from its appurtent share of the common elements, shall be a sole property subject to ownership, mortgaging, taxation, possession, sale, and all types of juridical acts, inter vivos or causa mortis independent of the other condominium units (MCL 559.161, 559.231[1]).

Charron & Hanisch, P.L.C. (by *David W. Charron* and *Heidi L. Hohendorf*), for petitioner.

Law, Weathers & Richardson, P.C. (by *Jessica L. Wood* and *Jeffrey T. Gray*), for respondent.

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

MURRAY, J.

I. INTRODUCTION

Petitioner, Paris Meadows, L.L.C., appeals as of right a July 23, 2008, judgment entered by the Michigan Tax Tribunal that granted the city of Kentwood's motion for summary disposition and denied Paris Meadows' motion for summary disposition. The central question on appeal is whether the city can tax the common element of Paris Meadows' condominium development independent of the condominium units. We hold that it cannot, and therefore reverse the decision of the Tax Tribunal and remand for further proceedings.

II. FACTS AND PROCEEDINGS

Paris Meadows developed a residential 24-unit condominium project, and recorded a master deed for the project on December 29, 2005, in Kent County. The disputed property is designated as a "convertible area" on the subdivision plan, and is defined in the master deed as part of the "general common elements" of the condominium project. The general common elements include "[t]he land (including air space) described in Section 2.1 [setting forth the legal description of the condominium project] of this Master Deed (except for any land which is part of a Condominium Unit and any portion designated in Exhibit B as a Limited Common

Element)."[1] Paris Meadows, as the developer, reserved the right to contract or expand "all or any portion of the lands described from time to time in Section 2.1 [except for units that are sold or subject to a binding purchase agreement] by an amendment or series of amendments to the Master Deed . . . without the consent of any Co-owner, mortgagee, or other person" before six years from the date the master deed was recorded. Paris Meadows similarly reserved the right to convert, within those six years, "any General Common Element into one or more additional Condominium Units and/or into Limited Common Element(s) appurtenant to one or more Units, by an amendment . . . without the consent of any Co-owner, mortgagee, or other person." Although Paris Meadows reserved these development rights, the co-owners were granted exclusive rights to their individual units, the appurtenant limited common elements, and have an undivided interest in, "and an inseparable right to share with other Co-owners, the General Common Elements of the Project as described in this Master Deed."

This dispute originated in March 2007, when the city sent Paris Meadows a notice of assessment regarding Paris Meadows' property. The city assessed the disputed property at $240,500, and indicated a taxable value of $240,500. Paris Meadows asserted that the disputed property was not subject to separate taxation against it because the property consisted solely of the general common element area of the condominium project, and no condominium units were established on the property.

Paris Meadows petitioned for review of the assessment to the Kentwood Board of Review, arguing

[1] The limited common elements include cable and utility lines, decks, patios, porches, driveways, sidewalks, parking areas, and heating and cooling appliances.

that the general common elements of the project were not subject to taxation under MCL 559.231 of the Michigan Condominium Act (MCA), MCL 559.101 *et seq*. The Board of Review denied Paris Meadows' appeal and sustained the assessed and taxable value of $240,500. Paris Meadows appealed that decision to the Tax Tribunal's small claims division, where it moved for summary disposition, again arguing that the disputed property consisted only of the "general common element, and not a condominium unit, pursuant to the Michigan Condominium Act."

In its response to Paris Meadows' motion for summary disposition, and in its own motion for summary disposition, the city argued—relying on *Richmond Street, LLC v City of Walker*, 16 MTTR 571 (Docket No. 337980, June 23, 2008),—that the disputed property consisted of a "convertible area," not a general common element, to which Paris Meadows had the exclusive right (for six years) to develop with additional condominium units, and noted that utilities and streets were already constructed before the master deed was recorded. The city also argued that Paris Meadows may be treated as the owner of the property and taxed as the owner, as Paris Meadows has control over the property and is the agent of the co-owners under the master deed.

The Tax Tribunal denied Paris Meadows' motion for summary disposition, and granted the city's motion for summary disposition. In doing so, the Tax Tribunal noted that because the master deed provided that the developer reserved the right to contract, convert, or expand the condominium project (including the disputed area) for six years after the master deed was filed, under its earlier decision in *Bay Harbor Yacht Club v Petoskey*, 16 MTTR 339 (Docket No. 298777, May 2,

2006), the disputed property was not a "true" common element until after the six years ran because the common element was not inseparable from the individual condominium units. Thus, the Tax Tribunal upheld the assessment on Paris Meadows for the common element.

III. ANALYSIS

This Court reviews de novo the Tax Tribunal's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(10). *Signature Villas, LLC v City of Ann Arbor*, 269 Mich App 694, 698; 714 NW2d 392 (2006). This Court must view the affidavits, pleadings, and other documentary evidence in the light most favorable to Paris Meadows, and decide whether Paris Meadows has raised a genuine issue of material fact. *Id.* at 698-699; MCR 2.116(C)(10). The central dispute in this case involves the proper interpretation and application of statutory language, which is a question of law that this Court reviews de novo. *Signature Villas*, *supra* at 699. "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). This Court begins by reviewing the text of the statute at issue; if the language is unambiguous, it is presumed that the Legislature intended the meaning plainly expressed, and judicial construction of the statute is not permitted. *Id.* Nothing may be read into a clear statute "that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

The tribunal's factual findings are to be affirmed if supported by competent, material, and substantial evidence. *Meadowlanes Ltd Dividend Housing Ass'n v City*

of Holland, 437 Mich 473, 482; 473 NW2d 636 (1991). Because we are reviewing a decision of a state agency, we give

> "respectful consideration" and [must have] "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue. [*In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 103; 754 NW2d 259 (2008).]

Finally, we must recall that "the authority to impose a tax must be expressly authorized by law; it will not be inferred." *Michigan Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 477; 518 NW2d 808 (1994) (citations omitted).

As noted, the critical issue is whether the convertible property, designated as a common element, can be separately valued and assessed for taxation purposes where the condominium project developer retains the right to convert, contract, or otherwise develop the convertible property for six years. Several statutory definitions of key terms must be considered. Under the MCA, recording a master deed that complies with the MCA establishes the condominium project. MCL 559.172(1). A "condominium project" under the MCA is "a plan or project consisting of not less than 2 condominium units established in conformance with this act." MCL 559.104(1). The MCA defines "condominium unit" as "that portion of the condominium project designed and intended for separate ownership and use, as described in the master deed, regardless of whether it is intended for residential, office, industrial, business, recreational, use as a time-share unit, or any other type of use." MCL 559.104(3). A "co-owner" is defined as "a person, firm, corporation, partnership,

association, trust, or other legal entity or any combination of those entities, who owns a condominium unit within the condominium project." MCL 559.106(1). Pursuant to MCL 559.165, the co-owners are required to comply with the terms of the master deed and the association bylaws.

Importantly, "common elements" are defined as "the portions of the condominium project other than the condominium units." MCL 559.103(7). The "convertible area" is designated as "a unit or a portion of the common elements of the condominium project referred to in the condominium documents within which additional condominium units or general or limited common elements may be created in accordance with this act." MCL 559.105(3).[2] In addition, the MCA provides that when a condominium project is established, "each condominium unit, together with and inseparable from its appurtenant share of the common elements, shall be a sole property subject to ownership, mortgaging, taxation, possession, sale, and all types of juridical acts, inter vivos or causa mortis independent of the other condominium units." MCL 559.161. "Each co-owner has an exclusive right to his condominium unit and has such rights to share with other co-owners the common elements of the condominium project as are designated by the master deed." MCL 559.163.

In assessing property taxes on condominium projects, MCL 559.231 provides, in part:

> (1) Special assessments and property taxes *shall be assessed against the individual condominium units identified as units of the condominium subdivision plan and not*

[2] "General common elements" are "the common elements other than the limited common elements." MCL 559.106(5). "Limited common elements" are "a portion of the common elements reserved in the master deed for the exclusive use of less than all of the co-owners." MCL 559.107(2).

> *on the total property of the project or any other part of the project*, except for the year in which the condominium project was established subsequent to the tax day. . . .
>
> (2) Special assessments and *property taxes in any year in which the property existed as an established condominium project on the tax day shall be assessed against the individual condominium unit*, notwithstanding any subsequent vacation of the condominium project. Condominium units shall be described for such purposes by reference to the condominium unit number of the condominium subdivision plan and the caption of the plan together with the liber and page of the county records in which the approved master deed is recorded. Assessments for subsequent real property improvements to a specific condominium unit shall be assessed to that condominium unit description only. For property tax and special assessment purposes, each condominium unit shall be treated as a separate single unit of real property and shall not be combined with any other unit or units and no assessment of any fraction of any unit or combination of any unit with other units or fractions of any unit shall be made, nor shall any division or split of the assessment or taxes of any single condominium unit be made notwithstanding separate or common ownership of the unit. [Emphasis added.]

The master deed may allocate "an undivided interest in the common elements" to each condominium unit. MCL 559.137(1). Additionally, "the undivided interest in the common elements allocated to any condominium unit shall not be altered, and any purported transfer, encumbrance, or other disposition of that interest without the condominium unit to which it appertains is void," except where the MCA expressly provides otherwise. MCL 559.137(5).

We were recently presented with a very similar case in which we reversed the decision of the Tax Tribunal and held that where the developer retained the right to develop or remove land within the condominium project, the land could not be taxed separately from the

condominium units under MCL 559.231. *Richmond Street, LLC v City of Walker*, unpublished opinion per curiam of the Court of Appeals, issued July 14, 2009 (Docket No. 286454).[3] In *Richmond Street, LLC*, *supra*, 16 MTTR at 574, the master deed referred to the disputed property, an undeveloped wetland area, as the general common elements. Like our case, in the master deed the developer also reserved the right to elect, within six years of recording the deed, to contract, withdraw, expand, or convert any of the general common elements by amending the master deed without the consent of any co-owners or others. *Id.* The Tax Tribunal held that "[t]he degree of control over property by a developer in a convertible condominium project like Richmond's straddles the fence between permitted statutory control and actual control." *Id.* at 577. Examining the "market realities," the Tax Tribunal concluded that the developer "really controls the land[.]" *Id.* The Tax Tribunal noted that merely designating a piece of property as a common area, while reserving rights to the developer, does not remove the property from taxation, and found that although the option to convert or develop the property expired in six years and did not exceed the statutory limit, the property "labeled as a 'common element' is not truly a common element until after the six years have run, ending the developer's rights to expand the condominium development"; the co-owners of the units therefore did not possess an inseparable appurtenant share of the common elements until the six years elapsed. *Id.*

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[3] Although unpublished opinions of this Court are not binding precedent, MCR 7.215(C)(1); *In re Application of Indiana Michigan Power Co*, 275 Mich App 369, 380; 738 NW2d 289 (2007), they may, however, be considered instructive or persuasive. *Id.* In the present circumstances, *Richmond Street, LLC*, provides instructive and persuasive value.

On appeal, this Court held that, according to the MCA's definitions of a condominium unit and common elements, "a condominium project consists of 'units' and 'common elements' only. Any part of the project that is not a unit *must* be a common element." *Richmond Street, LLC*, unpub op at 2 (emphasis in original). Further, this Court stated that under MCL 559.231(1) and MCL 559.161, the condominium units were properly assessed on the basis of their individual value plus the value of the common elements that was "prorated by the value of each unit and added to the unit's tax bill." *Id.* This Court concluded that the Tax Tribunal erroneously

> used its own definition of "common elements," rather than the one provided by statute, and decided that "common elements" could only include land over which all co-owners had equal control, so the land was not a common element. This reasoning is clearly contrary to the plain language of the MCA. Under the definition provided in MCL 559.103(7), *every* part of a project that is not part of a unit is a "common element." Notably, some of these common elements might include "limited common elements," which by definition are not subject to the use of all co-owners equally. MCL 559.107(2). Although a developer may retain rights to withdraw or develop land within the project, until it records an amended master deed the land remains part of the project and, under MCL 559.231, no part of the project is taxed separately from the units. The MTT failed to recognize that although units and their appurtenant common elements are inseparable, the MCA fully contemplates that the size of common elements can be altered through the means set forth in the Act. The MTT seemed to find an irresolvable conflict between petitioner's reserved rights and the MCA's provision in MCL 559.137(5) that a transfer of an interest in common elements separate from a unit is void, but that provision is only applicable "[e]xcept to the extent otherwise expressly provided by this act . . . ." [MCL 559.137(5).] Because the MCA expressly provides for the

> withdrawal or conversion of common elements, the MTT erred in finding that petitioner's reservation of such rights was contrary to the MCA. [*Id.*, unpub op at 2-3 (emphasis in original).]

Indicating that the Tax Tribunal "erred in imposing its view of what the statute should read instead of simply reading the definitions and provisions that the Legislature included in the act," this Court concluded that the city lacked authority under the MCA "to tax any part of a condominium project separately from the units unless that part has been withdrawn according to the procedures set forth in the MCA." *Id*., unpub op at 3.

We agree with this rationale, and adopt it as our own. Consequently, we hold that the Tax Tribunal erred by concluding that Paris Meadows' reservation of rights to develop the disputed property rendered the property not a common element, and thus separately taxable. According to the language in the master deed and the MCA, the disputed property was a common element, in which the co-owners held an undivided, inseparable interest, and the fact that Paris Meadows retained the right to withdraw or develop the property for six years did not vitiate this fact. MCL 559.103(7); *Richmond Street, LLC*, unpub op at 2-3.

The plain language of the MCA specifically provides for the right of the developer to subsequently develop or otherwise modify property within the condominium project. For example, pursuant to MCL 559.132, if the project is an expandable project, then the master deed must explicitly include this reservation of rights by the developer, any restrictions on this election (such as co-owner consent), a time limit of not more than six years, a description of the land that may be added, the specific methods for expansion, and any limitations on the development. Where the project is a "contractable"

condominium project, the master deed must contain a reservation explicitly providing the developer with an option to elect to withdraw land, any restrictions on electing the option (such as co-owner consent), a time limit of six years, a description of the subject property, and any restrictions on withdrawing the land. MCL 559.133. Additionally, the MCA also allows for the creation of a "convertible area," which can be either "a unit or a portion of the common elements," wherein general or limited common elements or condominium units may subsequently be created. MCL 559.105(3); MCL 559.131 (providing that certain specific information regarding the potential development of convertible areas of the project must be contained in the master deed). In general, "or" is a disjunctive term, indicating a choice between two alternatives, i.e., a unit or a portion of the common elements. *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50; 575 NW2d 79 (1997). MCL 559.141(1) specifically provides that the "developer may convert all or any portion of any convertible area into condominium units or common elements, including, without limitation, limited common elements, subject to the restrictions which the condominium documents may specify."

Similar to the Tax Tribunal in *Richmond Street, LLC*, the Tax Tribunal in the present case "seemed to find an irresolvable conflict" as a result of the fact that Paris Meadows reserved rights in the common elements that were owned by all co-owners of the condominium units. *Richmond Street, LLC*, unpub op at 2. Interpreting the MCA to preclude a developer from retaining rights in the common elements goes against the plain language of the act. The MCA clearly provides for the reservation of development rights by the developer. The Legislative intent is further demonstrated by the fact that the MCA permits the master deed to designate

what are the common elements of the condominium project and what rights the units' co-owners hold in them, as the master deed did in this case. MCL 559.163; MCL 559.137(1).

In conclusion, the plain language of the MCA prohibits the separate taxation of the disputed property except through the condominium units. MCL 559.161; MCL 559.137(5); MCL 559.231(1). The disputed property, as a common element, was subject to ownership and taxation only through the individual condominium units, because the individual condominium units are owned and taxed as individual units plus their inseparable and appurtenant shares of the common elements. MCL 559.161. Property taxes may only be assessed against the individual units, not the total property of the project. MCL 559.231(1). As this Court previously held, "no part of the project is taxed separately from the units," *Richmond Street, LLC*, unpub op at 2, even when the developer reserves development rights. MCL 559.103(7). The Tax Tribunal erred by concluding otherwise.

The city's final argument is that it could assess taxes on the disputed property against Paris Meadows because it was an agent of the co-owners. However, whether Paris Meadows was an agent of the co-owners is irrelevant, because, pursuant to MCL 211.3, if the owner of the property is known, the owner is taxed:

> Real property shall be assessed in the township or place where situated, to the owner if known, and also to the occupant, if any; if the owner be not known, and there be an occupant, then to such occupant, and either or both shall be liable for the taxes on said property, and if there be no owner or occupant known then as unknown. A trustee, guardian, executor, administrator, assignee or agent, having control or possession of real property, may be treated as the owner.

Hence, resort to the agent of the owner is not necessary because the owners of the disputed property are known: the co-owners of the individual condominium units.

Reversed and remanded. No costs, a public question being involved. We do not retain jurisdiction.

MICHIGAN'S ADVENTURE, INC v DALTON TOWNSHIP
ESSEX v DALTON TOWNSHIP

Docket Nos. 283770 and 283869. Submitted December 2, 2009, at Grand Rapids. Decided January 14, 2010, at 9:00 a.m.

Michigan's Adventure, Inc., and Bruce J. Essex and others brought separate actions in the Muskegon Circuit Court against Dalton Township, alleging that the special assessments imposed on plaintiffs' real property to improve a sewer system far exceeded any benefit conferred by the improvement, that their constitutional rights were violated, and that the township failed to follow proper procedures. The court, William C. Marietti, J., permitted Muskegon County to intervene in the actions, consolidated the actions, and determined that it had subject-matter jurisdiction regarding plaintiffs' claims that defendant failed to properly follow statutory procedural requirements. The court concluded, however, that it was otherwise without jurisdiction to hear plaintiffs' claims. The plaintiffs appealed separately and their appeals were consolidated.

The Court of Appeals *held*:

1. The Tax Tribunal has exclusive and original jurisdiction over a proceeding for direct review of a final decision of any agency relating to assessments and a proceeding for a refund or redetermination of a tax levied under the property tax laws of this state. This jurisdiction extends to taxpayers' constitutional arguments that a tax assessed is arbitrary and without foundation.

2. Allegations that a taxing authority failed to follow statutory procedures for imposing assessments fall within the jurisdiction of the Tax Tribunal.

3. Neither the Headlee Amendment, Const 1963, art 9, § 32, nor its enabling legislation, MCL 600.308a, extend the jurisdiction of the courts to special assessment disputes. Special assessments generally are not taxes for the purposes of constitutional tax limitations.

4. The alleged special assessment was not so clearly a tax that jurisdiction was conferred on the circuit court under the Headlee Amendment. It is appropriate for the Tax Tribunal to initially

consider plaintiffs' claim of an alleged violation of the Headlee Amendment in the context of plaintiffs' challenge to the special assessment.

5. The judgment and orders of the trial court must be reversed and the matter must be remanded to the extent that the trial court determined that it had subject-matter jurisdiction regarding the claims that defendant failed to follow statutory procedural requirements. The orders and judgments must be affirmed to the extent that the trial court held that it was otherwise without jurisdiction to hear plaintiffs' claims.

Affirmed in part, reversed in part, and remanded.

1. TAXATION — TAX TRIBUNAL — JURISDICTION — TAX ASSESSMENTS.

The Tax Tribunal has exclusive and original jurisdiction over proceedings for direct review of a final decision of an agency relating to tax assessments, including constitutional arguments that a tax assessment is arbitrary and without foundation or that the taxing authority failed to follow statutory procedures for imposing assessments.

2. TAXATION — SPECIAL ASSESSMENTS.

Special assessments are not taxes for the purposes of constitutional tax limitations; the differences between a special assessment and a tax are that a special assessment can be levied only on land and cannot be made a personal liability of the person assessed, and also that a special assessment is based wholly on benefits and is exceptional both as to time and locality.

Parmenter O'Toole (by *John C. Schrier* and *Adam G. Zuwerink*) for Michigan's Adventure, Inc.

Miller Johnson (by *J. Scott Timmer*) for Bruce J. Essex and others.

Craig A. Rolfe, PLLC (by *Craig A. Rolfe*), and *James W. Porter, P.C.* (by *James W. Porter*), for Dalton Township.

Williams, Hughes & Cook, PLLC (by *Douglas M. Hughes* and *Eric C. Grimm*), for Muskegon County.

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

BANDSTRA, J. In these consolidated cases and appeals, plaintiffs are taxpayers who own real property against which defendant Dalton Township imposed what it called a "special assessment" to raise money for a sewer project. The primary issue raised on this appeal, the resolution of which disposes of the appeals, is one of jurisdiction: did the lower court here have jurisdiction to decide whether the special assessments were properly imposed on plaintiffs or, instead, did the Michigan Tax Tribunal (MTT) have exclusive jurisdiction to decide plaintiffs' claims? We conclude that the MTT had exclusive jurisdiction and, accordingly, we affirm the lower court decision in part, reverse it in part, and remand.

Because the dispositive issue raised here is one of jurisdiction, it is not necessary to recite at length either the facts giving rise to these cases or the substance of plaintiffs' arguments regarding the propriety of the special assessments. Briefly stated, plaintiffs' contention is that the special assessments imposed by the township to improve a sewer system far exceed any benefit conferred by that sewer system on the properties against which the assessments were made. Plaintiffs claim that their constitutional rights were violated in a number of ways and, further, that the Township failed to follow proper procedures under the township public improvement act, MCL 41.721 *et seq*.

As already noted, the dispositive issue raised on appeal is one of jurisdiction, which presents a question of law that we review de novo. *White v Harrison-White*, 280 Mich App 383, 387; 760 NW2d 691 (2008). The MTT has "exclusive and original jurisdiction" over "[a] proceeding for direct review of a final decision . . . of an agency relating to assessment . . . [and] [a] proceeding for a refund or redetermination of a tax levied under the

property tax laws of this state." MCL 205.731(a) and (b). The MTT's jurisdiction extends to taxpayers' constitutional arguments that a tax assessment is arbitrary and without foundation. *Wikman v City of Novi*, 413 Mich 617, 646-647; 322 NW2d 103 (1982). See *Meadowbrook Village Assoc v Auburn Hills*, 226 Mich App 594, 597; 574 NW2d 924 (1997) ("The Tax Tribunal may . . . consider claims that an assessment is arbitrary or without foundation even if couched in constitutional terms."); *Johnston v Livonia*, 177 Mich App 200, 207; 441 NW2d 41 (1989) ("The tribunal may decide claims framed in constitutional terms alleging that a tax assessment was arbitrary and capricious and without foundation."); *Johnson v Michigan*, 113 Mich App 447, 459; 317 NW2d 652 (1982) ("[T]he tax tribunal has equitable jurisdiction and may consider constitutional questions relating to the validity of property tax assessments."); *Grosse Ile Comm for Legal Taxation v Grosse Ile Twp*, 129 Mich App 477, 486; 342 NW2d 582 (1983) (Michigan Tax Tribunal has jurisdiction over action alleging that township's total property tax levy exceeded constitutional limitations). Similarly, allegations that a taxing authority failed to follow statutory procedures for imposing assessments fall within the jurisdiction of the MTT. *Johnston*, 177 Mich App at 207-208.

While all these cases undermine plaintiffs' claim that the MTT did not have exclusive jurisdiction over the constitutional and statutory questions they raise, none of them directly confronted the Headlee Amendment argument that plaintiffs advance. That argument is potentially problematic because, notwithstanding the exclusive jurisdiction of the MTT over the assessment and tax matters just discussed, the Headlee Amendment to the Michigan Constitution and its enabling legislation specifically grant the courts jurisdiction over Headlee Amendment challenges against the imposition

of a "tax." Const 1963, art 9, § 32; MCL 600.308a. However, neither the Headlee Amendment nor the statute extends jurisdiction to special assessment disputes and, generally, special assessments are not taxes for the purposes of constitutional tax limitations. *Kadzban v Grandville*, 442 Mich 495, 500; 502 NW2d 299 (1993); *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 323-324; 683 NW2d 148 (2004).

Plaintiffs claim that, even though defendant called the contested action here a "special assessment," defendant's "true purpose" was not to provide sewer service specifically to the affected properties but, instead, to undertake a "massive infrastructure improvement program" for the general benefit of the broader community. Thus, plaintiff claims that this case really involves the imposition of a "disguised tax" and that, at least with respect to their Headlee Amendment claims against that tax, jurisdiction is properly vested in the circuit court. We disagree.

"In determining jurisdiction, this Court will look beyond a plaintiff's choice of labels to the true nature of the plaintiff's claim." *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998). "A special assessment is a levy upon property within a specified district. Although it resembles a tax, a special assessment is not a tax. In contrast to a tax, a special assessment is imposed to defray the costs of specific local improvements, rather than to raise revenue for general governmental purposes." *Kadzban*, 442 Mich at 500 (citation omitted). In *Blake v Metro Chain Stores*, 247 Mich 73, 77; 225 NW 587 (1929), our Supreme Court set out the test for distinguishing the two:

> "The differences between a special assessment and a tax are that (1) a special assessment can be levied only on land; (2) a special assessment cannot (at least in most States) be

> made a personal liability of the person assessed; (3) a special assessment is based wholly on benefits; and (4) a special assessment is exceptional both as to time and locality." [citation omitted.]

Plaintiffs have conceded that, under factors (1), (2), and (4) of the *Blake* analysis, this case involves special assessments; their only contention, under the third *Blake* factor, is that a tax is involved here because the benefit being derived by the impacted parcels of property is greatly disproportionate to the costs imposed against those parcels. In light of that concession, we do not conclude that, notwithstanding the fact that the township called its action a special assessment, it was so clearly a tax instead that jurisdiction was conferred on the court under the Headlee provisions.

We note that the claims plaintiffs raise here are similar to those considered by our Supreme court in *Wikman*, 413 Mich at 647:

> Plaintiffs' claim is that these special assessments were not made according to the benefits received as required by law. The resolution of this claim involves many fact determinations. The membership of the Tax Tribunal is structured to provide it with experience in resolving these fact issues. The tribunal's *de novo* review gives it the opportunity to rectify any errors in the agency's determination.

Similar fact issues underlie plaintiffs' claim here that the special assessments were, in fact, a disguised tax, subject to the Headlee Amendment. Thus, it is appropriate for the Tax Tribunal to initially consider plaintiffs' claim of an alleged violation of the Headlee Amendment in the context of their challenge to the special assessments. Any decision by the Tax Tribunal will be subject to judicial review on appeal.

To the extent that the trial court determined it had subject-matter jurisdiction regarding plaintiffs' claims

that defendant failed to properly follow statutory procedural requirements, we reverse and remand. To the extent that the trial court otherwise determined that it was without jurisdiction to hear plaintiffs' claims, we affirm.

Neither party having fully prevailed, no costs should be imposed. MCR 7.219.

PEOPLE v McCAULEY

Docket No. 281197. Submitted January 5, 2010, at Detroit. Decided January 19, 2010, at 9:00 a.m.

Dedrick L. McCauley was convicted by a jury in the Wayne Circuit Court, Craig S. Strong, J., of first-degree felony murder, second-degree murder, three counts of assault with intent to commit murder, and possession of a firearm during the commission of a felony. He was sentenced to life in prison for the felony-murder conviction, concurrent prison terms of 450 to 900 months for the second-degree murder conviction and 225 to 450 months for each assault conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appealed, alleging, in part, that he was denied the effective assistance of counsel in connection with his pretrial rejection of a plea offer whereby he would have been allowed to plead guilty of second-degree murder, with an 18-year minimum sentence, and possession of a firearm during the commission of a felony, in exchange for the dismissal of the remaining charges. The Court of Appeals, ZAHRA, P.J., and TALBOT and WILDER, JJ., while retaining jurisdiction, remanded the matter to the trial court for a hearing on his claim regarding ineffective assistance of counsel. Unpublished order of the Court of Appeals, entered August 29, 2008 (Docket No. 281197). On remand, the trial court determined that defendant established a claim of ineffective assistance of counsel because defense counsel failed to explain the concept of aiding and abetting to defendant and failed to inform defendant that as an aider and abettor he could still be convicted of first-degree murder even if he did not fire the fatal shot.

The Court of Appeals *held*:

1. A defendant, to establish ineffective assistance of counsel, must show that his or her attorney's performance was objectively unreasonable in light of prevailing professional norms and that, but for the attorney's error or errors, a different outcome reasonably would have resulted. The same standard applies to a claim based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a prosecutor's plea offer.

2. The record supports the trial court's determinations that defense counsel's failure to explain the concept of aiding and

abetting to defendant, and failure to inform him that he could still be convicted of first-degree murder even if he did not fire the fatal shot, fell below an objective standard of reasonableness and that defendant was prejudiced by his counsel's performance.

3. Defendant's convictions and sentences must be conditionally vacated and the case must be remanded to allow the prosecution to reinstate its original plea offer, and to allow defendant, with the assistance of counsel, to consider that offer and enter a plea in accordance with its terms. If the prosecution presents a new offer in excess of its original offer, it must rebut the presumption of vindictiveness that arises. If the prosecution meets this burden, the parties may negotiate a new plea. If the prosecution does not overcome the presumption and refuses to reinstate its original plea offer, defendant's convictions and sentences must be vacated in full. Conversely, if defendant refuses to accept the original plea offer after being given a reasonable opportunity to do so, the original convictions and sentences must be reinstated.

Convictions and sentences conditionally vacated and case remanded for further proceedings.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Olga Agnello*, Principal Attorney, Appeals, for the people.

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

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

PER CURIAM. Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317,[1] three counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison for the

[1] Defendant was convicted of second-degree murder as a lesser offense to an original charge of first-degree premeditated murder. MCL 750.316(1)(a).

felony-murder conviction, concurrent prison terms of 450 to 900 months for the second-degree murder conviction and 225 to 450 months for each assault conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We conditionally vacate defendant's convictions and sentences and remand for further proceedings.

Defendant's convictions arise from the November 8, 2006, shooting death of Peter Issa. The prosecution's theory at trial was that Housam Baydoun lured his intended victim, Mustapha Dallal, and three other men, Issa, Scotty Khemoro, and Rony Khemoro, to a gas station in Detroit under the pretext that he would sell them Vicodin. Instead, he sent defendant to conduct the transaction. According to the surviving victims, defendant attempted to rob them and began shooting inside their car. There was evidence that a second gunman also approached the car and began shooting, but that person was never identified. Issa was killed and Dallal and Scotty received nonfatal gunshot wounds.

Defendant denied intending to rob the victims. He claimed that while he was inside the victims' car, Rony Khemoro produced what appeared to be a gun, and then a second gunman unexpectedly arrived and began firing at the car. Defendant claimed that he disarmed Rony and then fired his own gun at the unidentified gunman in self-defense, and then fled. Defendant denied firing the shot that killed Issa, and claimed that it was the unidentified gunman who shot and killed Issa.

After defendant filed his claim of appeal, this Court, while retaining jurisdiction, granted defendant's motion to remand for a *Ginther*[2] hearing on his claim that he was denied the effective assistance of counsel in con-

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

nection with his pretrial rejection of a plea offer whereby he would have been allowed to plead guilty of second-degree murder, with an 18-year minimum sentence, and felony-firearm, in exchange for the dismissal of the remaining charges. Defendant testified that he knew that he could not have fired the shot that killed Issa and that he was unwilling to accept the prosecutor's plea offer because he believed that he could not be convicted of murder when he was not the individual who shot Issa. Defendant denied being aware that even if he did not fire the fatal shot, he could still be convicted of first-degree murder under an aiding and abetting theory. Defendant testified that if he had known this,

> I would not have gambled like that knowing I could be convicted of the [sic] something because they believed that I came with somebody or they believed that I was an accomplice to another shooter. I would have took the plea I would not of gambled with my life like that.

Defendant testified that he told trial counsel that he believed that the second shooter was shooting at him, and that he had been set up for a robbery. Defense counsel advised him that he had a good chance of obtaining acquittal based on his self-defense claim.

Defendant's trial attorney testified that defendant was "adamant" about not accepting the prosecutor's plea offer because he had not killed anyone. Counsel admitted that he "never had any discussion with [defendant] about aiding and abetting."

Following the hearing, the trial court found that defendant had established a claim of ineffective assistance of counsel. The court stated:

> In the case at bar, counsel gave insufficient advice during the plea-bargaining process. Defendant told his attorney that he would not plead guilty to murder because

> he did not fire the bullet that killed the deceased. Counsel was aware of the two-shooter theory and professional competence demanded that he explain to his client that he could be convicted for murder as an accomplice even if he did not himself fire the fatal shot. Instead counsel simply accepted his client's ill-informed decision and moved forward to trial. Counsel's performance was deficient.
>
> The defendant was prejudiced because he turned down a plea offer that he would have accepted if he had received proper advice.

The trial court concluded that both prongs of the ineffective assistance test were satisfied because it was "reasonably likely that defendant would have pleaded guilty and the trial court would have accepted the plea under the terms offered by the prosecution."

Defendant now renews his ineffective assistance of counsel claim. Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's findings of fact at a *Ginther* hearing for clear error, and review questions of constitutional law de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for his attorney's error or errors, a different outcome reasonably would have resulted. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). These same standards apply where a defendant's ineffective assistance of counsel claim is based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a prosecutor's plea offer. *Hill v Lockhart*, 474 US 52, 58; 106 S Ct 366; 88 L Ed 2d 203 (1985).

Defendant relies on *Magana v Hofbauer*, 263 F3d 542 (CA 6, 2001), in which the court granted the petitioner's habeas corpus petition for review of his Michigan state court convictions of narcotics offenses. The petitioner argued that his trial counsel mistakenly informed him that the prosecutor's offer to allow him to plead guilty of a single offense would not provide him with more advantageous sentencing consequences than he would receive if he were convicted of multiple offenses at trial. *Id.* at 544-545. Defense counsel mistakenly believed that sentences for multiple convictions would run concurrently, when, in fact, they would run consecutively, thus risking much longer incarceration if the defendant were convicted of the multiple offenses at trial. *Id.* at 545. The court concluded that defense counsel's advice, which reflected an erroneous understanding of the applicable sentencing statutes, was objectively deficient. The court also concluded that the defendant was prejudiced by defense counsel's erroneous advice because there was a reasonable probability that he would have accepted the prosecutor's plea offer if he had been properly informed.

The record in this case likewise supports defendant's claim that he declined to accept the prosecutor's plea offer because he was not properly informed that he could be convicted of first-degree murder even if he did not fire the fatal shot. Defense counsel admitted that he was aware of defendant's reluctance to plead guilty because he did not kill anyone, and was also aware of the prosecution's intent to proceed under an aiding and abetting theory. Despite this knowledge, he failed to explain to defendant that he could be convicted of first-degree murder as an aider and abettor even if he did not fire the fatal shot. As explained in *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006), under MCL 767.39, "[a] defendant is

criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet." Without this knowledge, and without the knowledge that the prosecution intended to proceed under an aiding and abetting theory, defendant could not make an informed decision whether to accept or reject the prosecution's plea offer. Therefore, the record supports the trial court's finding that defense counsel's failure to explain the concept of aiding and abetting to defendant, and failure to inform him that he could still be convicted of first-degree murder even if he did not fire the fatal shot, fell below an objective standard of reasonableness.

The record also supports the trial court's finding that defendant was prejudiced by trial counsel's deficient performance. Defendant, who was 18 years old at the time, testified that he would not have "gambled" his life by standing trial with the risk of a life sentence if he had known that the jury could convict him of first-degree murder under an aiding and abetting theory. The trial court's finding that it is probable that defendant would have accepted the prosecutor's plea offer if he understood that he could be convicted under such a theory, thereby subjecting him to life imprisonment, is not clearly erroneous.

The more difficult issue is the question of remedy. In *Magana*, 263 F3d at 553, the Sixth Circuit fashioned its remedy for defense counsel's ineffective assistance as follows:

> [W]e . . . **REMAND** this case to the district court to grant the writ of habeas corpus within ninety days, conditional upon a new plea hearing in state court at which Magana has the opportunity to consider, with counsel, the

> state's original plea offer. Should the state choose to offer Magana a plea in excess of ten years, its original offer, the district court must determine whether the state can rebut the presumption of vindictiveness which would attach to its offer. If the state can meet its burden, then the parties are free to negotiate a new plea. If the state cannot overcome the presumption and it refuses to reinstate its original offer, then the writ must be granted.

Other courts have found that the remedy for a claim of ineffective assistance arising from the rejection of a plea agreement may vary, depending on the circumstances of the case. The Arizona Court of Appeals in *State v Donald*, 198 Ariz 406, 415-416; 10 P3d 1193 (Ariz App, 2000), explained:

> The United States Supreme Court has stated that the remedy for a violation of the Sixth Amendment right to counsel "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364, 66 L. Ed. 2d 564, 101 S. Ct. 665 (1981). Inevitably, however, when a court seeks to redress such an injury, some degree of remedial burden must be borne.
>
> The State, for example, has expended resources in conducting the original trial, and these resources cannot be recouped. The expense and burden of trial, however, do not excuse the court from providing a remedy for violation of a defendant's Sixth Amendment rights.
>
> Donald has requested that this court order either specific performance of the original plea offer by the State or a new trial. Other courts have ordered each of these remedies, and variations of them. *See*, *e.g.*, [*In re*] *Alvernaz*, [2 Cal 4th 924, 944; 8 Cal Rptr 2d 713; 830 P2d 747 (2002)] (holding that prosecutor must either submit previously offered plea bargain to the trial court for approval or must elect, within 30 days, to retry defendant and resume plea negotiation process; trial court not required to approve plea agreement if submitted); [*People v*] *Curry*, [178 Ill 2d 509, 536-537; 687 NE2d 877 (1997)] (remanding for new

> trial with opportunity to resume plea bargaining process); *Williams* [*v State*, 326 Md 367, 383; 605 A2d 103 (1992)] (allowing defendant opportunity to accept original plea; if he does not do so within 30 days, original conviction and sentence will be reinstated); [*State v*] *Lentowski*, [212 Wis 2d 849, 857-858; 569 NW2d 758 (Wis App, 1997)] (remanding for new trial with opportunity for new plea bargain at prosecutor's discretion).
>
> The United States Supreme Court has indicated that specific performance of a plea agreement is a constitutionally permissible remedy. *See Mabry v Johnson*, 467 U.S. 504, 510 n. 11, 81 L. Ed. 2d 437, 104 S. Ct. 2543 (1984); *Santobello v. New York*, 404 U.S. 257, 263, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971). Indeed some courts hold that the *most* appropriate remedy is to order the prosecution to reinstate the plea offer, effectively restoring the defendant to the position he or she would have occupied but for the deficient performance of counsel. *See Lewandowski* [*v Makel*], 949 F.2d [884] 889 [CA 6, 1991)]; *Williams*, 605 A.2d at 110-11. [Emphasis in original.]

We conclude that a modified version of the remedy employed in *Magana* would be appropriate in this case. Accordingly, we conditionally vacate defendant's convictions and sentences and remand this case to allow the prosecution to reinstate its original plea offer, and to allow defendant, with the assistance of counsel, to consider that offer and enter a plea in accordance with its terms. If the prosecution decides to present a new offer in excess of its original offer, it shall be required to rebut the presumption of vindictiveness that arises. If the prosecution can meet that burden, the parties would also be free to negotiate a new plea. If the prosecution cannot overcome the presumption and refuses to reinstate its original plea offer, then defendant's convictions and sentences shall be vacated in full. Conversely, if defendant refuses to accept the prosecution's original plea offer

after being given a reasonable opportunity to do so, his original convictions and sentences shall be reinstated.[3]

Defendant's convictions and sentences are conditionally vacated and the case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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[3] In the event defendant's felony-murder conviction is reinstated, his second-degree murder conviction and sentence shall remain vacated because multiple murder convictions arising from the death of a single victim violate constitutional double jeopardy protections. US Const, Am V; Const 1963, art 1, § 15; *People v Clark*, 243 Mich App 424, 429-430; 622 NW2d 344 (2000).

PEOPLE v PERREAULT

Docket No. 288540. Submitted November 10, 2009, at Lansing. Decided January 19, 2010, at 9:05 a.m.

Michael J. Perreault was convicted following a bench trial in the Grand Traverse Circuit Court, Thomas G. Power, J., of possession with intent to deliver marijuana. He appealed, alleging that the trial court erroneously refused to suppress evidence obtained when the assistant principal of his high school in Traverse City, while in the presence of a police officer, searched his vehicle in the parking lot of the school while defendant was also present, but without his consent and without a warrant. The search had occurred after the assistant principal and the police officer were informed that the Grand Rapids area Silent Observer anonymous tip hotline had received an anonymous tip indicating that several students, including defendant, were selling drugs at the high school.

The Court of Appeals *held*:

1. The police may search a motor vehicle without a warrant if they have probable cause to believe that evidence of a crime may be found therein. School officials may search a student's person or property on school premises on the lesser standard of reasonable suspicion.

2. Reasonable suspicion requires articulable reasons and a particularized and objective basis for suspecting the particular person of criminal activity. Whether a reasonable suspicion exists in a case involving an anonymous tipster must be tested under the totality of the circumstances with a view to the question whether the tip carries with it sufficient indicia of reliability to support a reasonable suspicion of criminal activity. An anonymous tip can provide reasonable suspicion if it is considered along with a totality of the circumstances that show the tip to be reliable. But, alone, without any indicia of reliability or means to test the informant's knowledge or credibility, an anonymous tip is generally insufficient.

3. The anonymous tip was the only basis for the search in this case. The anonymous tip contained little information concerning defendant and was vague. There were no other circumstances to be viewed.

4. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before governmental authorities may act against a suspect. The tip in this case is an example of such a tip. The tip itself did not provide a sufficient basis to form a reasonable suspicion necessary for the search of defendant's vehicle. The search was unconstitutional and the trial court's order denying suppression of the evidence must be reversed and the case must be remanded to the trial court for further proceedings.

Reversed and remanded.

O'CONNELL, J., dissenting, stated that the anonymous tip, considered in light of the totality of the circumstances, provided the assistant principal reasonable suspicion that defendant was trafficking in drugs on school property and justified the assistant principal's search of defendant's vehicle. The tip, considered in its entirety, was sufficiently detailed to provide indicia of reliability. There was also information corroborating the tip, aiding in the determination that a reasonable suspicion existed to search defendant's vehicle. The tip and the corroborating information provided the assistant principal a particularized suspicion that defendant was engaging in criminal activity in his vehicle on school grounds and that contraband was present in the vehicle. The tip carried with it sufficient indicia of reliability to support a reasonable suspicion of criminal activity. The assistant principal's search did not constitute a violation of defendant's rights. The order denying suppression of the evidence should be affirmed.

1. SEARCHES AND SEIZURES — SCHOOLS — REASONABLE SUSPICION.

The police may search a motor vehicle without a warrant if they have probable cause to believe that evidence of a crime can be found therein; school officials may search a student's person or property on school premises on the lesser standard of reasonable suspicion; reasonable suspicion requires articulable reasons and a particularized and objective basis for suspecting the particular person of criminal activity.

2. SEARCHES AND SEIZURES — ANONYMOUS TIPSTERS — REASONABLE SUSPICION.

Whether reasonable suspicion for a search exists in a case involving an anonymous tipster must be tested under the totality of the circumstances with a view to the question whether the tip carries with it sufficient indicia of reliability to support a reasonable suspicion of criminal activity; an anonymous tip can provide reasonable suspicion if it is considered along with a totality of the circumstances that show the tip to be reliable, but, alone, without

> any indicia of reliability or means to test the informant's knowledge or credibility, an anonymous tip is generally insufficient to support a reasonable suspicion.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Alan R. Schneider*, Prosecuting Attorney, for the people.

James M. Hunt, for defendant.

Before: TALBOT, P.J., and O'CONNELL and DAVIS, JJ.

DAVIS, J. Defendant was convicted by the trial court of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*). Defendant appeals as of right, arguing that the trial court erred by refusing to suppress evidence obtained in a search of his vehicle conducted without a warrant. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was a student at Traverse City Central High School. On April 24, 2008, the Grand Rapids area Silent Observer[1] anonymous tip hotline received an anonymous tip "regarding a VCSA[2] at Traverse City Central High School." The tipster stated that he had previously been friends with a drug dealer at the school but that the tipster had given up drugs and now wished to report his former friend. The tipster described that friend's trafficking as "the largest threat to the school," but the tipster decided to also provide the names of and details about other "big dealers," one of whom was stated as being defendant. The tipster provided extensive information about his former friend, and less-

[1] <http://www.silentobserver.org> (accessed January 15, 2010).

[2] Presumably, this stands for "violation of the controlled substances act."

detailed information about the other alleged dealers. Defendant was simply described as a male caucasian junior who sells marijuana "from school, his truck and East Bade [sic] Park in Traverse City." The Silent Observer report was forwarded to the Traverse City Police Department.

A few days later, Officer Evan Warsecke, who served as a liaison officer for the school, forwarded the report to Rick VanderMolen, assistant principal at the school. The only further investigation taken by Officer Warsecke was to verify the vehicles registered to the named dealers. However, at some point before the search of defendant's vehicle, a search of the principal suspect (the tipster's former friend) was conducted, and no contraband was found. VanderMolen testified that, other than a vague and undefined "concern" expressed by "a counselor from East Junior High" about "some behavior at the junior high," but "not talking about specifically marijuana," he had no other information about defendant or about defendant's involvement with marijuana. Officer Warsecke likewise testified that he had no information about defendant or about defendant's involvement with drugs other than the anonymous tip.

Nevertheless, more than a week after receiving the anonymous tip, VanderMolen decided to search defendant's vehicle. VanderMolen asked Officer Warsecke and some other school officials to accompany him as he searched defendant's vehicle. Defendant did not consent to the search, although defendant was present during the search. Officer Warsecke stood by while the assistant principal conducted the search. VanderMolen found marijuana in a bag behind a seat, whereupon defendant was arrested. Defendant moved to suppress that evidence as the fruit of an

unconstitutional search. The trial court denied the motion, finding that the anonymous tip alone was sufficient to constitute reasonable suspicion, given the level of detail the tip contained.

Evidence obtained in violation of a suspect's rights under the Fourth Amendment of the United States Constitution is subject to suppression at trial. *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997). See also *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961) (incorporating the Fourth Amendment against the states under the Fourteenth Amendment). In reviewing a trial court's decision following a suppression hearing, this Court reviews the trial court's factual findings for clear error, but reviews the legal conclusions de novo. See *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

The police may search a motor vehicle without a warrant if they have probable cause to believe that evidence of a crime may be found therein. *People v Kazmierczak*, 461 Mich 411, 418-419; 605 NW2d 667 (2000). However, school officials may search a student's person or property on school premises on the lesser standard of reasonable suspicion. See *New Jersey v TLO*, 469 US 325, 341-342; 105 S Ct 733; 83 L Ed 2d 720 (1985). Defendant suggested in the trial court that the presence of a police officer during the search might raise the applicable standard, but because that argument was not raised on appeal, we do not express any opinion thereon. In any event, it is unnecessary for us to do so in light of our conclusions in this matter.[3]

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[3] Where we part with the dissent for purposes of this analysis is the dissent's view, as reflected in footnote 2 of the dissenting opinion, that there is no distinction or difference between possession of marijuana and possession of a bomb or an assault weapon on school property.

Reasonable suspicion requires " 'articulable reasons' " and "a particularized and objective basis for suspecting the particular person . . . of criminal activity." *United States v Cortez*, 449 US 411, 417-418; 101 S Ct 690; 66 L Ed 2d 621 (1981). In "a case involving an *anonymous* tipster," whether reasonable suspicion exists "must be tested under the *totality of the circumstances* with a view to the question whether the tip carries with it *sufficient indicia of reliability* to support a *reasonable suspicion* of criminal activity." *People v Faucett*, 442 Mich 153, 169; 499 NW2d 764 (1993) (emphasis in original), citing *Alabama v White*, 496 US 325; 110 S Ct 2412; 110 L Ed 2d 301 (1990). An anonymous tip *can* provide reasonable suspicion *if* it is considered along with a "totality of the circumstances" that show the tip to be reliable. But alone, without any " 'indicia of reliability' " or " 'means to test the informant's knowledge or credibility,' " an anonymous tip is generally insufficient. *People v Horton*, 283 Mich App 105, 111-113; 767 NW2d 672 (2009), citing and quoting *Florida v J L*, 529 US 266, 271-272, 274; 120 S Ct 1375; 146 L Ed 2d 254 (2000).

Here, the anonymous tip was the only basis for the search. Both the assistant principal who conducted the search and the police officer who attended the search testified that the anonymous tip was the only basis for the search.[4] The prosecution points out that the tip

[4] During VanderMolen's cross-examination at defendant's preliminary examination, the following exchange took place:

> *Q*. Was there anything in particular that happened that day that you picked that day to conduct the search?
>
> *A*. No.
>
> *Q*. So it wasn't based upon any activity or information that you had other than what was in the Silent Observer?

provided considerable detail about one of the alleged dealers, but that particular dealer was searched and found not to have any contraband on his person. The prosecution further argues that the tip is reliable because the tipster showed that he was well-intended and reliable by professing to be motivated by one of the alleged dealers' selling to another friend and an ex-girlfriend, and also because the tipster took care to distinguish between a dealer and that dealer's physically identical-looking brother. However, these are merely assertions regarding the information contained *within* the anonymous tip and therefore are not corroborating circumstances. Furthermore, the anonymous tip contained little information concerning defendant. Although the tip sheet states that defendant was "[s]een" trafficking in marijuana, and specifies three locations, it does not indicate whether the informant had witnessed the trafficking or was relaying information heard secondhand.

Therefore, the anonymous tip was vague concerning defendant and could not be viewed with a "totality of the circumstances" because there were no other circumstances. Indeed, the only other possible circumstance weighed *against* the tip's being reliable. "Some

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A. Yes.

* * *

Q. And you were searching his vehicle solely on the basis of the information which you had from the Silent Observer?

A. Yes.

VanderMolen also stated that he had "no idea" who had called in the anonymous tip or how reliable the information therein was. Officer Warsecke testified that the only information he passed on to VanderMolen about defendant was the contents of the anonymous tip.

tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation" before governmental authorities may act against a suspect. *White*, *supra* at 329 (quotation marks and citation omitted). This is an example of such a tip. The tip alone did not provide a sufficient basis to form reasonable suspicion necessary for the search of defendant's vehicle, and the search was based on nothing more than the tip. The search was therefore unconstitutional, and the trial court should have suppressed the evidence as the fruit of an illegal search. See *Wong Sun v United States*, 371 US 471, 487-488; 83 S Ct 407; 9 L Ed 2d 441 (1963); *Cartwright*, *supra*.

Although it appears that the prosecution would not be able to proceed without the evidence that should have been suppressed, we decline to make that presumption conclusive. We express no view as to the resolution of any other aspect of, or issue in, this case. The trial court's order denying suppression of the evidence seized from defendant's vehicle is reversed, and the matter is remanded for further proceedings as the trial court deems appropriate. We do not retain jurisdiction.

TALBOT, P.J., concurred.

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

I would affirm the decision of the learned trial court. The sole issue in this case is whether the assistant principal at Traverse City Central High School had reasonable suspicion that contraband would be found in defendant's truck. It is a well-accepted principle of law that school officials may search a student's person or property on the school premises pursuant to the lesser standard of "reasonable suspicion." See *New Jersey v TLO*, 469 US 325, 341-343; 105 S Ct 733; 83 L Ed 2d

720 (1985). In *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996), our Supreme Court, citing *United States v Sokolow*, 490 US 1; 109 S Ct 1581; 104 L Ed 2d 1 (1989), noted, "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause."

An anonymous tip can provide reasonable suspicion if it is considered along with a "totality of the circumstances" that shows the tip to be reliable. *People v Faucett*, 442 Mich 153, 169; 499 NW2d 764 (1993). Further, the tip must carry with it sufficient indicia of reliability to support a reasonable suspicion of criminal activity. *Id.* However, a sufficiently detailed tip may provide reasonable suspicion of criminal activity, especially (but not necessarily) when there is independent corroboration of some of the facts. *Id.* at 170-172. However, the *police* may only search a motor vehicle without a warrant if they have probable cause to believe that evidence of a crime may be found therein. *People v Kazmierczak*, 461 Mich 411, 418-419; 605 NW2d 667 (2000). Taken together, this caselaw leads to one obvious conclusion: although probable cause is necessary to permit a *police* search of a motor vehicle, a school official only needs to have "reasonable suspicion" to search a student's motor vehicle when it is located on the school premises.

In this case, Rick VanderMolen, the assistant principal at Traverse City Central High School, had been provided with a detailed anonymous tip from the "Silent Observer" program that implicated defendant in drug trafficking. In this case, the only issue is whether the anonymous tip, considered in light of the totality of the circumstances, provided VanderMolen reasonable suspicion that defendant was trafficking in drugs on

school property and, consequently, justified his search of defendant's vehicle.[1] The trial court found that, on the basis of the totality of the circumstances, the tip provided sufficient indicia of reliability to support VanderMolen's reasonable suspicion of criminal activity. I agree.

The trial court explained why the totality of the circumstances created a reasonable suspicion of criminal activity:

> [W]ith respect to Mr. Perreault, [the report] indicates that he traffics in marijuana. That the anonymous witness said that they had seen him actually sell it and that he sells from school, his truck and in East Bay Park in Traverse City.
>
> Well, the truck—actually, I guess it was an S-10, was the testimony—was parked in the parking lot of the Traverse City Central [High] School. So, I guess, is that enough to create a reasonable suspicion that—that Mr. Perreault may be involved in drug dealing and that there might be evidence in his truck when this anonymous report, which is quite detailed, specifically says he sells from his truck. That would seem to me to create a reasonable suspicion.

The trial court then distinguished the standard applied to school officials from the probable cause requirement for a search warrant, stating:

> Now, if we're talking about validating an affidavit for a search warrant, it might require some corroboration in order to make it sufficient to reach the level appropriate to support a search warrant. . . . [R]easonable suspicion is a lesser standard.

A trial court's factual findings in a ruling on a motion to suppress evidence are reviewed for clear error, and

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[1] Defendant does not challenge on appeal the application of the "reasonable suspicion" standard as the proper standard that must be met to permit a school official to search a student's vehicle located on school grounds.

the trial court's interpretation of the law or application of a constitutional standard is reviewed de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). In this case, I cannot find any violation of the constitutional standard, nor can I conclude that the trial court committed clear error.[2]

The tip named four students who were selling drugs on school property. The tipster said that he was aware that these four students were the "big sellers" at Traverse City Central High School because the tipster had previously been involved in drug activity and one of the "big sellers," a friend of the tipster, had begun selling marijuana to the tipster's friends and ex-girlfriend. The tipster said that he had seen all four "big sellers" selling drugs. The tipster warned that drugs were being sold on school property and gave details of how the drugs were being sold. The tipster indicated that defendant "[s]ells from school, his truck and East

[2] If the anonymous tip in question were a bomb threat or a claim that a weapon was located in the defendant's vehicle, I suspect that school officials, most parents, and the majority in this case would conclude that because of the imminent threat, exigent circumstances, and the threat of harm to all students in the school, the tip alone would be enough to confer "reasonable suspicion" and justify a search of a student's vehicle. I would also agree, but I see the aforementioned hypothetical as presenting a distinction without a difference. In my opinion, the presence of drugs on school property presents a similarly serious risk of harm to students that parents, school officials, and this Court should not accept. More importantly, the standard that a school official would be permitted to apply in order to justify a search, "reasonable suspicion," is the same in both situations. The standard does not change simply because the contraband in question is viewed by some as "less threatening."

On a separate note, some school districts have an official school policy that grants school officials "implied consent" to search a student's property while that student or that student's belongings are located on school property. The lower court record is devoid of any evidence regarding whether Traverse City Area Public Schools has such a contractual relationship with parents or students.

Bade [sic, Bay] Park in Traverse City," and indicated that he had seen defendant sell marijuana.[3] The tipster also noted that the drug trafficking that he was reporting was the largest threat to the school.

Admittedly, the tipster provided more detailed information about one of the other "big sellers," including information that this "big seller" was suspected of selling drugs to a freshman student and kept "a machete in the glove compartment of his blue Ford Explorer." However, the tipster also provided identifying information concerning the other "big sellers," including their names, their grades at school, and where they sold drugs. In particular, the tipster specified that defendant drove a truck and that another "big seller" drove a GMC Yukon. I believe that the tip, considered in its entirety, is sufficiently detailed to provide indicia of

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[3] The Silent Observer screener who took the tipster's call filled out a tip sheet listing information that she had solicited from the tipster. When asking about defendant's involvement in drug activity and receiving the tipster's responses, she recorded the following information:

DRUGS

Regarding: Trafficking **Type:** Marijuana **Witnessed:** Seen

This information indicates that when asked whether he had witnessed the criminal activity, the tipster said that he had seen defendant trafficking in marijuana. If the tipster was reporting this information secondhand, I would reasonably assume that a trained call screener would note that the information was secondhand on the tip sheet, and not assume that recording the word "seen" would imply that this information was secondhand. In addition, I note that when the call screener recorded information about the "big seller" who was a friend of the tipster and about whom the tipster had significant firsthand information, she indicated that the tipster had "seen" him trafficking in marijuana and ecstasy. I believe that this provides an additional indication that the call screener's use of the word "seen" to fill in the category "**Witnessed**" indicates that the tipster had admitted seeing these "big sellers" engage in illegal activity firsthand.

reliability. I do not think that the majority's conclusion that "corroborating circumstances" outside the tip must be present for an anonymous tip to be considered reliable, no matter how detailed and internally consistent the tip itself might be, is necessarily supported by the prevailing caselaw.

Regardless, there was information corroborating this tip, aiding in a determination that a reasonable suspicion existed to search defendant's vehicle. When Officer Evan Warsecke, who served as a police liaison officer for the school, initially received the "Silent Observer" report, he verified that defendant and the seller with the GMC Yukon drove the vehicles described and noted this on the report. He also verified that another "big seller" who was reported as not having a vehicle did not, in fact, have a vehicle registered with the school. VanderMolen also independently knew that defendant drove a truck, as was stated in the report, because defendant had driven a truck recklessly in the parking lot earlier in the school year, and VanderMolen had discussed this behavior with defendant and his mother. Further, defendant's name appeared to be associated with some drug-related problems that were occurring at a local junior high school. Finally, just before VanderMolen began his search of the vehicle, he noted that he could see a plastic bag, later found to contain defendant's marijuana and related drug-trafficking supplies, through the truck window, although he could not determine from outside the truck what was inside that bag.

I believe that this information, taken together, was sufficient to provide VanderMolen a "reasonable suspicion" that defendant was engaged in illegal activity on school grounds and to authorize his search of defendant's truck. Not only was the tip quite detailed and internally

consistent, indicating its trustworthiness,[4] but information in the tip was also corroborated.[5] VanderMolen did not search defendant's truck because he had a "hunch" that contraband might be found therein. Instead, the tip and corroborating information provided VanderMolen with a particularized suspicion that defendant was engaging in criminal activity in his truck on school grounds, and that contraband was present in the truck. Accordingly, the tip carried with it sufficient indicia of reliability to support a reasonable suspicion of criminal activity, and VanderMolen's search did not constitute a violation of defendant's rights.

Defendant also indicates in his brief on appeal that the tipster likely did not report on defendant's wrongdoing because he had a vendetta against defendant. Instead, defendant claims that the tipster primarily wished to turn in his friend, and his revelation that defendant was also involved in drug dealing was "merely an afterthought that the tipster had no intention of revealing until making the call." This description of the tipster's statements regarding defendant as being a "mere afterthought" undermines the notion that the tipster might have wished to falsely accuse defendant of wrongdoing and, serendipitously, provides an additional indication, based on the totality of the circumstances, that the tipster's information concerning defendant was valid and that VanderMolen had a reasonable suspicion to search defendant's vehicle.[6]

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[4] It is well established that inconsistencies in an individual's statement can often indicate that the statement is false. There is no such indication of inconsistencies in this anonymous tip.

[5] VanderMolen also appropriately chose to search defendant's truck, as opposed to defendant's person or locker, because as indicated in the tip, the truck was the locus of the criminal activity and, hence, the source of danger to the school.

[6] It appears, instead, that the tipster provided all the information he could on these other "big sellers" and lacked a motivation to lie when

In some ways, I find this case to be analogous to *People v Goforth*, 222 Mich App 306; 564 NW2d 526 (1997), and the doctrine of *in loco parentis*. In *Goforth*, the defendant claimed that his parents did not have the legal right to allow the police to search his bedroom in his parents' house, where evidence of marijuana trafficking activity was found, because he had "a legitimate expectation of privacy" in his bedroom. *Id.* at 308. This Court concluded that there is no absolute rule precluding parents from validly waiving their child's privilege against an unreasonable search of the child's bedroom in the parents' home, and concluded that the facts of the case indicated that an officer could reasonably believe that the defendant's mother had common authority over the defendant's bedroom and could consent to the search. *Id.* at 315-316. In a separate concurrence, I noted, "excepting the most unusual of situations, a parent always has the right to consent to the search of the bedroom of a child residing with that parent." *Id.* at 317 (O'CONNELL, J., concurring). The parent, not the child, is in charge of the household; the child is not in charge of the parent.

A similar relationship exists with schools. School administrators act *in loco parentis*[7] with students, and "[s]chools . . . are provided a tremendous measure of

doing so. Of course, the presence of marijuana and related trafficking supplies in defendant's truck proves the tipster's statement correct.

[7] *In loco parentis* is Latin for " 'in the place of a parent' " and is defined as "[o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent." Black's Law Dictionary (8th ed). "The [United States] Supreme Court has recognized that during the school day, a teacher or administrator may act *in loco parentis*. See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 115 S.Ct. 2386 (1995)." *Id.* A "person *in loco parentis*" is defined as "[a] person who acts in place of a parent, either temporarily (as a schoolteacher does) or indefinitely (as a stepparent does); a person who has assumed the obligations of a parent without formally adopting the child." *Id.*

authority because of their responsibilities *in loco parentis* . . . ." *Baker v Couchman*, 271 Mich App 174, 203; 721 NW2d 251 (2006) (O'CONNELL, J., concurring in part and dissenting in part), rev'd 477 Mich 1097 (2007) (adopting the partial dissent of O'CONNELL, J.).

Admittedly, the doctrine of *in loco parentis* does not obviate all of a student's Fourth Amendment protections in a public school setting. *TLO*, *supra* at 336-337. Yet the doctrine helps illustrate the tension placed on school administrators, who must balance their limitations as public employees with their responsibilities to protect students from the myriad increasingly dire threats facing young people today.[8] Although it is a delicate balance between preserving order in the school and safeguarding a student's individual rights, this case does not present a close question. Students know that drugs, weapons, and contraband are not permitted on school grounds. Bringing these items onto school property is simply an unacceptable practice in our society and at our schools.[9] School officials have a responsibility to police the school and create a safe environment for all students, and in this case, VanderMolen performed his duty admirably. He had a reasonable suspicion that defendant was undermining the health and safety of the student body by trafficking marijuana on school grounds. VanderMolen, acting within the confines of the law, did what was necessary to protect the students of Traverse City Central High School from a drug dealer. His actions and diligence should be applauded.

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[8] Perhaps it is not coincidental that the traditional *in loco parentis* standard applied in public schools was weakened just as drugs and violence began their ascendancy as major threats within our schools. See *TLO*, *supra*.

[9] Many schools even post signs in their student parking lots to this effect.

WOLF v CITY OF DETROIT

Docket No. 279853. Argued February 5, 2009, at Lansing. Decided January 21, 2010, at 9:00 a.m.

Laurence G. Wolf, doing business as Lawrence Wolf Properties, brought an original action in the Court of Appeals against the city of Detroit, seeking a declaration that the solid waste inspection fee charged by the city to the owners of commercial and industrial properties who do not contract with the city for solid waste removal services constitutes a tax that violates Const 1963, art 9, § 31 of the Headlee Amendment, because it was imposed without a vote of the city's electorate. The city responded, contending that the inspection charge is a valid regulatory fee that has the purpose of making sure that the owners of commercial and industrial properties make arrangements for trash disposal service at a level appropriate to handle the solid waste generated on the properties. Plaintiff moved for summary disposition.

The Court of Appeals *held*:

1. A "tax" is designed to raise revenue, while, in general, a "fee" is exchanged for a service rendered or a benefit conferred and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.

2. The three criteria for a "fee" are that a fee serves a regulatory purpose, is proportionate to the necessary costs of the service, and is voluntary. The three criteria are not to be considered in isolation, but are to be considered in their totality, so that a weakness in one area does not necessarily mandate a finding that the charge at issue is not a fee. Additional considerations when evaluating these three criteria for a fee include: whether the charge constitutes an investment in infrastructure; whether the charge simply defrays the cost of a regulatory activity; whether the charge reflects the actual cost of use, metered with relative precision in accordance with available technology, including some capital investment component; whether the charge corresponds to the benefits conferred; whether the charge applies only to those property owners who will enjoy the full benefits of the new construction or applies to all property owners; whether the ordinance imposing the charge lacks a significant element of regulation; whether the payment of the charge is compulsory only for

those who use the service; whether the users of the service have the ability to choose how much of the service to use or whether to use the service at all; whether the charge raises revenue to replace a portion of a program that was previously funded by a government's general fund; whether the charge may be secured by the imposition of a lien; and whether the charge is billed through a governmental unit's assessor's office and is mailed with property tax statements.

3. The solid waste inspection fee satisfies the first criterion because it serves the regulatory purposes of enabling the city to inspect commercial and industrial properties to make sure that they have made arrangements for trash disposal service, whether it is a private contractor or the city, as well as to ensure that each business has an appropriate level of solid waste collection service. The fee satisfies the regulatory purposes of ensuring the efficient removal of solid waste products and protecting the public by reducing blight and illegal dumping.

4. The manner in which the city implements the inspection process supports the conclusion that the fee serves a regulatory purpose. The continuing reduction of the amount of the fee charged as the city refines the inspection process contradicts the notion that the city imposed the fee solely for the purpose of enhancing the city's revenue stream.

5. The inference that may be drawn from the city's failure to complete each inspection required in the 2007-2008 fiscal year, that the city launched the inspection program before it had worked out the details of the process, does not support a conclusion that the city intended the fee solely to generate revenue.

6. The fact that the fee generates revenue for the city's Department of Public Works does not establish that it is a tax. A regulatory fee can have dual purposes and still maintain its regulatory character. As long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose. The solid waste inspection fee generates revenue in support of an underlying regulatory purpose.

7. The Court of Appeals must presume that the amount of the fee is reasonable, unless the contrary appears on the face of the law itself or is established by proper evidence. The evidence shows that any disproportionality in the fees charged by the city to the services provided resulted from the city's lack of preparedness to implement the inspection process, not an intent by the city to generate a revenue stream outside its taxing power by subterfuge.

8. The evidence establishes that the fee is voluntary and this suggests that the fee is not a disguised tax.

9. The mere facts that the city bills the fee on the property owner's tax bill and may place a lien on the property owner's parcel in the amount of the fee do not transform an otherwise proper fee into a tax.

10. Plaintiff's motion for summary disposition must be denied and summary disposition must be granted in favor of defendant.

Summary disposition granted in favor of defendant.

1. TAXATION — WORDS AND PHRASES — TAXES — FEES.

A "tax" is designed to raise revenue, while a "fee" generally is exchanged for a service rendered or a benefit conferred and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.

2. TAXATION — FEES — PRIMARY CRITERIA.

The three primary criteria to be considered when distinguishing between a fee and a tax is that a fee serves a regulatory purpose rather than a revenue-raising purpose, a fee is proportionate to the necessary costs of the service rendered or benefit conferred in exchange for the fee, and a fee is voluntary; the criteria are to be considered in their totality, not in isolation, so that a weakness in one area does not necessarily mandate a finding that the charge at issue is not a fee.

3. TAXATION — FEES — REGULATORY FEES.

A regulatory fee can have dual purposes and still maintain its regulatory character; as long as the primary purpose of the fee is regulatory in nature, it can also raise money if it is in support of the regulatory purpose.

Kickham Hanley PLLC (by *Gregory D. Hanley* and *Timothy O. McMahon*) for plaintiff.

Krystal A. Crittenton, Corporation Counsel, and *James Noseda* and *Joanne D. Stafford* for the city of Detroit.

Before: WHITBECK, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM. In this original action,[1] plaintiff, Laurence G. Wolf, doing business as Laurence Wolf Properties (Wolf), seeks a declaration that a new solid waste inspection fee charged by the city of Detroit to the owners of certain commercial and industrial properties constitutes a disguised tax. Wolf asserts that if the new solid waste inspection fee is a disguised tax, then it violates § 31[2] of the Michigan Constitution's Headlee Amendment[3] because the city imposed the tax without a vote of its electorate. Applying the criteria that the Michigan Supreme Court established in *Bolt v City of Lansing*,[4] we conclude that the inspection charge is a valid regulatory fee, not a disguised tax.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. THE CREATION AND IMPLEMENTATION OF THE NEW SOLID WASTE INSPECTION FEE

Chapter 22 of the Detroit City Code governs all aspects of the handling of solid waste generated at all residential and commercial property within the city, as well as blight prevention. Its provisions, as stated in § 22-2-1, are intended to provide "a sanitary and satisfactory method of storage, preparation, collection, transport, disposal and placement of municipal solid waste, and for the maintenance of public and private property in a clean, orderly, and sanitary condition to ensure the peace, health, safety, and welfare of the People of the City of Detroit." The code prohibits "any person" other than the employees of the city's Department of Public Works or private waste collectors li-

[1] See MCL 600.308a.

[2] Const 1963, art 9, § 31.

[3] Const 1963, art 9, §§ 25-34.

[4] *Bolt v City of Lansing*, 459 Mich 152, 154, 158-159; 587 NW2d 264 (1998).

censed by the city from removing solid waste from private and commercial properties within the city. Although the code charges the Department of Public Works with the overall responsibility for solid waste collection and disposal within the city, a reorganization plan that the Detroit City Council approved in 2002 reassigns the inspectors responsible for enforcing the provisions of Chapter 22 of the Detroit City Code from the Department of Public Works to the city's Department of Environmental Affairs. Thus, the Department of Public Works is to verify which property owners receive solid waste collection services from the city. But the Department of Environmental Affairs carries out the inspections.

Before the June 30, 2006 enactment of the ordinance at issue,[5] the city collected a three-mill tax levied on commercial businesses and apartment buildings containing more than five units to finance a portion of its solid waste collection, disposal, and inspection operations. This millage generated $8 million in revenue. The city discontinued its reliance on the three-mill tax with the 2007-2008 fiscal year budget. It did so, according to the city, because it "could not continue to provide free residential trash services paid for solely by taxes and by an even greater amount of general fund monies, and fully fund other essential services . . . ." The city replaced the revenues generated by the three-mill tax with revenues from the commercial solid waste collection and disposal funds generated by a $300 annual fee for the Department of Public Works' residential trash collection service for each residence, and by the new solid waste inspection fee that is at issue in this case.

To implement the switch from the millage-generated revenue to the fee-generated revenue, the

[5] Detroit City Code, § 22-2-56.

Detroit City Council passed Ordinance 18-06 on June 30, 2006. This ordinance amended various ordinances within Chapter 22 of the Detroit City Code. Specifically, § 22-2-56 of the Detroit City Code authorized the new solid waste inspection fee and provided, in pertinent part:

> (c) From time to time, the Director of the Department of Public Works with the approval of City Council, may develop a schedule of fees for services including, but not limited to, inspections to ensure compliance with this section and for other services provided, exclusive of the rates charged for regular collection of commercial solid waste.

The purpose of this fee was to "ensure proper solid waste removal services exist."

At the time of the revenue source switch, the city estimated that the new solid waste inspection fee, in conjunction with the updated commercial waste collection and disposal charges, would generate $12.5 million in revenue for the city. With the revenue generated from the $300 annual residential trash collection fee, the new solid waste inspection fee, and the commercial solid waste charges, the city projected that it would collect approximately $74 million. This would, the city projected, save the city's general fund approximately $47 million.

The Detroit City Counsel later amended § 22-2-56(c), with the passage of Ordinance 23-07 to add the phrase "and industrial site solid waste" to the end of subsection (c). The purpose of these amendments was to authorize the city to impose an inspection fee for the inspection of commercial and industrial properties "to make sure they have made arrangements for trash disposal service, whether it is a private contractor or the City." Another purpose was to ensure that

"every business has an appropriate level of [solid waste collection] service" based on the amount of solid waste generated onsite.

On May 10, 2007, Pamela C. Scales, then budget director for the city, submitted a proposed schedule to the Detroit City Council of commercial solid waste inspections fees to be imposed pursuant to § 22-2-56(c). Scales proposed that the city charge an annual inspection fee of $250 to commercial properties of 10,000 or less square feet, $500 to commercial properties between 10,001 and 49,999 square feet, and $1,000 to commercial properties 50,000 or more square feet. The rates were varied to reflect the "additional effort involved in inspecting businesses of various size and type." According to Scales,

> [t]he schedule . . . had been developed th[r]ough meetings of a committee comprised of myself and personnel from the DPW, the Budget Department, the Finance Department's Treasury and Assessor divisions, and the Law Department. During that process, the City had not had the full opportunity to determine the all [sic] activity that would be required by the new and pro-active inspection program that the City sought to implement as of July 1, 2007, nor the costs of doing so.

Accordingly, these fee amounts reflected mere estimates of the costs of performing the inspections. The Detroit City Council approved Scales' proposed fee schedule on May 23, 2007.

Following the City Council's approval of the proposed fee schedule, and upon advice of legal counsel, Scales undertook a cost analysis in an effort to forecast the costs to be incurred in association with the inspections. She prepared a series of costs analyses between May 25, 2007, and June 26, 2007. Those analyses purportedly reflect the direct and indirect personnel and overhead

costs associated with the verification and inspection process. They contain a projected cost of $268.48 for each commercial property of 10,000 square feet or less, a projected cost of $321.72 for each commercial property of 10,001 to 49,999 square feet, and a projected cost of $476.30 for each commercial property of 50,000 or more square feet. In July 2007, the Detroit City Council approved the commercial solid waste inspection fee schedule, retaining the annual inspection $250 fee for properties of 10,000 or less square feet, but reducing the $500 fee for properties of between 10,001 and 49,999 square feet to $325, and the $1,000 fee for properties of 50,000 or more square feet to $475. According to Scales, she provided this adjusted fee schedule to the city treasurer and it was used for billing the fees on the summer tax statement.

Initially, and before the inspection process was implemented, there was considerable confusion regarding whether the inspection fee would be charged only to commercial property owners who do not contract with the Department of Public Works for waste removal service or whether the fee would be charged to all commercial properties regardless of whether the property owners contracted with Department of Public Works or a licensed private waste collector for solid waste removal services. On the one hand, Scales submitted a report to the Detroit City Council indicating that the inspection fee "will allow DPW to verify proof of service by requiring paid annual contracts with private collectors and ensure that the level of service is sufficient for the business." Moreover, the Detroit City Council adopted a resolution that approved the inspection fee schedule and which begins: "This Fee is [sic] Commercial and Residential Properties that opt out of the City of Detroit Department of Public Works Solid

Waste Pick up and Disposal Service. Proof of service with a licensed private solid waste collector is required."

On the other hand, a letter from the director of the city's Department of Public Works, dated July 21, 2007, and employing the salutation "Dear Property Owner," contradicted the city's representation that the fee related only to those property owners who do not have a contract with the city for waste removal services. The letter provides, in part:

> Starting this fiscal year (2007-2008), and continuing on an annual basis, the city will require property owners to provide proof of service with either the Department of Public Works or an approved private contractor for solid waste removal.
>
> If you already utilize the Department of Public Works for your solid waste services, this inspection fee is included in the contract amount. If you utilize a private contractor, you will be receiving this annual billing for the first time. Copies of non-DPW garbage service contracts should be presented to the Department of Public Works administrative office within 30 days of this billing.

Further, then-Detroit Mayor Kwame Kilpatrick's remarks to the Detroit City Council during his presentation of the proposed 2007-2008 city budget also cast confusion on the question whether the new solid waste inspection fee applied to all commercial properties. Those remarks are as follows:

> By ordinance, DPW is required to verify that every business that does not use DPW has an appropriate level of solid waste service provided by a licensed contractor. This budget also institutes an inspection fee for all businesses to make sure they have made arrangements for trash disposal service, whether it is a private contractor or the City.

> The fee is minimal . . . . It will pay for the cost of conducting inspections to make sure every business has an appropriate level of service. Every business operating in this city has a responsibility to take care of its own trash. This inspection program is designed to make sure that happens.

Once the inspection process was implemented, the city charged an inspection fee to *only* the owners of commercial and industrial property that contracted with licensed private solid waste collectors for solid waste collection and disposal services. The city charged the owners of commercial and industrial property under contract with the Department of Public Works for solid waste collection and disposal service only the service fees identified on the Department of Public Works' published solid waste collection rates. The city charged no inspection fee to commercial or industrial customers of the Department of Public Works.

According to Scales, the city charged a commercial solid waste inspection fee to 15,731 owners of commercial or industrial property within the city. "Of that total number of non-Department of Public Works accounts, 12,451 properties were billed $250.00 (79.15%); 2,517 were billed $325.00 (16%), and 763 were billed $475.00 (4.85%). The total amount billed for the solid waste compliance inspections was $4,293,200.00." Scales indicated that "[a]ll revenue collected by the fee charged for the inspection of those properties which do not elect to use DPW waste collection service is allocated in the City Budget to the Solid Waste Section" of the Department of Public Works. The following chart illustrates the various actions that the city took with respect to the new solid waste inspection fee.

Fees/ Costs	Pre-6/06	6/30/06	5/10/07	5/23/07	5/07-6/07	7/07	2007-2009	09/10 FY
	City collects 3-mill tax	City authorizes new Solid Waste Inspection Fee	Scales proposes new fee schedule	City approves proposed fee schedule	Scales projects costs.	City approves new fee schedule.	City implements new Solid Waste Inspection Fee	City intends to implement $200 flat fee
10k or less			$250	$250	$268.48	$250	$250	
10,001—49,999			$500	$500	$321.72	$325	$325	
50k or more			$1,000	$1,000	$476.30	$475	$475	

B. WOLF

Wolf owns three parcels of commercial real property located within the city of Detroit and, allegedly, the city has charged him a solid waste inspection fee for each parcel, pursuant to § 22-2-56 of the Detroit City Code. On July 24, 2007, Wolf received a property tax and fees billing from the city for his property located at 5700 Woodward Avenue. The total billed includes a $475 charge for the solid waste inspection fee, despite the fact that Wolf contracts with the Department of Public Works for solid waste collection and disposal service for that property. That same day, Wolf received a similar billing for his property located at 120 Glynn Ct. That billing reflects only a "Solid

Waste Fee" of $3,000. Two days later, on July 26, 2007, Wolf received a property tax and fees billing from the city for his property located at 100 Glynn Ct. That billing likewise reflects only a "Solid Waste Fee" of $3,000. The city asserts that the latter two billings did *not* bill for the inspection fee. According to Wolf, however, the latter two billings *did* include the inspection fee. He paid all the inspection fees under protest. The latter two billings appear to be consistent with the fee charged by the Department of Public Works for solid waste collection and disposal services associated only with the use of four 400-gallon containers.

On August 9, 2007, Wolf commenced this original action in this Court with the filing of a complaint seeking declaratory relief, a damages award, and other relief. Wolf sought a declaration that the inspection fee constitutes a disguised tax and, therefore, the fee's imposition violates § 31 of the Headlee Amendment because the city imposed the tax without a vote of the city's electorate. Wolf also sought class certification.

By letter dated June 13, 2008, the city notified Wolf that an audit revealed that the city had erroneously charged Wolf an inspection fee for his property located at 5700 Woodward Avenue. The city stated that the "property has a Commercial Refuse Account with the City of Detroit . . . , and has been receiving weekly refuse collection services utilizing nine (9) — 400 gallon containers." The city further notified Wolf that it should have charged Wolf a solid waste collection fee of $6,500. The city then indicated that the city had credited the $475 fee paid against the solid waste collection fee owed and directed Wolf to "promptly remit $6025.00 in payment of the balance due for refuse collection for fiscal year 2007."

II. FEE OR TAX

A. STANDARD OF REVIEW

Wolf commenced this action, in part, for a declaratory judgment. "The purpose of a declaratory judgment is to enable the parties to obtain adjudication of rights before an actual injury occurs . . . ."[6] The plaintiff in a declaratory judgment action bears "the burden of establishing the existence of an actual controversy, as well as the burden of showing that . . . it has actually been injured or that the threat of imminent injury exists."[7]

Following various pleadings and motions, Wolf moved for summary disposition under MCR 2.116(C)(10), arguing that there is no genuine issue of material fact that the new solid waste inspection fee is an improperly imposed tax.

Under MCR 2.116(C)(10), a party may move for summary disposition on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[8] We must consider all the documentary evidence in the light most favorable to the nonmoving party.[9]

B. THE PARTIES' POSITIONS

Wolf claims that the new solid waste inspection fee has all relevant indicia of a tax. He asserts that: (1) the

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[6] *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 294; 732 NW2d 160 (2007).

[7] 22A Am Jur 2d, Declaratory Judgments, § 239, p 788.

[8] MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[9] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

fee has no relation to any service or benefit actually received by the taxpayer; (2) the amount of the fee has no relation to the cost incurred by the city in performing any service; (3) the fee is nothing more than a mechanism designed to generate revenue that the city is not obtaining from its waste collection charges, not to fund commercial solid waste inspection services; (4) the payor of the fee benefits in no manner distinct from any other taxpayer; (5) the fee is not voluntary, but mandatory; (6) the fee in not paid because of a use of service but because of a status as a property owner; and (7) failure to pay the fee can result in the city placing a lien on the subject property.

The city argues that the new solid waste inspection fee does not constitute a disguised tax. According to the city, the Detroit City Council authorized the fee for a regulatory purpose; that is, the ensuring of efficient removal of solid waste from commercial generators of waste and to protect the public health. Therefore, the city maintains, the inspection for which it charges the fee is a component of a comprehensive regulatory program that the city has implemented to ensure the safe and efficient collection and removal of solid waste from generation sites to licensed disposal sites.

The city points out that, although the new solid waste inspection fee will generate revenue, it will use the funds that the fee generates to defray the costs of executing and maintaining a regulatory program. Therefore, the city asserts, one must presume that the fee is proportionate to those costs. The city states that the fee will not generate revenue for the general fund and does not replace a tax. The city admits that the fee provides some benefit to the general public: protection of the public health. But, the city argues, the fee also benefits the fee payer by permitting the property owner

to use private refuse collection companies and by guaranteeing that the property owner will comply with the city's solid waste collection and disposal requirements. Thereby, the city asserts, the fee payer will avoid a blight citation, legal proceedings, and a civil fine. The city also asserts that the fee payer will benefit from an increase in the value of its property because its property will not become blighted.

The city also notes that the new solid waste inspection fee is voluntary because a property owner may escape the fee by contracting with the city for solid waste disposal services. As the city points out, although the prebilling correspondence that Wolf received from the city was confusing, in fact the city did not charge him an inspection fee for the two properties that the Department of Public Works services.

C. THE HEADLEE AMENDMENT

Const 1963, art 9, § 31 provides, in relevant part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above the rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

The levying of a tax or an increase in the tax rate higher than that authorized by law at the time of the Headlee Amendment's adoption triggers application of this section of the Headlee Amendment.[10] The amendment invalidates either action unless the local unit of government secures voter approval.[11] However, a unit of

[10] *Bolt*, 459 Mich at 154, 158-159; *Saginaw Co v Buena Vista Sch Dist*, 196 Mich App 363, 366; 493 NW2d 437 (1992).

[11] Const 1963, art 9, § 31.

local government may institute a fee without violating the Headlee Amendment. Rather than being an exercise of the municipality's power to tax, the imposition of a fee constitutes an exercise of the municipality's police power to regulate public health, safety, and welfare.[12]

D. THE *BOLT* INTERPRETATION

The Michigan Supreme Court addressed the distinction between a fee and a tax in *Bolt v City of Lansing*. The Court explained the distinction as follows: "Generally, a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.' A 'tax,' on the other hand, is designed to raise revenue."[13] The Court further identified the three criteria for a fee as follows: (1) a fee serves a regulatory purpose, (2) a fee is proportionate to the necessary costs of that service, and (3) a fee is voluntary.[14] "[T]hese criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee."[15]

Moreover, when evaluating these criteria, a court should consider whether the charge constitutes an investment in infrastructure;[16] whether the charge simply defrays the cost of a regulatory activity; whether the charge reflects the actual cost of use, metered with relative precision in accordance with available technol-

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[12] *Bolt*, 459 Mich at 159; *Merrelli v St Clair Shores*, 355 Mich 575, 583; 96 NW2d 144 (1959).

[13] *Bolt*, 459 Mich at 161 (citations omitted).

[14] *Id.* at 161-162.

[15] *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999); see also *Bolt*, 459 Mich at 167 n 16.

[16] *Bolt*, 459 Mich at 163.

ogy, including some capital investment component;[17] whether the charge corresponds to the benefits conferred; whether the charge applies only to those property owners who will enjoy the full benefits of the new construction or applies to all property owners; whether the ordinance imposing the charge lacks a significant element of regulation;[18] whether the payment of the charge is compulsory only for those who use the service; whether the users of the service have the ability to choose how much of the service to use; whether the users of the service have the ability to decide whether to use the service at all; whether the charge raises revenue to replace a portion of a program that was previously funded by a government's general fund;[19] whether the charge may be secured by the imposition of a lien; and whether the charge is billed through a governmental unit's assessor's office and is mailed with property tax statements.[20]

E. APPLYING THE *BOLT* STANDARDS

(1) REGULATORY VERSUS REVENUE-RAISING PURPOSE

The new solid waste inspection fee authorized by § 22-2-56 of the city's code satisfies the first fee criterion because it serves a regulatory purpose. The provisions of Chapter 22 of the Detroit City Code are intended to establish "a sanitary and satisfactory method of storage, preparation, collection, transport, disposal and placement of municipal solid waste, and for the maintenance of public and private property in a clean, orderly, and sanitary condition to ensure the

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[17] *Id.* at 165.

[18] *Id.* at 167.

[19] *Id.* at 168.

[20] *Id.* at 169.

peace, health, safety, and welfare of the People of the City of Detroit." The purpose of the code amendment at issue is to allow the city to impose an inspection fee to enable it to inspect commercial and industrial properties "to make sure they have made arrangements for trash disposal service, whether it is a private contractor or the City," as well as to ensure that "every business has an appropriate level of [solid waste collection] service." The imposition of the fee allows for inspections that further both purposes expressed in Chapter 22, and, in so doing, bolsters the contention that the fee serves and furthers a regulatory purpose; that is, to ensure the efficient removal of solid waste products and to protect the public health by reducing blight and illegal dumping.[21]

Further, the manner in which the city implements the inspection process supports the conclusion that the fee serves a regulatory purpose. The city detailed this process in its answer to Wolf's interrogatory number 2 as follows:

> The inspection at issue is made for determine [sic] compliance with Chapter 22 of the Detroit City Code. The inspection involves two components. The first component is verification by personnel of the Department of Public Works (DPW) that a property owner has a contract for service with a licensed private solid waste collector. The second component is an inspection of the subject premises by an Environmental Control Inspector (ECI) with the Department of Environmental Affairs (DEA). Among the activity encompassed by an inspection, as provided by City Code Chapter 22, the inspector may request the owner to provide documented proof of private solid waste service; determine whether the level of service being provided by

[21] *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005); *Peninsula Sanitation, Inc v Manistique*, 208 Mich App 34, 40-41; 526 NW2d 607 (1994).

> the private waste collector is sufficient, determine whether approved solid waste containers are present, identified and labeled, determine whether the solid waste containers are adequate in number, type, and size, determine whether solid waste containers are lawfully located; determine whether portable containers are located in loading and unloading areas, parking lots, construction and demolition sites, and significant pedestrian areas as may be required; determine whether solid waste is properly stored and separated; and determine whether there are no defective or unapproved containers. The inspector may issue one or more blight violations notices under the Solid Waste and Illegal Dumping provisions of the City Code.

We note that the city reduced the $500 fee for properties of between 10,001 and 49,999 square feet to $325, and the $1,000 fee for properties of 50,000 or more square feet to $475 after Scales performed her cost analysis. We further note that the city intends to reduce the inspection fee to $200 for each parcel, regardless of the size of the parcel to be inspected, beginning in fiscal year 2009-2010. These actions support the conclusion that the fees further a regulatory purpose, as opposed to merely a revenue generating purpose. The continuing reduction of the fee charged as the city refines the inspection process contradicts the notion that the city imposed the fee *solely* for the purpose of enhancing the city's revenue stream.

Wolf asserts that "[t]he City's failure to complete the inspections [for the 2007-2008 fiscal year] is further support for [his] contention that the City never intended to conduct all of the inspections and that the Inspection Fees were never intended to cover the actual costs of such inspection but rather were borne of a desire to assist the City in reducing its general overall deficit." Wolf correctly observes that the evidence generated clearly established that the city failed to inspect all the properties it was required to inspect during fiscal

year 2007-2008. The city failed to inspect either 2,113 or 2,361 tax-exempt properties that it had charged an inspection fee for the 2007-2008 fiscal year. Further, a review of the inspection reports that the inspectors generated during fiscal year 2007-2008, and that the city provided to Wolf for inspection, reveals that the Department of Environmental Affairs has no inspection reports for 2,824 taxable properties. The city concedes that it failed to inspect at least 2,113 tax-exempt properties that it assessed an inspection fee for fiscal year 2007-2008.

Thus, there is no question that the city failed to inspect all the properties that the ordinance required it to inspect during fiscal year 2007-2008. Wolf incorrectly infers that the city never intended to inspect all the properties that it charged a fee. From this inference, Wolf argues that the city imposed the fee solely to garner revenue. But the evidence does not support Wolf's inferences. The fact that the Department of Environmental Affairs initially believed that it would be inspecting between 500 and 5,000 properties stemmed from the lack of an accurate understanding by the Department of Environmental Affairs and the city of the number of inspections that the Department of Environmental Affairs would have to perform on an annual basis. It also reflects institutional lethargy in the accurate identification of properties requiring inspection and the provision of this information to the Department of Environmental Affairs.

It is certainly true that the Department of Environmental Affairs failed to inspect each property that the city charged an inspection fee for the 2007-2008 fiscal year. But this is largely attributable to the fact that the Department of Public Works first supplied the Department of Environmental Affairs with the Excel spread-

sheet listing the 15,572 taxable properties in January 2008, more than halfway through the 2007-2008 fiscal year. Further, the Department of Public Works did not provide the Department of Environmental Affairs with a list identifying the tax-exempt properties to be inspected for the 2007-2008 fiscal year until April, 2008. And the Department of Environmental Affairs apparently lacked sufficient time and resources to complete the overwhelming majority of inspections in the $5\frac{1}{2}$ months that remained in the 2007-2008 fiscal year. Moreover, the Department of Environmental Affairs' record keeping during this period was exceedingly lax.

Finally, the evidence generated during supplemental discovery suggests that the city is attempting to eliminate the chaos associated with the initial implementation of the inspection process and to install a process by which it actually inspects each property subject to inspection. Indeed, Willa Williams, the general manager of the Department of Environmental Affairs, indicated that she is attempting to ensure that inspections the city conducts are performed in a regular, continuous, and systematic manner during the entire fiscal year. To this end, Williams has revamped the inspection process for the 2008-2009 fiscal year. According to Williams:

> [f]or 2008/2009, each ECI [Environmental Control Inspector] is given a daily "route sheet" listing 25 properties to be inspected, along with 25 corresponding inspection checklists. Inspectors are also provided with copies of a document entitled Frequently Asked Questions ("FAQ") . . . . Inspectors are required to provide a copy of the FAQ to those with whom they make contact at an inspection site. If no personal contact is possible, a copy of the FAQ is left at the premises. At the end of each day, inspectors return their completed checklists and corresponding route sheet to a Principal Environmental Control Inspector who counts and proofreads the checklists. The completed route sheets are signed and dated by the ECI

> and the Principal. The route sheet and corresponding checklists are given to a clerical who checks the count and enters data from the completed checklists into an electronic database. . . . After entering inspection data in the electronic database, the clerical files the route sheet, checklist, and related communications to and from the property owners. The filed documents are maintained in order by parcel number.

Williams further indicated that the Department of Environmental Affairs no longer relies on the Excel spreadsheets that the Department of Public Works supplies. Instead, the Department of Environmental Affairs created its own "Access database" to track inspection activity. According to Williams, the Access database

> allows for reports to be generated from the data recorded. DEA uses the Access database to generate a report entitled "Reconciliation Sheet." That report shows how many inspections have been completed as of any given day for each of the 22 wards, the number still to be inspected, the number of contacts received by DEA, and the percentage of inspections left to complete. DEA uses the Reconciliation Sheet to monitor the progress of inspections and to assign staff, as may be necessary to ensure that the DEA is on track to compete all 2008/2009 inspections by June 30, 2009.

A reconciliation sheet generated on June 12, 2009, indicates that, as of that date, the Department of Environmental Affairs had completed 98 percent of the inspections for fiscal year 2008-2009.[22]

The switch to the Access database also made it possible for the city to equip some of the inspectors with "a portable computer known as a Toughbook." As Williams explained:

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[22] In her June 15, 2009 affidavit, Williams stated that, on the basis of its performance of inspections during the 2008-2009 fiscal year, she anticipated that the Department of Environmental Affairs would complete all inspections for fiscal year 2008-2009 before June 30, 2009.

> The Toughbook contain[s] a computerized inspection checklist from the Access database into which inspection data is entered by the ECI. The Toughbook data entry replaces use of the printed checklist. When a Toughbook is used, the ECI's [sic] still uses a printed route sheet which is completed and reviewed by a Principal at the end of each day. The daily inspection information in the Toughbook is uploaded to the DEA's computer system which is then incorporated by a DEA computer specialist into the Access database.

On this record, the only inference we can reasonably draw from the city's failure to complete each and every inspection required in the 2007-2008 fiscal year is that it launched the inspection program before it had worked out the details of the process. Such an inference does not, however, support a conclusion that the city intended the new solid waste inspection fee solely to generate revenue.

Wolf concentrates on the fact that the new solid waste inspection fee generates revenue for the Department of Public Works. But the fact that the fee generates such revenue does not conclusively establish that it is a tax. "[A] regulatory fee can have dual purposes and still maintain its regulatory characterization. As long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose . . . ."[23]

Here, the new solid waste inspection fee generates revenue in support of an underlying regulatory purpose. The fact that the inspections that the Department of Environmental Affairs performs generate funds for the operations of the Department of Public Works does not establish, as a matter of law, an intent by the city to raise revenue under the guise of implementing a police power regulation. Chapter 22 of the Detroit City Code charges

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[23] *Westlake Transp, Inc v Pub Serv Comm*, 255 Mich App 589, 613; 662 NW2d 784 (2003).

the Department of Public Works with the overall responsibility for solid waste collection and disposal within the city. The inspections ensure commercial and industrial properties within the city are under contracts for trash disposal service, either with a private contractor or the city. And the inspections ensure that the service the property owner contracts for is adequate to handle the amount of solid waste that the property generates. The fees these inspections generate allow the city to "administer" Chapter 22 so as to reduce illegal dumping and ensure compliance with Chapter 22. The purposes and consequences of the Department of Environmental Affairs' inspections are related to the solid waste collection and disposal goals that the Department of Public Works addresses. Consequently, the city's use of the fees to further solid waste collection and disposal does not demonstrate, as a matter of law, an intent on the part of the city to raise revenue under the guise of a police power regulation.[24]

(2) PROPORTIONALITY OF THE FEE TO THE SERVICE PROVIDED

With regard to the second criterion, "[f]ees charged by a municipality must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged."[25] This Court must presume that the amount of the fee is reasonable, "unless the contrary appears on the face of the law itself or is established by proper evidence . . . ."[26]

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[24] *Saginaw Co v John Sexton Corp of Mich*, 232 Mich App 202, 212-213; 591 NW2d 52 (1998).

[25] *Kircher v City of Ypsilanti*, 269 Mich App 224, 231-232; 712 NW2d 738 (2005).

[26] *Wheeler*, 265 Mich App at 665-666, quoting *Graham*, 236 Mich App at 154-155, quoting *Vernor v Secretary of State*, 179 Mich 157, 168; 146 NW 338 (1914) (quotation marks omitted).

The Detroit City Council initially adopted a fee schedule of $250 for commercial properties 10,000 or less square feet, $500 for commercial properties between 10,001 and 49,999 square feet, and $1,000 for commercial properties 50,000 or more square feet. Scales developed this fee schedule on the basis of estimates of the costs of performing the inspections. The city never implemented this fee schedule. Rather, the Detroit City Treasurer bills each commercial and industrial property an inspection fee from the revised fee schedule that it generated in response to Scales' May/June 2007 costs analysis. Scales' cost analysis, which purports to reflect the direct and indirect personnel and overhead costs associated with the verification and inspection process, revealed, as shown above, a projected cost of $268.48 for each inspection of commercial property of 10,000 square feet or less, a projected cost of $321.72 for each inspection of commercial property of 10,001 to 49,999 square feet, and a projected cost of $476.30 for each inspection of commercial property of 50,000 or more square feet. According to Scales, on the basis of her cost analysis, the city retained the $250 annual inspection fee for properties of 10,000 or less square feet, but reduced the $500 fee for properties of between 10,001 and 49,999 square feet to $325, and the $1,000 fee for properties of 50,000 or more square feet to $475. According to Scales, these fee amounts constitute "reimbursement for our estimated cost of performing the inspections citywide."

Scales admitted that she based her cost analysis on estimates that the city generated before it actually implemented the inspection process. She stated that a new cost analysis would have to be performed once the city had finalized the inspection process. However, beginning with the 2009-2010 fiscal year, the city intends to reduce the inspection fee to $200 for each

parcel, regardless of the size of the parcel to be inspected. The fact that the city intends to reduce the fees charged to a single flat fee is a strong indicator that the fees actually charged were disproportionate.

Nevertheless, affidavits and deposition testimony that both Scales and Mauricio Kohn[27] provided reflect their good-faith attempts, and hence the city's good-faith attempts, to determine a reasonable fee on the basis of the information then existing and available to them. The evidence also suggests that the source of any disproportionality in the fees that the city actually charged is not an intent on the part of the city to generate a revenue stream outside its taxing power by subterfuge. Rather, the evidence suggests that the city's lack of preparedness to implement the solid waste disposal inspection process and its resulting inept launching of the inspection process caused any such disproportionality.

(3) VOLUNTARY CRITERION

With regard to the third criterion—whether the fee contains any element of volition—the parties' documentation establishes that the fee is voluntary. The fee applies only to those properties for which the owners do not contract with the city's Department of Public Works for solid waste removal services. Consequently, the property owner may choose to avoid paying the new

[27] Mauricio Kohn is an expert hired by the city to evaluate the reasonableness of Scales' cost analysis in an effort to forecast the costs to be incurred by the city in the performance of the inspections. We mention his involvement only to further demonstrate that the city engaged him in a good-faith attempt to determine "what would be a reasonable amount for the City of Detroit . . . to charge as a fee to conduct inspections of property owners that do not use the City's Solid Waste Collection Services . . . , so as to assure that the fee is reasonably proportionate to cover the direct and indirect costs of providing these services."

solid waste inspection fee by simply contracting with the Department of Public Works for solid waste collection and disposal services. The voluntary aspect of the fee suggests that the fee is not a disguised tax.

(4) ADDITIONAL FACTORS

The fact that the city bills the inspection fee on the property owner's tax bill and may place a lien on the property owner's parcel in the amount of the fee does not transform an otherwise proper fee into a tax.[28]

III. CONCLUSION

The first and third *Bolt* criteria support a conclusion that the new solid waste inspection fee is a fee, not a hidden tax. The fee serves a recognized regulatory purpose. The property owner determines whether that owner's property is subject to the fee by the owner's choice on how to dispose of the solid waste that the owner's use of that property generates. Further, the good-faith attempts on the city's part to determine a reasonable fee on the basis of the information then existing and available to it support the conclusion that the new solid waste inspection fee is a valid fee and not a disguised tax.

In sum, we conclude that the new solid waste inspection fee constitutes a poorly launched, but nonetheless permissible, regulatory fee. Therefore, it is not a tax that implicates the Headlee Amendment.[29] Accordingly, we deny Wolf's motion for summary disposition and enter summary disposition in favor of the city.[30] Because our resolution on this issue is dispositive, Wolf's motion for class certification is moot.

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[28] *Bolt*, 459 Mich at 168.

[29] Const 1963, art 9, § 31.

[30] MCR 2.116(I)(2).

WEISHUHN v CATHOLIC DIOCESE OF LANSING

Docket No. 287174. Submitted December 9, 2009, at Detroit. Decided January 26, 2010, at 9:00 a.m.

Madeline Weishuhn brought an action in the Genesee Circuit Court, Archie L. Hayman, J., against the Catholic Diocese of Lansing and St. Mary's Catholic Church, alleging violations of the Civil Rights Act (CRA), MCL 37.2101 *et seq*., and the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., following the defendants' decision not to renew plaintiff's contract to teach mathematics and religion classes at St. Mary's Elementary School in Mount Morris. The trial court granted defendants' motions for summary disposition of the WPA claim and the CRA claim. Defendants appealed by leave granted with regard to the CRA claim. The Court of Appeals, ZAHRA, P.J., and WHITBECK and BECKERING, JJ., held that the ministerial exception to the application of employment-discrimination and civil rights statutes to religious institutions and their ministerial employees exists in Michigan. The Court of Appeals vacated the order denying summary disposition of the CRA claim and remanded the case to the trial court for an analysis, pursuant to a nonexhaustive list of factors, whether plaintiff was a ministerial employee and conclusions in that regard. 279 Mich App 150 (2008). On remand, the trial court determined that the ministerial exception applied to plaintiff and dismissed the CRA claim. Plaintiff appealed the dismissal of both her WPA claim and her CRA claim.

The Court of Appeals *held*:

1. The trial court did not err by determining that plaintiff's duties were primarily religious in nature. Teaching "secular" classes is not necessarily purely secular in the context of religious schools, particularly in this case where plaintiff stated that she incorporated her religious teachings into her mathematics lessons.

2. All aspects of plaintiff's work had religious significance, including her teaching of religion classes and involvement in planning masses and preparing students for confirmation and reconciliation services.

3. Plaintiff's role in educating and indoctrinating the children as a teacher of religion was important to and furthered the purposes of the church.

4. Although plaintiff did not assume a liturgical role within the entire congregation, she was intimately involved in liturgical planning of worship services, as well as providing confirmation and reconciliation services for students. The trial court did not err by determining that plaintiff was a ministerial employee and that defendants were entitled to summary disposition of the CRA claim under MCR 2.116(C)(4).

5. The WPA claim is also subject to the ministerial exception. The ministerial exception operates to bar any claim the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions. The exception may be applied to WPA claims that involve a religious institution and a ministerial employee.

6. The ministerial exception does not apply to all employment decisions by religious institutions. It applies only to claims involving a religious institution's choice as to who will perform spiritual functions.

7. Termination of the employment of a ministerial employee by a religious institution is an absolutely protected action under the First Amendment, regardless of the reason for doing so. The trial court did not err by dismissing both the CRA claim and the WPA claim.

Affirmed.

1. CONSTITUTIONAL LAW — CIVIL RIGHTS — MINISTERIAL EXCEPTION — WHISTLEBLOWERS' PROTECTION ACT.

The "ministerial" exception is a nonstatutory, constitutionally compelled exception to the application of employment-discrimination and civil rights statutes to religious institutions and their ministerial employees; the exception generally bars inquiry into a religious institution's underlying motivation for employment decisions regarding ministerial employees; the exception applies to claims under the Civil Rights Act and the Whistleblowers' Protection Act and operates to bar any claim the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions; the appropriate analysis is the religiously affiliated nature of the institution and the employee's role there, not the particular issues that spring from a termination of employment and the resulting claims (MCL 15.361 *et seq*., 37.2101 *et seq*.).

2. CONSTITUTIONAL LAW — CIVIL RIGHTS — EMPLOYMENT DISCRIMINATION — MINISTERIAL EXCEPTION — SPIRITUAL FUNCTIONS.

The ministerial exception to the application of employment-discrimination and civil rights statutes to religious institutions

> and their ministerial employees does not apply to all employment decisions by religious institutions, nor does it apply to all claims by ministers; it applies only to claims that involve a religious institution's choice as to who will perform spiritual functions; termination of the employment of a ministerial employee by a religious institution is an action absolutely protected under the First Amendment, regardless of the reason for doing so.

Law Office of Julie A. Gafkay, PLC (by *Julie A. Gafkay*), and *Joliat, Tosto, McCormick & Bade, PLC* (by *Michael T. Joliat*), for plaintiff.

Foster, Swift, Collins & Smith, P.C. (by *Thomas R. Meagher* and *Liza C. Moore*), for defendants.

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

SHAPIRO, J. Plaintiff, a teacher at St. Mary's Elementary School in Mount Morris, filed this action against defendants, alleging violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, and violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, after her contract was not renewed for the 2005-2006 school year. In June 2006, the trial court granted defendants' motion for summary disposition of the WPA claim pursuant to MCR 2.116(C)(10). Defendants later moved for summary disposition of the CRA claim under MCR 2.116(C)(4), arguing that the trial court lacked subject-matter jurisdiction over that claim pursuant to the "ministerial exception." The trial court denied that motion. In a prior interlocutory appeal, this Court held that "the ministerial exception exists in Michigan," vacated the order denying the motion, and remanded the case to the trial court "for an analysis of, and conclusions regarding, whether [plaintiff] was a 'ministerial' employee." *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 152; 756 NW2d 483 (2008). On remand, the trial court concluded that the ministe-

rial exception applied to plaintiff and, accordingly, dismissed her CRA claim pursuant to MCR 2.116(C)(4). Plaintiff appeals as of right, challenging the dismissal of both her WPA claim and her CRA claim. We affirm.

I. BASIC FACTS AND PROCEEDINGS

In *Weishuhn*, 279 Mich App at 153-155, this Court summarized the relevant underlying facts as follows:

A. WEISHUHN'S BACKGROUND

> In 1992, Weishuhn obtained her Bachelor of Science degree in elementary education from the University of Michigan. For more than 10 years, until 1999, Weishuhn worked for St. Charles and Helena Catholic Church in Clio, Michigan. She was that church's director of religious education for its "parish religious ed[ucation] program" for approximately eight years. In 2001, she obtained her master's degree in teaching from Marygrove College.

B. WEISHUHN'S EMPLOYMENT AND DUTIES AT ST. MARY'S

> In August 1999, Weishuhn began teaching at St. Mary's Elementary School in Mount Morris, Michigan. Weishuhn taught mathematics for the fifth through the eighth grades and carried out religious responsibilities that included teaching religion for the sixth through the eighth grades. Initially, Weishuhn taught two mathematics classes and four religion classes each day, but she later taught four mathematics classes and three religion classes each day. And in her final year at St. Mary's (2004-2005), she taught four mathematics classes and two religion classes each day.
>
> At her deposition, Weishuhn explained that her religious-education duties entailed teaching sixth-, seventh-, and eighth-grade religion classes. She was also responsible for planning Masses for those grades, as well as assisting a fourth-grade teacher with student liturgies. Weishuhn and the St. Mary's pastor discussed the subject matter of the Masses. Weishuhn also prepared her seventh-

and eighth-grade students for the sacrament of confirmation, and she developed reconciliation (penance) services twice a year. At her deposition, Weishuhn agreed that her responsibilities were ministerial in the sense that she provided religious direction for her students. She also testified that religion was an integral part of the school's curriculum and her lesson plan.

C. THE PROCEEDINGS BELOW

After a series of employment-related incidents, none of which involved the subject of religion, St. Mary's terminated Weishuhn's employment in the spring of 2005. Weishuhn later filed a two-count complaint against defendants, alleging violations of the Whistleblowers' Protection Act [MCL 15.361 *et seq.*] and the Civil Rights Act [MCL 37.2101 *et seq.*] for retaliatory termination. Defendants then moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that both of Weishuhn's claims failed as a matter of law. The trial court granted the motion with respect to the Whistleblowers' Protection Act claim, but it denied the motion with respect to the retaliation claim under the Civil Rights Act.

In June 2006, defendants moved for summary disposition pursuant to MCR 2.116(C)(4), arguing that the trial court lacked subject-matter jurisdiction over Weishuhn's employment-discrimination claim because of the ministerial exception. Defendants asserted that "[b]ecause [Weishuhn's] duties while employed by St. Mary's School included a 'spiritual function,' the First Amendment of the United States Constitution precludes application of the Elliott Larsen Civil Rights Act . . . to [her] employment relationship with St. Mary's School." The trial court denied defendants' motion, ruling that there was a question of fact for the jury in terms of whether Weishuhn's primary function was spiritual in nature. In reaching its conclusion, the trial court noted that the caselaw cited by the parties used the word "primary." The trial court also acknowledged that there appeared to be some overlap between Weishuhn's duties in terms of secular and spiritual teaching, and opined that "this is a case that maybe could create

some new law in this area, at least maybe get some clarification as to whether or not there needs to be an analysis by the court with respect to this primary or secondary purpose." The trial court gave effect to its ruling in a subsequent written order. The trial court also denied defendants' motion for reconsideration of this matter.

This Court then concluded that the ministerial exception exists in Michigan,[1] vacated the order denying the motion, and remanded the case for further proceedings to determine whether plaintiff was a ministerial employee, explaining:

> The salient question then is whether Weishuhn was a ministerial employee. On the basis of our review de novo, we are unable to determine whether the trial court reached a conclusion on whether Weishuhn was a ministerial employee. The trial court did engage in some discussion about whether Weishuhn's teaching functions were primarily religious in nature. But ultimately the trial court concluded that this was a fact question for the jury and therefore denied defendants' motion for summary disposition.
>
> As we have stated above, this conclusion was erroneous. We recognize, however, that the trial court was acting at a considerable disadvantage because there was no explicit holding that the ministerial exception existed in Michigan and no guidance from Michigan appellate courts regarding how to apply that exception. We therefore remand to the trial court for an analysis of, and conclusions with regard to, whether, in light of this opinion, Weishuhn was a ministerial employee. In this regard, the trial court shall

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[1] This Court described the ministerial exception as follows:

> The ministerial exception is a nonstatutory, constitutionally compelled exception to the application of employment-discrimination and civil rights statutes to religious institutions and their "ministerial" employees. The ministerial exception has its roots in the Establishment and Free Exercise of Religion clauses of the First Amendment and generally bars inquiry into a religious institution's underlying motivation for a contested employment decision. [*Id.* at 152.]

consider the affidavits, depositions, admissions, or other documentary evidence that the parties have submitted. In undertaking that analysis and reaching these conclusions, the trial court should focus on the totality of Weishuhn's duties and responsibilities, her position, and her functions. More specifically, the trial court should consider the following non-exhaustive list of factors:

(1) Whether Weishuhn had primarily religious *duties* and *responsibilities* in the sense that her primary *duties* consisted of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship;

(2) Whether Weishuhn's *duties* had religious significance;

(3) Whether Weishuhn's *position* was inherently, primarily, or exclusively religious, whether that *position* entailed proselytizing on behalf of defendants, whether that *position* had a connection to defendants' doctrinal mission, and whether that *position* was important to defendants' spiritual and pastoral mission; and

(4) Whether Weishuhn's *functions* were essentially liturgical, that is, related to worship, and whether those *functions* were inextricably intertwined with defendants' religious doctrine in the sense that Weishuhn was intimately involved in the propagation of defendants' doctrine and the observance and conduct of defendants' liturgy by defendants' congregation.

If, after consideration of these factors, the trial court determines that Weishuhn's position and function were such that she was a ministerial employee, then the trial court shall enter an order dismissing Weishuhn's discrimination claim. But if after this inquiry the trial court concludes that Weishuhn was not a ministerial employee, it should schedule further proceedings as necessary for trial. [*Weishuhn*, 279 Mich App at 177-179 (emphasis in original).]

II. STANDARD OF REVIEW

We review de novo trial court decisions on motions for summary disposition. *Id.* at 155. We also review de

novo the trial court's decision on the ministerial exception because this issue is a question of law. *Id.* at 175-176; *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). Constitutional issues are also reviewed de novo on appeal. *Weishuhn*, 279 Mich App at 155.

III. CIVIL RIGHTS ACT CLAIM

With regard to the first factor the trial court was directed to consider, we find no error in the trial court's determination that plaintiff's duties were primarily religious in nature. Plaintiff argues that the trial court ignored evidence that the majority of her classes were mathematics classes. We disagree. Although plaintiff was hired in part to teach mathematics, she also taught religion and she was actively involved in religious planning and activities. She was involved in planning student masses and helped prepare the students for confirmation and reconciliation services. Plaintiff's assertion that "the majority" of her classes were mathematics classes appears to be based solely on the number of classes taught. The argument is erroneous because it fails to consider the amount of classroom time spent on each subject as well as the additional time spent planning masses and preparing students for confirmation and reconciliation services. However, even if we agreed that the total number of classes alone should govern in this case, plaintiff has not shown that the trial court's determination that her duties were primarily religious in nature was erroneous. Plaintiff's argument is based on the premise that teaching mathematics is secular. However, teaching "secular" classes is not necessarily "purely secular" in the context of religious schools. *Coulee Catholic Sch v Labor & Indus Review Comm*, 2009 WI 88, ¶¶ 52-55; 320 Wis 2d 275, 307-309;

768 NW2d 868 (2009). This is particularly true in this case where plaintiff stated that she incorporated her religious teachings into her mathematics lessons. In an interview that plaintiff gave to *The Catholic Times*, she explained that her students

> "hear me talk about God and religion in math class as much as I do in religion class. I'm not the kind of person who separates religion—it's part of who I am and what I teach . . . . My ultimate goal is to help each student develop into a young Christian person who has a conscience." [Lisa Briggs, *Teacher's plan is simple: Lessons for a lifetime*, The Catholic Times, April 30-May 6, 2005, p 8.]

Therefore, we find no error in the trial court's conclusion that plaintiff's duties were primarily religious, notwithstanding the fact that she taught four mathematics and two religion classes in her last year of teaching.

With regard to the second factor, plaintiff's teaching of religion classes and her involvement in planning masses and preparing students for confirmation and reconciliation services clearly have religious significance. Further, plaintiff's admission that she incorporated her religious teachings into her mathematics classes indicates all aspects of her work had religious significance. Thus, we agree with the trial court that this factor also weighs in favor of finding that plaintiff was a ministerial employee.

In its analysis of the third factor, the trial court found that plaintiff's position was primarily religious because, as a teacher of religion, she was involved in proselytizing on behalf of the church. We agree. As the trial court noted, educating and indoctrinating the children was important to and furthered the purposes of the church. Thus, plaintiff's involvement in planning masses and preparing students for confirmation and reconciliation

services were connected to defendants' doctrinal mission, and these activities were important to defendants' spiritual and pastoral mission. Moreover, plaintiff admitted in her interview with *The Catholic Times* that even in her math classes, she did not separate religion and that it was part of her mission to promote and reinforce Christian ideals.

The fourth factor presents a closer question, given that plaintiff did not assume a liturgical role within the entire congregation. Still, she was intimately involved in liturgical planning of worship services, as well as confirmation and reconciliation services, for students. Further, her role as a religion teacher involved propagation of defendants' doctrine to students, which included guidance in worship services and rituals.

We conclude that, in light of this record, the trial court did not err by determining that consideration of the foregoing factors established that plaintiff was a ministerial employee.

Plaintiff argues that the facts in this case more closely resemble those in cases cited in *Weishuhn* that found the ministerial exception did not apply to teachers. This argument misconstrues the Court's discussion of those opinions in *Weishuhn*. This Court cited cases such as *Redhead v Conference of Seventh-Day Adventists*, 440 F Supp 2d 211, 220-222 (ED NY, 2006), and *Guinan v Roman Catholic Archdiocese of Indianapolis*, 42 F Supp 2d 849, 853 (SD Ind, 1998), and noted that these courts "have ruled that the ministerial exception did not apply to teachers." *Weishuhn*, 279 Mich App at 164-165. However, this Court also reviewed cases in which the contrary view was followed. *Id*. at 163-164. The Court ruled that the ministerial exception *could* apply to the plaintiff depending upon the documentary evidence, *id.* at 178-179, and rejected the position that

the ministerial exception is inapplicable to teachers. Instead, the Court opted for a broader totality of the circumstances test. *Id.* To the extent that plaintiff is requesting we reconsider that determination, we must decline. Under the law of the case, we are bound by *Weishuhn*. *Sinicropi v Mazurek*, 279 Mich App 455, 465; 760 NW2d 520 (2008).

For these reasons, the trial court did not err by finding that plaintiff was a ministerial employee and that defendants were therefore entitled to summary disposition of plaintiff's CRA claim pursuant to MCR 2.116(C)(4).

IV. WHISTLEBLOWERS' PROTECTION ACT CLAIM

Plaintiff also challenges the trial court's determination that she failed to establish a genuine issue of material fact with respect to her WPA claim, thereby entitling defendants to summary disposition of that claim under MCR 2.116(C)(10). We find it unnecessary to decide whether dismissal of plaintiff's WPA claim was proper under MCR 2.116(C)(10) because we agree with defendants that the WPA claim is also subject to the ministerial exception.

Michigan courts have not yet addressed the applicability of the ministerial exception to WPA claims. The ministerial exception is rooted in the First Amendment and, thus, generally takes precedence over statutorily based claims. As explained in *Weishuhn*, 279 Mich App at 152, it is a "constitutionally compelled exception to the application of employment-discrimination and civil rights statutes to religious institutions and their 'ministerial' employees." Although the CRA and the WPA are distinct acts, they have as a common purpose the prevention of discrimination in employment on the basis of statutorily recognized factors rooted in public

policy. Indeed, the Michigan Supreme Court has held that " '[w]histleblower statute[s] [are] analogous to antiretaliation provisions of other employment discrimination statutes' " and " 'the policies underlying these similar statutes warrant parallel treatment . . . .' " *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 617; 566 NW2d 571 (1997), quoting *Rouse v Farmer's State Bank of Jewell, Iowa*, 866 F Supp 1191, 1204 (NE Iowa, 1994). Thus, the rationale for recognizing the existence of the ministerial exception to a claim under the CRA seems to apply equally to a claim under the WPA.

Although we located no federal cases specifically involving "whistleblower" claims, there have been several involving Title VII of the Civil Rights Act, as amended, 42 USC 2000e to 2000e-17 (Title VII), all of which have concluded that the ministerial exception applies.

In *Gellington v Christian Methodist Episcopal Church*, 203 F3d 1299 (CA 11, 2000), the plaintiff was an ordained minister who alleged that he was retaliated against and constructively discharged by the defendant in violation of Title VII. *Id*. at 1300. The United States Court of Appeals for the Eleventh Circuit upheld the district court's grant of summary disposition, concluding that the ministerial exception applied to the claim. *Id*. at 1301. The court noted that "applying Title VII to the employment relationship between a church and its clergy would involve 'excessive government entanglement with religion' as prohibited by the Establishment Clause of the First Amendment" because "[a] church's view on whether an individual is suited for a particular clergy position cannot be replaced by the courts' without entangling the government in questions of religious doctrine, polity, and practice." *Id*. at 1304 (quotation marks and citation omitted).

In *Elvig v Calvin Presbyterian Church*, 375 F3d 951, 965 (CA 9, 2004), the plaintiff alleged that while serving as the associate pastor for defendant, the lead pastor "engaged in sexually harassing and intimidating conduct toward her, creating a hostile working environment" and that when she made a formal complaint, filed a claim of discrimination with the EEOC and received her right-to-sue letter, she was placed on unpaid leave and subsequently her employment was terminated. *Id.* at 953. The plaintiff had "alleged five retaliatory adverse employment actions: (1) the removal of certain duties, (2) her suspension, (3) her termination, (4) the refusal to permit the circulation of her personal information form and (5) retaliatory harassment in the form of verbal abuse and intimidation." *Id.* at 965. The United States Court of Appeals for the Ninth Circuit noted that "the first four of these actions are protected ministerial decisions" because "[a] church's selection of its ministers is unfettered, and its true reasons—whatever they may be—are therefore unassailable." *Id.* at 961, 965. Simply put, "the [c]hurch cannot be required to articulate a justification for its ministerial decisions . . . ." *Id.* at 961-962. On the basis of these holdings, the Ninth Circuit upheld the dismissal of the plaintiff's retaliation claims.[2] *Id.* at 969. The Ninth Circuit also ordered the district court to consider the plaintiff's state law claims, but noted that " '[j]ust as there is a ministerial exception to Title VII, there must also be a ministerial exception to any state law cause of action that would otherwise impinge on the

[2] The Ninth Circuit did hold that the plaintiff's sexual harassment claim and the retaliation claim (predicated on retaliatory harassment) survived, but that the "protected ministerial decisions—the removal of certain duties, her suspension, her termination and the refusal to permit the circulation of her personal information form" could not be bases of liability for those claims. *Elvig*, 375 F3d at 969.

church's prerogative to choose its ministers or to exercise its religious beliefs in the context of employing its ministers.' " *Id.*, quoting *Bollard v California Province of the Society of Jesus*, 196 F3d 940, 950 (CA 9, 1999).

In *Petruska v Gannon Univ*, 462 F3d 294 (CA 3, 2006), the plaintiff was a chaplain working for a private Catholic university. *Id.* at 299-300. The plaintiff claimed that on the basis of her opposition to sexual harassment and her gender, the university retaliated by restructuring itself in a manner that constructively discharged her. *Id.* at 300-302. The United States Court of Appeals for the Third Circuit concluded that "the First Amendment protects [the university's] right to restructure—regardless of its reason for doing so" because the "choice to restructure constituted a decision about who would perform spiritual functions and about how those functions would be divided" and dismissed the plaintiff's Title VII claims, as well as her state law claims for civil conspiracy and negligent supervision and retention. *Id.* at 307-308, 309.

At least one state has explicitly applied the ministerial exception to state whistleblower claims. In *Archdiocese of Miami, Inc v Minagorri*, 954 So 2d 640 (Fla App, 2007),[3] the Florida Court of Appeals considered a whistleblower claim brought by a principal of a Catholic school, who alleged that when she complained to the archdiocese about her supervisor's assaulting and battering her, the archdiocese retaliated by firing her. *Id.* at 641. The court noted that the ministerial exception had been applied to claims under the Americans with Dis-

[3] Although this is a Florida Court of Appeals decision, the Florida Supreme Court, although originally granting leave, indicated the review was improvidently granted, *Minagorri v Archdiocese of Miami, Inc*, 985 So 2d 1086 (Fla, 2008), and the United States Supreme Court denied review, *Minagorri v Archdiocese of Miami, Inc*, 555 US 1102; 129 S Ct 936; 173 L Ed 2d 113; (2009).

abilities Act, 42 USC 12101 *et seq.*, the Age Discrimination in Employment Act, 29 USC 621 *et seq.*, and common-law claims brought against religious employers, and held "[w]e see no reason why the ministerial exception should not be applied to the instant whistleblower claim." *Id.* at 643.

Thus, the general consensus is that "[t]he ministerial exception, as we conceive of it, operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Petruska*, 462 F3d at 307; see also *Hartwig v Albertus Magnus College*, 93 F Supp 2d 200, 211 n 13 (D Conn, 2000) (the appropriate analysis is the religiously affiliated nature of the institution and the employee's role there, "not the particular issues which spring from the termination of his employment relationship and the resulting claims"). We agree with this approach and adopt it as our position. Accordingly, we hold that the ministerial exception may be applied to WPA claims that involve a religious institution and a ministerial employee.

We recognize that it seems unjust that employees of religious institutions can be fired without recourse for reporting illegal activities, particularly given that members of the clergy, as well as teachers, are mandated reporters. MCL 722.623(1)(a). However, to conclude otherwise would result in pervasive violations of First Amendment protections.[4]

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[4] Although we recognize the unfairness of the position, we lack the power to alter the legislative reporting requirements and the Legislature cannot trump the United States Constitution. Our ruling does not reduce or immunize statutory reporters who are ministerial employees of religious institutions from the consequences if they fail to meet their mandatory reporting duties because they fear retaliation for which there would be no civil recourse.

> We are mindful of the potential for abuse our holding theoretically may invite; namely, the use of the First Amendment as a pretextual shield to protect otherwise prohibited employment decisions. But we think that saving grace lies in the recognition that courts consistently have subjected personnel decisions of various religious organizations to statutory scrutiny where the duties of the employees were not of a religious nature. We have confidence that courts will continue to consider these situations on a case-by-case basis, looking in each case to see whether the plaintiff's employment discrimination claim can be adjudicated without entangling the court in matters of religion. [*Scharon v St Luke's Episcopal Presbyterian Hosps*, 929 F2d 360, 363 n 3 (CA 8, 1991) (citations omitted).]

Furthermore, we agree with the Third Circuit that the ministerial exception

> does not apply to *all* employment decisions by religious institutions, nor does it apply to *all* claims by ministers. It applies only to claims involving a religious institution's choice as to who will perform spiritual functions. [*Petruska*, 462 F3d at 305-306 n 8.]

Thus, some claims by ministerial employees are not necessarily foreclosed by the ministerial exception. For example, certain "independent" tort and contract actions have survived, see *Petruska*, 462 F3d at 310-311 (holding that a negligent misrepresentation claim was unaffected by the ministerial exception because its resolution "does not turn on the lawfulness of the decision to restructure, but rather upon the truth or falsity of the assurances that she would be evaluated on her merits" and that the breach of contract claim could also move forward because enforcement "in no way constitutes a state-imposed limit upon a church's free exercise rights," although it would be subject to an evaluation of whether resolution "required inquiry into the church's ecclesiastical policy"); *Elvig*, 375 F3d at

965 (holding that "retaliatory harassment in the form of verbal abuse and intimidation" was not a protected employment decision and, therefore, the plaintiff's retaliatory harassment claim was not barred by the application of the ministerial exception), as well as claims where the termination decision is made by a nonreligious entity, see *Maruani v AER Servs, Inc*, unpublished memorandum opinion of the United States District Court for the District of Minnesota, issued September 18, 2006 (Docket No. 06-176) (holding that the plaintiff's whistleblower claim could proceed because "the Court can envision a situation wherein [the plaintiff] could contend that the rabbis' determination did not in fact motivate [the nonreligious entity employer] to take the adverse employment action without challenging the validity, existence or plausibility of the religious doctrine itself").

However, none of these exceptions apply to the present case because plaintiff's WPA claim alleges retaliation by termination of employment. Termination of a ministerial employee by a religious institution is an absolutely protected action under the First Amendment, regardless of the reason for doing so. *Petruska*, 462 F3d at 307, 309; *Elvig*, 375 F3d at 961. In light of our affirmance of the trial court's conclusion that plaintiff was a ministerial employee, the trial court properly granted summary disposition as to plaintiff's WPA claim, albeit for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

Affirmed.

HOWELL EDUCATION ASSOCIATION, MEA/NEA
v HOWELL BOARD OF EDUCATION

Docket No. 288977. Submitted January 5, 2010, at Lansing. Decided January 26, 2010, at 9:05 a.m.

The Howell Education Association, MEA/NEA, Doug Norton, Jeff Hughey, Johnson McDowell, and Barbara Cameron brought an action in the Livingston Circuit Court, Stanley J. Latreille, J., against the Howell Board of Education and the Howell Public Schools, seeking to prevent the disclosure, under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., to intervening defendant/counter-plaintiff Chetly Zarko of e-mail sent to and from Howell Public Schools teachers Norton, Hughey, and McDowell (who are also members of and officials for the Howell Education Association, MEA/NEA) and e-mail sent to and from Cameron (a MEA representative) to and from Norton, McDowell, and Hughey. Plaintiffs sought a declaratory judgment providing, in part, that the personal e-mail of the individual plaintiffs and their e-mail pertaining to union business were not public records subject to disclosure under FOIA. Defendants contended that the e-mails were public records because, when they were sent or received on defendants' e-mail system, a copy of each e-mail was automatically retained in the system's memory. Defendants also maintained that the individual plaintiffs' alleged violation of defendants' acceptable use policy barring personal use of the e-mail system rendered the personal e-mails public records subject to FOIA. The trial court granted summary disposition in favor of defendants. Plaintiffs appealed, specifically limiting their appeal to whether the trial court properly concluded that all e-mails generated through defendants' e-mail system that are retained or stored by defendants are public records subject to FOIA.

The Court of Appeals *held*:

1. Mere possession of a record by a public body does not render the record a public document. Rather, the use or retention of the document must be in the performance of an official function.

2. For the e-mails at issue to be public records, they must have been stored or retained by defendants in the performance of an official function. There is nothing about the personal e-mail, given

that by its very definition it has nothing to do with the operation of the schools, that indicates that it is required for the operation of an educational institution.

3. Unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because the individual is an employee of a public body. It was not the intent of the Legislature when it passed FOIA to render all personal e-mail sent by governmental employees while at work subject to public release upon request.

4. Personal e-mails are not rendered public records under FOIA merely by use of a public body's computer system to send or receive those e-mails or by an automatic back-up system that causes the public body to retain those e-mails.

5. Although defendants' acceptable use policy notified computer users that personal e-mail may be looked at by school officials and that documents could be released pursuant to a subpoena, it did not indicate that users' e-mail may be viewed by any member of the public who simply asks. Public employees' agreement to the acceptable use policy did not render their personal e-mail subject to FOIA.

6. Although violation of the acceptable use policy can subject defendants' employees to sanctions, a violation does not transform the employees' personal communications into public records.

7. The back-up system that retained copies of all e-mail without distinguishing between that sent pursuant to defendants' educational goals and that sent for personal reasons did not constitute an official function sufficient to render the e-mails public records subject to FOIA.

8. The e-mail involving internal union communications is personal e-mail.

9. The trial court erred by concluding that all e-mails captured in a government e-mail computer storage system, regardless of their purpose, are rendered public records subject to FOIA. The order granting summary disposition must be reversed and the case must be remanded to the trial court for further proceedings.

Reversed and remanded.

1. RECORDS — FREEDOM OF INFORMATION ACT — WORDS AND PHRASES — PUBLIC RECORDS.

A "public record" for purposes of the Freedom of Information Act is a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created; mere possession of a record by a public body

does not render the record a public document; the use or retention of a record by a public body must be in the performance of an official function for the record to be a public record (MCL 15.232[e]).

2. RECORDS — FREEDOM OF INFORMATION ACT — PUBLIC RECORDS — E-MAIL — OFFICIAL FUNCTIONS.

A back-up system employed by a public school system to retain all e-mails sent through the school's computer system and that does not distinguish between e-mails sent pursuant to the school's education goals and those sent by employees for personal reasons is not performing an "official function" sufficient to render the e-mails public records subject to the Freedom of Information Act (MCL 15.232[e]).

3. RECORDS — FREEDOM OF INFORMATION ACT — PERSONAL DOCUMENTS — PUBLIC DOCUMENTS.

Purely personal documents can become public documents for purposes of the Freedom of Information Act where the subsequent use or retention of the personal documents by a public body is in the performance of an official function of the public body (MCL 15.232[e]).

White, Schneider, Young & Chiodini, P.C. (by *Michael M. Shoudy, Kathleen Corkin Boyle*, and *Dena M. Lampinen*), for plaintiffs.

Thrun Law Firm, P.C. (by *Raymond M. Davis, David M. Revore*, and *Eric D. Delaporte*), for defendants.

Jaffe, Raitt, Heuer & Weiss, P.C. (by *Arthur H. Siegal* and *Nicole R. Foley*), and *John C. Scully*, for Chetly Zarko.

Amicus Curiae:

Patrick J. Wright for the Mackinac Center for Public Policy.

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

PER CURIAM. Plaintiffs appeal as of right the trial court's grant of summary disposition to defendants and dismissal of their "reverse" Freedom of Information Act (FOIA), MCL 15.231 *et seq*., action.[1] We reverse and remand for further proceedings consistent with this opinion. While we believe the issue in this case is one that must be resolved by the Legislature, and we call upon the Legislature to address it, we conclude that under the FOIA statute the individual plaintiffs' personal e-mails were not rendered public records solely because they were captured in a public body's e-mail system's digital memory. Additionally, we conclude that mere violation of an acceptable use policy barring personal use of the e-mail system—at least one that does not expressly provide that e-mails are subject to FOIA—does not render personal e-mails public records subject to FOIA.

I. FACTUAL AND PROCEDURAL BACKGROUND

In March 2007, the intervenor, Chetly Zarko, began submitting a series of FOIA requests to defendant Howell Public Schools (HPS), including requests for all e-mail beginning January 1, 2007, sent to and from three HPS teachers: plaintiffs Doug Norton, Jeff Hughey, and Johnson McDowell. During that time, each of these teachers was also a member and official for plaintiff Howell Education Association, MEA/NEA (HEA); Norton was president, Hughey was vice president for bargaining, and McDowell was vice president for grievances. After the filing of this lawsuit, Zarko also requested all e-mail sent to or from plaintiff Barbara Cameron that was to or from Norton, McDow-

[1] A "reverse FOIA" claim is one where a party "seek[s] to prevent disclosure of public records under the FOIA." *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 290; 565 NW2d 650 (1997).

ell, and Hughey. Cameron is the UniServ Director employed by the Michigan Education Association to provide representational services to the HEA. The requests were apparently made in the context of heated negotiations for a new collective bargaining agreement that were being reported in the local media.

The HEA objected to having to release union communications sent between HEA leaders or between HEA leaders and HEA members and took the position that, to the extent the e-mails addressed union matters, they were not "public records" as defined under FOIA. The HEA asked counsel for HPS to confirm whether the internal union communications of Norton, Hughey, and McDowell would be treated as nondisclosable. Counsel for HPS noted that there was no reported caselaw regarding whether personal e-mails or internal union communications maintained on the computer system of a public body were public records subject to disclosure under FOIA and suggested a "friendly lawsuit" to determine the applicability of FOIA to the e-mail requests made by Zarko.

Plaintiffs filed their complaint in May 2007 against HPS and defendant Howell Board of Education requesting a declaratory judgment that: (1) personal e-mails and e-mails pertaining to union business are not "public records" as defined by FOIA; (2) that the collective bargaining e-mails were exempt pursuant to MCL 15.243(1)(m); and (3) that the e-mails containing legal advice were exempt pursuant to MCL 15.243(1)(g). Plaintiffs also requested an injunction to prevent the release of the documents until the issues could be resolved. A temporary restraining order (TRO) was entered on May 7, 2007. Following a show cause hearing, Zarko was permitted to intervene as an intervening defendant and counter-plaintiff, the TRO was extended

"until further notice," and the parties agreed to organize all the e-mails for an in camera review. The parties were directed to release all uncontested e-mails and to deliver to the court all e-mails they contended were either not public records, or were subject to an exemption under FOIA.

The trial court appointed a special master to review approximately 5,500 e-mails.[2] At the same time, plaintiffs informed the trial court that they were withdrawing their request to defendants that an exemption under MCL 15.243(1)(m) be asserted regarding e-mail sent between one or more plaintiffs and the school administration. Defendants then released those e-mails to Zarko.

Defendants moved for summary disposition in July 2008, arguing that plaintiffs lacked standing to prevent disclosure because all the documents were public records and only defendants had the authority to assert the exemption provisions of MCL 15.243. Defendants also argued that the trial court could not grant relief to Hughey given that his e-mail had already been released and could not grant relief as to any e-mail from the other plaintiffs to which Hughey was a party because that e-mail was "no longer secret." Defendants argued that any exemption under MCL 15.243(1)(m) was inapplicable because the collective bargaining agreement had already been reached. Thus, there could be no harm to the collective bargaining negotiations, as the negotiations had concluded. Finally, defendants argued that plaintiffs were not entitled to injunctive relief because they could not show irreparable harm.

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[2] These e-mails did not include any to or from Hughey. On May 2, 2007, before the suit was filed, the review of these e-mails was completed and defendants released the e-mails to Zarko.

The trial court held a hearing on defendants' motion for summary disposition. As to the injunction, the trial court concluded that plaintiffs lacked standing to assert the claim. As to the claimed exemptions, the trial court concluded that those issues were moot "because the disputed emails have been released to the intervenor," resulting in a lack of an actual controversy. Finally, the trial court concluded that "any emails generated through the District's email system, that are retained or stored by the district, are indeed 'public records' subject to FOIA . . . ." Plaintiffs now appeal.

II. STANDARD OF REVIEW

The issue before us is one of statutory interpretation and arises in the context of a summary disposition motion. We review de novo both issues of statutory interpretation and a trial court's decision to grant summary disposition. *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 664; 753 NW2d 28 (2008).

III. ANALYSIS

The issue before us requires us to consider the application of the FOIA statute, adopted in 1977 and last amended in 1997, in the context of today's ubiquitous e-mail technology. This is a challenging issue and one that, as we noted at the outset, we believe is best left to the Legislature because it is plainly an issue concerning social policy. Unfortunately, until the Legislature makes its intention clear by adopting statutory language that takes this technology into account, we must attempt to discern, as best we can given the tools available to us, what the intent of the Legislature would have been under the circumstances presented by this technology that it could not have foreseen. Cf. *Denver Publishing Co v Bd of Co Comm'rs of Arapahoe, Colorado*, 121 P3d 190, 191-192

(Colo, 2005). We find ourselves in the situation akin to that of a court being asked to apply the laws governing transportation adopted in a horse and buggy world to the world of automobiles and air transportation.

"Consistent with the legislatively stated public policy supporting the act, the Michigan FOIA requires disclosure of the 'public record[s]' of a 'public body' to persons who request to inspect, copy, or receive copies of those requested public records." *Mich Federation of Teachers*, 481 Mich at 664-665. It is undisputed that defendants are public bodies. MCL 15.232(d)(*iii*). A "public record" is "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created."[3] MCL 15.232(e). Plaintiffs have specifically limited their appeal to whether the trial court properly concluded that all e-mails generated through defendants' e-mail system that are retained or stored by defendants are public records subject to FOIA.[4]

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[3] Although unnecessary for the resolution of this case, we wish to address the suggestion of amicus curiae Mackinac Center for Public Policy that the "it" in the clause "from the time it is created" refers to the public body. The amicus asserts that interpreting the "it" as a writing would cause the overruling of *Detroit News, Inc v Detroit*, 204 Mich App 720; 516 NW2d 151 (1994). However, this ignores that *Detroit News* explicitly interpreted the "it" as meaning a writing:

> The city relies on the statutory clause "from the time it is created" found in the definition of public record. We do not construe this clause as requiring that a writing be "owned, used, in the possession of, or retained by a public body in the performance of an official function" from the time the writing is created in order to be a public record. A writing can become a public record after its creation. We understand the phrase "from the time it is created" to mean that the ownership, use, possession, or retention by the public body can be at any point from creation of the record onward. [*Id.* at 725.]

Accordingly, we reject the suggested interpretation.

[4] Thus, we are not ruling on whether any exemptions apply or who has the standing to argue them.

The trial court determined that the personal e-mails are public records because they are "in the possession of, or retained by" defendants. See MCL 15.232(e). However, "mere possession of a record by a public body" does not render the record a public document. *Detroit News, Inc v Detroit*, 204 Mich App 720, 724; 516 NW2d 151 (1994). Rather, the use or retention of the document must be "in the performance of an official function." See *id.* at 725; MCL 15.232(e). For the e-mails at issue to be public records, they must have been stored or retained by defendants in the performance of an official function.

Defendants argue that retention of electronic data is an official function where it is required for the operation of an educational institution, citing *Kestenbaum v Mich State Univ*, 414 Mich 510; 327 NW2d 783 (1982).[5] However, the lead opinion in *Kestenbaum* "accept[ed] without deciding" that the electronic data at issue was a public record. *Id.* at 522 (FITZGERALD, C.J.). Only Justice RYAN's opinion addressed the issue of "an official function." *Id.* at 538-539 (RYAN, J.). Justice RYAN concluded that the magnetic tape involved, which was the school's purposefully created and retained record of student names and addresses, was, in fact, "prepared, owned, used, processed, and retained by the defendant public body 'in the performance of an official function' " because the university could not have functioned " 'without such a list of students.' " *Id.* at 539.

In the present case, defendants can function without the personal e-mail. There is nothing about the personal e-mail, given that by their very definition they have nothing to do with the operation of the schools, which indicates that they are required for the operation of an

[5] *Kestenbaum* was a three to three decision and has no majority opinion.

educational institution. Thus, we decline to conclude that they are equivalent to the student information at issue in *Kestenbaum*. Furthermore, "unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee." *Id*. We believe the same is true for all public body employees. Absent specific legislative direction to do so, we are unwilling to judicially convert every e-mail ever sent or received by public body employees into a public record subject to FOIA.

Defendants offer a simple solution approach to this puzzle, which is to simply say that anything on the school's computer system is "retained" by the school and therefore subject to FOIA. However, the school district does not assert that its back-up system was purposely designed to retain and store personal e-mail or that personal e-mail has some official function. It appears that the system is intended to retain and store e-mail relating to official functions, but that it is simply easier technologically to capture all the e-mail on the system rather than have some mechanism to distinguish them. We do not think that because the technological net used to capture public record e-mail also automatically captures other e-mails we must conclude that the other e-mails are public records.[6] To rule as defendants request would essentially render all personal e-mail sent by governmental employees while at work subject to public release upon request. We conclude that this was not the intent of the Legislature when it passed FOIA.

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[6] Indeed, we should not presume that the question would even end with personal e-mail sent on government computers. At oral argument, defendants would not concede that employees' personal e-mail would not be subject to FOIA even if the employees sent it on their personal laptop computers if, because the laptops used a government wireless system, the e-mail was captured and retained.

E-mail has in essence replaced mailboxes and paper memos in government offices. Schools have traditionally, as part of their function, provided teachers with mailboxes in the school's main office. However, we have never held nor has it even been suggested that during the time those letters are "retained" in those school mailboxes they are automatically subject to FOIA. Now, instead of physical mailboxes, we have e-mail. However, the nature of the technology is such that even after the e-mail letter has been "removed from the mailbox" by its recipient, a digital copy of it remains, possibly in perpetuity. This effect is due solely to a change in the technology being used and, absent some showing that the retention of personal e-mail has some official function other than the retention itself, we decline to so drastically expand the scope of FOIA. We do not suggest that a change in technology cannot be a part of the circumstances that would result in a significant change in the scope of a statute. However, where the change in technology is the sole factor, we should be very cautious in expanding the scope of the law.

This position is consistent with federal cases interpreting whether an item is an "agency record" under the federal FOIA.[7] In *Bloomberg, LP v United States Securities & Exch Comm*, 357 F Supp 2d 156 (D DC, 2004), the court determined that the electronic calendar for the chairman of the Securities and Exchange Commission (SEC) was not an "agency record." *Id.* at 164. This was true even though the calendar included both personal and business appointments and "the calendar was maintained on the agency computer sys-

[7] "Federal court decisions regarding whether an item is an 'agency record' under the federal FOIA are persuasive in determining whether a record is a 'public record' under the Michigan FOIA." *MacKenzie v Wales Twp*, 247 Mich App 124, 129 n 1; 635 NW2d 335 (2001).

tem and backed-up every thirty days . . . ." *Id.* The plaintiff had argued that the backing-up process integrated the calendar into the agency record system. *Id.* The SEC countered that employees were "permitted 'limited use of government office equipment for personal needs' " and that the routine back-up system did "not distinguish between personal and SEC business-related documents." *Id.* In making its determination, the court reiterated that " 'employing agency resources, standing alone, is not sufficient to render a document an 'agency record.' " *Id.* (citation omitted).[8]

The e-mails in the present case are analogous to the electronic calendar and other personal uses of SEC office equipment. Defendants' storage and retention of personal e-mails is a byproduct of the fact that all e-mail is electronically retained, regardless of whether it was personal or business-related. We are not persuaded that personal e-mails are rendered "public records" under FOIA merely by use of a public body's computer system to send or receive those e-mails or by the automatic back-up system that causes the public body to "retain" those e-mails.

Contrary to Zarko's position, our determination that personal e-mails are not public records does not render

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[8] We note that the United States Supreme Court has granted certiorari in the case of *City of Ontario, California v Quon*, 558 US ___; 130 S Ct 1011; 175 L Ed 2d 617 (2009). While that case involves an issue of privacy raised by new communications technology, it is unlikely to have any bearing on this case. In *Quon*, the city had an informal policy of allowing its employees to use their city-supplied pagers for personal text messaging provided the employee paid the extra cost of service. *Quon v Arch Wireless Operating Co, Inc*, 529 F3d 892, 897 (CA 9, 2008). Despite assurances that the city would not review the contents of the personal text messages, the city did so and an employee brought an action claiming violation of his Fourth Amendment right to be protected against unreasonable searches and seizures. *Id*. at 897-898. Because *Quon* involves the Fourth Amendment and not FOIA, it is unlikely to answer the question now before us.

MCL 15.243(1)(a) nugatory. MCL 15.243(1)(a) provides that public records may be exempt from disclosure where they contain "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." As Justice RYAN noted in his opinion in *Kestenbaum*, 414 Mich at 539 n 6, "[t]he question whether a writing is a 'public document' or a private one not involved 'in the performance of an official function' is separate and distinct from the question whether the document falls within the so-called 'privacy exemption' . . . ." Implicit in this statement is that some documents are not public records because they are private while other documents are public records but will fall within the privacy exemption.

For example, personal information that falls within this exclusion includes home addresses and telephone numbers. *Mich Federation of Teachers*, 481 Mich at 677. Thus, when someone makes a FOIA request for an employee's personnel file, the personnel file is a public record, *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 288-289; 565 NW2d 650 (1997), but the employee's home address and telephone number may be redacted because they are subject to the privacy exclusion in MCL 15.243(1)(a). The employee's home address and telephone number are examples of private information contained within a public record. In contrast, an e-mail sent by a teacher to a family member or friend that involves an entirely private matter such as carpooling, childcare, lunch or dinner plans, or other personal matters, is wholly unrelated to the public body's official function. Such e-mails simply are not public records.

We recognize that the present case is distinguishable from *Bloomberg*, where limited use of the office equip-

ment for "personal needs" was expressly permitted, because defendants' employees have no such permission. Before logging into defendants' computer system, users are greeted by the following statement:

> This is a Howell Public Schools computer system. Use of this system is governed by the Acceptable Use Policy which may be viewed at http://www.howellschools.com/aup.html.
>
> All data contained on any school computer system is *owned* by Howell Public Schools, and may be monitored, intercepted, recorded, read, copied, or captured in any manner by authorized school personnel. Evidence of unauthorized use may be used for administrative or criminal action.
>
> *By logging into this system, you acknowledge your consent to these terms and conditions of use*. [Emphasis added.]

Defendants' acceptable use policy provides, in relevant part:

> Howell Public Schools provides technology in furtherance of the educational goals and mission of the District. As part of the consideration for making technology available to staff and students, users agree to use this technology only for appropriate educational purposes. . . .
>
> * * *
>
> Email is not considered private communication. It may be re-posted. It may be accessed by others and is subject to subpoena. School officials reserve the right to monitor any or all activity on the district's computer system and to inspect any user's email files. *Users should not expect that their communications on the system are private.* Confidential information should not be transmitted via email.
>
> * * *
>
> Appropriate use of district technology is defined as a use to further the instructional goals and mission of the district.

> Members should consider any use outside these instructional goals and mission constitutes potential misuse . . . .
>
> * * *
>
> Members are prohibited from . . . [u]sing technology for personal or private business, . . . or political lobbying . . . .

Defendants argue that their acceptable use policy notified users that personal e-mail was subject to FOIA. We disagree. Although the use policy certainly gives notice to the users that school officials may look at their e-mail, and that the documents could be released pursuant to a subpoena, it in no way indicates that users' e-mail may be viewed by any member of the public who simply asks for it. Thus, we conclude that the public employees' agreement to this acceptable use policy did not render their personal e-mail subject to FOIA.

Furthermore, we are not persuaded that a public employee's misuse of the technology resources provided by defendants, by sending private e-mails, renders those e-mails public records. The acceptable use policy makes clear that "[a]ppropriate use of district technology is defined as a use to further the instructional goals and mission of the district." An employee's use of a public body's technology resources for private communication is clearly not in the furtherance of the instructional goals of the public body. Although this is an inappropriate use that could subject the employee to sanction for violation of the policy, the violation does not transform personal communications into public records. Indeed, the fact that the communication is sent in violation of the use policy militates in favor of the conclusion that the e-mail is not a public record because it falls expressly outside the performance of an official function, i.e. the furtherance of the instructional goals of the district.

Our reasoning is also consistent with *Walloon Lake Water Sys, Inc v Melrose*, 163 Mich App 726, 730; 415 NW2d 292 (1987). In *Walloon*, a letter was sent to the township supervisor that "pertained in some way to the water system provided by plaintiff to part of the township." *Id.* at 728. The letter was read aloud at the township board's regularly scheduled meeting. *Id.* at 729. The plaintiff subsequently sought a copy of the letter under FOIA, but the township refused to provide it, claiming it was not a public record. *Id.* This Court concluded that the letter was a public record because, "once the letter was read aloud and incorporated into the minutes of the meeting where the township conducted its business, it became a public record. 'used . . . in the performance of an official function.' " *Id.* at 730. Thus, the caselaw is clear that purely personal documents can become public documents based on how they are utilized by public bodies. However, it is their subsequent use or retention "in the performance of an official function" that rendered them so. In the present case, the retention of the e-mail by defendants on which the trial court relied was nothing more than a blanket saving of all information captured through a back-up system that did not distinguish between e-mail sent pursuant to the district's educational goals and that sent by employees for personal reasons. The back-up system did not constitute an "official function" sufficient to render the e-mails public records subject to FOIA. See *Bloomberg*, 357 F Supp 2d at 164.

In reaching our decision, we have also considered two unpublished cases in which our Court has addressed issues that may be relevant. These cases are not precedential authority. However, given the limited published caselaw on the issue and the issue's significance, we have reviewed them for guidance. In *WDG Investment Co v Mich Dep't of Mgt & Budget*, unpublished opinion

per curiam of the Court of Appeals, issued October 25, 2002 (Docket No. 229950), a rejected bidder on a government project sued the state Department of Management and Budget (DMB), alleging fraud in the manner in which the bid was awarded. A second count in the action sought production, under FOIA, of the individual notes written by bid reviewing board members concerning the bids. The DMB asserted that it had no obligation to provide the notes because they were "personal" and not kept in the DMB files. This Court held that the notes were public records. We specifically noted that the defendants' use of the word "personal" was undefined and vague, stating "[i]t is not at all clear from the record what defendants mean by 'personal' notes. We therefore decline to address this argument at this time." *Id*., unpub op at 7 n 4. Thus, the case can offer only limited guidance. However, to the degree it is helpful, it indicates that individual notes taken by a decisionmaker on a governmental issue are still public records when they were taken in furtherance of an official function. This does not suggest, however, that notes sent from one governmental employee to another about a matter not in furtherance of an official function are also public records.

A similar approach was followed in *Hess v City of Saline*, unpublished opinion per curiam of the Court of Appeals, issued May 12, 2005 (Docket No. 260394), which involved the use of video cameras to record a city council meeting. At some point, the council adjourned but the video camera was not turned off and it recorded conversations among city staffers who remained in the council chambers talking for some time after the council members had left. A copy of the videotape of the staffers' postmeeting conversations was sought under FOIA. We held that "the unedited videotape was not a public record. . . . [as] no official city business was

conducted during that time" despite the fact that the city retained the unedited tape. *Id*., unpub op at 2. The inadvertent taping of the conversations in *Hess* was due to human error in forgetting to turn off the recorder. The "taping" of the personal e-mail in this case was similarly inadvertent because, as a result of the nature of the capture technology, the recorder can never be turned off.

This is *not* to say that personal e-mails cannot become public records. For example, were a teacher to be subjected to discipline for abusing the acceptable use policy and personal e-mails were used to support that discipline, the use of those e-mails would be related to one of the school's official functions—the discipline of a teacher—and, thus, the e-mails would become public records subject to FOIA. This is consistent with *Detroit Free Press, Inc v Detroit*, 480 Mich 1079 (2008). It is common knowledge that underlying that case was a wrongful termination lawsuit that resulted in a multi-million dollar verdict against the city of Detroit. During the course of the lawsuit and subsequent settlement negotiations, certain text messages became public, which had been sent between the Detroit mayor and a staff member through the staff member's city-issued mobile device. The text messages indicated that the mayor and the staff member had committed perjury. Two newspapers filed FOIA requests for the settlement agreement from the wrongful termination trial, along with various other documents. Our Supreme Court found no error in the trial court's determination that the settlement agreement was a public record subject to disclosure under FOIA. *Id*. However, the Supreme Court did *not* rule that the text messages themselves were public records. The Court's order denying leave to appeal contains no reference to text messages. Rather,

the order indicated that the documents setting forth the settlement agreement were subject to FOIA. *Id*.

Having determined that the personal e-mails are not "public records" subject to FOIA, the next question is whether e-mails involving "internal union communications"[9] are personal e-mails. We conclude that they are. Such communications do not involve teachers acting in their official capacity as public employees, but in their personal capacity as HEA members or leadership. Thus, any e-mail sent in that capacity is personal. This holding is consistent with the underlying policy of FOIA, which is to inform the public "regarding the affairs of government and the official acts of . . . public employees . . . ." MCL 15.231(2). See *Walloon*, 163 Mich App at 730 (holding that the purpose of FOIA "must be considered in resolving ambiguities in the definition of public record"). The release of e-mail involving internal union communications would only reveal information regarding the affairs of a labor organization, which is not a public body.

IV. CONCLUSION

This is a difficult question requiring that we apply a statute, whose purpose is to render government transparent, to a technology that did not exist in reality (or even in many people's imaginations) at the time the statute was enacted and that has the capacity to make "transparent" far more than the drafters of the statute could have dreamed. When the statute was adopted,

[9] We define "internal union communications" to mean those communications sent only between or among HEA members and leadership, involving union business or activities, including contract negotiation, grievance handling, and voting. Any e-mail involving these topics that is sent to the district is no longer purely between or among HEA members and leadership and, therefore, does not fall under this category.

personal notes between employees were simply thrown away or taken home and only writings related to the entity's public function were retained. Thus, we conclude that the statute was not intended to render all personal e-mails public records simply because they are captured by the computer system's storage mechanism as a matter of technological convenience.

Accelerating communications technology has greatly increased tension between the value of governmental transparency and that of personal privacy. As we stated at the outset, the ultimate decision on this important issue must be made by the Legislature and we invite it to consider the question. However, on the basis of the statute adopted in 1977, the technology that existed at that time, and the caselaw available to us, we conclude that the trial court erred in its conclusion that all e-mails captured in a government e-mail computer storage system, regardless of their purpose, are rendered public records subject to FOIA.[10]

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, a public question being involved.

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[10] Although the question is not before us, we note that an e-mail transmitted in performance of an official function would appear to be a public record under FOIA.

AUTO-OWNERS INSURANCE COMPANY
v FERWERDA ENTERPRISES, INC (ON REMAND)

Docket No. 277574. Submitted November 17, 2009, at Lansing. Decided January 28, 2010, at 9:00 a.m.

Auto-Owners Insurance Company brought an action in the Mason Circuit Court, seeking a determination regarding its liability to its insured, Ferwerda Enterprises, Inc., doing business as Holiday Inn Express Ludington (Holiday Inn), under a commercial general liability insurance policy for injuries sustained by Daryl and Melissa Bronkema and their three minor children. The Bronkemas were exposed in Holiday Inn's indoor-pool building to gas from chlorine and muriatic acid that had formed in the system that filters, heats, and sanitizes the pool water. Holiday Inn filed a counterclaim, alleging breach of contract, estoppel, and waiver and seeking attorney fees and penalty interest. The court, Richard I. Cooper, J., granted summary disposition in favor of Holiday Inn, determining that the Bronkemas' personal injury claims fell within the scope of the policy, specifically the heating equipment exception to the policy's pollution exclusion. The court entered a judgment in favor of Holiday Inn on its breach of contract claim and its claim that Auto-Owners owed it a duty to defend and indemnify against the Bronkemas' underlying personal injury lawsuit and awarded costs and attorney fees. The court also awarded the Bronkemas attorney fees and costs and awarded penalty interest to Holiday Inn and the Bronkemas. Auto-Owners appealed, and Holiday Inn cross-appealed with regard to the dismissal of its counterclaims based on waiver and estoppel. The Court of Appeals, BANDSTRA and GLEICHER, JJ., reversed the trial court's holding that the heating equipment exception provided coverage and that, as a result, Auto-Owners was obligated to defend and indemnify Holiday Inn in the underlying suit. Instead, the Court of Appeals held that the language of the policy was ambiguous and could be construed to include or exclude coverage for the incident and, therefore, the meaning of the policy should be ascertained by the fact-finder. The Court of Appeals also held that questions of fact existed regarding whether the chemicals used in the treatment of the pool water were pollutants subject to the pollution exclusion provision of the policy. Finally, the Court of

Appeals affirmed the dismissal of Holiday Inn's claims of waiver and estoppel and, while not specifically discussing Auto-Owners' claim that the trial court erred by awarding attorney fees to Holiday Inn and the Bronkemas, reversed that holding. 283 Mich App 243 (2009). Judge O'CONNELL, dissenting, stated that the policy was unambiguous and should be construed to provide coverage for the incident. Holiday Inn and the Bronkemas sought leave to appeal and Auto-Owners filed a cross-application for leave to appeal. The Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals and remanded the case to the Court of Appeals for consideration of whether the trial court properly assessed the attorney fees and penalty interest against Auto-Owners. The Supreme Court also held that the circuit court correctly granted summary disposition in favor of the defendants because the policy unambiguously provided coverage for defendants' claim and, therefore, the Supreme Court also reinstated the circuit court's judgment. 485 Mich 905 (2009).

On remand, the Court of Appeals *held*:

1. Given the trial court's explicit statement that the suit was not frivolous and that there was law supporting plaintiff's position, attorney fees were not properly awarded under MCR 2.625 (A)(2). Plaintiff does not appear to have brought the litigation for an improper purpose. The trial court erred by awarding defendants attorney fees.

2. The trial court erred by awarding penalty interest. The "reasonably in dispute" language in MCL 500.2006(4) applies to third-party tort claimants. The breach of contract claim in this case is specifically tied to the underlying third-party tort claim. The claim was reasonably in dispute and, therefore, the nonpayment of the underlying tort claim was not an unfair trade practice. In addition, the Bronkemas are not entitled to collect on the underlying judgment because that judgment was reversed on appeal. The awards of attorney fees and penalty interest must be reversed and the case must be remanded to the trial court for further proceedings.

Reversed and remanded.

Gross & Nemeth, P.L.C. (by *James G. Gross*), and *Lincoln G. Herweyer, P.C.* (by *Lincoln G. Herweyer*), for Auto-Owners Insurance Company.

Varnum LLP (by *Mark S. Allard* and *April H. Sawhill*), for Ferwerda Enterprises, Inc.

Gee & Longstreet LLP (by *Bruce W. Gee*) for Daryl, Jackson T., Caleb A., Savannah J., and Melissa Bronkema.

Before: O'CONNELL, P.J., and BANDSTRA and GLEICHER, JJ.

ON REMAND

O'CONNELL, P.J. This case is on remand from the Supreme Court.[1] On remand, this Court is charged with determining whether the trial court erred in assessing attorney fees and penalty interest against Auto-Owners Insurance Company (Auto-Owners). We reverse the award of attorney fees and penalty interest and remand this case to the trial court for further proceedings.

I. UNDERLYING FACTS AND PROCEEDINGS

This Court's initial opinion contains a concise statement of the events that led to the instant litigation:

> The Holiday Inn Express Ludington offers its guests the use of a swimming pool, located in a building attached to the hotel. The equipment used to operate the pool includes a water pump, polyvinyl chloride (PVC) lines that carry pool water to and from the water pump, a boiler that heats the pool water, and a device called a Rola-Chem that dispenses chemicals into the pool water. The pump propels pool water through the PVC lines into the filter and then into the boiler, which heats the water. From the boiler, the warmed water travels to the Rola-Chem, which injects chlorine and muriatic acid, and the pump then pushes the warmed, chemically treated water back into the pool. An affidavit signed by Jeffrey Curtis, Holiday Inn's general manager, describes the mechanical equipment as "an integrated system that filters, heats, and sanitizes the indoor pool water."

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[1] *Auto-Owners Ins Co v Ferwerda Enterprises, Inc*, 485 Mich 905 (2009).

> The boiler used to heat the pool water serves as the primary source of heat for the entire pool building. Curtis's affidavit explains, "There are no heat ducts from any source in the pool pump room. The sole source of heat for the pump room is the heat given off by the integrated pipe and boiler system." Gerald Gregorski, a mechanical engineer, also supplied an affidavit, which attested that the pool "lose[s] heat through the processes of convection and evaporation," and as a result heats the air space in the building housing the pool. Gregorski's affidavit continues, "Because of heat loss through convection and evaporation, pools require the use of a heater to maintain a constant water temperature. A system that pumps pool water into a boiler to heat the water and pumps the heated water back into the pool heats the building where the pool is located." Plaintiff retained engineer Michael T. Williams to inspect the Holiday Inn's pool equipment. At his deposition, Williams conceded that "the only source of heat for the pool building at issue in this litigation in the Holiday Inn Express that requires the use of equipment is the heating of the pool water by the boiler in the utility room." Williams expressed that apart from solar heat entering the pool room's windows, he did not know of any source of heat besides the boiler.
>
> On April 9, 2004, an elbow in the PVC line "blew out." A Holiday Inn maintenance man repaired it, but did not turn off the Rola-Chem "feeder system" while completing the repair. Gases created by the continuously flowing chlorine and muriatic acid formed in the PVC lines. When the maintenance man successfully repaired the elbow and powered the system back on, a cloud of gas traveled through the PVC lines, entered the pool area, and injured the Bronkema family. [*Auto-Owners Ins Co v Ferwerda Enterprises, Inc*, 283 Mich App 243, 245-246; 771 NW2d 434 (2009), rev'd and remanded 485 Mich 905 (2009).]

The Bronkemas filed a personal injury action against Holiday Inn, adding Rola-Chem as a defendant after Holiday Inn filed notice of non-party fault. Holiday Inn was insured by a policy issued by Auto-Owners. The

policy contained a pollution exclusion, which precluded coverage for bodily injury or property damage resulting from the actual or threatened release of pollutants at or from any premises owned, occupied, or controlled by the insured.

Initially, Auto-Owners paid approximately $10,000 in medical expenses for the Bronkemas, but ultimately declined to defend and indemnify Holiday Inn in the suit brought by the Bronkemas. Auto-Owners concluded that the pollution exclusion precluded coverage for the injuries suffered by the Bronkemas, reasoning that the flow of chlorine and muriatic acid into the pool area constituted a release of pollutants.

In October 2005, Auto-Owners filed a declaratory judgment action, naming Holiday Inn and the Bronkema family as defendants and arguing that it had no duty to defend and indemnify Holiday Inn in the underlying suit because the pollution exclusion precluded coverage. Holiday Inn filed a counterclaim, alleging breach of contract, estoppel, and waiver, and requesting attorney fees and penalty interest.

Auto-Owners moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that no genuine issue of fact existed regarding the exclusion of the Bronkema family's claims under the pollution exclusion. Holiday Inn filed a cross-motion for summary disposition pursuant to MCR 2.116(C)(8), (9), and (10), arguing that an endorsement to its policy, known as the "heating equipment exception," provided coverage for the claims. This exception provided that the pollution exclusion did not apply to a claim for bodily injury if such injury was "sustained within a building at such premises, site or location and caused by smoke, fumes, vapor or soot from equipment used to heat a building at such premises, site or location." Holiday Inn argued that be-

cause the pool filtering and water heating mechanisms were part of an integrated system, and because this system was the source of heat for the pool building, the incident fell within the heating equipment exception to the pollution exclusion.

The trial court held a hearing on the motions for summary disposition on June 30, 2006. At the conclusion of the hearing, the trial court granted Holiday Inn's motion, finding that the heating equipment exception applied and that Auto-Owners had a duty to defend and indemnify Holiday Inn in the underlying suit. Subsequently, Holiday Inn moved for summary disposition on its counterclaims. Holiday Inn asserted that it sought attorney fees as a sanction because Auto-Owners had misquoted the policy in a letter and Auto-Owners' position had no support in fact or law. The trial court found that Auto-Owners' position was arguable, but awarded attorney fees to Holiday Inn notwithstanding that conclusion. The trial court denied Holiday Inn's motion for summary disposition on the counterclaims of estoppel and waiver. Finally, the trial court granted the Bronkemas their attorney fees.

The suit filed by the Bronkemas went to trial in September 2006, and the jury returned a verdict in favor of the Bronkemas. On December 20, 2006, the trial court entered a final judgment awarding the Bronkemas $528,935.91 plus interest.[2]

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[2] Holiday Inn appealed as of right the jury verdict. In *Bronkema v Ferwerda Enterprises, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2009 (Docket No. 275528), this panel vacated the judgment, finding that the trial court erred by granting a directed verdict on the issue of negligence. This panel also reversed the trial court's grant of summary disposition in favor of Rola-Chem on Holiday Inn's cross-claim and remanded for a new trial and other proceedings. *Id.* Our Supreme Court denied Rola-Chem's application for leave to appeal. *Bronkema v Ferwerda Enterprises, Inc*, 485 Mich 927 (2009).

Holiday Inn filed another motion for summary disposition on its claims for penalty interest and breach of contract and sought a hearing on attorney fees. The trial court found that Auto-Owners breached its contract because it was obligated to defend and indemnify Holiday Inn and because it had failed to pay the jury verdict. The trial court awarded penalty interest at the rate of 12 percent on both the judgment and the attorney fees awarded.

In a final order entered on February 22, 2007, the trial court awarded Holiday Inn $186,127.44 in attorney fees and costs and $528,935.91 for breach of contract by Auto-Owners, and it awarded the Bronkemas $71,365.72 in attorney fees and costs. Finally, the trial court awarded penalty interest under MCL 500.2006 on all amounts awarded.

II. APPELLATE PROCEEDINGS

Auto-Owners appealed to this Court, arguing that (1) the trial court erred by holding that Auto-Owners was required to defend and indemnify Holiday Inn in the underlying suit because the heating equipment exception in Holiday Inn's policy applied and thus coverage was not precluded; (2) the trial court erred by awarding attorney fees to Holiday Inn and the Bronkemas on the basis that the trial court found for Holiday Inn and the Bronkemas on the issue of coverage; and (3) the trial court erred by awarding penalty interest to Holiday Inn and the Bronkemas on the judgment amounts. Holiday Inn filed a claim of cross-appeal, arguing that the trial court erred by dismissing its claims of waiver and estoppel.

In our previous opinion in this case, a majority of this panel reversed the trial court's holding that the heating equipment exception provided coverage under the

policy and that as a result, Auto-Owners was obligated to defend and indemnify Holiday Inn in the underlying suit. *Auto-Owners Ins Co*, 283 Mich App at 244-245. Instead, the majority held that the language of the insurance contract was ambiguous and could be construed to include or exclude coverage for the incident; therefore, the meaning of the insurance contract should be ascertained by the fact-finder. *Id.* at 252-253. In addition, the majority held that questions of fact existed regarding whether the chemicals used in the treatment of the pool water were pollutants brought onto the premises by the insured and thus were subject to the pollution exclusion provision of the policy. *Id*. at 254-256. Finally, the majority affirmed the trial court's dismissal of Holiday Inn's claims of waiver and estoppel. *Id*. at 245, 256-258. The majority did not specifically discuss the claim by Auto-Owners that the trial court erred by awarding attorney fees to Holiday Inn and the Bronkemas, but reversed that holding as well. *Id*. at 245. The dissent stated that the policy was unambiguous and therefore should be construed to provide coverage for the incident. *Id*. at 258-263 (O'CONNELL, P.J., dissenting).

Holiday Inn and the Bronkemas sought leave to appeal to our Supreme Court. Auto-Owners filed a cross-application for leave to appeal. In lieu of granting leave to appeal, our Supreme Court reversed our judgment in *Auto-Owners Ins Co*, 283 Mich App 243, and remanded to this panel "for consideration of whether the trial court properly assessed attorney fees and penalty interest against plaintiff, Auto-Owners Insurance Company." *Auto-Owners Ins Co*, 485 Mich 905. Our Supreme Court also reinstated the circuit court's judgment, explaining, "The circuit court correctly granted summary disposition in favor of the defendants because the subject policy unambiguously provided coverage for the defendants' claim." *Id.*

III. ANALYSIS ON REMAND

Auto-Owners argued in its original appeal to this Court that the trial court erred by assessing attorney fees and penalty interest. Our original opinion did not address these issues.

A. ATTORNEY FEES

"As a general rule, an award of attorney fees as an element of costs or damages is prohibited unless it is expressly authorized by statute or court rule." *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 683; 713 NW2d 814 (2006). Defendants claim that they were awarded attorney fees as a sanction under MCR 2.625(A)(2) because plaintiff filed a frivolous claim and such an award is mandatory under the rule. In making its decision, the trial court stated:

> I'm still agreeing with Auto-Owners that you have an arguable situation here and, in fact, the law even to my surprise would favor Auto-Owners' position.
>
> However, this idea that the, that Auto-Owners also was tagging the situation bearing in mind that they would have been aware of the heating unit exclusion and yet that was never put on the table except, except through the brief.
>
> This brings me round circle to what [Holiday Inn's] attorney [Mark] Allard is saying that if you have a case and the Court is asked to award attorney fees and there's a request for sanctions, yes, if it's frivolous, the Court would deal with that standard. *But I don't find it to be frivolous*.
>
> But as far as based in law, I am persuaded by the arguments today that this aspect of law somehow did not get properly focused by Auto-Owners until much, much more recently.

* * *

> I think that someplace along the line that as a matter of law that the case was argued from the wrong policy language.
>
> And so the American Rule notwithstanding, I think we have an argument that failed as a matter of law; so the Court does rule in favor of [Holiday Inn] on the attorney fee issue.

The trial court stated that although the suit was not frivolous, because plaintiff took too long before it addressed the heating equipment exception, the court would still award attorney fees to defendants. Given the trial court's explicit statement that the suit was not frivolous and that there was law supporting plaintiff's position, attorney fees were not properly awarded. According to the plain language of the court rule, a trial court may only award attorney fees "if the court finds . . . that an action or defense was *frivolous* . . . ." MCR 2.625(A)(2) (emphasis added).

Defendants also cite *Mich Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 118-119; 617 NW2d 725 (2000), for the proposition that attorney fees can be awarded against an insurance company under MCR 2.114(E) or (F) for initiating a declaratory judgment action for an improper purpose. However, plaintiff does not appear to have brought the instant litigation for an improper purpose. Holiday Inn's counsel even represented to the trial court that he was not claiming that the lawsuit was filed to harass Holiday Inn.

Moreover, the trial court noted that it found some support for plaintiff's position. This case involved a heating equipment exception that had not yet been addressed by Michigan courts, in addition to questions regarding where Michigan stood regarding the application of the "absolute pollution exclusion." Accordingly,

we conclude that the trial court erred by awarding defendants attorney fees.

B. PENALTY INTEREST

Defendants brought the claim for penalty interest as part of a motion for summary disposition. Defendants claimed that they are entitled to penalty interest because plaintiff breached its contract of insurance with defendants. We conclude that the trial court erred by awarding penalty interest.

MCL 500.2006 provides, in pertinent part:

> (1) A person must pay on a timely basis to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant 12% interest, as provided in [MCL 500.2006(4)], on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in [MCL 500.2006(4)] is an unfair trade practice unless the claim is reasonably in dispute.
>
> * * *
>
> (4) If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably

> in dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law.

Defendants maintain that pursuant to *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551; 741 NW2d 549 (2007), whether the issue was reasonably in dispute is irrelevant. We disagree. The *Griswold* Court resolved an ongoing dispute regarding the application of language in *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998),[3] recognizing that the "reasonably in dispute" language in MCL 500.2006(4) applies to third-party tort claimants. *Griswold*, *supra* at 566.

Defendants argue that because their award comes from a breach of contract claim, they are entitled to penalty interest. We disagree with defendants' characterization. In this case, the breach of contract claim is specifically tied to the underlying third-party tort claim. Indeed, the trial court was exceptionally clear that the amount of the breach of contract claim exactly matched that of the judgment in the underlying tort claim. The trial court only granted a breach of contract claim award to Holiday Inn because plaintiff had not yet paid the judgment in the underlying tort claim.

This is a wholly different situation than that found in the cases where penalty interest was awarded. *Griswold* involved three consolidated claims, all of which involved an insurance company's failure to pay for the direct losses of the insured, as opposed to the nonpayment of

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[3] The pertinent language in *Yaldo* stated:

> With respect to collection of twelve percent interest, reasonable dispute is applicable only when the claimant is a third-party tort claimant. Here, plaintiff is not such a claimant. Rather, he is seeking reimbursement for the loss of this business due to a fire. Therefore, plaintiff could have recovered interest at the rate of twelve percent per annum under the Uniform Trade Practices Act. [*Yaldo*, *supra* at 349.]

a third-party claim found in this case. *Griswold*, *supra* at 559-561. This case involves an issue of first impression to Michigan's jurisprudence. The claim, as shown by our prior opinions in these cases, was "reasonably in dispute" and therefore the nonpayment of the claim was not an unfair trade practice. Moreover, the Bronkemas are not entitled to collect on the underlying judgment because that judgment was reversed on appeal.

We reverse the awards of attorney fees and penalty interest and remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

PEOPLE v GIPSON

Docket No. 287324. Submitted January 5, 2010, at Detroit. Decided January 28, 2010, at 9:05 a.m.

Ted F. Gipson was convicted by a jury in the Macomb Circuit Court, David F. Viviano, J., of first-degree felony murder and armed robbery. Defendant appealed.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion by admitting evidence that, following the charged offenses, defendant obtained a tattoo that read "Murder 1" and depicted a chalk outline of a dead body underneath. The tattoo was relevant to the issues of defendant's intent and culpability in the victim's death and the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice.

2. The trial court did not err by determining that the statements defendant made to the police while in police custody were made voluntarily, knowingly, and intelligently. The trial court did not err by denying defendant's motion to suppress the evidence.

Affirmed.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Robert Berlin*, Chief Appellate Lawyer, and *Jurij Fedorak*, Assistant Prosecuting Attorney, for the people.

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

Before: DAVIS, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM. Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), and armed robbery, MCL 750.529. He was sentenced to concurrent terms of life imprisonment for

the murder conviction and 285 to 480 months' imprisonment for the robbery conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the beating death of defendant's drug supplier, David Witting, during a robbery. Evidence at trial indicated that defendant arranged a meeting with Witting to purchase drugs. During the transaction, defendant's brother, Scott Gipson,[1] emerged from behind a dumpster and struck the victim on the head with a bottle. Defendant and Gipson thereafter punched and kicked the victim, who died from internal bleeding after his spleen ruptured. There is no dispute that defendant was present during the assault, and defendant admitted kicking or punching the victim once or twice, but defendant generally maintained that he did not know that Gipson was going to attack the victim, and defendant claimed that he only struck the victim when he believed the victim was going to hit him.

Defendant argues first that the trial court erred in admitting evidence that, after the charged offenses, he obtained a tattoo that read "Murder 1" and depicted a chalk outline of a dead body underneath. Defendant argues that this evidence was irrelevant and unfairly prejudicial. We review the trial court's decision to admit this evidence for an abuse of discretion, which exists when the trial court's decision falls outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). Generally, "the trial court's decision on a close evidentiary question . . . ordinarily cannot be an abuse of discretion." *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

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[1] Because the two brothers share their last name, for convenience we refer to defendant Ted Floyd Gipson as "defendant" and his brother Scott Gipson as "Gipson."

Generally, all relevant evidence is admissible. MRE 402; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Yost*, *supra* at 355. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Yost*, *supra* at 407. "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *Blackston*, *supra* at 462. The determination whether evidence should be excluded pursuant to MRE 403 is best left to the trial court's contemporaneous assessment. *Id*.

Defendant asserts that there are many possible reasons for the tattoo. Indeed, defendant was able to present to the jury a number of plausible theories as to why he obtained the tattoo. Those theories included referring to his dog, which was shot during the police raid on his house; and as a reminder of something he overcame in his life, because he believed he would win the case and not even be charged with the instant offenses. However, there was also evidence that defendant altered the tattoo from an outline of a body to the shape of a dog after being informed that the police wanted to photograph the tattoo. Furthermore, other possible reasons are, as argued by the prosecution, bravado or a symbolic representation of defendant's acknowledged connection to the victim's death. Under the circumstances, the tattoo was relevant to the issues of defendant's intent and culpability in the victim's death. Because the prosecution presented significant other evidence of defendant's guilt without unduly focusing on the tattoo evidence, and because defendant

had the opportunity to present his own explanation of the tattoo, we do not believe that the probative value of the tattoo was substantially outweighed by any danger of unfair prejudice. At the most, it would be a close question of the kind that we could not deem an abuse of discretion.

Defendant next argues that statements that he made while in police custody should have been suppressed because they were not voluntarily made. Defendant argues that the statements were given while he was under the influence of drugs and were coerced by the police.

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). We review de novo a trial court's determination that a waiver was knowing, intelligent, and voluntary. *People v Tierney*, 266 Mich App 687, 707-708; 703 NW2d 204 (2005). When reviewing a trial court's determination of voluntariness, we examine the entire record and make an independent determination. *People v Shipley*, 256 Mich App 367, 372; 662 NW2d 856 (2003). But we review a trial court's factual findings for clear error and will affirm the trial court's findings unless left with a definite and firm conviction that a mistake was made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Deference is given to a trial court's assessment of the weight of the evidence and the credibility of the witnesses. *Id.*

"[W]hether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion." *Daoud*, *supra* at 635. A waiver is voluntary if it was the product

of a free and deliberate choice rather than intimidation, coercion, or deception. *Shipley*, *supra* at 373-374. The voluntariness of a defendant's statements is determined by examining the totality of the circumstances surrounding the interrogation. *Daoud*, *supra* at 633-634. A court should consider factors such as: the duration of the defendant's detention and questioning; the age, education, intelligence, and experience of the defendant; whether there was unnecessary delay of the arraignment; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency. *Shipley*, *supra* at 373-374.

Whether a waiver was made knowingly and intelligently requires an inquiry into defendant's level of understanding, irrespective of police conduct. *Daoud*, *supra* at 636. A defendant does not need to understand the consequences and ramifications of waiving his or her rights. A very basic understanding of those rights is all that is necessary. *Id*. at 642. Intoxication from alcohol or other substances can affect the validity of a waiver, but is not dispositive. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987).

Defendant argued below that his statements were coerced because the police threatened his mother. He testified at the *Walker*[2] hearing that the police told him that his mother, who had been taken into custody, was being detained naked because her clothes were confiscated for evidence. They also allegedly told him that if he spoke, she would be released. Otherwise, she would be charged with being an accessory to murder. Defendant further testified that during the 24 hours before he was taken into custody, he drank four to five 40-ounce beers, ingested approximately 25 Vicodin pills, and smoked 12 marijuana joints. Conversely, the detectives

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

denied making the alleged statements regarding defendant's mother. They also testified that based on their experience, defendant did not appear to be under the influence of alcohol or drugs, and they had no trouble communicating with defendant.

Defendant does not dispute that at the time his statements were given, he was in his mid-20s, had a GED, had some limited prior contact with the police, was interviewed within a short time after being taken into custody, and that his interviews, which were about three hours apart, lasted approximately an hour each. Defendant's suppression motion depended on the trial court's resolution of the parties' conflicting accounts of the circumstances surrounding defendant's interrogations, specifically whether the police threatened defendant's mother and whether defendant was under the influence of drugs when he gave his statements. In this regard, the trial court found that Detectives Keith Keitz and Kevin Woods, who both denied making the alleged statements regarding defendant's mother, and who both stated that defendant did not appear to be under the influence of alcohol or drugs, were credible. Further, as the trial court observed, defendant's admitted ability to lie regarding the amount of sleep he had and regarding his initial account of his role in the offense, as well as his ability to change his story to account for inconsistencies between his and Scott Gipson's account while minimizing his own involvement, belied defendant's assertion that he was "in a fog" because of his intoxication. Considering the totality of the circumstances and giving deference to the trial court's assessment of credibility, the trial court did not err by determining that defendant's statements were made voluntarily, knowingly, and intelligently. Thus, the trial court properly denied defendant's motion to suppress.

Affirmed.

PEOPLE v LUCEY

Docket No. 287446. Submitted January 5, 2010, at Lansing. Decided February 2, 2010, at 9:00 a.m.

Dennis R. Lucey pleaded guilty to attempted third-degree fleeing and eluding, MCL 257.602a(3). He was sentenced in the Roscommon Circuit Court, Michael J. Baumgartner, J., to 17 to 30 months' imprisonment. This was a departure from the intermediate sanction specified by the applicable sentencing guidelines and MCL 769.34(4)(a), which requires the sentencing court to state a substantial and compelling reason for imposing a prison sentence on a defendant whose recommended minimum sentence range has an upper limit of 18 months or less. In imposing this sentence, the court considered the fact that defendant was on parole for a previous offense, but it did not acknowledge on the record that it was departing from the guidelines. Defendant appealed by delayed leave granted.

The Court of Appeals *held*:

1. A sentencing court's speculation regarding what action the department of corrections or the parole board might take in the future with respect to a prisoner or parolee within its jurisdiction cannot be considered an objective and verifiable fact that could serve as a substantial and compelling reason to depart from the sentence recommended under the guidelines.

2. The fact that a defendant might require imprisonment for a previous sentence is not a substantial and compelling reason to depart from a guidelines' recommended intermediate sanction when sentencing that defendant for a subsequent offense.

3. The arguments raised in defendant's Standard 4 brief regarding alleged inaccuracies in the presentence investigation report and ineffective assistance of counsel are without merit.

Convictions affirmed, sentence vacated, and case remanded for further proceedings.

1. SENTENCES — SENTENCING GUIDELINES — INTERMEDIATE SANCTIONS — DEPARTURES.

A court may not sentence a defendant who is entitled to an intermediate sanction under the sentencing guidelines to prison

unless it states on the record a substantial and compelling reason for the departure (MCL 769.34[3]; 769.34[4][a]).

2. SENTENCING — SENTENCING GUIDELINES — INTERMEDIATE SANCTIONS — PRISONERS AND PAROLEES.

A sentencing court's speculation regarding what action the department of corrections or the parole board might take in the future with respect to a prisoner or parolee within its jurisdiction is not an objective and verifiable fact that can serve as a substantial and compelling reason to depart from the sentence recommended under the guidelines (MCL 769.34[3]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Mark Jernigan*, Prosecuting Attorney, and *Anica Letica*, Assistant Attorney General, for the people.

Bart R. Frith and Dennis Lucey, *in propria persona*, for defendant.

Before: BECKERING, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM. Defendant appeals by delayed leave granted the sentence of 17 to 30 months in prison imposed on his plea-based conviction of attempted third-degree fleeing and eluding, MCL 257.602a(3).[1] We affirm defen-

[1] Defendant apparently pleaded guilty to a charge of attempted third-degree fleeing and eluding under the general attempt statute, MCL 750.92. The information and judgment of sentence cites the underlying offense as MCL 257.602a(3), a violation of the Michigan Vehicle Code. However, the general attempt statute does not apply to MCL 257.602a(3) because MCL 750.92 only prescribes a criminal penalty when a criminal offense is attempted and "no express provision is made by law for the punishment of such attempt." But MCL 257.602a(1) includes "attempting to flee or elude [an] officer" as being the substantive offense. The offense is elevated to third-degree fleeing and eluding by certain aggravating circumstances, or where the defendant has prior convictions for substantially similar conduct. MCL 257.602a(3). Moreover, MCL 257.204b(2) provides: "The court shall impose a criminal penalty for a conviction of an attempted violation of [the

dant's convictions[2] but remand for resentencing or rearticulation of a substantial and compelling reason for departing from the sentencing guidelines.

The sentencing guidelines recommended a minimum term of 5 to 17 months.[3] The trial court sentenced defendant to 17 to 30 months in prison to run consecutively to the sentence for which defendant was serving parole at the time he committed the instant offenses. On appeal, defendant argues that the trial court failed to articulate on the record a substantial and compelling reason for departing from the sentencing guidelines. We agree.

Under the statutory sentencing guidelines, a trial court is generally required to impose a minimum sentence in accordance with the appropriate sentence

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Michigan Vehicle Code] . . . in the same manner as if the offense had been completed." Thus, both third-degree fleeing and eluding and "attempted" third-degree fleeing and eluding are punishable by "imprisonment for not more than 5 years." MCL 257.602a(3). Generally, when a court imposes an indeterminate prison sentence, the court must set as the top end the "maximum penalty provided by law . . . ." MCL 769.8. Here, defendant pleaded guilty with the understanding that his maximum sentence could not exceed 30 months, one-half the maximum for the completed offense. MCL 750.92(3).

[2] Defendant also pleaded guilty to a charge of operating a motor vehicle while visibly impaired, MCL 257.625(3), and was sentenced to pay a fine of $100 and costs of $100.

[3] Defendant's prior record variable (PRV) score was 140 points (PRV level F). His offense variable (OV) score was 25 points (OV level III). Third-degree fleeing and eluding is categorized by the sentencing guidelines as a public safety offense and as a class E felony, MCL 777.12e. If defendant's guidelines score had been applied to the class E guidelines grid, MCL 777.66, his guidelines recommended minimum sentence would have been 14 to 29 months. However, because the conviction was for an "attempt," MCL 777.19(3)(b) requires the sentencing court to use the class H guidelines grid. On the class H guidelines grid, MCL 777.69, the OV score column tops out at 16+ points and the PRV score row tops out at 75+ points. The top class H cell provides the recommended minimum sentence of 5 to 17 months.

range. MCL 769.34(2). A court may depart from the range set forth in the guidelines if it states on the record a substantial and compelling reason for doing so. MCL 769.34(3); *People v Harper*, 479 Mich 599, 616; 739 NW2d 523 (2007).

The interpretation and application of statutory sentencing guidelines are legal questions that we review de novo. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). Whether a factor justifying departure from the sentencing guidelines exists is a factual determination for the trial court, which we review for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). We review the issue of whether a particular factor is objective and verifiable as a matter of law. *Id*. We review the determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the guidelines for an abuse of discretion. *Id*. at 264-265.

Here, the guidelines recommended a minimum term range of 5 to 17 months. But, because the upper recommended minimum sentence range was 18 months or less, the trial court was required to impose an intermediate sanction unless it stated on the record a substantial and compelling reason to sentence defendant to prison. MCL 769.34(4)(a); *People v Stauffer*, 465 Mich 633, 635-636; 640 NW2d 869 (2002). MCL 769.34(4)(a) provides:

> If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in [MCL 777.1 *et seq*.] is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the

> upper limit of the recommended minimum sentence range or 12 months, whichever is less.

MCL 769.31(b) defines "intermediate sanction" as "probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed." Thus, a prison sentence cannot constitute an intermediate sanction. *Stauffer*, 465 Mich at 635; *People v Muttscheler*, 481 Mich 372, 375; 750 NW2d 159 (2008).

At sentencing, defense counsel noted that the sentencing guidelines indicated a sentence range of 5 to 17 months, and that a county jail sentence was appropriate. The probation officer explained his recommendation for a prison sentence:

> *Officer*: Your Honor, it is what the department called a location departure. That is due to this defendant's prisoner status as a parolee and his lack of—his inability to receive any credit for time served due to parole status. It is technically called a location departure, your Honor.
>
> *The Court*: Okay. So he has got to serve the balance of his sentence on the previous charge before he starts this one?
>
> *Officer*: That is correct, your Honor.

Defense counsel countered that defendant's parole status and prior criminal record did not provide reasons for a departure from an intermediate sanction because they had been accounted for in scoring the guidelines. The prosecutor contended the guidelines did not adequately account for defendant's extensive criminal history and his failures at rehabilitation. After these arguments, the trial court imposed its sentence as follows:

> I don't know how we can accomplish it[;] if we sentenced him to county jail, and he had to finish his parole we could take him to prison and bring him back. I am not going to go there. So I am going to sentence you, Mr. Lucey, to a

> location departure, sentence you to not less than seventeen months nor more than thirty months with the Michigan Department of Corrections.
>
> * * *
>
> And you are—this sentence will be consecutive to completion of the sentence upon which you are under parole.

Defense counsel informed the court that the court needed to advise defendant of his right to appeal the sentence because it represented a departure. The trial court responded:

> I understand. I have already explained that it is not longer. It is seventeen months. That is what the guidelines are, five to seventeen. And as indicated, it's a location departure. He is going to have to—it is consecutive to his—consecutive to his current sentence.
>
> I gave those forms to—I have explained that it is a location departure as indicated that he is going to have to serve that before he starts his—this sentence. I am not going to have that situation. Indicate that because he is on parole status he is not entitled to any credit for time served.

In *People v Ratliff*, 480 Mich 1108 (2008), our Supreme Court suggested that the logistical inconvenience that may occur when sentencing a parolee to an intermediate sanction does not constitute a substantial and compelling reason for departure from the sentencing guidelines. The Court stated in an order in lieu of granting leave to appeal:

> The trial court's assumption that the defendant would be required to serve additional prison time on his parole sentence before serving the instant sentence was not objective and verifiable, and in fact was erroneous. Furthermore, the possibility of a current prisoner or parolee serving a sentence in the county jail does not relate to the

> seriousness of the offense or the culpability of the offender, and is not a compelling reason to deny the defendant an intermediate sanction to which he is entitled by statute. [*Id*.]

We read the *Ratliff* order as establishing two principles. First, what action the department of corrections or parole board might take in the future with respect to a prisoner or parolee within its jurisdiction cannot be considered an objective and verifiable fact that could serve as a substantial and compelling reason for departure from the guidelines' recommended sentence. See *Babcock*, 469 Mich at 256-258. Second, that a defendant might require imprisonment for a previous sentence is not a substantial and compelling reason to depart from a guidelines' recommended intermediate sanction when sentencing that defendant for a subsequent offense—in other words, there is no such thing as a "location departure." The fact that a defendant might have to serve county jail time following additional prison incarceration for a parole violation cannot be a substantial and compelling reason to depart from the sentencing guidelines. MCL 769.34(4)(a).

At sentencing, the prosecutor stressed that a departure was appropriate in light of defendant's extensive criminal history, which had not been given adequate weight by the guidelines. On appeal, the prosecutor argues that although the trial court did not explicitly cite defendant's criminal record as the basis for the departure, the proximity of its argument to the trial court's imposition of its sentence allows for such an inference. We agree that a court may find that an offense characteristic or offender characteristic that has already been taken into account in scoring the guidelines but given inadequate or disproportionate weight provides a substantial and compelling reason for a guidelines departure. MCL 769.34(3)(b). Thus, a defen-

dant's criminal history that has not been given adequate weight by the guidelines may provide a substantial and compelling reason to depart from the guidelines recommended sentence. *Harper*, 479 Mich at 638. Nevertheless, MCL 769.34(3) requires the trial court to "state[] on the record the reasons for departure." The *Babcock* Court explained that because of MCL 769.34(3),

> it is not enough that there *exists* some potentially substantial and compelling reason to depart from the guidelines range. Rather, this reason must be articulated by the trial court on the record. Accordingly, on review of the trial court's sentencing decision, the Court of Appeals cannot affirm a sentence on the basis that, even though the trial court did not articulate a substantial and compelling reason for departure, one exists in the judgment of the panel on appeal. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing or rearticulation. The obligation is on the trial court to articulate a substantial and compelling reason for any departure. As discussed below, the obligation of the Court of Appeals is to *review* the trial court's determination that a substantial and compelling reason exists for departure. [*Babcock*, 469 Mich at 258-259 (emphasis in original).]

Because a "location departure" does not provide a substantial and compelling reason for not imposing an intermediate sanction, *Ratliff*, 480 Mich at 1108, and because it is not even clear on this record that the trial court realized its sentence was a guidelines departure, we must remand this case to the trial court for resentencing or rearticulation. *Babcock*, 469 Mich at 258-259. On remand, the trial court must either impose an intermediate sanction, or, if the court elects to affirm its departure from the sentencing guidelines, state on the record a substantial and compelling reason to sentence defendant to the jurisdiction of the Department of Corrections. MCL 769.34(4)(a).

Defendant has also filed a Standard 4 brief in which he argues that the presentence investigation report (PSIR) contained false statements and inaccuracies and that he was deprived of the effective assistance of counsel because counsel failed to properly investigate the case and raise meritorious defenses. Defendant's arguments are without merit.

We review a trial court's response to a claim of inaccuracy in the PSIR for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). A "sentencing court must respond to challenges to the accuracy of information in a presentence report; however, the court has wide latitude in responding to these challenges." *Id*. The trial court may determine that the challenged information is accurate, accept the defendant's version, or disregard the challenged information as irrelevant. *Id*. If the court chooses to disregard the challenged information, it must indicate that it did not consider the information when fashioning the sentence and it must strike the information from the PSIR. *Id*. at 649.

When reviewing a claim of ineffective assistance arising from a guilty plea, our inquiry is whether the plea was made voluntarily and understandingly. *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001), aff'd but modified on other grounds 468 Mich 233; 661 NW2d 553 (2003). The pertinent question is not whether counsel's advice was right or wrong; rather, it is whether counsel's advice was within the range of competence for attorneys in criminal cases. *Id*.; *People v Thew*, 201 Mich App 78, 89-90; 506 NW2d 547 (1993).

Defendant challenged the accuracy of the victim's impact statement, which described how the victim injured his arm while attempting to apprehend defendant. The trial court declined to change the victim's

impact statement because it considered that portion of the report to be inherently subjective, explaining, "[T]hat is what the victim said. Whether that is what happened, that is what he remembers." The trial court did not abuse its discretion by declining to change this portion of the PSIR.

Defendant also challenged the part of the PSIR that indicated he had a history of substance abuse dating back to 1980. Defendant argued that he abstained from drugs while in prison, a fact that should be noted in the PSIR. The probation officer argued that the personal history section was intended to convey defendant's historical propensity for drug use and did not include periods of abstinence. The trial court adopted the probation officer's rationale and declined to alter the PSIR. This response was not an abuse of discretion.

Defendant also challenged the PSIR's characterization of his behavior on the night of the instant offense as reflecting defendant's past behavior and that he appeared to be "casing" houses. Defendant challenged the PSIR author's conclusions as opposed to the factual bases from which those conclusions were drawn. Accordingly, the trial court did not abuse its discretion in retaining this opinion-based passage in the PSIR. See *People v Wybrecht*, 222 Mich App 160, 173; 564 NW2d 903 (1997).

Defendant also claimed that, contrary to the statement in the PSIR, the Michigan state trooper failed to identify himself as a police officer when defendant and his companion demanded he do so. The trial judge declined to change the PSIR, stating, "I am satisfied that it's an appropriate statement and there is some basis in fact, not just pulling it out of the air." When a defendant raises an effective challenge to the accuracy of information contained in the PSIR, the burden shifts

to the prosecution to prove the disputed factual assertions in the PSIR by a preponderance of the evidence. See *People v Callon*, 256 Mich App 312, 333-334; 662 NW2d 501 (2003). Defendant has not supported his challenge; therefore, we conclude that the challenge was not effective and that the trial court did not abuse its discretion by declining to change the PSIR.

Defendant asserts for his claim of ineffective assistance of counsel that counsel failed to properly investigate the case and to raise meritorious defenses; however, defendant does not claim that his plea was involuntarily or not understandingly made. Thus, defendant has not carried his burden of demonstrating that counsel provided ineffective assistance. *Watkins*, 247 Mich App at 30-31.

We affirm defendant's convictions, but remand for resentencing or rearticulation of a substantial and compelling reason for departing from the sentencing guidelines on defendant's sentence for attempted third-degree fleeing and eluding. We do not retain jurisdiction.

PEOPLE v DOWDY

Docket No. 287689. Submitted January 5, 2010, at Lansing. Decided February 2, 2010, at 9:05 a.m.

Randall L. Dowdy, a homeless person who has been convicted of first-degree criminal sexual conduct, was charged in the Ingham Circuit Court, Thomas L. Brown, J., with failure to comply with the provisions of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The trial court dismissed the charges. The Court of Appeals, METER, P.J., and OWENS and M.J. KELLY, JJ., denied the prosecution's delayed application for leave to appeal in an unpublished order, entered February 12, 2009 (Docket No. 287689). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 484 Mich 855 (2009).

The Court of Appeals *held*:

1. SORA provides for registering and reporting by individuals convicted of specified crimes where those individuals have either a domicile or a residence.

2. A "domicile" is a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere. The parties agree that, as a homeless person, defendant has no true, fixed, principal, and permanent home.

3. The term "residence" generally, and as specifically defined in SORA, does not include the concept of the intent to make the residence a permanent home. A person may have many residences but only one domicile.

4. Pursuant to SORA, a "residence" refers to a place, a dwelling, an abode, where an individual has a regular place of lodging. A "lodging" is a place to live or accommodations in a house, especially in rooms to rent. The provisional location where a homeless person happens to spend the night does not fall within the ambit of these definitions. The concepts of habitually and regularity are antithetical to the circumstances of homelessness.

5. SORA provides for maintaining information on the location of convicted sex offenders in order to provide for the public safety.

The reporting requirements are focused on persons who have a domicile or a residence, as defined by the act. The trial court properly dismissed the charges on the basis that defendant does not have a domicile or a residence.

Affirmed.

CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT.

The Sex Offenders Registration Act provides for the registering of and reporting by individuals convicted of specified crimes where those individuals have either a domicile or a residence, as defined by the act (MCL 28.721 *et seq*.).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Stuart J. Dunnings III*, Prosecuting Attorney, and *Joseph B. Finnerty*, Assistant Prosecuting Attorney, for the people.

Patrick J. Eagan for defendant.

Before: BECKERING, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM. On remand from our Supreme Court, the prosecution argues that the trial court erred by dismissing the charges pending against the homeless defendant for failure to comply with the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*.[1] We affirm.

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[1] The prosecution originally brought a delayed application for leave to appeal an order of the circuit court dismissing charges brought against defendant under SORA for failing to register, MCL 28.729(1)(a), failing to comply with reporting duties, MCL 28.729(2)(a), and failing to pay registration fees, MCL 28.729(4). This Court denied leave on the basis of a lack of merit in the appeal raised. *People v Dowdy*, unpublished order of the Court of Appeals, entered February 12, 2009 (Docket No. 287689). Our Supreme Court, in lieu of granting leave to appeal, remanded the case for consideration as on leave granted. *People v Dowdy*, 484 Mich 855 (2009). Defendant has several convictions for the offense of first-degree criminal sexual conduct, MCL 750.520b.

Resolution of this appeal turns on an interpretation of provisions of SORA. The goal of statutory interpretation is to give effect to the intent of the Legislature. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). The intent of the Legislature is most reliably shown through the words used in the statute. *Id*. If the language in the statue is unambiguous, judicial construction is neither required nor permitted. *Id.* But if a statute is ambiguous, then judicial construction is appropriate. See *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008).

Here, the intent of the Legislature is clearly defined in the act. The Legislature enacted SORA to "better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a.

MCL 28.725(1) provides as follows:

> An individual required to be registered under this act shall notify the local law enforcement agency or sheriff's department having jurisdiction where his or her new residence or domicile is located or the department post of the individual's new residence or domicile within 10 days after the individual changes or vacates his or her residence, domicile, or place of work or education, including any change required to be reported under section 4a.

MCL 28.722(g) defines the term "residence" as follows:

> "Residence", as used in this act, for registration and voting purposes means that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. If a person has more than 1 residence, or if a wife has a residence separate from that of the husband, that place at which the person resides the greater part of time shall be his or her official residence for the purposes of this act.

Thus, SORA provides for registering and reporting by individuals convicted of specified crimes where those individuals have either a domicile or residence. A "domicile" is "a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." Black's Law Dictionary (8th ed). While the terms "domicile" and "residence" are often used as synonyms, the term "residence" generally, and as specifically defined in SORA, does not include the concept of the intent to make the residence a permanent home. A person may have many residences, but only one domicile. See *In re Scheyer's Estate*, 336 Mich 645, 652; 59 NW2d 33 (1953); *Beecher v Common Council of Detroit*, 114 Mich 228, 230; 72 NW 206 (1897). SORA's use of the two terms clearly indicates that the act recognizes and maintains this important distinction.

Domicile is not an issue in this case because the parties agree that as a homeless person, defendant has no "true, fixed, principal, and permanent home." The issue on appeal focuses on the question whether he has a residence for purposes of SORA. It is accepted that defendant is homeless. The plain language of the statute employed by the Legislature here says the term "residence" refers to a place, a dwelling, an abode, where an individual has a "regular place of lodging." A "lodging" is defined to be "[a] place to live," *The American Heritage Dictionary of the English Language* (1996), or "accommodation in a house, esp. in rooms for rent," *Random House Webster's College Dictionary* (1997). The provisional location where a homeless person happens to spend the night does not fall within the ambit of these definitions. A homeless person is not provided an accommodation by another as a place to habitually sleep or store personal items.

Moreover, the concepts of habitually and regularity are antithetical to the circumstances of homelessness. If there is anything "habitual" to the sleeping arrangements of the homeless, it is that it is customary for them not to have the security of a customary place of lodging. If there is anything "regular" about the place where a homeless person lives, it is that it is not within a home. See *People v Dowdy*, 484 Mich 855, 857-858 (2009) (KELLY, C.J., concurring).

In sum, in SORA, the Legislature provided for maintaining information on the location of convicted sexual offenders in order to provide for the public safety. MCL 28.721a. But, in so doing, the Legislature chose to focus those reporting requirements on persons who have a domicile or residence, as defined by the act. The Legislature is free, indeed, empowered, to make this choice, as it is to include a provision addressing reporting requirements for the homeless. As Justice HATHAWAY indicated in her dissenting opinion in *Dowdy*, 484 Mich at 863, the purpose of SORA is wise, and the Legislature is urged to consider changes so that a homeless person who does not have a domicile or residence may readily comply with its requirements. Any such change, however, is solely within the province of the legislative branch. *Gardner*, 482 Mich at 66.

We affirm.

PEOPLE v MANN

Docket No. 288314. Submitted January 5, 2010, at Lansing. Decided February 2, 2010, at 9:10 a.m.

Brian C. Mann pleaded guilty in the Barry Circuit Court, James H. Fisher, J., to charges of armed robbery and unlawful imprisonment stemming from an incident during which defendant entered a store while armed with a knife and demanded money from an employee, obtained the money, left the store, stopped a woman driving a car, and forced the woman to drive him to another location. Defendant was sentenced to concurrent terms of 171 months to 40 years for the robbery conviction and 10 to 15 years for the unlawful imprisonment conviction. The Court of Appeals, FORT HOOD, P.J., and WHITE and MURRAY, JJ., in lieu of granting defendant's delayed application for leave to appeal, entered an unpublished order on May 21, 2008 (Docket No. 284628), vacating the judgment of sentence and remanding the case to the trial court with instructions to recalculate Offense Variable (OV) 9 in light of *People v Melton*, 271 Mich App 590, 596 (2006), and MCL 777.39. *Melton* held that OV 9 was to be scored solely according to the number of victims placed in danger of physical injury or death, not victims placed in danger of financial injury. MCL 777.39 was amended after *Melton* was decided, effective one month before defendant committed the crimes. The amendment added persons placed in danger of property loss as victims for purposes of scoring OV 9. On remand, the trial court changed the score of OV 9 from 10 points to zero points and resentenced defendant to 135 months to 40 years for the robbery conviction and 10 to 15 years for the unlawful imprisonment conviction. The prosecution appealed.

The Court of Appeals *held*:

1. Neither *Melton* nor the amendment of MCL 777.39 following *Melton* presents a reason for adjusting the original scoring of OV 9, because the prosecution has always relied on the fact that two victims were placed in danger of injury or death, not financial or other property-related criteria, in maintaining that a score of 10 points is proper. Neither *Melton* nor the legislative response to it bars the reinstatement of the original score.

2. The course of committing an armed robbery includes the robber's conduct in fleeing the scene of the crime. Therefore, defendant's forcing the driver of the car to drive him from the scene of the robbery created a second victim, the driver, of the armed robbery.

3. The trial court inaccurately inferred from the Court of Appeals order that the Court of Appeals demanded that OV 9 be scored at zero points. The trial court correctly scored OV 9 at 10 points in the first instance. The sentences imposed on remand must be vacated and the case must be remanded to the trial court for the reinstatement of the original sentences.

Vacated and remanded.

CRIMINAL LAW — ARMED ROBBERY — CONDUCT IN FLEEING SCENE OF CRIME.

An armed robber's conduct in fleeing the scene of the crime is included within the course of committing the armed robbery (MCL 750.529, 750.530).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Thomas E. Evans*, Prosecuting Attorney, and *David G. Banister*, Chief Assistant Prosecuting Attorney, for the people.

Ronald D. Ambrose for defendant.

Before: BECKERING, P.J., and MARKEY and BORRELLO, JJ.

MARKEY, J. The prosecution appeals by leave granted the trial court's decision to rescore a sentencing variable and adjust downward defendant's sentence for a conviction of armed robbery, MCL 750.529. We vacate and remand for reinstatement of the original sentences. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to charges of armed robbery and unlawful imprisonment, MCL 750.349b. At the plea proceeding, defendant admitted that while armed with a knife he entered a store in Nashville and

demanded money from an employee. Defendant further admitted that upon obtaining the money, he left the store, stopped a woman driving a car, and forced her to drive him to Battle Creek. In exchange for the plea, the prosecutor agreed to drop charges of carjacking, MCL 750.529a, and kidnapping, MCL 750.349, and to waive habitual offender enhancement of defendant's sentences. Additionally, the trial court agreed to impose minimum sentences at the low end of the guidelines range.

The trial court initially sentenced defendant to serve concurrent terms of imprisonment of 171 months to 40 years for the robbery conviction and 10 to 15 years for the unlawful imprisonment conviction. The trial court denied a motion for resentencing. In response to defendant's delayed application for leave to appeal, this Court, in lieu of granting the delayed application, entered an order vacating the judgment of sentence and remanding this case to the trial court with instructions to recalculate Offense Variable (OV) 9 in light of *People v Melton*, 271 Mich App 590, 596; 722 NW2d 698 (2006), and MCL 777.39. Unpublished order, entered May 21, 2008 (Docket No. 284628). On remand, the trial court changed the score of OV 9 from 10 to zero points, and resentenced defendant to 135 months to 40 years for the robbery conviction and 10 to 15 years for the unlawful imprisonment conviction. The prosecutor now appeals by leave granted.

Offense Variable 9 addresses the number of victims. The trial court originally assessed 10 points for that variable, which is the total prescribed where "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c).

In the conflict resolution case of *Melton*, this Court held that OV 9 was to be scored solely according to the

number of victims placed only in physical danger. Under *Melton*, no points are to be scored under OV 9 for victims placed in danger of financial injury. *Melton*, 271 Mich App at 592 (DAVIS, P.J.), 597 (NEFF, J., concurring). *Melton* was decided on July 20, 2006. In apparent response to that decision, the Legislature amended MCL 777.39, effective March 30, 2007 (approximately one month before the crimes here at issue), to add persons placed in danger of property loss to those placed in danger of physical injury or death as victims for purpose of scoring OV 9. 2006 PA 548.

In this case, however, the prosecutor seeks to return defendant's score for OV 9 from zero to 10 points solely on the basis that two victims were threatened with injury or death. Because the prosecutor has never relied on financial or other property-related criteria in maintaining that a score of 10 points is proper, neither *Melton* nor the legislative response to it presents a reason for adjusting the original scoring of OV 9. Consequently, neither *Melton* nor the legislative response to it now bar the reinstatement of that original score.

Other caselaw does come to bear, however. In *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), our Supreme Court held that for purposes of scoring OV 9, "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." *Id.* at 122.

Defendant protests that his armed robbery was completed with there being only one victim for purposes of OV 9 before he began the separate crime stemming from his commandeering a car and driver for his getaway. The applicable statutes, however, prevail over this empirical reasoning. MCL 750.530(1) sets forth

robbery in general terms as a felony punishable by imprisonment for not more than 15 years. MCL 750.530(2) in turn adds that for purposes of that statute, the course of committing a larceny includes "flight or attempted flight after the commission of the larceny . . . ." MCL 750.529 incorporates MCL 750.530 by reference and enhances the penalty if the robbery is accomplished with the use of a dangerous weapon. Accordingly, the course of an armed robbery includes the robber's conduct in fleeing the scene of the crime. Thus, in the instant case, defendant's commandeering of a car immediately after taking money from the first victim and forcing the driver of the car to drive him to another community, created a second victim of the armed robbery. In other words, the carjacking incident constituted not only the commission of separate offenses, but was also a continuation of the armed robbery.

At the beginning of the resentencing proceeding, the trial court stated, "As I understand it, the Court of Appeals has indicated that OV 9 should have been scored zero. Is that correct?" Defense counsel agreed, but the prosecuting attorney protested, arguing that the variable was to be recalculated, not necessarily adjusted to zero. The trial court heard arguments, announced its decision to rescore OV 9 at zero, and invited the prosecuting attorney to appeal.

Defendant argues that the trial court correctly interpreted this Court's remand order in this regard and that the result demands respect now as the law of the case. We disagree.

We conclude that the trial court inaccurately inferred from this Court's remand order that this Court demanded that it score zero for OV 9. This Court instead expected only that the question would be considered

anew, applying *Melton*, to the extent that it was relevant. Upon further review, we now conclude that the trial court correctly scored OV 9 at 10 points in the first instance.

Because the original sentences of 171 months to 40 years for the armed robbery conviction and 10 to 15 years for the unlawful imprisonment conviction were within the appropriate guidelines sentence range of properly scored guidelines, resentencing is neither required nor permitted. MCL 769.34(10). Instead, we vacate the sentences imposed after this Court's initial remand and again remand with instructions to reinstate the original sentences.[1]

We vacate defendant's new sentences and remand for reinstatement of his original sentences. We do not retain jurisdiction.

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[1] The trial court should take this opportunity to correct an irregularity that the parties have not discussed. Although at resentencing the trial court stated from the bench its intention to retain the 10- to 15-year sentence for the unlawful imprisonment conviction, which was not at issue, the judgment of sentence that followed listed for that conviction the same 135 months to 40 years sentence listed for the armed robbery conviction. Because there was no legal reason or justification for increasing both the minimum and maximum sentences for that conviction, we regard this irregularity as simple inadvertence but ask the trial court to correct it on remand.

CITIZENS STATE BANK v NAKASH

Docket No. 286990. Submitted December 2, 2009, at Detroit. Decided February 9, 2010, at 9:00 a.m.

Citizens State Bank brought an action in the Macomb Circuit Court against Ramzia Nakash, trustee of the Ramzia Nakash Revocable Trust, seeking declaratory relief as to an alleged surplus created when intervening plaintiffs, Vasilios L., Rose Marie, and George Melistas, defaulted with regard to a mortgage executed between intervening plaintiffs, as mortgagors, and defendant, as mortgagee. Defendant was the only bidder at the sheriff's sale following foreclosure proceedings commenced by defendant, and defendant bid an amount that included the amount stated in the mortgage, which was recorded, and the amount of additional loans from defendant to intervening plaintiffs made after the mortgage was recorded that were allegedly referred to in an unrecorded promissory note referenced in the mortgage. Following the recording of the mortgage, plaintiff loaned intervening plaintiffs money secured by a mortgage on the same property on which defendant held his mortgage. Plaintiff sought the surplus to satisfy its junior mortgage, while defendant asserted that a future advance mortgage was created by the promissory note that was incorporated by reference into its recorded mortgage. The trial court, Peter J. Maceroni, J., held that defendant did not have a future advance mortgage and had therefore created a surplus to which plaintiff was entitled. Defendant appealed the order of judgment.

The Court of Appeals *held*:

MCL 565.901(b) requires that an instrument creating a future advance mortgage be recorded. All the language used by defendant to support the creation of a future advance mortgage is found within the unrecorded promissory note. The recorded mortgage does not contain any future advance language. The trial court correctly determined that the requirements for the creation of a future advance mortgage were not met and that defendant's bid was in excess of his recoverable interest, entitling plaintiff, as a junior mortgagee, to claim the surplus.

Affirmed.

1. MORTGAGES — WORDS AND PHRASES — FUTURE ADVANCES.

A "future advance" is an indebtedness or other obligation that is secured by a mortgage and arises or is incurred after the mortgage has been recorded, whether or not the future advance was obligatory or optional on the part of the mortgagee (MCL 565.901[a]).

2. MORTGAGES — WORDS AND PHRASES — FUTURE ADVANCE MORTGAGES.

A "future advance mortgage" is a mortgage that secures a future advance and is recorded; if a recorded mortgage is amended to secure, expressly and not by implication, a future advance arising after the amendment, the mortgage becomes a future advance mortgage at the time the amendment is recorded; the instrument creating a future advance mortgage must be recorded (MCL 565.901 [b]).

Holzman Ritter & LeDuc, PLLC (by *Pamela S. Ritter* and *Steven D. DeLuca*), for plaintiff.

Allen Brothers, PLLC (by *David W. Jones*), for defendant.

Before: SERVITTO, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM. Defendant, Ramzia Nakash, trustee of the Ramzia Nakash Revocable Trust, appeals as of right the trial court's order of judgment in favor of plaintiff, Citizens State Bank. The court held that defendant did not have a future advance mortgage and, therefore, his bid at a foreclosure sale created a surplus to which plaintiff was entitled as a junior mortgagee. We affirm.

On July 24, 2004, the mortgage at issue was executed between intervening plaintiffs, as mortgagors, and defendant, as mortgagee. The mortgage provided, in part, that "Mortgagors owe Mortgagee the principal sum of Two Hundred Fifty Thousand ($250,000) Dollars pursuant to the terms set forth in that certain promissory note executed on even date herewith (the 'Indebtedness')."

The promissory note referenced in the mortgage contained the following language:

> To secure payment of this Note and all other obligations which Debtor owes to the Holder, whether the obligations are now existing or are hereafter created, whether direct or indirect, whether absolute or contingent, and whether due or to become due, Debtor has agreed to grant Holder a mortgage on certain real estate . . . pursuant to a certain Mortgage executed on even date herewith.

On August 2, 2004, the mortgage was recorded with the Macomb County Register of Deeds. As shown by promissory notes, defendant subsequently loaned intervening plaintiffs $50,000, followed by a second loan of $30,000.[1]

Following the recording of the mortgage, plaintiff loaned intervening plaintiffs $500,000. The loan was secured by a mortgage on the same property on which defendant held a mortgage interest. The mortgage was recorded with the Macomb County Register of Deeds on December 8, 2004. The parties do not dispute that the mortgage in favor of plaintiff is the junior mortgage.

Intervening plaintiffs eventually defaulted under defendant's mortgage. Defendant subsequently commenced foreclosure proceedings and was the only bidder at the resulting sheriff's sale. Defendant's bid of $474,308.95 was apparently based on the original $250,000 loan, along with the subsequent loans, and also included interest and costs permitted by statute. In the trial court, plaintiff contended that it was improper for defendant's bid to include the additional loans. Therefore, according to plaintiff, defendant's bid cre-

[1] Defendant claims that there were other loans granted to intervening plaintiffs and that these loans exceeded $124,000. However, as defendant acknowledges, there are no documents available proving the existence of the additional loans.

ated a surplus to which plaintiff was entitled as the junior lien holder. In contrast, defendant asserted that there was no surplus because his mortgage was a future advance mortgage. Defendant acknowledged that the language of the mortgage in question did not explicitly create a future advance mortgage. However, defendant argued that a future advance mortgage was created by the language of the underlying promissory note that was incorporated by reference into the recorded mortgage. The trial court, citing MCL 565.901, held that "defendant's recorded mortgage fails to contain specific language establishing a future advance mortgage." The court elaborated, "It is not sufficient that the mortgage references a promissory note with the requisite language inasmuch as the note was unrecorded." Accordingly, the court concluded that defendant's mortgage lien "is confined to the repayment of the $250,000.00, plus any interest, taxes, and other assessments/costs included." As a result, an order of judgment was entered on June 16, 2008, that declared that defendant's purchase of the foreclosed property created a surplus.

On appeal, defendant asserts that the trial court's order was in error for failing to recognize the future advance mortgage. We disagree.

Whether the instruments here at issue created a future advance mortgage is a question of law. This Court reviews questions of law de novo. *Cardinal Mooney High Sch v Mich High Sch Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991); *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 511 NW2d 918 (1994). To the extent that this case calls for statutory interpretation, review is also de novo. *Esselman v Garden City Hosp*, 284 Mich App 209, 216; 772 NW2d 438 (2009).

MCL 565.901(a) defines "future advance" as "an indebtedness or other obligation that is secured by a mortgage and arises or is incurred after the mortgage has been recorded, whether or not the future advance was obligatory or optional on the part of the mortgagee." MCL 565.901(b), in turn, defines "future advance mortgage" as "a mortgage that secures a future advance and is recorded . . . . If a recorded mortgage is amended to secure, expressly and not by implication, a future advance arising after the amendment, the mortgage becomes a future advance mortgage at the time the amendment is recorded."

MCL 565.901(b) requires that the instrument creating a future advance mortgage be recorded. All the language used by defendant to support the creation of such an advance is found within the unrecorded promissory note. Defendant relies on *Ladue v Detroit & M R Co*, 13 Mich 380 (1865), and *In re Claim of Seiberling Tire & Rubber Co*, 78 Mich App 587, 590-591; 261 NW2d 13 (1977), for his argument that plaintiff was on notice of the future advance nature of the mortgage between defendant and intervening plaintiffs. Defendant correctly cites *Ladue* as requiring reasonable inquiry by a lender. As *Ladue* states:

> The record of such an instrument might be an intimation that advances and indorsements were contemplated as probable, and that they might, therefore, have been already made; and for this reason might, to this extent, properly put a purchaser or incumbrancer upon inquiry. But, unless it is to have a greater effect than the record of other mortgages, it could be notice only of such facts as might have been ascertained by inspection of the instrument and papers referred to, and by inquiry; in other words, by a knowledge of the rights of the parties in respect to the land at the time notice became material. [*Ladue*, *supra* at 398.]

Seiberling did acknowledge the viability of the *Ladue* decision, but focused its attention on what kind of documentation put a subsequent lender on notice of a future advance mortgage. In *Seiberling*,

> [i]t was the mortgage itself that was recorded, not any notes evidencing indebtedness. Plaintiff had constructive notice of the defendant's mortgage, and the terms thereof, at the time the second mortgage was consummated. It was incumbent upon plaintiff to ascertain the status of the prior encumbrance before making its loan to the mortgagors. Having failed to do so, plaintiff cannot now complain that it was unaware of the second advance by defendant. [*Seiberling*, 78 Mich App at 590-591.]

Thus, even before the enactment of the current statute, Michigan law focused on the examination of recorded instruments. The requirements of MCL 565.901 became effective in 1991. 1990 PA 348. The amendment to incorporate the requirement that amendments to mortgages be express and recorded was added in 1992. 1992 PA 35. Defendant misreads the more recent case of *Farm Credit Servs of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662; 591 NW2d 438 (1998), as allowing the creation of future advance mortgages by reference. In *Farm Credit*, the Court found evidentiary error when a trial court failed to consider documents executed contemporaneously with a recorded mortgage to determine if the parties intended the mortgage to be a complete integration of all agreements between them. That analysis, while silent as to whether the other instruments were recorded, focused on the use of contemporaneous documents between parties to those documents. In this case plaintiff and defendant are contractual strangers, governed by statute not the common law. The recorded instrument does not contain any future advance language and the promissory note was unrecorded. Therefore the trial court correctly

determined that the requirements for the creation of a future advance mortgage were not met.

For these reasons, the trial court correctly held that the recorded mortgage's incorporation by reference of an unrecorded promissory note with a future advance clause did not thereby create a future advance mortgage and that defendant's bid on the foreclosed property was in excess of his recoverable interest, entitling plaintiff, as a junior mortgagee, to claim the surplus.

Affirmed.

DALLEY v DYKEMA GOSSETT PLLC

Docket No. 289046. Submitted January 5, 2010, at Grand Rapids. Decided February 11, 2010, at 9:00 a.m.

H. Scott Dalley brought an action in the Kent Circuit Court, Paul J. Sullivan, J., against Dykema Gossett P.L.L.C., John Ferroli, a Dykema employee, Guidance Software, Inc., and Lincoln National Life Insurance Company and Lincoln Financial Advisors Corporation (collectively Lincoln), alleging five intentional tort claims resulting from the defendants' conduct in gaining entry into plaintiff's apartment and copying the data from all plaintiff's computers while serving plaintiff a temporary restraining order (TRO) entered in the United States District Court for the Western District of Michigan in an action brought by Lincoln against Rodney Ellis, a Lincoln agent, and Lucasse, Ellis, Inc. Dykema Gossett and Ferroli represented Lincoln in the federal court action. The five tort claims included invasion of privacy in the form of intrusion on seclusion or into private affairs, trespass, intentional or reckless infliction of emotional distress, abuse of process, and tortious interference with business relationships or expectancies. The trial court granted defendants' motions for summary disposition and dismissed plaintiff's complaint. Plaintiff appealed.

The Court of Appeals *held*:

1. Plaintiff adequately set forth a claim of invasion of privacy by intrusion on seclusion. The language of the TRO did not render unenforceable plaintiff's claim of intrusion on seclusion. Defendants and plaintiff shared no special relationship, business or otherwise, and defendants possessed no legitimate interest in viewing plaintiff's apartment or copying his computer data unrelated to Lincoln. The circuit court erroneously concluded that the TRO divested plaintiff of his right to privacy in his apartment and computer hard drives. The TRO afforded defendants no right whatsoever to enter or search plaintiffs' apartment or copy personal computer data unrelated to Lincoln. There is no support for the circuit court's conclusion that defendants "had a right to copy hard drives that were potential sources of Lincoln information."

2. The circumstances surrounding defendants' entry into plaintiff's apartment and the copying of his computer hard drives

reasonably suggest that defendants' artifice and dishonesty enticed plaintiff's consent. Factual questions on which reasonable minds could differ exist with respect to whether defendants gained admission to plaintiff's apartment by deceit or exceeded the scope of the consent plaintiff extended. As alleged by plaintiff, defendants' entry of plaintiff's apartment under false pretenses and their disregard of his instructions about the location of the Lincoln-related information they desired could be found objectionable by a reasonable juror. Irrespective of whether defendants ever viewed the copied information, plaintiff's amended complaint adequately pleaded an invasion of plaintiff's seclusion and the trial court improperly granted summary disposition of this claim in favor of defendants.

3. The circuit court's conclusion that the language of the TRO contemplated or authorized an entry into plaintiff's apartment is unfounded. The averments in plaintiff's amended complaint adequately delineate a trespass claim and defendants' alleged misrepresentations could reasonably be found to have vitiated plaintiff's consent to the entry of his apartment. The circuit court erred by granting summary disposition of the trespass claim in favor of defendants.

4. Defendants' actions did not amount to atrocious or extreme behavior and did not rise to the level of outrageousness necessary to establish a claim of intentional infliction of emotional distress. The trial court correctly dismissed this claim.

5. The trial court properly determined that plaintiff did not identify an act or facts supporting the allegation that defendants used the TRO for an improper collateral purpose. The case must be remanded to the circuit court and plaintiff must be afforded an opportunity to amend his complaint pursuant to MCR 2.116(I)(5) to set forth his abuse of process claim in greater detail.

6. The plaintiff failed to allege an act of improper interference by defendants sufficient to allow him to maintain his claim of tortious interference with a business relationship or expectancy. Summary disposition of this claim was properly granted in favor of defendants.

Affirmed in part, reversed in part, and remanded.

1. TORTS — INVASION OF PRIVACY — INTRUSION UPON SECLUSION.

The three elements necessary to establish a prima facie case of intrusion upon seclusion are the existence of a secret and private subject matter, a right possessed by the plaintiff to keep that subject matter private, and the obtaining of information about that subject matter through some method objectionable to a reasonable person;

such an action focuses on the manner in which the information was obtained, not on the information's publication.

2. TORTS — INVASION OF PRIVACY — INTRUSION UPON SECLUSION — CONSENT TO INTRUSION.

There can be no invasion of privacy under the theory of intrusion upon the seclusion of the plaintiff if the plaintiff consented to the defendant's intrusion; the scope of a waiver or consent generally will present a question of fact for the jury.

3. TORTS — INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

A plaintiff, to establish a prima facie claim of intentional infliction of emotional distress, must present evidence of the defendant's extreme and outrageous conduct, the defendant's intent or recklessness, causation, and the severe emotional distress of the plaintiff; liability will attach only if the plaintiff demonstrates that the defendant's conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.

4. TORTS — ABUSE OF PROCESS.

An action for abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue.

5. TORTS — INTERFERENCE WITH A BUSINESS RELATIONSHIP.

The elements of a claim of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff; the plaintiff must demonstrate that the defendant acted both intentionally and either improperly or without justification to fulfill the third element and must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference to establish that the defendant's conduct lacked justification and showed malice; where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.

Kreis, Enderle, Hudgins & Borsos, PC (by *Sean P. Fitzgerald*), and *Fossi & Jewell* (by *Karen Jewell* and *Lawrence J. Fossi*) for plaintiff.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg*, *Charles F. Behler*, and *John R. Oostema*) for Dykema Gossett PLLC, John Ferroli, and Guidance Software, Inc.

Barnes & Thornburg LLP (by *Jeffrey G. Muth*) and *Chittenden, Murday & Novotny LLC* (by *Donald A. Murday, David J. Novotny,* and *Vittorio F. Terrizzi*) for Lincoln National Life Insurance Company and Lincoln Financial Advisors Corporation.

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

GLEICHER, J. In this action alleging several intentional torts, plaintiff, H. Scott Dalley, appeals as of right a circuit court order granting defendants summary disposition pursuant to MCR 2.116(C)(8). We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS AND UNDERLYING PROCEEDINGS

A. THE FEDERAL CASE

This case finds its genesis in a dispute between an insurance company and its agent. On April 13, 2004, defendants Lincoln National Life Insurance Company and Lincoln Financial Advisors Corporation (collectively Lincoln) sued Rodney Ellis, a Lincoln agent, and Lucasse, Ellis, Inc. (Lucasse), a company partially owned by Ellis, in the United States District Court for the Western District of Michigan. Lincoln's federal court complaint alleged fraud, breach of fiduciary duty, conversion, breach of contract, and tortious interference with business expectancies or relations. Defen-

dants Dykema Gossett P.L.L.C. (Dykema) and John Ferroli, a Dykema member, represented Lincoln in the federal court action.

On April 15, 2004, a federal judge entered a temporary restraining order (TRO) prohibiting Ellis, Lucasse, and instant plaintiff Dalley from "deleting, erasing, destroying, shredding, secreting, removing, modifying, overwriting, replacing, or 'wiping' " any computer data or files containing information related to Lincoln's customers and financial records. The paragraphs of the TRO directly relevant to plaintiff's present intentional tort action provide as follows:

> 9. Rodney D. Ellis and Lucasse, Ellis, Inc., all officers, owners, employees, principals, and agents of either of them who receive actual notice of this Order by personal service or otherwise, including but not limited to H. Scott Dalley, and all persons or entities acting in concert with any of them, are hereby ordered immediately upon service of this order to make available to a computer/data consultant retained by Plaintiffs all hard drives and other magnetic, optical or electronic media in the possession, custody, or control of any of them, including those hard drives and other magnetic, optical, or electronic media that they have the effective power to obtain, which contain any Lincoln Customer Records, for prompt non-destructive copying at Plaintiffs' expense. Plaintiffs shall minimize disruption to the producing person's business to the extent practicable. Plaintiffs shall return all hard drives and other magnetic, optical, or electronic media supplied pursuant to this Order within 24 hours, or such longer time as may be stipulated to or ordered by this Court. Plaintiffs' computer consultant shall maintain the copied data in a secure, locked location, and shall not review or inspect the data copied, or show it to Plaintiffs or their attorneys, until further order of this Court.
>
> 10. Rodney D. Ellis and Lucasse, Ellis, Inc., all officers, owners, employees, principals, and agents of either of them, including, but not limited to, H. Scott Dalley, and all

> persons or entities acting in concert with any of them who receive actual notice of this Order by personal service or otherwise, are hereby ordered immediately upon service of this order to provide for prompt copying of, at Plaintiffs' expense, (i) any and all "notes" data, files or records of present or former customers of any Lincoln affiliate, and (ii) any and all "Alice Reports," "A-Roll" lists, and any other documents relating to any contemplated or processed change-in-employment status for any employees of the Henry Ford Health System with an account at any Lincoln affiliate.[1]

On April 19, 2004, Lincoln's agents served plaintiff with the TRO in his Kentwood apartment, and with the assistance of personnel employed by defendant Guidance Software, Inc. (Guidance Software), copied all the data from all of plaintiff's computers. The events surrounding defendants' entry into plaintiff's apartment and the copying of his computer data form the basis of the instant lawsuit.

B. THE STATE COURT COMPLAINT

Plaintiff commenced this action on April 18, 2007, by filing in the Kent Circuit Court a complaint against Dykema, Ferroli, Lincoln, and Guidance Software.[2] Plaintiff subsequently filed a substantially similar first

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[1] Despite that this case involves a summary disposition motion brought under MCR 2.116(C)(8), we consider the TRO because defendants rely, in part, on the language of the TRO, which is a matter of public record, see MCR 2.113(F)(1)(a), and plaintiff's complaint references the TRO.

[2] On June 13, 2007, defendants removed this action to federal court, averring that "the allegations of Plaintiff's Complaint raise substantial disputed issues concerning the scope and interpretation of a Temporary Restraining Order entered by the United States District Court for the Western District of Michigan . . . ." However, a federal judge later granted plaintiff's motion to remand, finding that "the TRO is not a complex document and did not specifically retain jurisdiction in a federal court for the purpose of interpreting and enforcing it."

amended complaint, which describes in detail the circumstances surrounding defendants' conduct in serving the TRO and copying plaintiff's computer data. Because the allegations within the amended complaint supply the facts necessary to our resolution of this case, we turn to an examination of that pleading.

The amended complaint avers that in April 2004, plaintiff worked out of his apartment as an independent computer consultant for several small businesses, including Lucasse. The computers in his apartment provided the means to generate his livelihood and held confidential information concerning all his clients, such as their user identifications and passwords. Plaintiff, who suffers from AIDS, also stored on his computers highly personal information, medical records, photographs, and tax returns.

On April 19, 2004, plaintiff's doorbell rang and someone requested that plaintiff permit entry into his apartment building. Because plaintiff was not expecting visitors, he did not respond. At approximately 11:00 a.m., loud pounding on his door "jolted" plaintiff awake and he "realized that the men outside had managed to slip through the security system downstairs." Plaintiff saw papers slid under his door, and he read them after the men had departed. The papers included the TRO, which "completely blindsided" plaintiff. Soon thereafter, plaintiff's telephone rang, but he did not answer it. The caller, Ferroli, left a message declaring that a federal court subpoena allowed him and others to enter plaintiff's apartment "to either take his computers and hard drives or copy what was on them." Plaintiff "reasonably believed that he could not let Ferroli simply walk out the door with the computers," and that "he had no choice and would go to jail" if he refused Ferroli access to his computers. Plaintiff thus "returned Ferro-

li's call and agreed to" allow Ferroli "to copy the information on his computers."

Ferroli and several Guidance Software employees arrived, and plaintiff "led the group to the master bedroom where he kept two computers and four hard drives and, having seen from the subpoena that the case had something to do with Lincoln and Ellis, pointed them to the one and only hard drive that would contain Lincoln data." But "[t]he intruders . . . demanded everything." The Guidance Software personnel connected laptop computers to plaintiff's machines and transferred "every bit of information on all [plaintiff's] computers and hard drives." Only a "small percentage" of the information copied by the Guidance Software personnel related to Ellis, Lucasse, or Lincoln. The data transfer and copying process consumed 11 hours, during which period Ferroli "wandered in and out." In frail health and underweight, plaintiff "did not sleep for several days thereafter."

Four days after Ferroli and the Guidance Software technicians entered plaintiff's home, a Dykema attorney took plaintiff's deposition, urging him "to state on the record that he was suffering from AIDS[.]" As a result of illness, plaintiff had to complete the deposition later, by telephone from his bed. On July 1, 2004, Lincoln's attorneys informed the federal judge in the Ellis case that plaintiff had violated the TRO. Despite this claim and similar allegations in Lincoln's federal court complaint, defendants never uncovered or presented any evidence of wrongdoing by plaintiff or Ellis. Defendants' actions "traumatized [plaintiff], devastated his best customer, and thereby destroyed [plaintiff's] business." According to the amended complaint, Lincoln bore vicarious liability for the conduct of Dykema, Ferroli, and Guidance Software, because these

defendants "were Lincoln's agents and were acting within the scope of their agency."

The amended complaint sets forth five intentional tort claims: invasion of privacy in the form of intrusion on seclusion or into private affairs; trespass; intentional or reckless infliction of emotional distress; abuse of process; and tortious interference with business relationships or expectancies. All defendants sought summary disposition of plaintiff's claims pursuant to MCR 2.116(C)(8). Dykema, Ferroli and Guidance Software filed a separate motion seeking summary disposition under MCR 2.116(C)(10). In a written opinion and order entered on September 9, 2008, the circuit court granted defendants' motions under (C)(8) and dismissed the entirety of plaintiff's complaint.

II. SUMMARY DISPOSITION ANALYSIS

A. STANDARD OF REVIEW

Plaintiff challenges the circuit court's grant of summary disposition in favor of defendants regarding all five counts of his complaint. This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A court may grant summary disposition under MCR 2.116(C)(8) if "[t]he opposing party has failed to state a claim on which relief can be granted." A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004).[3] When deciding a motion under (C)(8), this Court accepts all well-pleaded factual allegations as

[3] In contrast, a motion brought "under MCR 2.116(C)(10) tests the *factual* sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (emphasis added).

true and construes them in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). Summary disposition on the basis of subrule (C)(8) should be granted only when the claim "is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998).

Because the circuit court granted defendants summary disposition solely under subrule (C)(8), we examine the pleaded allegations pertaining to each of the asserted intentional torts. Well-established principles guide our review. A complaint must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend . . . ." MCR 2.111(B)(1). "[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993), citing 1 Martin, Dean & Webster, Michigan Court Rules Practice, p 186. Our Supreme Court has characterized MCR 2.111(B)(1) as consistent with a "notice pleading environment . . . ." *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 700 n 17; 684 NW2d 711 (2004). If a party fails to plead facts with sufficient detail, the court should permit "the filing of an amended complaint setting forth plaintiff's claims in

more specific detail." *Rose v Wertheimer*, 11 Mich App 401, 407; 161 NW2d 406 (1968); see also MCR 2.116(I)(5).

B. INVASION OF PRIVACY

"Michigan has long recognized the common-law tort of invasion of privacy." *Lewis v LeGrow*, 258 Mich App 175, 193; 670 NW2d 675 (2003). Dean William Prosser has identified a Michigan case, *De May v Roberts*, 46 Mich 160; 9 NW 146 (1881), as among the first reported decisions allowing relief premised on an invasion of privacy theory. Prosser, *Privacy*, 48 Cal L R 383, 389 (1960). Today, the invasion of privacy tort

> has evolved into four distinct tort theories: (1) the intrusion upon another's seclusion or solitude, or into another's private affairs; (2) a public disclosure of private facts about the individual; (3) publicity that places someone in a false light in the public eye; and (4) the appropriation of another's likeness for the defendant's advantage." [*Lewis*, 258 Mich App at 193.]

Count I of plaintiff's amended complaint invokes intrusion on seclusion, the first of these theories.

> There are three necessary elements to establish a prima facie case of intrusion upon seclusion: (1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a reasonable man. [*Doe v Mills*, 212 Mich App 73, 88; 536 NW2d 824 (1995).]

The circuit court granted summary disposition in favor of defendants of plaintiff's intrusion on seclusion claim on the basis that the complaint failed to set forth facts "that show that he had a right to privacy in those areas of the apartment necessary to carry out the mandate of the TRO." Relying on this Court's opinion

in *Saldana v Kelsey-Hayes Co*, 178 Mich App 230; 443 NW2d 382 (1989), the circuit court added that the TRO deprived plaintiff of a right to privacy in his computers and hard drives:

> With respect to the plaintiff's personal information on the computers, the complaint further alleges that plaintiff pointed the Dykema defendants to the "one and only hard drive that would contain Lincoln data" but that the employees of defendant Guidance copied all of the information contained on all of plaintiff's computers and hard drives. Pursuant to the TRO, the Dykema defendants had a right to copy hard drives that were potential sources of Lincoln information. Thus, even when viewed in plaintiff's favor, the complaint does not allege facts that show he had a right to privacy in his hard drives for purposes of carrying out the TRO. [Citation omitted.]

Plaintiff asserts that the circuit court misconstrued both *Saldana* and the TRO, insisting that the TRO neither invested defendants with a right to violate plaintiff's privacy nor deprived plaintiff of his common-law privacy rights.

The plaintiff in *Saldana*, a supervisor in one of the defendant's facilities, fell from a bicycle in the course of his employment. *Id.* at 232. The defendant suspected the plaintiff of malingering and hired a private investigation firm to "investigate plaintiff and to attempt to determine the extent of plaintiff's injuries." *Id*. The investigators employed a variety of surveillance techniques, including observing the plaintiff through an open window with a 1,200-millimeter camera lens and posing as a process server "for the purpose of looking around plaintiff's home[.]" *Id*. at 233. The plaintiff brought an invasion of privacy action asserting an intrusion on his seclusion. *Id*.

This Court first determined that the plaintiff "can show an intrusion," because "agents of defendants

entered plaintiff's home under false pretenses" and "the use of a powerful lens to observe the interior of a home or of a subterfuge to enter a home could be found objectionable to a reasonable person." *Id*. at 234. However, because the defendants' surveillance of the plaintiff "involved matters which defendants had a legitimate right to investigate," this Court concluded that the plaintiff failed to allege facts that showed the intrusions "were into matters which plaintiff had a right to keep private." *Id*. This Court explained that the "duty to refrain from intrusion into another's private affairs is not absolute in nature, but rather is limited by those rights which arise from social conditions, *including the business relationship of the parties*." *Id*. (emphasis in original). The Court concluded that the plaintiff's privacy interest in his home "was subject to the legitimate interest of his employer in investigating suspicions that plaintiff's work-related disability was a pretext." *Id*. at 235.

We find *Saldana* readily distinguishable from this case. In *Saldana*, the nature of the parties' relationship limited the plaintiff's right to privacy concerning the matter the defendant investigated: whether the plaintiff suffered from work-related disabilities. Here, defendants and plaintiff shared no special relationship, business or otherwise, and defendants possessed no legitimate interest in viewing plaintiff's apartment or copying computer data unrelated to Lincoln. Furthermore, we reject the circuit court's conclusion that the TRO divested plaintiff of his right to privacy in his apartment and computer hard drives. The TRO afforded defendants no right whatsoever to enter or search plaintiff's apartment.[4] Regarding plaintiff's com-

[4] The common law reflects "reverence . . . for the individual's right of privacy in his house." *Miller v United States*, 357 US 301, 313; 78 S Ct

puters, the TRO entitled Lincoln's agent to copy hard drives and other electronic media "which contain any Lincoln Customer Records . . . ." But no provision in the TRO authorized defendants to copy personal computer data unrelated to Lincoln.[5] Moreover, we find no support for the circuit court's determination that defendants "had a right to copy hard drives that were *potential* sources of Lincoln information." (Emphasis added.) The TRO neither mentions "potential" sources of information nor in any manner expands the reach of defendants' copying authority beyond matters directly related to Lincoln.

Plaintiff's amended complaint avers that he "had a right to privacy in his own home and a right to keep private the private information on his computers and hard drives," and that defendants invaded plaintiff's

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1190; 2 L Ed 2d 1332 (1958). Nothing in the language of the TRO supports a construction of that document as the equivalent of a warrant permitting entry into plaintiff's apartment or authorizing a search and seizure therein.

[5] Defendants offer a patently unreasonable suggested interpretation of ¶ 9 of the TRO, the meaning of which "involves questions of law that we review de novo on appeal." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008). Defendants dispute the portion of ¶ 9 instructing that plaintiff and others must

> make available . . . all hard drives and other magnetic, optical or electronic media in the possession, custody, or control of any of them, including those hard drives and other magnetic, optical, or electronic media that they have the effective power to obtain, *which contain any Lincoln Customer Records*, for prompt non-destructive copying . . . ." [Emphasis added.]

Our reading of this provision clearly and unambiguously conveys that the italicized qualifying language, "which contain any Lincoln Customer Records," refers and applies to the previously referenced electronic media whether in the possession of the specifically identified individuals like plaintiff or within their "effective power to obtain . . . ." Stated differently, in this case defendants plainly had entitlement to access only those Lincoln customer records in plaintiff's actual or constructive possession.

privacy "by intruding upon his seclusion or solitude and into his private affairs, and obtained access to [plaintiff's] home and information about his private affairs by methods objectionable to a reasonable person." This averment adequately sets forth a claim of invasion of privacy by intrusion on seclusion. The plain language of the TRO in no way renders unenforceable plaintiff's intrusion on seclusion claim.

Defendants alternatively maintain that plaintiff expressly or impliedly consented to the intrusion on his seclusion by allowing Ferroli and the Guidance Software personnel into his apartment and permitting them to copy his computer data. We resolve this contention by referring to our Supreme Court's landmark decision in *De May* and this Court's analysis in *Lewis*. The defendant in *De May*, a physician, set out on "a dark and stormy" night to attend to the plaintiff, a patient in labor. *De May*, 46 Mich at 162. Because Dr. De May "was sick and very much fatigued from overwork," he asked a defendant, Alfred Scattergood, "a young unmarried man, a stranger to the plaintiff and utterly ignorant of the practice of medicine," to accompany and assist him. *Id*. at 161-162. When they arrived at the plaintiff's home, Dr. De May told the plaintiff's husband, " 'I had fetched a friend along to help carry my things' . . . ." *Id*. at 162. Neither the plaintiff nor her husband objected to Scattergood's presence, and during most of the plaintiff's labor Scattergood sat facing a wall. *Id*. at 162, 165. At one point, Dr. De May asked Scattergood to assist by holding the plaintiff's hand "during a paroxysm of pain . . . ." *Id*. at 162. The plaintiff brought suit when she ascertained Scattergood's true identity and lack of medical training, contending that Dr. De May deceived her into believing that Scattergood "was an assistant physician . . . ." *Id*. at 161.

The Supreme Court held that the "plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation." *Id*. at 165-166. Notwithstanding that Scattergood and Dr. De May "were bidden to enter, treated kindly and no objection whatever [was] made to the presence of defendant Scattergood," *id*. at 162, the Supreme Court declined to hold that the plaintiff had consented to Scattergood's intrusion on her privacy:

> The fact that at the time, she consented to the presence of Scattergood supposing him to be a physician, does not preclude her from maintaining an action and recovering substantial damages upon afterwards ascertaining his true character. In obtaining admission at such a time and under such circumstances without fully disclosing his true character, both parties were guilty of deceit, and the wrong thus done entitles the injured party to recover the damages afterwards sustained, from shame and mortification upon discovering the true character of the defendants. [*Id*. at 166.]

This Court revisited *De May* in *Lewis*, a case that "involve[d] the surreptitious, nonconsensual videotaping of intimate acts of sexual relations in defendant['s] . . . bedroom." *Lewis*, 258 Mich App at 178. A jury found that the defendant had violated the plaintiffs' common-law rights to privacy. The defendant argued on appeal that because the plaintiffs had consented to having sex with him, as a matter of law he had not invaded their privacy. *Id*. at 191. This Court acknowledged that "there can be no invasion of privacy under the theory of intrusion upon the seclusion of plaintiffs if plaintiffs consented to defendant's intrusion (videotaping)." *Id*. at 194. However, "[t]he question of waiver or consent . . . does not have a zero-sum answer but, rather, presents an issue of the degree or

extent of waiver or consent granted, which depends on the facts and circumstances of the case." *Id*. Because the evidence in *Lewis* could support the plaintiffs' contention that the defendant had videotaped the plaintiffs without their knowledge or consent, this Court concluded that a factual question had existed on which reasonable minds could differ with respect to the scope of the plaintiffs' consent to the taping.

The Court in *Lewis* characterized *De May* as illustrating that "[t]he deceitful presence of a medically unqualified, unnecessary person" exceeded the plaintiff's consent to the presence of "any necessary physician's assistants." *Id*. The Court in *Lewis* further referenced the following statement from this Court's opinion in *Earp v Detroit*, 16 Mich App 271, 278 n 5; 167 NW2d 841 (1969):

> The right of privacy may be waived by the individual or by anyone authorized by him, and this waiver may be either express or implied. . . . The existence of a waiver carries with it the right to an invasion of privacy only to such an extent, however, as may be legitimately necessary and proper in dealing with the matter which has brought about the waiver, or, as otherwise stated, only to the extent warranted by the circumstances which brought about the waiver. [Quotation marks and citation omitted.]

And in *Saldana*, 178 Mich App at 234, this Court found that the plaintiff established an intrusion based on the defendants' agents' entry into the plaintiff's home "under false pretenses."

Here, plaintiff's amended complaint alleges that defendants obtained consent to enter the apartment through a combination of subterfuge and threat: "Ferroli said he had a federal court subpoena that allowed him and the other men to come inside [plaintiff's] apartment to either take his computers and hard drives

or copy what was on them." The amended complaint also avers that plaintiff withheld consent to defendants' copying of anything other than "the one and only hard drive that would contain Lincoln data." These averments fall squarely within the legal analyses and holdings presented in *De May* and *Lewis*. As described in the amended complaint, the circumstances surrounding defendants' entry into plaintiff's apartment and the copying of his computer hard drives reasonably suggest that defendants' artifice and dishonesty enticed plaintiff's consent. "Generally, the scope of a waiver or consent will present a question of fact for the jury[.]" *Lewis*, 258 Mich App at 195. As in *Lewis*, *id*., when viewed in the light most favorable to plaintiff, the amended complaint presents factual questions on which reasonable minds could differ with respect to whether defendants gained admission to plaintiff's premises by deceit, as in *De May*, or exceeded the scope of the consent plaintiff extended, as in *Lewis* and *Earp*.

Defendants lastly argue regarding the invasion of privacy count that plaintiff's complaint contains no facts supporting plaintiff's allegation that defendants obtained private information through a method that might be objectionable to a reasonable person, or that defendants ever viewed the information they copied. Whether a reasonable person would find an intrusion objectionable constitutes a factual question best determined by a jury. *Saldana*, 178 Mich App at 234. In *Saldana*, this Court specifically opined that use "of a subterfuge to enter a home could be found objectionable to a reasonable person." *Id*. We conclude that as alleged, defendants' entry of plaintiff's apartment under false pretenses and their disregard of his instructions about the location of the Lincoln-related information they desired could be found objectionable by a reasonable juror. Furthermore, "An action for intrusion upon se-

clusion focuses on the *manner* in which the information was obtained, not on the information's publication." *Lewis*, 258 Mich App at 193 (emphasis added). In *Harkey v Abate*, 131 Mich App 177, 182; 346 NW2d 74 (1983), this Court adopted the Restatement's view that

> [t]he type of invasion of privacy asserted by plaintiff does not depend upon any publicity given to the person whose interest is invaded, but consists solely of an intentional interference with his or her interest in solitude or seclusion of a kind that would be highly offensive to a reasonable person. [*Id*., citing 3 Restatement Torts, 2d, § 652B, p 378.]

Therefore, irrespective of whether defendants ever viewed the copied information, the amended complaint's description of the methods defendants employed to obtain the data adequately pleaded an invasion of plaintiff's seclusion.

In summary, because plaintiff's amended complaint adequately sets forth a claim for invasion of privacy by intrusion on seclusion, we conclude that the circuit court improperly granted defendants summary disposition of this claim under MCR 2.116(C)(8).

C. TRESPASS

Plaintiff next challenges the circuit court's ruling that his amended complaint "failed to state the element of unauthorized entry that is necessary for a claim of trespass." The circuit court reasoned that defendants "had a nonconsensual privilege to enter plaintiff's apartment for the purpose of" executing the TRO. In support of this conclusion, the circuit court cited this Court's decision in *Antkiewicz v Motorists Mut Ins Co*, 91 Mich App 389; 283 NW2d 749 (1979), vacated in part on other grounds 407 Mich 936 (1979), and 2 Restatement Torts, 2d, § 210. Defendants suggest that because plaintiff refused to allow his computers to be taken

from his apartment, the circuit court correctly determined that the TRO authorized entry of the apartment for duplication of the hard drives.

A trespass is an unauthorized invasion on the private property of another. *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705; 609 NW2d 607 (2000). In *Antkiewicz*, 91 Mich App at 396, the Court explained that "[n]ormally, a public officer who is on the premises of another pursuant to legal authorization is not liable for trespass." The circuit court in this case recognized that defendants do not qualify as public officers, but opined that they possessed analogous powers under 2 Restatement Torts, 2d, § 210, which provides as follows:

> The privilege to execute an order of a court directing the actor to put a third person in possession of land of which another is in possession, or to do any other act on the land, carries with it the privilege to enter the land for the purpose of executing the order, provided that any writ issued for the execution of the order is valid or fair on its face.

Irrespective that Michigan has not adopted this section of the Restatement, we decline to apply § 210 here because it bears no relevance to the facts of this case. The TRO neither authorized defendants to take possession of plaintiff's land nor invested them with the authority "to do any other act on the land . . . ." The TRO required plaintiff "to provide for prompt copying" of his computer data concerning Lincoln and permitted Lincoln's agents to copy the data, but it afforded defendants no right to enter plaintiff's apartment, either to obtain the computer hard drives or to accomplish the copying. Consequently, we reject as unfounded the circuit court's conclusion that the language of the TRO contemplated or authorized an entry into plaintiff's apartment.

Whether plaintiff consented to defendants' entry into his apartment presents a more difficult question. Plaintiff's amended complaint avers that he allowed defendants to enter his apartment on the basis of their misrepresentation that the TRO permitted them "to either take his computers and hard drives or copy what was on them." Michigan has not squarely considered whether in an action for trespass a misrepresentation utilized to secure a homeowner's consent to enter a private home vitiates the homeowner's consent. In *American Transmission*, this Court considered a somewhat similar issue. The *American Transmission* plaintiffs sued a television station that had recorded the interactions between a decoy customer and the plaintiffs' transmission repair personnel. The plaintiffs' complaint asserted that the defendants had committed a trespass when they "gained entry by concealing their true identity and misrepresenting their agent's relationship to them . . . ." *American Transmission*, 239 Mich App at 699-700. This Court upheld the order granting summary disposition of the plaintiffs' trespass claim in favor of the defendants, finding that although the decoy customer "misrepresented her purpose, plaintiffs' consent was still valid because she did not invade any of the specific interests relating to the peaceable possession of land that the tort of trespass seeks to protect." *Id*. at 708. The Court emphasized that the decoy customer had entered only public areas of the plaintiffs' transmission shop and videotaped a "professional discussion . . . ." *Id*. at 709. The decoy customer "did not disrupt the shop or invade anyone's private space, and the videotape she made did not reveal the intimate details of anybody's life." *Id*.

In *American Transmission*, 239 Mich App at 708, this Court cited favorably a case decided by the United States Court of Appeals for the Seventh Circuit,

Desnick v American Broadcasting Cos, Inc, 44 F3d 1345 (CA 7, 1995). In *Desnick*, the Seventh Circuit, in an opinion authored by Chief Judge Richard Posner, rejected the contention that journalists posing as test patients at an eye surgery center had committed a trespass, reasoning that the test patients' entry did not invade

> any of the specific interests that the tort of trespass seeks to protect. The test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves). The activities of the offices were not disrupted . . . . Nor was there any inva[sion of] a person's private space, . . . as in the famous case of *De May v. Roberts*, 46 Mich 160, 9 N.W. 146 (1881) (where a doctor, called to the plaintiff's home to deliver her baby, brought along with him a friend who was curious to see a birth but was not a medical doctor, and represented the friend to be his medical assistant) . . . . [*Id*. at 1352 (quotation marks omitted).]

As the Seventh Circuit recognized in *Desnick*, important distinctions differentiate misrepresentations directed to gain entry to business concerns and those employed to enter a private home. The Seventh Circuit acknowledged that in a true trespass case, "there can be no implied consent in any nonfictitious sense of the term when express consent is procured by a misrepresentation or a misleading omission." *Id*. at 1351. The court posited the following illustrative example: "If a homeowner opens his door to a purported meter reader who is in fact nothing of the sort—just a busybody curious about the interior of the home—the homeowner's consent to his entry is not a defense to a suit for trespass." *Id*. at 1352. Nevertheless, the law sometimes deems effective in the trespass context a consent procured by misrepresentation. The Seventh Circuit in

Desnick explained the difference between the two classes of cases by contrasting the phony meter reader intruding into a home with a phony customer, reminiscent of the defendants in *American Transmission*:

> T]he homeowner victimized by the phony meter reader does not want strangers in his house unless they have authorized service functions. The dealer's objection to the customer who claims falsely to have a lower price from a competing dealer is not to the physical presence of the customer, but to the fraud that he is trying to perpetuate. [*Id.*]

A decision of the United States Court of Appeals for the Ninth Circuit, *Theofel v Farey-Jones*, 359 F3d 1066 (CA 9, 2004), further illustrates that the character of a particular deceit remains critical to a determination of the implicated privacy interests. In *Theofel*, the plaintiffs cooperated with a faulty subpoena issued by the defendants, federal court litigants, and the Ninth Circuit considered whether the plaintiffs' cooperation operated as a consent to disclosure of otherwise protected information. The Ninth Circuit analogized to the common law of trespass and, citing *Desnick*, concluded that the plaintiffs had alleged facts that vitiated their apparent consent:

> A defendant is not liable for trespass if the plaintiff authorized his entry. *See Prosser & Keeton* § 13, at 70. But "an overt manifestation of assent or willingness would not be effective . . . if the defendant knew, or probably if he ought to have known in the exercise of reasonable care, that the plaintiff was mistaken as to the nature and quality of the invasion intended." *Id*. § 18, at 119 . . . .
>
> Not all deceit vitiates consent. "[T]he mistake must extend to the essential character of the act itself, which is to say that which makes it harmful or offensive, rather than to some collateral matter which merely operates as an inducement." *Prosser & Keeton* § 18, at 120 . . . . In other

> words, it must be a "substantial mistake[] . . . concerning the nature of the invasion or the extent of the harm." *Restatement (Second) of Torts* § 892B(2) cmt. g. . . .
>
> [T]he theory is that some invited mistakes go to the essential nature of the invasion while others are merely collateral. Classification depends on the extent to which the intrusion trenches on "the specific interests that the tort of trespass seeks to protect." *Desnick*, 44 F.3d at 1352 . . . .
>
> * * *
>
> Under this standard, plaintiffs have alleged facts that vitiate [their internet service provider] NetGate's consent. NetGate disclosed the sample in response to defendants' purported subpoena. Unbeknownst to NetGate, that subpoena was invalid. This mistake went to the essential nature of the invasion of privacy. The subpoena's falsity transformed the access from a bona fide state-sanctioned inspection into private snooping. The false subpoena caused disclosure of documents that otherwise would have remained private; it effected an "invasion . . . of the specific interests that the [statute] seeks to protect." *Desnick*, 44 F.3d at 1352. [*Theofel*, 359 F3d at 1073-1074 (some citations omitted).]

The Ninth Circuit concluded that "[b]ecause defendants procured consent by exploiting a mistake of which they had constructive knowledge, the district court erred by dismissing based on that consent." *Id*. at 1075.[6]

[6] Although *Theofel* involved an invalid subpoena rather than a valid TRO, we find instructive its discussion regarding the duties attendant on those who invoke the powers of the court:

> The subpoena power is a substantial delegation of authority to private parties, and those who invoke it have a grave responsibility to ensure it is not abused. Informing the person served of his right to object is a good start, *see* Fed.R.Civ.P. 45(a)(1)(D), but it is no substitute for the exercise of independent judgment about the subpoena's reasonableness. Fighting a subpoena in court is not

"[T]respass is an invasion of the plaintiff's interest in the exclusive possession of his land . . . ." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 59; 602 NW2d 215 (1999) (quotation marks and citation omitted). Under the common law, a trespass on land violated the landowner's right to exclude others from the premises. *Id*. at 60. Here, plaintiff's amended complaint avers that defendants obtained his consent to enter the apartment by representing that a "federal court subpoena" authorized their access to the inside of plaintiff's apartment, that defendants' entry constituted a trespass, and that "[t]hey intended to intrude on [plaintiff's] private property without authorization to do so." We conclude that these averments adequately delineate a trespass claim and that defendants' alleged misrepresentations could reasonably be found to have vitiated plaintiff's consent to the entry of his apartment. Because the interest protected by the common-law tort of trespass is identical to that identified in plaintiff's amended complaint, this case more closely parallels the phony meter reader's entry into a residence than the decoy customers' entries into business premises. Accordingly, we reverse the circuit court's grant of summary disposition in defendants' favor of the trespass claim.

D. INTENTIONAL OR RECKLESS INFLICTION OF EMOTIONAL DISTRESS

Plaintiff further asserts that the circuit court erred by granting in defendants' favor summary disposition of his claim for intentional or reckless infliction of emotional distress. According to plaintiff, reasonable minds could differ with respect to whether defendants' conduct qualified as outrageous in light of Ferroli's status as a lawyer,

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cheap, and many may be cowed into compliance with even overbroad subpoenas, especially if they are not represented by counsel or have no personal interest at stake. [*Id*. at 1074-1075.]

plaintiff's AIDS-related disability, and the prolonged time defendants spent in plaintiff's bedroom. "To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff." *Walsh*, 263 Mich App at 634. "[O]nly when a plaintiff can demonstrate that the defendant's conduct is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community' " will liability attach. *Id*., quoting *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999). "[M]ere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" do not give rise to liability for intentional infliction of emotional distress. *Doe*, 212 Mich App at 91. Initially, the trial court must determine whether a defendant's conduct qualifies as so extreme and outrageous as to permit recovery for intentional infliction of emotional distress. *Sawabini v Desenberg*, 143 Mich App 373, 383; 372 NW2d 559 (1985).

Even accepting as true the allegations in plaintiff's amended complaint, they fail to describe conduct so extreme or outrageous that it surpasses all bounds of decency in a civilized society. Assuming that Ferroli misled plaintiff about the scope of the TRO, defendants' conduct inside plaintiff's apartment simply does not amount to atrocious or extreme behavior. At worst, defendants' engaged in actions that were annoying and oppressive, but these actions do not rise to the level of outrageousness necessary to establish a claim for intentional infliction of emotional distress. We thus conclude that the circuit court correctly dismissed this claim under MCR 2.116(C)(8).

E. ABUSE OF PROCESS

Plaintiff additionally contends that the circuit court improperly granted summary disposition in defendants' favor of his abuse of process count.

> A meritorious claim of abuse of process contemplates a situation where the defendant has availed himself of a proper legal procedure for a purpose collateral to the intended use of that procedure, e.g., where the defendant utilizes discovery in a manner consistent with the rules of procedure, but for the improper purpose of imposing an added burden and expense on the opposing party in an effort to conclude the litigation on favorable terms. [*Vallance v Brewbaker*, 161 Mich App 642, 646; 411 NW2d 808 (1987).]

In a case alleging abuse of process, the pleadings must allege with specificity an act committed in the use of process "that is improper in the regular prosecution of the proceeding." *Early Detection Ctr, PC v New York Life Ins Co*, 157 Mich App 618, 629; 403 NW2d 830 (1986). A complaint must allege more than the mere issuance of the process, because an "action for abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue." *Friedman v Dozorc*, 412 Mich 1, 31; 312 NW2d 585 (1981) (quotation marks and citation omitted). A claim asserting nothing more than an improper motive in properly obtaining process does not successfully plead an abuse of process. *Young v Motor City Apartments Ltd Dividend Housing Ass'n No 1 & No 2*, 133 Mich App 671, 681; 350 NW2d 790 (1984).

Plaintiff's amended complaint alleges that defendants harbored an "ulterior purpose" to "serve Lincoln's strategy of intimidating and harassing Ellis, and give Lincoln a tactical business advantage over Ellis when there was no factual basis for the proceeding."

Even assuming that plaintiff may properly assert a collateral purpose directed solely at harming a third party, the amended complaint fails to allege with specificity any acts committed in furtherance of this purpose. Moreover, "the ulterior purpose alleged must be more than harassment, defamation, exposure to excessive litigation costs, or even coercion to discontinue business." *Early Detection Ctr*, 157 Mich App at 629-630. We agree with the circuit court's finding that plaintiff simply did not identify an act or facts supporting the allegation that defendants used the TRO for an improper, collateral purpose. However, pursuant to MCR 2.116(I)(5), the circuit court must afford plaintiff an opportunity to amend his complaint to set forth his abuse of process claim in greater detail.

F. TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP OR EXPECTANCY

Plaintiff lastly disputes the circuit court's grant of summary disposition in defendants' favor concerning his claim for tortious interference with a business relationship or expectancy.

> The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. [*BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996).]

To fulfill the third element, intentional interference inducing or causing a breach of a business relationship, a plaintiff must demonstrate that the defendant acted both intentionally and either improperly or without justification. *Bonelli v Volkswagen of America, Inc*, 166

Mich App 483, 498; 421 NW2d 213 (1988). To establish that a defendant's conduct lacked justification and showed malice, "the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference." *BPS Clinical Laboratories*, 217 Mich App 699. "Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *Id*.

Plaintiff's amended complaint asserts that defendants knew or should have known that their pursuit of the TRO and a vindictive, groundless lawsuit against Ellis would disrupt plaintiff's business relationship with Ellis and Lucasse. These allegations do not set forth a claim for tortious interference with a business relationship. "[I]n order to succeed under a claim of tortious interference with a business relationship, the plaintiffs must allege that the interferer did something illegal, unethical or fraudulent. There is nothing illegal, unethical or fraudulent in filing a lawsuit, whether groundless or not." *Early Detection Ctr*, 157 Mich App at 631 (citation omitted). We also decline to find that defendants' pursuit of the TRO amounts to illegal, unethical, or fraudulent conduct and conclude, as did the circuit court, that plaintiff's amended complaint fails to allege any act of improper interference sufficient to allow him to maintain his tortious interference claim.

III. ADDITIONAL ISSUES

Because the circuit court granted defendants summary disposition of all claims pleaded in the amended complaint, the court declined to address (1) Lincoln's argument that as a matter of law plaintiff cannot establish its vicarious liability; (2) Dykema and Ferroli's motion for summary disposition premised on MCR

2.116(C)(10); and (3) Dykema and Ferroli's contention that a litigation privilege entitles them to judgment as a matter of law. We similarly decline to address these additional issues raised by defendants on which the circuit court reserved ruling. *People v Herrick*, 277 Mich App 255, 259; 744 NW2d 370 (2007) (observing that generally appellate review is limited to issues decided by the trial court).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

MICHIGAN DEFERRED PRESENTMENT SERVICES ASSOCIATION, INC v COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE REGULATION

Docket No. 292685. Submitted January 6, 2010, at Detroit. Decided February 18, 2010, at 9:00 a.m.

The Michigan Deferred Presentment Services Association, Inc., an association of companies licensed under the Deferred Presentment Service Transactions Act (DPSTA), MCL 487.2121 *et seq*., which regulates the business of payday lending and of other businesses that provide short-term advancements of money to consumers up to the statutory limit of $600, brought an action in the Oakland Circuit Court, Michael Warren, J., against the Commissioner of the Office of Financial and Insurance Regulation, seeking declaratory and injunctive relief on the basis that an administrative order issued by defendant violated state and federal constitutional provisions and civil rights protections. The order required the licensees to limit their recovery with respect to a check returned due to insufficient funds to the face amount of the check, a returned check charge of $25, and, in the event of a lawsuit, court costs, as provided in the DPSTA and to not seek, under MCL 600.2952 of the Revised Judicature Act (RJA), the recovery of treble damages. The trial court granted injunctive relief in favor of plaintiff and struck down the administrative order as an unconstitutional infringement of the right of access to the courts. Plaintiff appealed and defendant cross-appealed.

The Court of Appeals *held*:

1. The administrative order correctly interpreted the DPSTA to limit a payday lender's remedy to the face amount of the check plus a $25 return check charge, instead of the treble damages permitted by MCL 600.2952.

2. The section of the RJA at issue, MCL 600.2952, and the section of the DPSTA at issue, MCL 487.2158, relate to the same subject matter and are *in pari materia*. The two statutes irreconcilably conflict, therefore, the DPSTA, the more specific statute with regard to payday lenders, controls the remedies available to a payday lender.

3. The DPSTA also controls because, in enacting the DPSTA, the Legislature preserved other preexisting legal remedies avail-

able to a person given a check that is dishonored because of a closed account or a stop payment order but did not preserve preexisting legal remedies against a person who gives a check that is later returned because of nonsufficient funds.

4. The administrative order merely prohibits payday lenders from violating a statute they must follow. No caselaw holds that an administrative agency violates an entity's constitutional rights by advising it to follow the law.

5. No violation of 42 USC 1983 occurred because payday lenders are not being denied access to the courts. The DPSTA authorizes defendant to notify payday lenders of the consequences of choosing to violate the DPSTA.

6. The trial court's January 14, 2009, opinion and order must be reversed and its February 25, 2009, judgment must be vacated. The subsequent award of attorney fees and costs and the opinion and order denying plaintiff's motion to enforce the earlier order and judgment must be vacated and the matter must be remanded for further proceedings.

Reversed in part, vacated in part, and remanded.

BILLS, NOTES, AND CHECKS — DEFERRED PRESENTMENT SERVICE TRANSACTIONS ACT — REVISED JUDICATURE ACT — CONFLICT OF LAWS.

Both MCL 600.2952, a section of the Revised Judicature Act, and MCL 487.2158, a section of the Deferred Presentment Service Transactions Act, relate to the same subject matter by specifying remedies available to entities that have been given a check that is later returned by the drawee because insufficient funds are available in the account to honor the check; the statutes are *in pari materia*, therefore, the more specific statute controls where there is an irreconcilable conflict; the Deferred Presentment Service Transactions Act controls the remedies available to a lender licensed under the act that is given an insufficient funds check because the remedy it provides irreconciliably conflicts with the remedy provided by the Revised Judicature Act.

Fried Porter, PLLC (by *Louis J. Porter*), for plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *David W. Silver*, Assistant Attorney General, for defendant.

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

PER CURIAM. This civil rights dispute brought under 42 USC 1983 concerns an administrative order issued by defendant, Commissioner of the Office of Financial and Insurance Regulation (OFIR), that allegedly prohibited plaintiff's members from seeking, in this state's courts, treble damages for nonsufficient funds (NSF) checks given by their customers. In its January 14, 2009, opinion and order, the lower court struck down defendant's administrative order as an unconstitutional infringement of the right of access to the courts. We reverse in part, vacate in part, and remand for proceedings consistent with this opinion.

Plaintiff is an association of companies licensed under the Deferred Presentment Service Transactions Act (DPSTA), MCL 487.2121 *et seq*., which is a statute that regulates the business of payday lending and of other businesses that provide short-term advancements of money to consumers up to the statutory limit of $600. The OFIR, formerly known as the Office of Financial and Insurance Services, is part of the Michigan Department of Energy, Labor, and Economic Growth.

Before passage of the DPSTA, payday lenders who received checks that were returned to them for nonsufficient funds obtained judgments under MCL 600.2952(4), a provision of the Revised Judicature Act (RJA) that allows for treble damages for a dishonored check under some circumstances.[1] The RJA also authorizes recovery of a small processing fee and court costs of $250. MCL 600.2952(4).

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[1] MCL 600.2952(4) states:

> Except as otherwise provided in subsection (5), a maker who fails to make payment pursuant to subsection (3) and who is found responsible for payment in a civil action is liable to the payee for payment of all of the following:
>
> (a) The full amount of the check, draft, or order.

In 2005, the Legislature passed the DPSTA to regulate payday lenders and to curb abuses within the industry. The DPSTA became effective on November 28, 2005. 2005 PA 244; MCL 487.2121. Under the DPSTA, a payday loan is called a deferred presentment service transaction. MCL 487.2122(1)(g). Under such a transaction, for a fee, the payday lender gives the customer a certain amount of money in exchange for a check in repayment of the loan; the lender then holds the customer's check for a period before presentment to the drawee bank. See MCL 487.2122(1)(g), (h). The DPSTA requires that entities engaged in such lending receive a license. MCL 487.2131. According to defendant, 788 licenses had been issued under this act. The DPSTA also limits the amount that a licensee could collect for a returned check to the face amount of the check amount plus $25. MCL 487.2158.

It is undisputed that, after passage of the DPSTA, payday lenders continued to seek and obtain damages under MCL 600.2952.[2] On April 3, 2008, defendant issued the administrative order at issue in this case. The administrative order explained, "To stop current practices by some licensees and to prevent the spread of these unlawful actions, it is necessary and appropriate to issue an order directing licensees to conform to the limitations in MCL 487.2158 regarding checks returned due to insufficient funds." The administrative order also noted:

(b) Civil damages of 2 times the amount of the dishonored check, draft, or order or $100.00, whichever is greater.

(c) Costs of $250.00.

[2] For example, one payday lender, Cash Now XV, LLC (Cash Now), filed a claim in the small claims division of the 36th District Court against a customer for damages resulting from a check returned NSF. The claim was filed on May 7, 2007, and Cash Now requested damages under MCL 600.2952 of the RJA.

> MCL 487.2167 gives the Commissioner the power to revoke licenses for violations of the [DPSTA] and his orders, such as this Order, if he finds that a licensee has done so "knowingly or through lack of due care."
>
> MCL 487.2168 authorizes the Commissioner to impose civil fines for violation of the [DPSTA]. If the Commissioner finds that a licensee "knew or reasonably should have known" that he or she was in violation of the Act, the Commissioner may order the licensee to pay a civil fine of not less than $5,000 or more than $50,000 for each violation.
>
> * * *
>
> When the staff of this agency examines the books and records of a licensee, the staff will evaluate compliance with this Order as part of its examination.

The administrative order concluded, "Therefore, it is ORDERED that licensees shall not, with respect to a check returned due to insufficient funds, recover anything other than the face amount of the check, a returned check charge of $25.00, and, in the event of a lawsuit, court costs. In particular, a licensee shall not seek any remedy under MCL 600.2952 with respect to any check returned due to insufficient funds." The administrative order was sent to licensees and posted on the agency's website.

On May 22, 2008, plaintiff filed its cause of action asserting claims for (1) denial of the federal constitutional right of access to the courts under 42 USC 1983; (2) denial of various state constitutional rights, including the right of access to the courts, the right to petition the government, freedom of speech, due process, and rights under the fair and just treatment clause; and (3) violation of the Michigan Constitution's separation of powers provision. Plaintiff sought declaratory and injunctive relief, but not damages.

Both sides moved for summary disposition. Plaintiff's motion, brought under MCR 2.116(C)(10), also sought a permanent injunction, and plaintiff requested attorney fees under 42 USC 1988. Defendant's motion was brought under MCR 2.116(C)(8) and (10). In its motion, plaintiff asserted three arguments: (1) that defendant, through his administrative order, denied plaintiff's members their rights of access to the courts, freedom of speech, and due process of law; (2) that defendant usurped powers belonging to the judicial branch; and (3) that defendant has no authority over collection practices and no standing to assert the rights of borrowers or customers.

In his motion, defendant explained that before the DPSTA took effect, the payday lending service sector was known for its exorbitant fees and hardnosed collection practices, but the DPSTA changed the landscape dramatically, requiring licensure of payday lenders after July 1, 2006, and making the OFIR the state regulator with enforcement powers. Defendant argued that the DPSTA's provision authorizing the commissioner to "issue orders and rules that he or she considers necessary to enforce and implement this act," MCL 487.2140(1), constitutes sufficient authority for defendant to issue his April 3, 2008, administrative order. Defendant argued that the DPSTA's provision in MCL 487.2158 listing the remedies available to a licensee for a returned check precluded a licensee from recovering the more ample remedies available under the RJA.

In an opinion and order dated January 14, 2009, the lower court granted plaintiff's motion for summary disposition and denied defendant's motion for summary disposition. The lower court concluded that the administrative order barred licensees from asserting a legally tenable position in court where no binding appellate

decision supported the agency's interpretation of the statutory provisions in conflict, and that "such action unconstitutionally usurps the judicial function, denigrates the rule of law, and infringes upon the constitutional right of access to the courts . . . ."

The opinion concluded that defendant's administrative order sought to overturn orders or judgments entered by courts, and that defendant lacked authority to do so. The lower court noted that it is the province of the judicial department to say what the law is, and that defendant threatened to sanction a licensee for pursuing certain legal remedies in court. The lower court stated that an administrative agency may only sanction a licensee for advocating a legal position in court when the position is legally baseless, i.e., when no reasonable litigant could realistically expect success on the merits, and that the licensees were not advocating legally baseless claims in seeking treble damages in district court proceedings. The lower court therefore concluded that defendant had infringed the licensees' First Amendment right of access to the courts. The lower court granted plaintiff's request for an injunction, stating that defendant was enjoined from enforcing or threatening to enforce the administrative order. Notably, the lower court never addressed whether the DPSTA actually precluded licensed payday lenders from seeking recovery under the RJA.[3]

In so doing, the lower court failed to address the central issue in this case, namely, whether defendant's administrative order correctly interpreted the DPSTA to limit a payday lender's remedies when a borrower's

[3] Ironically, although the lower court based its decision on the notion that the judiciary, not the executive branch, "says what the law is," the lower court never actually made a determination regarding the proper relationship between the underlying statutes in this case.

check is returned for nonsufficient funds to the face amount of the check plus a $25 returned check charge, instead of the treble damages permitted by MCL 600.2952. However, this issue must be addressed because plaintiff's constitutional claims hinge on the proposition that defendant's analysis of the relationship between the DPSTA and the RJA is incorrect and, therefore, defendant is somehow precluding plaintiff's members from seeking the recovery to which they are legally entitled.[4] See *Prudential Ins Co of America v Cusick*, 369 Mich 269, 290; 120 NW2d 1 (1963).

We conclude that the administrative order is a correct interpretation of the applicable law. Statutory construction is a question of law that we review de novo. *McManamon v Redford Charter Twp*, 273 Mich App 131, 134; 730 NW2d 757 (2006). The applicable principles of statutory construction are well established, and we begin our analysis by consulting the specific statutory language at issue. *Provider Creditors Comm v United American Health Care Corp*, 275 Mich App 90, 95; 738 NW2d 770 (2007). We give effect to the Legislature's intent, as expressed in the terms of the statute, by giving the words of the statute their plain and ordinary meaning. *In re Kostin Estate*, 278 Mich App 47, 57; 748 NW2d 583 (2008). " 'When the language poses no ambiguity, this Court need not look beyond the statute or construe the statute, but need only enforce the statute as written.' " *Id.*, quoting *McManamon*, *supra* at 136. We will not interpret a statute in a way that renders any statutory language surplusage or nugatory. *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002).

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[4] In the lower court proceedings, defendant asserted that his interpretations of the DPSTA and the RJA were correct, preserving this issue for our review.

"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." *Id.* at 710. To the extent that statutes that are *in pari materia* are unavoidably in conflict and cannot be reconciled, the more specific statute controls. *In re Kostin Estate*, *supra* at 57.

The section of the RJA at issue, MCL 600.2952, and the section of the DPSTA at issue, MCL 487.2158, relate to the same subject matter. Both statutes specify remedies available to entities that have been given a check that is later returned by the drawee because insufficient funds are available in the account to honor the draft. Therefore, these two statutes are *in pari materia*.

The two statutory sections irreconcilably conflict. Although the RJA section would grant treble damages plus costs to the entity given an NSF check, MCL 600.2952(4), the DPSTA limits the recovery to the face amount on the check plus a returned check charge of $25. MCL 487.2158(2), (3). Therefore, the more specific statute must control. *In re Kostin Estate*, *supra* at 57. The DPSTA is clearly the more specific statute. It relates only to payday lenders, while the RJA section relates to any person or entity given a check that is dishonored by the drawee (i.e., the bank). MCL 600.2952(4). Accordingly, the DPSTA controls the remedies available to a payday lender who is given a check by a customer when the check, upon deferred presentment, is dishonored by the drawee because of insufficient funds.

Defendant also provides an additional valid reason why the DPSTA should control. MCL 487.2158(2) states in pertinent part: "In addition to the charge authorized by this section, a licensee may exercise any other remedy available under any law applicable to the return of a check because of a closed account or a stop payment order." Thus, the Legislature preserved *other* preexisting legal remedies available to a person given a check that is dishonored because of a closed account or a stop payment order. Under the principle of *expressio unius est exclusio alterius* ("the express mention of one thing implies the exclusion of another"), *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 248, 704 NW2d 117 (2005), we interpret the DPSTA to have preserved legal remedies existing before its enactment for checks dishonored for the aforementioned reasons, but *not* to have preserved preexisting legal remedies against a person who gives a check that is later returned *because of nonsufficient funds*. Thus, the reason why the check is dishonored also determines the remedy available.

Defendant's interpretation of the applicable provisions of the DPSTA and the RJA was correct. Accordingly, the only thing that defendant is "ordering" the payday lenders to do is abide by the provisions of the statute. It is the DPSTA, not defendant or the OFIR, that ultimately prohibits payday lenders from recovering treble damages under the RJA. The administrative order simply "prohibits" payday lenders from violating a statute that they are required to follow anyway. We know of no caselaw holding that an administrative agency violates an entity's constitutional rights by advising it to follow the law. We also see no error in an administrative agency correctly explaining the law that it is charged with enforcing. See *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 240; 501 NW2d 88 (1993)

("Agencies have the authority to interpret the statutes they are bound to administer and enforce.").

Further, there is no violation of 42 USC 1983 because payday lenders are not being denied access to the courts. Payday lenders are not prohibited from filing claims with district courts to institute causes of action to recover for NSF checks. MCL 487.2158 expressly provides for a means of recovery for NSF and other returned checks, and for the reasons stated earlier, enactment of the DPSTA statutorily precludes recovery in the manner provided in the RJA. Plaintiff cannot claim that a violation of 42 USC 1983 occurred simply because a newly enacted statute precluded recovery of certain damages that plaintiff's members had become accustomed to receiving in NSF cases.[5]

Further, the administrative order simply informs payday lenders of the authority that, by statute, the Legislature granted to the OFIR to enforce the DPSTA

[5] We find it particularly troubling that payday lenders continue to seek damages under the RJA, in contravention of the DPSTA, against individuals who do not have the resources or legal acumen to address the payday lenders' repeated application of the incorrect statute. Many customers of payday lenders are individuals who live from paycheck to paycheck; the point of the payday lending business is to provide short-term salary advances to individuals who otherwise would not have enough money to make it to their next payday. Therefore, many of these default judgments would be against individuals who probably cannot afford legal representation and who likely are not even aware that the payday lender sought recovery under the wrong statute. Why would a down-on-his-luck working person, who needed a payday advance to pay his bills, whose check to the payday lender subsequently bounced, and who knew that he still owed money to the payday lender, question the legality of a judgment requiring him to pay treble damages and costs to the payday lender? Realistically, how would such an individual even know that the DPSTA, not the RJA, governed the amount that a payday lender could recover for his bounced check, and how could that individual, lacking legal training or the funds to hire an attorney, hope to make such a technical legal argument?

and to respond to violations. If it so chooses, a licensed payday lender may still file a cause of action with the district court seeking recovery in excess of what the DPSTA statutorily permits. The statute, however, permits the OFIR to revoke licenses and impose civil fines for violations of the DPSTA. The administrative order notifies payday lenders of the consequences of choosing to violate the DPSTA, all of which are authorized by statute. Defendant does not violate 42 USC 1983 by issuing an administrative order informing payday lenders of the statutorily mandated penalties that they face if they violate the provisions of the DPSTA.[6]

Accordingly, the January 14, 2009, opinion and order in this case is reversed, and the February 25, 2009, judgment in this case is vacated. By extension, the subsequent determination in this case, including the circuit court's award of $121,794.65 in attorney fees and costs and its opinion and order denying plaintiff's motion to enforce the earlier order and judgment are also vacated. Consequently, plaintiff's claims on appeal that the trial court erred by entering a judgment not in conformity with the requirements of MCR 3.310(C) and by failing to grant plaintiff a declaratory ruling are moot.

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[6] Plaintiff goes to extreme lengths in crafting its arguments in an attempt to preclude the Court from addressing whether the DPSTA supersedes the RJA with regard to the recovery permitted for a NSF check. Further, although defendant repeatedly maintains that the substance of the administrative order is correct, plaintiff refuses to address whether the DPSTA actually precludes payday lenders from recovering under the RJA for NSF checks in its briefing of this appeal, even as an alternative argument. We conclude that plaintiff's refusal to address the issue whether licensed payday lenders might still seek recovery for NSF checks under the RJA in a post-DPSTA world is a tacit admission that the DPSTA, not the RJA, controls. We can think of no other reason why plaintiff does not address this determinative issue in its brief.

Reversed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

DRIVER v NAINI

Docket No. 280844. Submitted May 5, 2009, at Detroit. Decided March 2, 2010, at 9:00 a.m.

Willie and Beverly Driver brought a medical malpractice action in the Wayne Circuit Court, Kathleen Macdonald, J., against Mansoor G. Naini, M.D., and Michigan Cardiology Associates, P.C. (MCA), after Willie was diagnosed with colon cancer in November 2005. Plaintiffs claimed that Dr. Naini failed to refer Willie for a colonoscopy in a timely manner. Plaintiffs sent Dr. Naini and MCA a notice of their intent to bring the action on April 25, 2006, and on October 23, 2006, filed a complaint against Dr. Naini and MCA. On January 19, 2007, Dr. Naini and MCA filed a notice of nonparty fault, naming Cardiovascular Clinical Associates, P.C. (CCA), as a defendant. On February 1, 2007, plaintiffs filed a first amended complaint that included CCA as a defendant. CCA moved for summary disposition, alleging failure to comply with the statutes concerning procedure in medical malpractice actions. The trial court denied the motion. The Court of Appeals, WILDER, P.J., and ZAHRA and K. F. KELLY, JJ., granted CCA's application for leave to appeal, limited to the issues raised in the application, in an unpublished order, entered March 21, 2008 (Docket No. 280844).

The Court of Appeals *held*:

1. November 2005 is the latest time at which the claim accrued because the colon cancer was diagnosed then. Plaintiffs, therefore, had until November 2007, at the latest, to commence an action against CCA within the two-year period of limitations.

2. A medical malpractice claimant must give to proposed defendants notice of the intent to sue at least 182 days before commencing an action. If the plaintiff gives such notice, the claimant tolls the two-year limitations period with regard to the persons who are sent the notice.

3. A plaintiff has not commenced a medical malpractice action if the plaintiff files a complaint before the notice period expired. Because plaintiffs filed their first amended complaint before the notice period expired, they did not commence a medical malpractice action against CCA. The period of limitations continued to run against CCA and plaintiffs' claims against CCA are time-barred.

4. The nonparty fault statute, MCL 600.2957(2), provides that after the initial defendants identified CCA as a nonparty potentially at fault, plaintiffs had 91 days to file and serve an amended complaint naming CCA. A cause of action filed under this subsection is not barred by a period of limitations unless the cause of action would have been barred by a period of limitations at the time of the filing of the original action. Not all of plaintiffs' claims against CCA would have been time-barred when the original complaint was filed.

5. A conflict exists because plaintiffs' claims against CCA would not be totally barred under MCL 600.2957(2), but would be totally barred under the notice of intent statute, MCL 600.2912b(1), and the statute of limitations, MCL 600.5805(6). The nonparty fault statute and the notice of intent statute are *in pari materia* and conflict, therefore, the more specific statute must control. The notice of intent statute is the more specific statute in this case. Plaintiffs' claim against CCA is barred by the statute of limitations because plaintiffs failed to comply with the notice of intent statute and did not commence an action against CCA.

6. Where claims against a professional corporation are predicated on its vicarious liability for a licensed health care provider rendering medical services, such as plaintiffs' claims against CCA, a notice of intent must be provided to the professional corporation.

7. MCL 600.2301, which allows for the amendment and disregard of "any error or defect," where the substantial rights of the parties are not affected and the cure is in furtherance of justice, does not apply here. The failure to give CCA any notice in the original notice of intent was not a mere defect in the notice subject to cure. CCA's substantial rights would be affected and any such cure would not be in the furtherance of justice. The order denying summary disposition must be reversed and the case must be remanded to the trial court for the entry of an order of summary disposition in favor of CCA.

Reversed and remanded.

1. LIMITATION OF ACTIONS — MEDICAL MALPRACTICE — NOTICE OF INTENT TO SUE.

The two-year limitations period applicable to medical malpractice actions is tolled, for a maximum of 182 days, when the plaintiff provides a valid notice of intent to bring the action before the period of limitations expires; the plaintiff must then wait for the duration of the notice of intent period before a complaint may be filed; a plaintiff has not commenced a medical malpractice action where the plaintiff files the complaint before the notice of intent period has expired (MCL 600.2912b[1], 600.5805[6], 600.5856).

2. LIMITATION OF ACTIONS — MEDICAL MALPRACTICE — NOTICE OF INTENT TO SUE — NOTICE OF NONPARTY FAULT.

The nonparty fault statute, MCL 600.2957, and the notice of intent statute, MCL 600.2912b(1), relate to the same subject matter and are *in pari materia* for purposes of a medical malpractice action where there is a notice of nonparty fault given and a failure to wait the entire notice of intent waiting period before filing an amended complaint naming that party; the provisions of the notice of intent statute, which apply only to medical malpractice actions, control the determination whether the action is barred by the applicable statute of limitations (MCL 600.2912b[1], 600.5805[6], MCL 600.5856).

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Erlich, Rosen & Bartnick, PC* (by *Sheldon D. Erlich*), for plaintiffs.

Tanoury, Nauts, McKinney & Garbarino, P.L.L.C. (by *Linda M. Garbarino* and *David R. Nauts*), for Cardiovascular Clinical Associates, P.C.

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

PER CURIAM. In this case alleging medical malpractice, defendant Cardiovascular Clinical Associates, P.C. (CCA), appeals by leave granted the circuit court's order denying its motion for summary disposition. We reverse.

The relevant facts are not disputed. Plaintiff[1] has colon cancer, which was diagnosed in November 2005. He had treated with defendant Dr. Mansoor G. Naini before his cancer diagnosis. He claims that Dr. Naini failed to refer him for a colonoscopy.

On April 25, 2006, plaintiffs' counsel sent a notice of intent to bring their action to Dr. Naini and defendant

[1] Beverly Driver, plaintiff Willie Driver's wife, joins him as a plaintiff, claiming loss of consortium, a derivative claim. "Plaintiff" shall refer to Willie Driver.

Michigan Cardiology Associates, P.C. (MCA). On October 23, 2006, plaintiffs filed a complaint against Dr. Naini and MCA. On January 19, 2007, Dr. Naini and MCA filed a notice of nonparty fault, naming CCA.

As a result of the notice of nonparty fault, plaintiffs sent an amended notice of intent to CCA on February 1, 2007. Approximately 39 days later, on March 12, 2007, plaintiffs filed a first amended complaint, including CCA as a defendant.

CCA moved for summary disposition, under MCR 2.116(C)(7), (8), and (10). CCA argued that plaintiffs had failed to comply with the medical malpractice procedural statutes and that plaintiffs' suit was time-barred.

In response, plaintiffs acknowledged that CCA should have had 182 days of notice, but stated that the period of limitations would have expired had they waited that long. Plaintiffs argued that under subsection (2) of the nonparty fault statute, MCL 600.2957(2), they have 91 days to add a potential defendant referenced in a notice of nonparty fault. Plaintiffs also noted that no new theories of liability were being alleged, and the only theory of liability was against Dr. Naini as the agent of his corporations. CCA was alleged to be vicariously liable.

CCA replied, noting that plaintiff's medical records reflected that Dr. Naini was associated with CCA. So, plaintiff was on notice of CCA.

At the hearing, plaintiffs denied that the period of limitations expired, arguing that the notice of intent sent to CCA, within the limitations period, tolled the statute. Plaintiffs also argued that, under subsection (2) of the nonparty fault statute, MCL 600.2957(2), the amended complaint was timely. Plaintiffs argued that, under that statute, as long as they added the nonparty

at fault within 91 days of the notice of nonparty fault, they are within the protection of that statute. The circuit court agreed with plaintiffs and denied the motion for summary disposition.

CCA applied for leave to appeal. This Court granted leave, limited to the issues stated in the application. *Driver v Naini*, unpublished order of the Court of Appeals, entered March 21, 2008 (Docket No. 280844).

CCA first argues that plaintiffs prematurely filed suit, before the expiration of the presuit notice of intent period, and that, accordingly, the circuit court erred by denying its motion for summary disposition.

This Court reviews summary disposition rulings de novo. *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 647; 761 NW2d 414 (2008). Issues of statutory construction are questions of law, reviewed de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). Similarly, this Court reviews de novo the legal question whether a statute of limitations bars an action. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997).

MCR 2.116(C)(7) permits summary disposition where the claim is barred because the applicable period of limitations expired before commencement of the action. In reviewing a motion under subrule (C)(7), a court accepts as true the plaintiff's well-pleaded allegations of fact, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted by the parties, to determine whether a genuine issue of material fact exists. *Id*. But these materials are considered only to the

extent that they are admissible in evidence. *In re Miltenberger Estate*, 275 Mich App 47, 51; 737 NW 2d 513 (2007).

A motion for summary disposition under subrule (C)(8) tests the legal sufficiency of the pleadings. *Johnson-McIntosh v Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). The pleadings are considered alone, without consideration of evidence. MCR 2.116(G)(5). Where the parties rely on documentary evidence, appellate courts proceed under the standards of review applicable to a motion made under MCR 2.116(C)(10). *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007).

A motion made under MCR 2.116(C)(10) tests the factual support for a claim, and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *The Healing Place at North Oakland Med Ctr*, 277 Mich App at 56. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id*. But such evidence is only considered to the extent that it is admissible. MCR 2.116(G)(6). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *The Healing Place at North Oakland Med Ctr*, 277 Mich App at 56.

Where the timeliness of a tort action is at issue, we analyze when the claim accrued, because the due date for commencing the action hinges on accrual. MCL 600.5805(1) ("[a] person shall not bring or maintain an action . . . unless, *after the claim first accrued* . . . the

action is commenced within the periods of time prescribed by this section") (emphasis added). A medical malpractice claim accrues at the time of the acts or omissions that are the basis for the claim. MCL 600.5838a(1).

Because plaintiff's colon cancer was diagnosed in November 2005, that is the latest time at which the claim accrued. MCL 600.5838a(1). Since the claim accrued, at the latest, in November 2005, plaintiffs had, at the latest, until November 2007 to commence an action against CCA. MCL 600.5805(6) (the period of limitations for malpractice is two years). The first amended complaint naming CCA was filed, and thus an action against CCA *ostensibly*[2] commenced, in March 2007.

A medical malpractice claimant must give, to proposed defendants, notice of the intent to sue, and this must be done at least 182 days before commencing an action. MCL 600.2912b(1).[3] A notice of intent must also be separately provided to a professional corporation, if the plaintiff wants to be able to sue the professional corporation for vicarious liability for medical malpractice. *Potter v McLeary*, 484 Mich 397, 402-403; 774 NW2d 1 (2009).

If the claimant gives this notice of intent, the claimant tolls the two-year limitations period of MCL

[2] Later in this opinion, we will see that a medical malpractice action is not legally commenced unless the claimants complied with the notice of intent period. *Burton v Reed City Hosp Corp*, 471 Mich 745, 753-754; 691 NW2d 424 (2005). Here, as to CCA, it is undisputed that plaintiffs did not comply with the notice of intent waiting period (although plaintiffs maintain that such compliance was not required; see the discussion later in this opinion).

[3] If the claimant does not receive the written response required by MCL 600.2912b(7) from the defendant within 154 days after the defendant received the notice, the claimant may commence a medical malpractice action upon the expiration of the 154-day period. MCL 600.2912b(8). Here, the shortening of the 182-day period to 154 days is irrelevant, because plaintiffs only waited approximately 39 days, after giving their amended notice to CCA, to file their first amended complaint.

600.5805(6), as against the persons who are sent the notice. MCL 600.5856(c). MCL 600.5856 states:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
>
> (b) At the time jurisdiction over the defendant is otherwise acquired.
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; *but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given*. [Emphasis added.]

Thus, the two-year limitations period is tolled, for a maximum of 182 days, if the plaintiff provides, before the period of limitations expires, a valid notice of intent. MCL 600.5856(c); *Waltz v Wyse*, 469 Mich 642, 646; 677 NW2d 813 (2004); *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 573; 703 NW2d 115 (2005) (notice of intent cannot toll the running of the period of limitations, if the limitations period has already expired before the notice was given). A claimant must then wait for the duration of the notice of intent period, before the claimant may file a complaint. *Burton v Reed City Hosp Corp*, 471 Mich 745, 753-754; 691 NW2d 424 (2005). As the emphasized language makes clear, the notice of intent tolling has a maximum number of days equal to the number of days remaining in the notice period. MCL 600.5856(c).

Next, also at play in determining the timeliness of a medical malpractice action are, obviously, the limitations periods. MCL 600.5838a(2) provides the overall

map of the limitations periods applicable to medical malpractice actions. It states, in relevant part:

> Except as otherwise provided in this subsection, *an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805* or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. . . . A medical malpractice action that is not commenced within the time prescribed by this subsection is barred. [MCL 600.5838a(2) (emphasis added).]

There is no issue raised by the parties regarding discovery of the alleged malpractice. Therefore, according to the emphasized language, MCL 600.5838a(2) points the analysis to MCL 600.5805, which provides a two-year limitations period for medical malpractice actions. It states, in relevant part:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued . . . the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (6) [T]he period of limitations is 2 years for an action charging malpractice. [MCL 600.5805.]

Thus, whether a claimant has complied with the statute of limitations depends on when the claimant commenced an action. Therefore, we turn to what actions constitute commencement of a medical malpractice action.

If a plaintiff files a complaint before the notice period has expired, the plaintiff has not commenced a medical malpractice action. *Burton*, 471 Mich at 754. The Court in *Burton* made this clear:

> Each statute sets forth a prerequisite condition to the commencement of a medical malpractice lawsuit. The filing of a complaint before the expiration of the statutorily mandated notice period is no more effective to commence a lawsuit than the filing of a complaint without the required affidavit of merit. In each instance, the failure to comply with the statutory requirement renders the complaint insufficient to commence the action. [*Id.*]

Here, plaintiffs provided their amended notice of intent, naming CCA, on February 1, 2007. Approximately 39 days later, plaintiffs filed their first amended complaint, naming CCA. Because plaintiffs filed their first amended complaint before the notice period expired, they did not commence a medical malpractice action as against CCA. *Burton*, 471 Mich at 753-754 (filing a premature complaint does not toll the statute of limitations). Because plaintiffs did not properly commence an action against CCA, the period of limitations continued to run as against CCA (was not tolled by the filing of the premature complaint[4]), *id.*,[5] and plaintiffs'

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[4] Even if the amended notice of intent tolled the limitations period, it only did so for a limited number of days. MCL 600.5856(c). Because plaintiffs never effectively commenced an action against CCA, *Burton*, 471 Mich at 753-754, the clock began to run again after § 5856(c) tolling expired.

[5] In *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 3; 704 NW2d 69 (2005), the Court faced a situation in which a first notice of intent did not need to toll the limitations period, because there were more than 182 days remaining in the limitations period, and then the plaintiff filed a second notice of intent, with fewer than 182 days remaining in the limitations period, thereby needing the tolling. The Court held that because the first notice of intent did not result in any tolling, the second notice of intent did result in tolling under MCL 600.5856(d) (which was amended to become subsection [c]). In the case at bar, plaintiffs only provided one notice of intent to CCA. In addition, that notice of intent could only toll for a limited number of days, see MCL 600.5856(c), and since plaintiffs' amended complaint, naming CCA, did not commence an action, because it was premature, the tolling under MCL 600.5856(c), for a limited number of days, ended long ago. MCL 600.5856(c).

claims against CCA are now time-barred, MCL 600.5805(6). This is the end of the case, unless, as plaintiffs argue, their claim against CCA is timely under another statute. They cite the notice of nonparty fault statute, MCL 600.2957.

In relevant part, the nonparty fault statute provides, in effect, that after the initial defendants identified CCA as a nonparty potentially at fault, plaintiffs had 91 days to file and serve an amended complaint naming CCA. MCL 600.2957(2). That subsection provides:

> Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action. [MCL 600.2957(2).]

Whether plaintiffs can rely on this statute, to render their claim against CCA timely, depends on how this statute is interpreted.

Statutory construction discerns and gives effect to the Legislature's intent. *Potter*, 484 Mich at 410. In determining that intent, the court first looks to the language of the statute. *Id*. The interpretation of the language must accord with the legislative intent. *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). As far as possible, the court gives effect to every phrase, clause, and word in the statute. *Id*. "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Id*. (quotation marks and citations omitted). Courts read a statute as a whole, and individual words and phrases, while important, are read in the context of the entire legislative scheme. *Id*.

Applying these rules, we first note that a cause of action filed in accordance with this subsection "is not barred by a period of limitation . . . ." MCL 600.2957(2). The only exception is the "unless clause," relied on by CCA here. Under the "unless clause," that part of plaintiffs' claims that would have been time-barred, at the filing of the original complaint, on October 2006, is not timely under subsection (2) of the nonparty fault statute. MCL 600.2957(2). Because plaintiffs claim that malpractice occurred up to and including November 2005 (which is within two years of October 2006), not all portions of plaintiffs' claims against CCA would have been time-barred when the original complaint was filed. Only those portions of the claims based on acts or omission occurring before October 23, 2004, would have been time-barred, as against CCA, at that time. MCL 600.5805(6) (2-year limitations period); MCL 600.5838a(1) (a medical malpractice claim accrues at the time of the acts or omissions that are the basis for the claim). Thus, the "unless exception" in subsection (2) of the nonparty fault statute is not a total bar to plaintiffs' claims against CCA.

Accordingly, given all the above analysis, we must turn to the apparent conflict between, on the one hand, the nonparty fault statute (under which plaintiffs' claims against CCA are not totally barred), and, on the other hand, the notice of intent statute and the statute of limitations (which, as discussed earlier in this opinion, as interpreted in *Burton*, would result in plaintiffs' claims against CCA being untimely *in toto*). Therefore, we turn to the law applicable when statutes touching the same area appear to conflict. *In re Kostin Estate*, 278 Mich App 47, 57; 748 NW2d 583 (2008).

Apparently conflicting statutes should be construed, if possible, to give each full force and effect. *Mich Good*

Roads Federation v State Bd of Canvassers, 333 Mich 352, 361; 53 NW2d 481 (1952); *Beattie v Mickalich*, 284 Mich App 564, 570; 773 NW2d 748 (2009). The object of the *in pari materia* rule is to effectuate legislative purposes when statutes are harmonious. *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008). If two statutes lend themselves to a harmonious construction, that construction controls. *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 148; 762 NW2d 192 (2009). Statutes are *in pari materia* when they relate to the same subject matter and share a common purpose. *In re Kostin Estate*, 278 Mich App at 57, citing *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007). In other words, statutes that are *in pari materia* must be read together, as a whole, to fully reveal the Legislature's intent. *Beattie*, 284 Mich App at 570. However, to the extent the two statutes at issue are in actual conflict, and are *in pari materia*, the more specific statute controls. *In re Kostin Estate*, 278 Mich App at 57, citing *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007).

Accordingly, we first consider whether the nonparty fault statute and the notice of intent statute (together with the statute of limitations) can be read harmoniously. We are constrained to hold that they are in unavoidable conflict. *Hughes v Almena Twp*, 284 Mich App 50, 66; 771 NW2d 453 (2009) (noting that statutes that are *in pari materia* must be read together as one law and should be reconciled "if possible"). As discussed earlier in this opinion, the nonparty fault statute unavoidably results in only *parts* of plaintiffs' claim against CCA being untimely. On the other hand, as explained earlier, the notice of intent statute, as bindingly interpreted in *Burton,* 471 Mich at 753-754, together with the statute of limitations, would result in

all of plaintiffs' claim against CCA being barred. We can see no interpretation of these statutes that can void the conflicting result, while still being faithful to *Burton*, 471 Mich at 753-754.

We also hold that, the nonparty fault statute, on one hand, and, on the other hand, the notice of intent statute (in conjunction with the statute of limitations), relate to the same subject matter, namely, the situation at bar, where there is, in a medical malpractice action, a notice of nonparty fault as well as a failure to wait the entire notice of intent waiting period. MCL 600.2912b; MCL 600.2957. Also, the statutes share a common purpose, namely, to provide rules and limitations for when actions may be brought against persons alleged to be liable for medical malpractice. MCL 600.2912b; MCL 600.5805(6); MCL 600.2957(2). Accordingly, these statutes are *in pari materia*. Compare *In re Kostin Estate*, 278 Mich App at 57 (holding *in pari materia* a statute dealing with Totten[6] trusts and a statute dealing with express trusts).

Because the statutes conflict, and are *in pari materia*, we must determine which is more specific. *In re Kostin Estate*, 278 Mich App at 57. The notice of intent statute applies only to medical malpractice actions. MCL 600.2912b(1). The nonparty fault statute, by contrast, applies to a broader category of actions, namely any "action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death," in which a defendant gives notice of a nonparty at fault. MCL 600.2957(1). Therefore, the notice of intent statute controls. *In re Kostin Estate*, 278 Mich App at 57. Because plaintiffs failed to comply with the notice of intent statute and did not commence an

[6] *In re Totten*, 179 NY 112; 71 NE 748 (1904); see also *In re Kostin Estate*, 278 Mich App at 55-56.

action against CCA, their claim against CCA is barred by the statute of limitations. *Burton*, 471 Mich at 753-754.

Plaintiffs argue that *Burton* is no longer good law, citing *Costa v Community Emergency Med Servs*, *Inc*, 475 Mich 403; 716 NW2d 236 (2006). This argument lacks merit. *Costa* did not overrule *Burton*. On the contrary, *Costa* cited, and relied upon, *Burton*. *Costa*, 475 Mich at 409. Therefore, *Burton* is still good law. *Id*.

Plaintiffs also argue that the notice of intent statute, and its mandatory waiting period, do not apply to CCA, because it is a professional corporation. Our Supreme Court recently rejected this position, holding that, where claims against a professional corporation are predicated on its vicarious liability for a licensed health care provider rendering professional services, a notice of intent must be provided to the professional corporation. *Potter*, 484 Mich at 402-403.

Potter does not in any way contradict the result we reach today. On the contrary, it supports it. *Potter*'s first holding is that "when claims alleged against a PC are predicated on its vicarious liability for a licensed health care provider rendering professional services, an NOI [notice of intent] must be provided" to the professional corporation. *Id.* at 402. *Potter*'s second holding is that the notice of intent statute does not require a claimant to set forth the legal and employment relationship between the parties to be sued. *Id*. at 420. *Potter*'s third holding is that a claimant is not required to set forth the claimant's legal theory of vicarious liability in the notice of intent sent to a professional corporation, even when vicarious liability is the only claim asserted against the professional corporation. *Id*. at 422. None of these *Potter* holdings contradicts our holdings today, because the *Potter* holdings do not relate to whether

claims are barred by reason of a statute of limitations where a claimant fails to wait the required notice period. *Id*.

Bush also does not contradict our result today. *Bush* dealt with a situation in which there were *defects* in a notice of intent, *not* a situation in which a party was *completely left out* of a notice of intent (received no notice whatsoever). *Bush*, 484 Mich at 160-161. Therefore, *Bush* is distinguishable. The first (and only relevant) issue in *Bush* was whether defects in a notice of intent would preclude tolling of the statute of limitations under MCL 600.5856. The Court held that defects in the notice of intent did not preclude notice tolling, because defects in the notice of intent can be addressed under MCL 600.2301,[7] which allows for amendment and disregard of "any error or defect," where the substantial rights of the parties are not affected, and the cure is in furtherance of justice. *Bush*, 484 Mich at 161. We hold that plaintiffs' failure to give any notice whatsoever to CCA in the original notice of intent cannot be considered a mere defect in the notice, subject to cure, and also that the substantial rights of CCA would be affected (indeed, CCA, though a corporate person, has a due process right to notice[8]). We also hold

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[7] MCL 600.2301 provides:

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

[8] *Greater Slidell Auto Auction, Inc v American Bank & Trust Co of Baton Rouge, La*, 32 F3d 939, 942 (CA 5, 1994) (holding that a corporation had due process right to notice by mail of the Federal Deposit Insurance Corporation's appointment as receiver).

that such a drastic "cure" (adding a new party) would not be in the furtherance of justice (if plaintiffs could obtain tolling for a claim against CCA, though no notice whatsoever was provided to CCA in the original notice of intent). See *id*. Therefore, *Bush* and MCL 600.2301 do not allow plaintiffs to leave CCA out of the original notice of intent, toll the statute of limitations as against CCA, and then "cure" the "error or defect" by giving CCA an amended notice.

Plaintiffs also argue that the correct action, in response to CCA's motion, would be dismissal without prejudice. This argument was not made in the circuit court. Therefore, we decline to consider it. *Kuznar v Raksha Corp*, 481 Mich 169, 182 n 35; 750 NW2d 121 (2008); *Ligon v Detroit*, 276 Mich App 120, 129; 739 NW2d 900 (2007).

Because we hold that plaintiffs' claims against CCA are time-barred, CCA's remaining arguments are moot, and this Court is not obliged to decide moot questions, *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008), even when they are preserved, *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).

Reversed and remanded for entry of summary disposition in CCA's favor. We do not retain jurisdiction. CCA, being the prevailing party, may tax costs pursuant to MCR 7.219.

PEOPLE v LEWIS (ON REMAND)

Docket No. 274508. Submitted October 15, 2009, at Lansing. Decided January 12, 2010. Approved for publication March 4, 2010, at 9:00 a.m.

Reginald L. Lewis was convicted by a jury in the Wayne Circuit Court, David J. Allen, J., of first-degree premeditated murder. Defendant appealed, and the Court of Appeals, METER, P.J., and SAWYER and WILDER, JJ., affirmed in an unpublished opinion per curiam, issued April 15, 2008 (Docket No. 274508). The Supreme Court, in lieu of granting leave to appeal, vacated in part the opinion of the Court of Appeals and remanded the case to the Court of Appeals for reconsideration of defendant's Confrontation Clause, sufficiency of the evidence, and ineffective assistance of counsel issues in light of *Melendez-Diaz v Massachusetts*, 557 US ___; 129 S Ct 2527; 174 L Ed 2d 314 (2009). 485 Mich 878 (2009).

On remand, the Court of Appeals *held*:

1. Defendant's constitutional right to confront the witnesses against him was not violated when the trial court admitted into evidence an autopsy report prepared by two nontestifying medical examiners through the testimony of a third medical examiner from the same laboratory.

2. Because the autopsy report was not prepared primarily for use in a later criminal prosecution, but was prepared pursuant to a duty imposed by statute, and defendant cross-examined the testifying medical examiner regarding the examiner's independent opinions that were based on the autopsy report, the report is not testimonial evidence and defendant was not denied his right to confront the two nontestifying medical examiners. The Supreme Court's determination in *Melendez-Diaz* that the disputed evidence was testimonial was based on characteristics that are not present with regard to the autopsy report in this case.

3. The admission of the report through the testimony of the third medical examiner was not outcome determinative because the report did not aid in establishing the identity of the perpetrator, which was the central issue in the case.

4. Defendant's trial counsel was not ineffective for failing to object to the admission of the autopsy report on Sixth Amendment grounds. Counsel's failure to object did not fall below an objective standard of reasonableness and defendant cannot demonstrate that, but for the attorney's alleged error, the outcome of the trial would have been different. There was sufficient evidence to support the conviction absent the report.

5. The evidence was sufficient for a rational trier of fact to find that defendant was the person who killed the victim. The trial court did not err by denying defendant's motion for a directed verdict that alleged that there was insufficient evidence identifying defendant as the perpetrator of the crime.

6. The autopsy report detailing the stab wounds sustained by the victim provided evidence of intent and premeditation. The prosecution, even without the report, presented sufficient evidence, including evidence regarding defendant's acts after the homicide, for a rational trier of fact to find intent and premeditation. The trial court did not err by denying defendant's motion for a directed verdict that alleged that insufficient evidence of premeditation was presented.

Affirmed.

1. CONSTITUTIONAL LAW — CONFRONTATION CLAUSE — TESTIMONIAL STATEMENTS.

Testimonial hearsay is inadmissible against a criminal defendant unless the declarant is unavailable at trial and there was a prior opportunity for cross-examination of the declarant; statements are testimonial where the primary purpose of the statements or the questioning that elicits them is to establish or prove past events potentially relevant to later criminal prosecution.

2. CONSTITUTIONAL LAW — CONFRONTATION CLAUSE — TESTIMONIAL STATEMENTS.

The class of testimonial statements covered by the Confrontation Clause includes material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; also included are extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, confessions, and statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial (US Const, Am VI; Const 1963, art 1, § 20).

3. CRIMINAL LAW — HOMICIDE — ELEMENTS — IDENTITY — PREMEDITATION — DELIBERATION.

Identity is an element of every criminal offense; the elements of the crime of premeditated murder are an intentional killing of a human being with premeditation and deliberation; premeditation and deliberation may be inferred from the circumstances and minimal circumstantial evidence is sufficient to prove an actor's state of mind (MCL 750.316).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Jeffrey Caminsky*, Principal Attorney, Appeals, for the people.

Gerald M. Lorence for defendant.

ON REMAND

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

PER CURIAM. In *People v Lewis*, unpublished opinion per curiam of the Court of Appeals, issued April 15, 2008 (Docket No. 274508), we affirmed defendant's conviction of first-degree premeditated murder, MCL 750.316. Following the United States Supreme Court's decision in *Melendez-Diaz v Massachusetts*, 557 US ___; 129 S Ct 2527; 174 L Ed 2d 314 (2009), and in lieu of granting leave to appeal, the Michigan Supreme Court vacated our opinion in part and remanded "for reconsideration of . . . defendant's Confrontation Clause, sufficiency of the evidence, and ineffective assistance issues in light of *Melendez-Diaz*." *People v Lewis*, 485 Mich 878 (2009). We again affirm.

As we stated in our previous opinion:

> Defendant's conviction[] ar[o]se from the death of his longtime girlfriend, Tomeka Cook. After a dispute with

> defendant over money, Cook was found dead with multiple stab wounds. [*Lewis*, unpub op at 1.]

An autopsy was performed on Cook's body and the trial court admitted into evidence the autopsy report prepared by two nontestifying medical examiners through the testimony of a third medical examiner from the same laboratory, Dr. Carl Schmidt. In his first claim on remand, defendant argues that the admission of the autopsy report violated his constitutional right to confront witnesses against him. We disagree. This issue is unpreserved because defendant failed to object to the admission of the autopsy report and Dr. Schmidt's testimony on Sixth Amendment grounds. Therefore, we review defendant's claim for plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999); *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005).

> We will reverse only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings," regardless of his innocence. [*People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004) (citation omitted).]

The Confrontation Clause provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. Our state constitution also guarantees the same right. Const 1963, art 1, § 20. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant was unavailable at trial and there was a prior opportunity for cross-examination of the declarant. *Crawford v Washington*, 541 US 36, 50-51, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347;

697 NW2d 144 (2005).[1] Statements are testimonial where the "primary purpose" of the statements or the questioning that elicits them "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

In our previous opinion, we thoroughly discussed this Court's applications of *Crawford* in *People v Jambor* (*On Remand*), 273 Mich App 477; 729 NW2d 569 (2007), and *People v Lonsby*, 268 Mich App 375; 707 NW2d 610 (2005). On the basis of these decisions, we concluded that the autopsy report was nontestimonial because it "was 'not prepared in anticipation of litigation against defendant,' but pursuant to a 'duty imposed by law,' MRE 803(8)." *Lewis*, unpub op at 4 (citation omitted), citing *Jambor*. We also noted that a medical examiner is required by statute to investigate the cause and manner of death of an individual under certain circumstances, including death by violence, MCL 52.202(1)(a), and thus further concluded that the admission of the autopsy report through Dr. Schmidt's testimony did not violate defendant's Sixth Amendment rights under *Crawford* and *Davis*.[2]

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[1] The Confrontation Clause does not restrict state law in the determination whether hearsay is admissible when it is nontestimonial, however. *Crawford*, 541 US at 68.

[2] We previously observed "the autopsy report contained enough 'objective' information and statements upon which Dr. Schmidt could form an independent opinion about which he could be cross-examined." *Lewis*, unpub op at 5. We stated:

> Dr. Schmidt testified that the autopsy report showed that Tomeka had sustained several stab wounds, and six wounds on the backs of her hands, which the report described as "defensive wounds." He testified that the one of the medical examiners who performed the autopsy had concluded that the cause of death was multiple stab wounds and the manner of death was homicide. After reviewing the report and sketch upon which the nontestify-

Our Supreme Court has instructed this Court to reconsider defendant's Confrontation Clause argument in light of *Melendez-Diaz*. That case involved the use of affidavits by forensic analysts to support the defendant's convictions of distributing and trafficking in cocaine. 557 US at ___; 129 S Ct at 2530-2531; 174 L Ed 2d at 319-321. At trial, over the defendant's objection, the court admitted three notarized "certificates of analysis" from nontestifying laboratory analysts who, at the request of the police, tested the substance in bags seized by the police. *Id.* The certificates stated that chemical testing identified the substance in the bags as cocaine. *Id.* Massachusetts' law permitted the certificates to serve as ' "prima facie evidence of the composition, quality, and the net weight" ' of the narcotic analyzed, and the trial court held that the authors of the certificates were not subject to confrontation. 557 US at ___; 129 S Ct at 2532; 174 L Ed 2d at 321.

On appeal, the defendant in *Melendez-Diaz*, 557 US at ___; 129 S Ct at 2531; 174 L Ed 2d at 320, challenged the admission of the certificates and claimed that the analysts were required to testify in person. The United States Supreme Court reversed the defendant's convictions, holding that the admission of the documents violated the Confrontation Clause. The Supreme Court's decision reaffirmed the principles set forth in *Crawford*. Justice Scalia, writing for the Court, reiterated *Crawford*'s description of "the class of testimonial statements covered by the Confrontation Clause," that is,

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ing medical examiner based her opinion, Dr. Schmidt agreed with her conclusions about cause and manner of death, and with her description of the wounds on the backs of the hands as defensive. Dr. Schmidt testified that, in his opinion, Tomeka could have been killed on February 2, 2003, or February 3, 2003, but not on February 4, 2003, because that is when the body was found and rigor mortis was waning. [*Id.*]

> "material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." [557 US at ___; 129 S Ct at 2531; 174 L Ed 2d at 321, quoting *Crawford*, 541 US at 51-52 (quotation marks and citations omitted.]

The Supreme Court concluded in *Melendez-Diaz* that the "certificates of analysis" were affidavits, and that they were statements offered against the defendant to prove a contested fact. 557 US at ___; 129 S Ct at 2532; 174 L Ed 2d at 321. As such, the certificates were testimonial in nature and subject to the Confrontation Clause. *Id.* The fact that the "sole purpose" of the certificates was to serve as prima facie evidence at trial further supported the Court's conclusion that they were testimonial. *Id.* The Supreme Court summarized its conclusion:

> In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to " 'be confronted with' " the analysts at trial. *Crawford*, *supra*, at 54, 124 S Ct 1354, 158 L Ed 2d 177. [*Id*. (emphasis in original).]

Applying *Melendez-Diaz* to the instant case, we again conclude that defendant has failed to establish plain error in the admission of the report. The Supreme Court's determination that the forensic analysts' certificates in *Melendez-Diaz* were testimonial was based on characteristics that are not present here. Unlike the certificates, which were prepared for the "sole purpose" of

providing "prima facie evidence" against the defendant at trial, *Melendez-Diaz*, 557 US at ___; 129 S Ct at 2532; 174 L Ed 2d at 321, the autopsy report was prepared pursuant to a duty imposed by statute. *Lewis*, unpub op at 4-5; MRE 803(8); MCL 52.202(1)(a). As we stated in our previous opinion:

> [W]hile it was conceivable that the autopsy report would become part of [a] criminal prosecution, investigations by medical examiners are required by Michigan statute under certain circumstances regardless of whether criminal prosecution is contemplated. [*Lewis*, unpub op at 4.]

Furthermore, unlike the way the certificates in *Melendez-Diaz* were used, Dr. Schmidt formed independent opinions based on objective information in the autopsy report and his opinions were subject to cross-examination. See *Lewis*, unpub op at 5; cf., *Jambor*, 273 Mich App at 488, and *Lonsby*, 268 Mich App at 392. Because the autopsy report was not prepared primarily for use in a later criminal prosecution and defendant cross-examined Dr. Schmidt regarding his independent opinions based on the autopsy report, the report is not testimonial evidence and defendant was not denied the right to be confronted by the two nontestifying medical examiners who prepared it. *Davis*, 547 US at 822; *Lonsby*, 268 Mich App at 392.

In addition, as we previously concluded, the admission of the report through the testimony of Dr. Schmidt was not outcome determinative: "There is no dispute that a crime was committed, and the autopsy did not aid in establishing the identity of the perpetrator, which was the central issue in this case." *Lewis*, unpub op at 6.[3]

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[3] The *Melendez-Diaz* Court noted that "[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections." *Melendez-Diaz*, 557 US ___ n 3; 129 S Ct at 2534 n 3; 174 L Ed 2d at 323 n 3.

In defendant's second claim on remand, he argues that his attorney was ineffective for failing to object to the admission of the autopsy report on Sixth Amendment grounds. We disagree. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The trial court must first find the facts, and then decide whether those facts constitute a violation of the defendant's constitutional right to counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* at 484-485.

Effective assistance is strongly presumed. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate ineffective assistance, a defendant must show: (1) that the defendant's attorney's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced the defendant that the defendant was deprived of a fair trial. *Grant*, 470 Mich at 485-486. Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.* at 486.

Because the admission of the autopsy report did not violate defendant's right of confrontation, his attorney's failure to object to the admission of the report did not fall below an objective standard of reasonableness. Moreover, defendant cannot demonstrate that, but for the attorney's alleged error, the outcome of the trial would have been different. *Id.* at 485-486. As we note later in this opinion, there was sufficient evidence to support defendant's first-degree murder conviction absent the report.

In defendant's last two claims on remand, he first argues that the prosecutor failed to present sufficient

evidence identifying him as the perpetrator to support his conviction, and he second challenges the trial court's denial of his motion for a directed verdict, reiterating his argument that there was insufficient evidence identifying him as the perpetrator and arguing that the evidence of premeditation was "scarce and circumstantial." We disagree. "A claim of insufficient evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). Circumstantial evidence and reasonable inferences may be satisfactory proof of the elements of a crime. *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). A challenge to the trial court's decision on a motion for a directed verdict has the same standard of review as a challenge to the sufficiency of the evidence. *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001).

"[I]dentity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "The elements of premeditated murder are (1) an intentional killing of a human being (2) with premeditation and deliberation." *People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009). ' "[P]remeditation and deliberation may be inferred from circumstances," ' and "[m]inimal circumstantial evidence is sufficient to prove an actor's state of mind." *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2002) (citation omitted).

Again, the autopsy report did not aid in establishing the identity element of the crime. *Lewis*, unpub op at 5. Accordingly, even if the autopsy report had constituted testimonial evidence and defendant was denied his Sixth Amendment rights, the admission of the report

would not have been outcome determinative to the issue of identity. Consistent with our previous opinion, we conclude that the evidence was sufficient for a rational trier of fact to find that defendant was Cook's killer because his blood was recovered from the back door of Cook's home, where she was found dead with defensive wounds. *Lewis*, unpub op at 10-11. For this same reason, the trial court did not err by denying defendant's motion for a directed verdict based on his identity argument.

Furthermore, as we stated in our previous opinion, the autopsy report detailing the numerous stab wounds that Cook sustained provided evidence of intent and premeditation. *Lewis,* unpub op at 11-12. However, even without the report, the prosecution presented sufficient evidence for a rational trier of fact to find intent and premeditation. Defendant and Cook had a contentious relationship. The autopsy photographs demonstrated that Cook sustained numerous stab wounds. Dr. Schmidt independently opined that some of Cook's wounds were defensive, indicating a struggle, which can be evidence of premeditation. See *id.* at 12, citing *People v Johnson*, 460 Mich 720, 730, 733; 597 NW2d 73 (1999). A rational trier of fact could also find premeditation from evidence of defendant's acts after the homicide. See *id.* at 11, citing *People v Gonzalez*, 178 Mich App 526, 533; 444 NW2d 228 (1989) (a defendant's conduct after the homicide may establish premeditation). As we thoroughly discussed in our previous opinion, it could be inferred that defendant attempted to construct an alibi by spending time with friends, that he acted secretively with telephone calls, and that, several months after Cook's death, he evaded conversation about Cook. Because the prosecution presented sufficient evidence for a rational trier of fact to find both intent and premeditation, the trial court did not err by

denying defendant's motion for a directed verdict on the basis of his premeditation argument.

Affirmed.

PEOPLE v WATERSTONE

Docket No. 294667. Submitted February 5, 2010, at Detroit. Decided March 4, 2010, at 9:05 a.m.

Mary M. Waterstone was charged by the Attorney General in the 36th District Court with four counts of misconduct in office involving defendant's alleged conduct while she was a circuit court judge in knowingly permitting witnesses to commit perjury during the trial of Alexander Aceval and Ricardo Pena for narcotics trafficking. Defendant moved, in part, to disqualify the Attorney General's Office, contending that the Attorney General had a conflict of interest and could not bring the charges against her because the Attorney General had represented defendant in a federal lawsuit filed by Aceval in which Aceval alleged under 42 USC 1983 that his civil rights were violated as a result of the admission of the perjured testimony. The district court denied the motion to disqualify the Attorney General. Defendant appealed to the Wayne Circuit Court, Daniel A. Hathaway, J., which affirmed the order of the district court denying the motion to disqualify the Attorney General's Office. The Court of Appeals, ZAHRA, P.J., and WILDER and K. F. KELLY, JJ., denied defendant's delayed application for leave to appeal in an unpublished order, entered December 17, 2009 (Docket No. 294667). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted, limited to the issues whether the Attorney General's prosecution of defendant is consistent with the requirements of MRPC 1.7, 1.9, and 1.10 and with *Attorney General v Pub Serv Comm*, 243 Mich App 487 (2000). 485 Mich 1016 (2010).

The Court of Appeals *held*:

1. Under the particular facts of this case, the Attorney General should be disqualified for violating the MRPC when, without obtaining defendant's consent, the Criminal Division of the Attorney General's Office prosecuted defendant regarding perjury at Aceval's trial after the Public Employment, Elections, and Tort (PEET) Division of the Attorney General's Office defended defendant from Aceval's federal civil claims arising from Aceval's trial.

2. The assistant attorney general from the PEET Division learned confidential information from defendant in the course of

representing her in the federal case. Defendant is not a current client of the Attorney General, because representation of defendant by that assistant attorney general ceased when the assistant attorney general notified defendant that the federal action had been dismissed. The present action is substantially related to the federal action because both cases arose from the same alleged perjury at Aceval's criminal trial. The Attorney General's instant criminal prosecution is materially adverse to the defense offered by the Attorney General on defendant's behalf in the federal civil case.

3. The Attorney General's Office is a law firm under the extraordinary circumstances of this case and for purposes of this case only.

4. Given the PEET Division's routine role in defending judges in federal §1983 civil claims, it is unreasonable for the Attorney General to have failed to carry out a conflict check before the Criminal Division undertook its investigation. Knowledge of the potential federal case can be inferred from the circumstances and, therefore, the Attorney General should have obtained the consent of his former client, defendant, before the Criminal Division undertook its investigation.

5. The Attorney General has an affirmative duty to perform a conflict check before undertaking the prosecution of a judge or other person whom the Attorney General's Office is statutorily required to defend.

6. Defendant was prejudiced by the tactics employed by Attorney General investigator Michael Ondejko when, during the course of the criminal investigation, he interviewed defendant while serving an investigative subpoena. Any information obtained from defendant as a result of the violation of the Michigan Rules and Professional Conduct cannot be used. Ondejko did not communicate to defendant information reasonably sufficient to permit defendant to appreciate the significance of the matter in question. Defendant was not adequately consulted about the conflict before the Attorney General's investigation of her conduct.

7. Defendant was not prejudiced as a result of her interview by Assistant Attorney General John Dakmak during the course of the criminal investigation.

8. The analysis employed in this case does not run afoul of the principles set forth in *Attorney General v Pub Serv Comm*, 243 Mich App 487 (2000), which held that the Attorney General's unique status requires accommodation, not exemption, under the Michigan Rules of Professional Conduct. That case holds that the Attorney General is subject to the Michigan Rules of Professional

Conduct. The rules do not permit a law firm to knowingly represent a party whose interests are adverse to those of former clients in the same or a substantially related matter without consultation. Here, the Attorney General failed to consult with defendant to obtain her consent. The Attorney General must withdraw from the prosecution of this case to remedy the conflict of interest. The order of the circuit court must be reversed and the case must be remanded to the circuit court for further proceedings.

Reversed and remanded.

1. PROSECUTING ATTORNEYS — CONFLICTS OF INTEREST.

A conflict of interest involving an assistant prosecuting attorney does not automatically require recusal of the entire staff of the prosecutor's office, rather, courts examine whether the assistant prosecuting attorney at issue has supervisory authority over other prosecutors in the office or the authority to make policy.

2. ATTORNEY AND CLIENT — CONFLICTS OF INTEREST.

A lawyer who has formerly represented a client in a matter may not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; a case is substantially associated with another case if the factual contexts of the two representations are similar or related (MRPC 1.9).

3. ATTORNEY GENERAL — CONFLICTS OF INTEREST.

The Attorney General has the responsibility to recognize and avoid conflicts of interest; the Attorney General has an affirmative duty to perform a conflict check before undertaking the prosecution of a judge or other person whom the office is statutorily required to defend.

4. PROSECUTING ATTORNEYS — CONFLICTS OF INTEREST.

The disqualification of an entire prosecutor's office for an alleged conflict of interest is not automatic; courts must consider the client's showing of actual prejudice and examine the extent to which the client's confidential information could be used to his or her detriment.

5. ATTORNEY AND CLIENT — CONFLICTS OF INTEREST.

A party seeking the disqualification of counsel for a conflict of interest bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result.

6. ATTORNEY GENERAL — MICHIGAN RULES OF PROFESSIONAL CONDUCT.

The Attorney General is subject to the Michigan Rules of Professional Conduct; the unique status of the Attorney General requires accommodation, not exemption, under the rules; mechanical application of the rules to the Attorney General is not possible and dual representation by the Attorney General may be allowed in certain circumstances not otherwise permitted in the arena of private practice.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Anica Letica*, Assistant Attorney General, for the people.

Gerald K. Evelyn, *Juan A. Mateo*, and *Paul C. Smith* for defendant.

Before: ZAHRA, P.J., and K. F. KELLY and STEPHENS, JJ.

PER CURIAM. This case is before us on remand from the Supreme Court for consideration as on leave granted, *People v Waterstone*, 485 Mich 1016 (2010), limited to the issues whether the Attorney General's prosecution of defendant is consistent with the requirements of Michigan Rules of Professional Conduct (MRPC) 1.7, 1.9, and 1.10 and consistent with *Attorney General v Pub Serv Comm*, 243 Mich App 487; 625 NW2d 16 (2000) (*AG v PSC*). We reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case involves defendant's alleged conduct while she was a circuit court judge in knowingly permitting witnesses to commit perjury at a criminal trial. In 2005, the Wayne County Prosecutor charged Alexander Aceval and Ricardo Pena with narcotics trafficking and defendant presided over their jury trial. Inkster Police Officers Scott Rechtzigel and Robert McArthur allegedly lied at trial to protect the identity of their confi-

dential informant, Chad Povish, who also allegedly lied at trial.[1] Wayne County Assistant Prosecuting Attorney Karen Plants was aware of the perjury and discussed it with defendant ex parte. Defendant directed that the transcripts of the two ex parte meetings initially be sealed in an attempt to preserve the issue for appellate purposes. One jury convicted Pena, but Aceval's jury could not reach a decision. Aceval eventually pleaded guilty.

In 2006, Aceval, acting in propria persona, filed a federal civil rights lawsuit under 42 USC 1983, naming defendant along with 13 others. Paragraph 27 of the complaint provided, in part:

> In no less than two (2) secret ex-parte hearings with Circuit Court Judge Mary Waterstone, Karen Plants told the judge of perjured testimony by Robert McArthur, Scott Rechtzigel and Chad Povish. . . . [J]udge Waterstone and Plants then had the hearing transcript sealed. They also just allowed this perjured testimony to go to the jury. The judge did also order that the defense could not get a phone record that would have lead [sic] to the discovery of the perjured testimony. All of this has now been admitted to by Karen Plants and Judge Mary Waterstone.

Also, paragraph 28-12 provided:

> Mary Waterstone was the Circuit Court Judge at plaintiff's trial. There is now unsealed transcript showing that this judge knew of the perjured testimony an[d] withheld it from plaintiff and the jury. Also this judge issued an order about a phone record to keep plaintiff from learning about the perjured testimony an[d] misled [the] defense stating "No one lies in my court room."

General Counsel for the Michigan Supreme Court directed the Attorney General to provide counsel to

[1] For additional facts regarding the trial, see *People v Aceval*, 282 Mich App 379; 764 NW2d 285 (2009).

defendant. The Attorney General assigned Assistant Attorney General Steven Cabadas of the Public Employment, Elections, and Tort (PEET) Division to represent defendant. Cabadas reportedly spoke to defendant three times on the telephone and filed a response on her behalf. The federal court dismissed Aceval's lawsuit on March 17, 2008, because Aceval had failed to provide the court with his address.

The Wayne County Prosecutor decided that, because of a conflict of interest, she could not bring criminal charges regarding the perjury. The prosecutor asked the Michigan Prosecuting Attorney's Coordinating Council to assign a special prosecutor. Prosecutors from four different counties declined to pursue the matter. The Attorney General ultimately accepted the prosecution and assigned the case to its Criminal Division, specifically assistant attorneys general William Rollstin and John Dakmak.[2]

During the course of the criminal investigation in November of 2008, Attorney General investigator Michael Ondejko interviewed defendant at her home, while serving an investigative subpoena. The following exchange occurred during that interview, which Ondejko recorded:[3]

> *Mr. Ondejko*: And [Dakmak is] gonna be the assistant in charge of that—those interviews. So we've got you on the list as well as about 20 others.
>
> *Ms. Waterstone*: As far as me.
>
> *Mr. Ondejko*: Yeah.
>
> *Ms. Waterstone*: This is in Karen Plants' investigation.
>
> *Mr. Ondejko*: Yes, yes. That's—

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[2] Mr. Dakmak since has left the employ of the Attorney General.

[3] It is unclear whether defendant knew that Ondejko was recording the interview.

Ms. Waterstone: I assumed that it—

Mr. Ondejko: I—

Ms. Waterstone: —that's what it was about.

Mr. Ondejko: [I] should've mentioned that.

Ms. Waterstone: That's okay. That was a—it was kind of an assumption, but I thought I should reclarify.

Mr. Ondejko: Yeah. That's kinda, you know, that's what it centers around. And then the officers who, you know, perjured themselves.

Ms. Waterstone: They did.

Before giving defendant the subpoena, Ondejko stated that it looked as though the officers had perjured themselves and stated "the only question is why this all happened." Defendant then spoke to Ondejko at length; the interview lasted 30 minutes and the resulting transcript exceeds 30 pages. Defendant shared her thoughts regarding why the perjury had occurred. Near the end of the interview, Ondejko gave the subpoena to defendant.

In response to the investigative subpoena, defendant appeared without counsel in December of 2008. The following exchange occurred:

Mr. Dakmak: You understand that you have the right not to incriminate yourself, given any act that could get you charged or potentially charged with a criminal act at any point. Do you understand that?

Ms. Waterstone: I do.

Mr. Dakmak: And, of course, you have the right to consult with an attorney who could advise you on whether or not you should answer those questions. Do you understand?

Ms. Waterstone: I understand.

Mr. Dakmak: You have the right not to—strike that. Do you have any questions for me regarding your rights afforded to you under the Michigan [or the] United States Constitution?

Ms. Waterstone: No. My understanding was this involved the investigation regarding Karen Plants; is that correct?

Mr. Dakmak: Involving the investigation surrounding the trial of Alexander Aceval, Ricardo Pena, Wayne County Prosecutor's Office and the police department.

Ms. Waterstone: Okay. That's a little broader that I understood.

Mr. Dakmak: Just so you know, we haven't narrowed it down to a defendant. We haven't charged anybody with a crime yet. We're investigating the acts, everything surrounding it. Do you understand?

Ms. Waterstone: I understand.

Mr. Dakmak: Do you want to go forward and answer the questions we put forth to you today?

Ms. Waterstone: Sure.

In March 2009, the Attorney General brought a felony complaint against defendant, Plants, and the officers. The Attorney General charged defendant with four felony counts of misconduct in office; two counts related to the two ex parte communications, one count involved the allowing of perjured testimony and the final count concerned the concealment of perjured testimony.

Defendant moved to dismiss the charges, arguing that the criminal complaint lacked any specific allegations of criminal intent. Defendant further argued that the charges ran afoul of principles of judicial immunity and separation of powers.[4]

Defendant also moved to disqualify the Attorney General because of his representation of her in the

[4] Because the Supreme Court has limited the issues for consideration to the issues whether the Attorney General's prosecution of defendant is consistent with the requirements of MRPC 1.7, 1.9 and 1.10 and *AG v PSC*, these grounds for dismissal will not be further discussed.

federal civil lawsuit. Defendant contended that the Attorney General had a conflict of interest and could not bring the charges against her. In an attached affidavit, defendant indicated that she had a series of confidential communications with Cabadas about the events that had occurred at the Aceval/Pena trial.

The Attorney General answered that no conflict of interest existed because Cabadas had not communicated any confidential information to the Criminal Division. Cabadas also did not participate in the investigation or the prosecution of the criminal case against defendant. The Attorney General added that, in any event, any remedy would be limited to the appointment of a special prosecutor, not the dismissal of the charges. The Attorney General detailed certain screening procedures and provided an affidavit from Cabadas regarding his limited contacts with defendant.

The district court ruled that the Attorney General should not be disqualified, noting that *AG v PSC* held that the Attorney General's unique nature precludes the mechanical application of the MRPC. The court observed that Aceval's federal case had ended before the Criminal Division began its investigation. The court examined affidavits from assistant attorneys general Cabadas, Rollstin, and Frank Monticello, the Attorney General's ethics officer, and stated that it was satisfied that no sharing of information occurred. The court determined that the MRPC had not been violated and denied defendant's motion to disqualify the Attorney General.

Defendant appealed to the circuit court, which permitted the parties to conduct additional discovery. The Attorney General submitted an affidavit, indicating that his office had been assigned 23,500 new cases in the previous year. He stated that he did not review

every incoming case. He had no knowledge of Aceval's federal civil action against defendant before the Criminal Division authorized criminal charges and had never discussed the federal civil case with Cabadas.

The circuit court ruled that the Attorney General need not be disqualified on the basis of a conflict of interest. The court ruled that the Attorney General's Office operated as a firm, but it had sufficiently screened Cabadas pursuant to MRPC 1.10 and also the divisions acted independently. The court also decided that defendant had not been prejudiced as a result of Cabadas' prior representation of her in the federal civil case. The circuit court was not convinced by defendant's argument that the Attorney General should have advised her that she was a target in the ongoing investigation, ruling that defendant not only was on notice that the investigation was not limited in scope, but also had been advised of her constitutional rights.

Defendant filed a delayed application for leave to appeal in this Court, which initially denied leave in an unpublished order, entered December 17, 2009 (Docket No. 294667). Defendant sought leave to appeal in the Supreme Court, which, in lieu of granting leave to appeal, remanded for consideration as on leave granted and limited the issues as described earlier in this opinion.

II. THE PARTIES' ARGUMENTS

Defendant contends that the Attorney General should be disqualified because of Cabadas' representation of her in the related federal civil matter. She maintains that the federal case has not been completely resolved, because it was dismissed without prejudice, and the Attorney General could be called upon to continue to represent her in that action. There is a

conflict: the assistant attorneys general never advised defendant that she was a target before interviewing her in conjunction with this criminal matter. Even if the Attorney General did not have knowledge of the federal suit when he began the investigation in this case, the Attorney General now is aware of the conflict. A "conflict wall" is not sufficient here; defendant's consent to the representation must be obtained.

The Attorney General answers that he and his office need not be disqualified. The Attorney General's Office was statutorily required to defend defendant, a state employee, in the federal civil case and the Attorney General also must act as the chief law enforcement officer for the state. The PEET Division, a separate division located 90 miles away from the Criminal Division, represented defendant in the federal lawsuit. No confidential communications were disclosed and the assistant attorneys general in the Criminal Division were unaware of Cabadas' involvement in the earlier civil lawsuit. Although defendant complains that she was not advised that she was a target of the investigation, statutory law does not require such advice and defendant was clearly advised of her rights when she appeared pursuant to the investigative subpoena.

III. STANDARD OF REVIEW

Whether a conflict of interest exists is a question of fact. *Camden v Kaufman,* 240 Mich App 389, 399; 613 NW2d 335 (2000). This Court reviews for clear error the trial court's findings of fact regarding a motion to disqualify counsel. *Lamont Community Church v Lamont Christian Reformed Church*, 285 Mich App 602, 613; 777 NW2d 15 (2009); *People v Tesen*, 276 Mich App 134, 141; 739 NW2d 689 (2007). The Court reviews de novo the trial court's

application of the law to the facts, as well as the application of " 'ethical norms.' " *Id*. (citation omitted).

IV. ANALYSIS

A. THE MICHIGAN RULES OF PROFESSIONAL CONDUCT

Defendant contends that the Attorney General should be disqualified for violating the MRPC when the Criminal Division prosecuted her regarding perjury at the Aceval/Pena trial after the PEET Division defended her from Aceval's federal civil claims arising from the same trial. We agree under the particular facts of this case.

In this case, the Attorney General accepted the role of prosecutor after four other prosecutors declined. A prosecutor's fundamental obligation is " 'to seek justice, not merely to convict.' " *People v Pfaffle*, 246 Mich App 282, 291; 632 NW2d 162 (2001) (citation omitted). If a conflict of interest arises for a prosecutor, the Legislature has provided for the appointment of a special prosecutor. *People v Herrick*, 216 Mich App 594, 598; 550 NW2d 541 (1996). See MCL 49.160(1), which provides:

> If the prosecuting attorney of a county determines himself or herself to be disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, he or she shall file with the attorney general a petition stating the conflict or the reason he or she is unable to serve and requesting the appointment of a special prosecuting attorney to perform the duties of the prosecuting attorney in any matter in which the prosecuting attorney is disqualified or until the prosecuting attorney is able to serve.

The disqualification of prosecutors because of a conflict of interest generally falls into two categories. *People v Doyle*, 159 Mich App 632, 641-642; 406 NW2d

893 (1987), mod on reh, 161 Mich App 743 (1987). The category at issue is disqualification for conflicts arising out of a professional attorney-client relationship, including when the prosecutor has become privy to confidential information. See *id*. Cases regarding prosecutor disqualification examine whether the prosecutor learned confidential information that he or she ethically may not use against the defendant and whether knowledge of that information may be imputed to other members of the prosecutor's office. *Id*. The party moving for disqualification has the burden to show a conflict of interest and specific prejudice. *Kubiak v Hurr*, 143 Mich App 465, 471; 372 NW2d 341 (1985).

Here, the Attorney General himself does not have a direct conflict of interest, because his affidavit reflects that he was not privy to confidential information in the federal case. The instant case involves three assistant attorneys general: Cabadas, Rollstin, and Dakmak. Recusal of a prosecutor's entire office, as requested here, is not automatic where an assistant prosecuting attorney is involved. *Doyle*, 159 Mich App at 645. Rather, courts examine whether the assistant prosecuting attorney at issue has supervisory authority over other prosecutors in the office or has the authority to make policy. *People v Mayhew*, 236 Mich App 112, 127; 600 NW2d 370 (1999). The three assistant attorneys general here do not appear to have authority over other attorneys in the office or the authority to make policy. Thus, disqualification is not automatic; hence, we examine whether Cabadas learned confidential information that he may not use against defendant and whether knowledge of that information may be imputed to other assistant attorneys general.

Despite the Attorney General's arguments to the contrary, we conclude that Cabadas learned confidential

information from defendant in the course of representing her in the federal case. Defendant's affidavit indicates that she shared confidential information with Cabadas and told him the basis for the rulings she made during the Aceval/Pena trial. We conclude that Cabadas' affidavit that defendant did not share confidential information with him is disingenuous, particularly in light of the answer to the complaint. Courts recognize that a presumption arises that, during representation, a client discloses potentially damaging confidences to his or her attorney. *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 609; 603 NW2d 824 (1999). See also the comment to MRPC 1.6, which provides, in part, that where lawyers are duty bound to maintain confidentiality, clients are advised to communicate "fully and frankly" with the lawyer, even if the information is damaging or embarrassing. Accord, the comment to MRPC 1.0, indicating that clients who know their communications will be private are more inclined to adhere to their legal obligations. Further, an attorney has a duty of confidentiality that involves " 'all confidential information, whether privileged or unprivileged, and whether learned directly from the client or from another source.' " *City of Kalamazoo v Mich Disposal Serv Corp*, 125 F Supp 2d 219, 242 (WD Mich 2000) (citation omitted).

Under statute, the Attorney General is charged with defending judges from lawsuits, 2006 PA 345, art 7, part 2, § 302(2)[5]; and assistant attorneys general are certainly aware of that fact. Although the Criminal Division may not have been specifically aware that Aceval

[5] Article 7, part 2, § 302(2) of 2006 PA 345 provides: "The attorney general shall defend judges of all state courts if a claim is made or a civil action is commenced for injuries to persons or property caused by the judge through the performance of the judge's duties while acting within the scope of his or her authority as a judge."

had filed a lawsuit naming defendant, the Criminal Division should have known that, had such a lawsuit been filed, the PEET Division likely would have represented defendant. It follows that, at the very least, knowledge of a potential defense of defendant by the PEET Division should be imputed to the Attorney General's Office.

As reflected in the MRPC, an attorney owes allegiance to his or her client and generally may not represent parties on both sides of a dispute. *Barkley v Detroit*, 204 Mich App 194, 203; 514 NW2d 242 (1994); *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 197; 650 NW2d 364 (2002). The Attorney General is subject to the MRPC. *AG v PSC*, 243 Mich App at 504. The conflict rules were designed " ' "to condemn the creation and existence of the dual relationship instead of merely scrutinizing the results that may flow therefrom." ' " *Barkley*, 204 Mich App at 202-203 (citations omitted).

MRPC 1.7, the rule regarding conflicts of interest of current clients, provides:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is under-

> taken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Here, defendant is not a current client of the Attorney General. Cabadas' representation of defendant ceased when he notified defendant of the March 17, 2008, federal court dismissal. See *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994), ruling that a lawyer's representation ends "upon completion of a specific legal service that the lawyer was retained to perform." We reject defendant's stance that Cabadas should have actively terminated the attorney/client relationship with her in the federal civil case, because defendant has provided no legal authority requiring an attorney to affirmatively end the attorney/client relationship once litigation has been dismissed. Admittedly, the case was dismissed without prejudice, but it has not been reinstated and the mere possibility that Aceval might reinstate his federal civil action at some future date should not be dispositive. We also observe that over one year has passed since the federal court dismissed the suit and the period of limitations likely has expired.[6] Further, defendant seems to concede in her brief that MRPC 1.7 does not apply, because defendant identified only MRPC 1.9 and 1.10 as the specific rules at issue and did not reference MRPC 1.7 in her initial pleadings filed with this Court.

MRPC 1.9 governs conflicts of interest regarding former clients and provides that an attorney may not represent a new client whose interests are adverse to a former client, unless the former client consents:

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[6] The period of limitations for a claim under 42 USC 1983 in Michigan is three years from when the claim accrues. *Thompson-Bey v Stapleton*, 558 F Supp 2d 767, 770 (ED Mich, 2008); MCL 600.5805(10).

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
>
> (b) Unless the former client consents after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated has previously represented a client
>
> (1) whose interests are materially adverse to that person, and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

MRPC 1.9 prohibits a client's representation where that representation is directly or materially adverse to the interest of another client or former client. *Lamont*, 285 Mich App at 614. The matters must be the same or substantially related. The new representation must be "materially adverse."

The Attorney General maintains that Aceval's federal § 1983 civil case is not the same or substantially related to the instant criminal case. We must reject this argument because both cases arose from the same

alleged perjury at the Aceval/Pena trial. A case is substantially associated with another case if " 'the factual contexts of the two representations are similar or related.' " *Savoy Oil & Gas, Inc v Preston Oil Co*, 828 F Supp 34, 36 (WD Mich, 1993) (citation omitted). Here, both cases involve the alleged perjured testimony of the police officers and the informant. Both cases relate to defendant's alleged cover-up of that perjury by way of ex parte meetings with the prosecution. Consequently, we decide that the matters are, if not exactly the same, then substantially related.

The Attorney General also challenges whether the new representation is materially adverse to the position taken in the federal case. We decline to accept the Attorney General's attempt to minimize the advocacy within Cabadas' answer filed on behalf of defendant in Aceval's federal case. In the federal case, Cabadas denied as false the allegations of paragraph 27, where Aceval averred that defendant allowed perjured testimony to go to the jury and precluded defense counsel from obtaining a telephone record that would have unveiled the perjury. Further, Cabadas denied as false the allegations in paragraph 28-12, where Aceval argued that defendant knew of the perjured testimony, withheld it from him and the jury, and issued an order to keep him from learning about it. We decide that the Attorney General's instant criminal prosecution is materially adverse to the defense offered by the Attorney General on defendant's behalf in the federal civil case.

We find beneficial the comments to MRPC 1.9, although we acknowledge that the text of the rule, not the comments, is authoritative. See MRPC 1.0(c). The comment to MRPC 1.9 provides that a lawyer who prosecuted a defendant cannot properly represent that

defendant in a later civil action against the government regarding the same transaction. The comment later indicates that, in considering the degree of the lawyer's involvement, "[t]he underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question."

In this case, it is clear that Cabadas could not "change sides" and participate in the criminal investigation of defendant given his confidential knowledge gained from the federal civil case. See *In re Osborne (On Remand, After Remand)*, 237 Mich App at 601-602, ruling that a conflict of interest existed when an attorney who had represented the client at a termination of parental rights hearing later joined the prosecutor's office and represented interests adverse to his former client. The question remains as to whether the entire Attorney General's Office must be disqualified in light of Cabadas' former representation.

MRPC 1.10 sets forth the limitations on a lawyer's firm regarding the representation of a party whose interests are adverse to the lawyer's former clients. The rule requires the firm to impose safeguards against improper communications and disclose those safeguards. It provides, in pertinent part:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a), or 2.2. If a lawyer leaves a firm and becomes associated with another firm, MRPC 1.10(b) governs whether the new firm is imputedly disqualified because of the newly hired lawyer's prior services in or association with the lawyer's former law firm.
>
> (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or

> a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, is disqualified under Rule 1.9(b), unless:
>
> (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

The comments to MRPC 1.0 and 1.10 define a law firm as a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, and lawyers employed in a legal services organization. We consider the Attorney General's Office to be a "firm" under these circumstances and for purposes of this case only. We acknowledge that certain federal cases have ruled that a large governmental agency cannot be considered akin to a private law firm. See, e.g., *United States v Caggiano*, 660 F2d 184 (CA 6, 1981), deciding that conduct rules applying to a private law firm do not necessarily translate to a governmental agency, in part because a government attorney's duty to seek a just result differs from a private attorney's duty to channel advocacy toward vindication of a client's claim and thus decreases the temptation to evade disciplinary rules. See, also, *State v Klattenhoff*, 71 Hawaii 598, 604; 801 P2d 548 (1990), where the court observed that the ethical rules for private law firms are not applicable to the Attorney General in every case given the Attorney General's statutorily imposed duties. Further, the comment to MRPC 1.10 indicates that those employed in separate units of a legal aid organization may not necessarily constitute a firm.[7] Nevertheless, merely because the

[7] That comment provides, in pertinent part: "Lawyers employed in the same unit of a legal service organization constitute a firm, but not

ethics rules do not automatically translate to a governmental agency does not mean that such agencies are exempt from following the rules. Under the extraordinary circumstances of this case, where the Attorney General was asked to investigate a claim regarding his former client's admission of perjured testimony after the Attorney General had defended the client against the same claim, the Attorney General's Office must be deemed a firm. Supporting that conclusion is the comment from MRPC 1.10 that indicates, in part, that, with regard to imputed disqualification, "a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client . . . ."

We therefore find distinguishable *In the Matter of the Grand Jury Investigation of Targets*, 918 F Supp 1374 (SD Cal, 1996), cited by the prosecution, where the court discussed the risk of shared confidential information. The *Grand Jury* court stated that the "assumption of free flow of information" that is within private law firms did not apply to large governmental agencies because the risk of shared confidential information was remote. *Id.* at 1378. Here, however, the risk was not that the PEET Division would share defendant's confidential information with the Criminal Division. Rather, here the risk was that defendant would continue to believe that she was a client of the Attorney General despite the Criminal Division's prosecution against her, Plants, and the police officers, where the Criminal Division failed to consult with her regarding the conflict.

Both MRPC 1.9 and 1.10 use the term "knowingly," which the comment to MRPC 1.0 defines as "actual

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necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as being associated with each other can depend on the particular rule that is involved and on the specific facts of the situation."

knowledge of the fact in question." The assistant attorneys general in the Criminal Division deny that they had knowledge of the federal civil case. Nevertheless, the comment to MRPC 1.0 also indicates that such knowledge "may be inferred from circumstances." As noted, the prosecution of a judge is an unusual event and knowledge of the potential federal case can be inferred. The Attorney General never explained why the office did not perform an automatic conflict check. Given the PEET Division's routine role in defending judges in federal § 1983 civil claims, it is unreasonable for the Attorney General to have failed to carry out a conflict check. We bear in mind that the comment to MRPC 1.7 indicates that lawyers should set forth appropriate procedures to determine whether actual or potential conflicts of interest exist, in both litigation and nonlitigation matters. Also, under the MRPC, "[e]very lawyer is responsible for observance of the Rules of Professional Conduct." See the comment to MRPC 1.0. See also Justice CORRIGAN's concurring statement in *People v Gottschalk*, 468 Mich 903 (2003), that the Attorney General should weigh conflict-of-interest issues before determining who should act as the prosecutor in future proceedings where the Attorney General previously filed an amicus curiae brief supporting the defendant's position.

Because the prosecution of a judge for permitting perjured testimony at trial is a rare occurrence, that all the more supports our belief that the Criminal Division should have conducted a conflict check before undertaking the investigation. Had the assistant attorneys general done so, the related federal case would have surfaced and the Attorney General would have consulted defendant regarding her consent. We decline to rule that the Attorney General should be exempt from imputed knowledge, where a simple conflict check

would have revealed the federal suit. We therefore conclude that knowledge may be inferred from these circumstances, and, therefore, the Attorney General should have obtained the consent of his former client, defendant.

Defendant relies on *In re Osborne*, where an attorney who had represented the respondent in a termination of parental rights proceeding later joined the prosecutor's office and appeared for the petitioner in the permanent wardship trial. This Court discussed the prejudice inherent in certain conflicts of interest:

> "In *Cuyler v Sullivan* [446 US 335, 345-350; 100 S Ct 1708; 64 L Ed 2d 333 (1980)], the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. . . . Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' *Cuyler v Sullivan*, *supra*, 446 US [350, 348] (footnote omitted)." [*In re Osborne*, 230 Mich App 712, 717; 584 NW2d 649 (1998), vacated and remanded 459 Mich 360 (1999), quoting *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984).]

This Court presumed prejudice in the case, stating that the extent to which the respondent's confidential information could be used to her detriment was immeasurable. *In re Osborne*, 230 Mich App at 721. The Court reversed the termination order and remanded for a new

hearing. The Court disqualified the entire Muskegon County Prosecuting Attorney's Office and directed the probate court to appoint a special prosecutor.

Our Supreme Court ruled that the disqualified lawyer should have recognized and avoided the conflict. With regard to the disqualification of the entire prosecutor's office, however, the Court ruled that several factors needed to be considered, including the extent that the disqualified lawyer shared his knowledge and the disqualified lawyer's role in the prosecutor's office. The Supreme Court remanded the case to the Court of Appeals and ordered the Court of Appeals to retain jurisdiction and remand the case to the circuit court to take additional proofs. *In re Osborne*, 459 Mich 360, 369-370; 589 NW2d 763 (1999).

On remand, after remand, this Court surmised that the Supreme Court had decided that the attorney's conflict of interest was not an error that " ' "seriously" affects the fairness, integrity, or public reputation of judicial proceedings," ' " which would have compelled automatic reversal. *In re Osborne (On Remand, After Remand)*, 237 Mich App at 601-602 (citation omitted). The Court noted that the attorney testified at the hearing that he did not recall obtaining any confidential information from respondent. This Court determined that actual prejudice had not been shown and thus the Court would not reverse. *Id.* at 603.

In re Osborne demonstrates that attorneys have a responsibility to recognize and avoid conflicts of interest. The Attorney General shares that responsibility. The Attorney General has a particular obligation given that the PEET Division habitually defends judges. As a result, the Attorney General has an obligation to make early inquiry into situations where, as here, the Criminal Division has agreed to prosecute a case involving a

judge. We hold that the Attorney General has an affirmative duty to perform a conflict check before undertaking the prosecution of a judge or other person whom the office is statutorily required to defend.

In re Osborne also teaches that the disqualification of an entire prosecutor's office is not automatic. Rather, courts must consider the client's showing of actual prejudice and examine the extent to which the client's confidential information could be used to his or her detriment.

Klattenhoff, 71 Hawaii at 598, a case relied on by the Attorney General, also requires a showing of prejudice. *Klattenhoff* involved the Hawaii Attorney General's criminal investigation of a sheriff, who moved for disqualification because the Administrative Division of the Attorney General's Office represented him in two unrelated civil actions when the Criminal Division began its investigation. The *Klattenhoff* court noted that most states permit the Attorney General to concurrently represent conflicting interests when the Attorney General can ensure that the parties are independently represented. The court held that the Hawaii Attorney General simultaneously may represent a state employee in a civil matter while prosecuting that employee in a criminal matter, provided the Attorney General's staff can be assigned in such a manner as to afford independent legal counsel in the civil matter, and provided that representation in the civil matter does not result in prejudice in the criminal matter. *Id.* at 605.

Here, the Attorney General points out that the Criminal Division and the PEET Division are different divisions and are separately located. The affidavits reflect that the Criminal Division's assistant attorneys general did not obtain information from Cabadas for use in this prosecution. *Klattenhoff* is not akin to this

case, however, because the civil actions against the sheriff did not, as here, involve the same or a substantially related matter as the criminal matter. Where the same case is at issue, the fact that the divisions are separate is, by itself, insufficient to guard against prejudice in the criminal matter.

Klattenhoff directs courts to consider whether the defendant has been prejudiced in the criminal case. A party seeking the disqualification of counsel " 'bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result.' " *Rymal v Baergen*, 262 Mich App 274, 319; 686 NW2d 241 (2004) (citation omitted). Defendant maintains that she would not have spoken freely with Ondejko and the assistant attorneys general in November and December of 2008, when unbeknownst to her she was the target of an investigation, had she known that the Attorney General was not representing her. She emphasizes that Cabadas' prior representation of her caused her to later speak with investigator Ondejko and assistant attorneys general Rollstin and Dakmak without counsel present.

We agree that defendant was prejudiced by investigator Ondejko's tactics in the interview he recorded. Any information obtained from defendant as a result of the violation of the MRPC cannot be used. This Court is disturbed by the methods used by Ondejko in delivering the investigative subpoena. He took the subpoena to defendant at her home, accepted coffee, and recorded their meeting, presumably without her knowledge. He stated that he was investigating the perjury at the Aceval/Pena trial and told her, without prompting, that she was one of 20 persons subpoenaed, which suggests that she was just another witness among 20, not one among four potential defendants. Further, Ondejko

agreed with defendant when she asked whether the investigation involved Plants and he added "and the officers." He did not identify defendant as a person subject to investigation. This failure to disclose is especially significant because a judge in defendant's position could have a reasonable belief that her good faith rulings at trial would not subject her to criminal prosecution. Thus, she could reasonably assume that the Attorney General was not investigating her, but instead remained her counsel. We cannot conclude that the Attorney General communicated information "reasonably sufficient to permit [defendant] to appreciate the significance of the matter in question." See comment to MRPC 1.0.

Moreover, the Attorney General's reliance on the language of the investigative subpoena to minimize the Ondejko interview is misplaced. Although the subpoena states that the person may have legal counsel and has all constitutional rights, including the right against self-incrimination, Ondejko did not give the subpoena to defendant until after he interviewed her and he never read the rights listed on it to her. Further, the investigative subpoena lists only perjury and obstruction of justice as the crimes being investigated; notably, the subpoena does not list misconduct in office, the crime that the Attorney General has charged defendant of committing. We thus decide that defendant was prejudiced by the investigator's interview.

We reach a contrary conclusion regarding defendant's interview with Assistant Attorney general Dakmak. Before defendant's interview in December of 2008, Assistant Attorney General Dakmak read defendant's rights to her. Assistant Attorney General Dakmak indicated that the investigation included the trial, over which defendant had presided. He said that the

investigation involved "everything" and that the investigation had not been narrowed. At that time, it should have been apparent that the Attorney General was not representing defendant—indeed, defendant agreed to waive her right to counsel at that time. The record reflects that defendant herself commented that the investigation was broader than she initially imagined. Defendant is not unsophisticated in the law given her four decades as an attorney and her judicial career. See *Factory Mut Ins Co v APComPower, Inc*, 662 F Supp 2d 896, 902 (WD Mich, 2009) (noting that a client familiar with the legal system had sufficient information to give fully informed and valid consent to waive a conflict of interest).

Both parties cite *People v Davenport*, 280 Mich App 464; 760 NW2d 743 (2008), where this Court ruled that a rebuttable presumption arose that lawyers within the prosecutor's office shared confidential information because a member of the prosecutor's office previously had represented the defendant in a related matter. *Id.* at 473. The *Davenport* Court ruled that prosecutors may rebut that presumption by showing effective screening procedures to isolate the defendant's former counsel from the prosecution. This Court adopted those imposed in *Manning v Waring, Cox, James, Sklar & Allen*, 849 F2d 222, 225 (CA 6, 1988), which ruled that a firm has the burden of showing that (1) no improper communication occurred and (2) it implemented adequate safeguards to prevent future improper communications. *Davenport*, 280 Mich App at 473. This Court added that courts should consider the office's written screening procedures, the likelihood of contact between the office's attorneys, and the rules that prevented the attorney with the conflict of interest from accessing files or information regarding the conflicted case. The

court also should weigh the size of the prosecutor's office when determining whether the screening was effective.[8] *Id.* at 474-475.

Davenport is not on all fours with the instant case. In *Davenport*, the fact that the prosecution targeted the defendant was not in doubt; the only issue was whether the former defense counsel shared confidential information with the prosecutor. Here, however, defendant was not aware that she was a target of the investigation. The critical issue is not whether Cabadas shared defendant's confidential information with Dakmak and Rollstin, but whether defendant herself shared such information on the basis of her reasonable belief that she was a former client of the Attorney General's "firm" whose investigator questioned her under the guise of investigating others.

Accordingly, it is largely immaterial to this analysis that the Attorney General instituted screening procedures to shield Cabadas after the investigation began. Although Cabadas has been precluded from any participation in the criminal matter and staff members were informed of the conflict in March of 2009, defendant herself was not adequately consulted about the conflict before the Attorney General's investigation of her conduct and that of Plants and the police officers.

B. *AG v PSC*

The above analysis does not run afoul of the principles set forth in *AG v PSC*, where this Court examined

[8] After the trial court conducted an evidentiary hearing on remand, this Court ruled that the prosecutor's office had met its burden to show that it took adequate steps to prevent improper communications and noted that the record did not contain evidence of any improper communications about the case. *People v Davenport (After Remand)*, 286 Mich App 191, 195-197; 779 NW2d 191 (2009).

whether a conflict of interest existed when the Attorney General was both the party appellant and counsel for the appellee. The Court noted that the Attorney General is a constitutionally mandated executive heading a principal department of state government. *AG v PSC*, 243 Mich App at 496. See Const 1963, art 5, § 3. Michigan statutory law permits the Attorney General to intervene in actions where the interests of the state require it. *AG v PSC*, 243 Mich App at 496, citing MCL 14.101. Additionally, the Legislature has recognized that the Attorney General has a "unique mandate" to perform all legal services for a principal executive department or a state agency. *AG v PSC*, 243 Mich App at 497. The Attorney General's duties also include those at common law. *Id.* This Court decided that the MRPC may not always apply to the Attorney General; rather, the circumstances

> suggest the need for studied application and adaptation of the rules of professional conduct to government attorneys such as the Attorney General and her staff, in recognition of the uniqueness of her office and her responsibility as the constitutional legal officer of the state to represent the various and sometimes conflicting interests of numerous government agencies. In other words, the Attorney General's unique status *requires accommodation, not exemption, under the rules of professional conduct*. [*Id*. at 506 (emphasis in original).]

This Court further ruled:

> [T]he rules of professional conduct do apply to the office of attorney general; [but] mechanical application of these rules is not possible because of the unique nature of that office, thus allowing dual representation in certain circumstances not otherwise permitted in the arena of private practice . . . . [*Id*. at 516.]

Pursuant to *AG v PSC*, this Court does not mechanically apply the MRPC to the Attorney General. We

consider the unique nature of the Attorney General's Office and acknowledge that is, in part, what caused the conflict here. The Attorney General is statutorily bound to defend judges in civil suits, 2006 PA 345, art 7, part 2, § 302(2); the Attorney General also prosecutes cases where county prosecutors do not, MCL 49.160. Nevertheless, *AG v PSC* holds that the Attorney General is subject to the MRPC—the case does not exempt the Attorney General from the conduct rules. As illustrated, the MRPC do not permit a firm to knowingly represent a party whose interests are adverse to those of former clients in the same or a substantially related matter without consent after consultation. Here, the Attorney General failed to consult with defendant to obtain her consent.

The Attorney General argues that *AG v PSC* is distinguishable because here the Attorney General is not a named party. Defendant counters that although the Attorney General here is not a named party, his interests are exactly the same as if he were. We do not find this point dispositive. In this case, when the Attorney General's investigation of defendant is examined under the MRPC, an insurmountable conflict of interest arises.

V. CONCLUSION

We conclude that the Attorney General violated the MRPC in undertaking the prosecution of defendant regarding misconduct in office in conjunction with the Aceval trial, where the Attorney General formerly defended her against Aceval's federal claims, without first obtaining her consent. Although we do not automatically apply the MRPC pursuant to *AG v PSC*, the unusual circumstances of this case cannot permit the accommodation sought by the Attorney General. To

remedy the conflict of interest, we direct that the Attorney General withdraw from the prosecution of this case. We remand for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

In re BECK

Docket No. 293138. Submitted January 6, 2010, at Detroit. Decided March 4, 2010, at 9:10 a.m.

The parental rights of Lawrence M. Beck to his two minor children were terminated pursuant to an order entered in the Oakland Circuit Court, Family Division, Martha D. Anderson, J. The order also required Beck to continue to provide child support for the children. Beck filed in the Court of Appeals a delayed application for leave to appeal, contending that his due process rights were violated by the part of the order regarding his continuing obligation to pay child support. The Court of Appeals granted the application.

The Court of Appeals *held*:

The responsibility to pay child support and the retention or exercise of parental rights are not interdependent. A child possesses the inherent and fundamental right to receive support from a parent. This ongoing right to financial support constitutes a right independent of a parent's retention or exercise of his or her parental rights. Public policy dictates that involuntary termination of parental rights does not automatically extinguish the parental responsibility of paying child support. Absent adoption, an order terminating a parent's parental rights does not terminate that parent's obligation to support his or her minor children.

Affirmed.

PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — PARENTS' OBLIGATION TO SUPPORT MINOR CHILDREN.

Absent adoption, an order terminating a parent's parental rights does not terminate that parent's obligation to support his or her minor children.

Jessica R. Cooper, Prosecuting Attorney, *John S. Pallas*, Chief, Appellate Division, and *Thomas R. Grden*, Assistant Prosecuting Attorney, for the Department of Human Services.

Nancy A. Plasterer for Lawrence M. Beck.

Before: DAVIS, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM. We granted respondent's delayed application for leave to appeal a trial court order that terminated his parental rights to the subject minor children pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j), and that also ordered respondent to continue to provide financial support for the minor children. We affirm.

Respondent is divorced from the children's mother, who retained custody of the children after respondent's parental rights were terminated. Respondent does not challenge the trial court's decision to terminate his parental rights, but argues that the trial court violated his due process rights by providing in the termination order that his "[c]hild support and other support for the children shall continue."

"Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law." *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). "Parents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003).

"The essence of due process is 'fundamental fairness.' " *In re Adams Estate*, 257 Mich App 230, 233-234; 667 NW2d 904 (2003) (citation omitted). There are two types of due process: procedural and substantive. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 32-33; 703 NW2d 822 (2005). The fundamental requirements of procedural due process are notice and a meaningful opportunity to be heard before an impartial decision

maker. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 213-214; 761 NW2d 293 (2008). "[T]he essence of a substantive due process claim is the arbitrary deprivation of liberty or property interests." *Id.* at 201 (emphasis omitted). A person claiming a deprivation of substantive due process "must show that the action was so arbitrary (in the constitutional sense) as to shock the conscience." *Id.* at 200.

Although respondent frames his issue as implicating his right to due process, apart from simply asserting that his due process rights were violated, he does not explain how the trial court's decision resulted in a denial of due process pursuant to the above standards. The issue whether respondent may continue to be liable for child support after his parental rights have been terminated appears to be a straightforward question of law, which is reviewed de novo on appeal. *Minority Earth Movers, Inc v Walter Toebe Constr Co*, 251 Mich App 87, 91; 649 NW2d 397 (2002).

MCL 712A.19b permits a court to terminate "parental rights," but is silent regarding parental responsibilities. "This Court gives effect to the Legislature's intent as expressed in the statute's terms, giving the words of the statute their plain and ordinary meaning." *McManamon v Redford Charter Twp*, 273 Mich App 131, 135-136; 730 NW2d 757 (2006). When the language poses no ambiguity, this Court need not look outside or construe the statute, but, rather, need only enforce the statute as written. *Id.* at 136. "We cannot read requirements into a statute that the Legislature did not put there." *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 423; 565 NW2d 844 (1997).

Had the Legislature intended that a termination of "parental rights" would also include a termination of "parental responsibilities", such as the responsibility of

a parent to pay child support, it could have used specific language to convey that intent. Moreover, rights and responsibilities are separate and distinct concepts. A "right" is a "power, privilege, or immunity secured to a person by law." Black's Law Dictionary (7th ed). A "responsibility," on the other hand, is a "liability." *Id.* The responsibility to pay child support and the retention or exercise of parental rights are not interdependent. Michigan law does not, for example, unequivocally hold (nor would it be in the best interest of a child to do so) that a fit parent should be prevented from visitation with his or her child simply because the parent is unable to pay child support.

Here, in the context of parent-child relationships, there are actually two distinct rights at issue. While, as previously stated, a parent has a legal right to the companionship, care, custody, and management of his or her children, *In re JK*, 468 Mich at 210, "[i]t is well settled that children have the right to receive financial support from their parents and that trial courts may enforce that right by ordering parents to pay child support," *Borowsky v Borowsky*, 273 Mich App 666, 672-673; 733 NW2d 71 (2007). That right cannot be bargained away by the parents, *Laffin v Laffin*, 280 Mich App 513, 518; 760 NW2d 738 (2008), and, "[a]bsent adoption, the legal obligation to support a child remains with his natural parents." *Wilson v Gen Motors Corp*, 102 Mich App 476, 480; 301 NW2d 901 (1980). Thus, a child possesses the inherent and fundamental right to receive support from a parent. This ongoing right to financial support constitutes a right independent of a parent's retention or exercise of his or her parental rights.

Pursuant to MCL 722.3(1), a child's parents "are jointly and severally obligated to support a minor as

prescribed in . . . MCL 552.605, unless a court of competent jurisdiction modifies or terminates the obligation or the minor is emancipated by operation of law, except as otherwise ordered by a court of competent jurisdiction." This Court in *Bradley v Fulgham*, 200 Mich App 156, 159; 503 NW2d 714 (1993), held that termination of a parent's parental rights pursuant to a voluntary release under the Adoption Code extinguishes the obligation to pay child support.[1] This Court subsequently held in *Evink v Evink*, 214 Mich App 172, 176; 542 NW2d 328 (1995), though, "that in the absence of a clear legislative directive stating otherwise, where a biological parent voluntarily releases parental rights to the children and custody remains with the other biological parent, the termination of parental rights does not terminate the parent's obligation to support the child." We find no appreciable difference between a voluntary and an involuntary termination insofar as the legal effect of the order is concerned. A parent's rights are no less terminated when the termination is voluntary rather than involuntary.

Public policy further dictates a holding that involuntary termination of parental rights does not automatically extinguish the parental responsibility of paying child support. First, the objectives of a termination of parental rights proceeding are to protect the child, *In re Johnson*, 142 Mich App 764, 765; 371 NW2d 446 (1985), and to provide permanence and stability to a child's life. Eliminating the benefit of child support after a termination of parental rights does not assist in protecting the child from any harm emanating from the prior parental relationship; instead, it denies the child benefits that are based on the child's needs and the

[1] This case does not involve a voluntary release of parental rights under the Adoption Code.

parent's ability to pay. That the duty to pay child support survives a termination of parental rights also fosters the goal of creating stability and permanency in the life of a child.

Second, as noted in *State v Fritz*, 801 A2d 679, 684-685 (RI, 2002), "[a]bsent an adoption, terminating support from one parent necessarily places the full financial responsibility on the other parent, often with assistance from the state." In these times of difficult financial circumstances, policy considerations support the avoidance of unnecessarily creating further financial burdens on the government, or its individual citizens.

Finally, if a judgment involuntarily terminating parental rights automatically discharges a parent from responsibility for child support, it could potentially lead to results detrimental to the child's welfare. It may, for example, force a parent to forgo reporting the abusive or neglectful behavior of a coparent in order to preserve a child's right to receive financial support. It may also provide a vehicle for the avoidance of a support obligation by a parent; an irresponsible parent could quickly realize that he or she could escape liability for child support by abusing or neglecting their child.

In order to effectuate the statutory scheme by which the rights and responsibilities of parents and children are governed, and to avoid potentially detrimental or injurious consequences, we hold that, absent adoption, an order terminating a parent's parental rights does not terminate that parent's obligation to support his or her minor children. Accordingly, we affirm the trial court's order requiring respondent to continue to pay child support despite the termination of his parental rights.

Affirmed.

DEXTROM v WEXFORD COUNTY

Docket No. 281020. Submitted May 14, 2009, at Petoskey. Decided March 9, 2010, at 9:00 a.m.

Ron Dextrom, Tony and Donota Cassone, and other property owners in Wexford County brought an action in the Wexford Circuit Court against Wexford County, the Wexford County Landfill, and the Wexford County Department of Public Works, seeking damages for property damage and other economic injuries resulting from groundwater contamination allegedly caused by defendants' landfill. Plaintiffs alleged, in part, claims for nuisance, nuisance per se, trespass, negligence, gross negligence, and negligence per se. Defendants moved for summary disposition on the basis of governmental immunity, citing MCR 2.116(C)(7) and (10). Ron Dextrom and certain other plaintiffs filed a brief in opposition to the motion. Tony and Donota Cassone and other plaintiffs also filed a brief in opposition to defendants' motion and they also requested that summary disposition be entered in their favor under MCR 2.116(I)(2). The trial court, DAVID A. HOGG, J., denied both motions for summary disposition, stating that genuine issues of material fact existed. Defendants appealed, and Ron Dextrom and certain other plaintiffs cross-appealed.

The Court of Appeals *held*:

1. Counties have statutory authority under MCL 123.737 to own and run waste disposal facilities. Although certain provisions of the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*., prohibit the operation of an unlicensed landfill, as defendants did for a period, those provisions do not show a legislative intent to withdraw defendants' authority to operate a refuse system for a violation of the environmental protection law. The trial court correctly concluded that a landfill of a governmental agency that is operating in violation of state licensing and environmental protection laws does not constitute an ultra vires activity of the agency not subject to the protection of governmental immunity.

2. The operation of a landfill by a governmental agency is ordinarily a governmental function, for which the governmental agency is generally immune.

3. Two tests must be satisfied before an activity may be deemed a proprietary function for purposes of the exception to governmental immunity for propriety functions. First, the activity must be conducted primarily for the purpose of producing a pecuniary profit. Second, the activity cannot normally be supported by taxes or fees. A court, in determining whether the agency's primary purpose is to produce a pecuniary profit, must consider, first, whether a profit is actually generated and, second, where the profit generated is deposited and how it is spent. The evidence shows that in 1990 the landfill began generating substantial profits, although no monies were spent on unrelated projects until from 2000 to 2005. The evidence raises a question concerning whether defendants' motivation behind the operation of the landfill changed over time. The evidence supports the inference that since 2000, perhaps earlier, the landfill was operated for the primary purpose of making a profit. The mere fact that defendants did not spend the primary portion of the landfill's profits on unrelated expenses is not conclusive proof that defendants were not nevertheless operating the landfill primarily for the purpose of producing a pecuniary profit. The trial court, in considering the motions for summary disposition under MCR 2.116(C)(10), did not err by concluding that there was a question of material fact concerning whether the landfill was being operated for the primary purpose of making a pecuniary profit, including whether that motive changed over time.

4. The fact that fees exclusively support the landfill is not sufficient in and of itself to avoid the proprietary function exception. The trial court must also consider the scope of the landfill in relation to the size of the community, its profitability, and how other communities of similar size support their landfills. The trial court, in considering the motions for summary disposition under MCR 2.116(C)(10), did not err by finding that there was a question of fact whether defendants' operation of the landfill was subject to the proprietary function exception to governmental immunity.

5. The trial court did not err by considering the affidavit of an expert for certain plaintiffs in ruling that a genuine issue of material fact existed concerning when the contamination occurred. There is no requirement that an expert's qualifications and methods be incorporated into an affidavit submitted in support of, or opposition to, a motion for summary disposition. The content of the affidavit must be admissible in substance, not form. Plaintiffs do not attack the admissibility of the content of the

affidavit, only its foundation. The affidavit need only show that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

6. It is appropriate under the circumstances of this case, where further factual development is required regarding defendants' motion for summary disposition on the ground of governmental immunity and application of the proprietary function exception to governmental immunity remains a question of law for the court, for the trial court to hold an evidentiary hearing on remand for the purpose of obtaining the factual development necessary to determine whether defendants' operation of the landfill was subject to the proprietary function exception. If the trial court then determines that defendants' operation of the landfill is subject to the proprietary function exception as a matter of law, it should then deny defendants' summary disposition motion under MCR 2.116(C)(7) and proceed to trial on the substance of plaintiffs' claims. If the trial court determines that defendants' operation of the landfill is not subject to the proprietary function exception as a matter of law, then the court should grant defendants' summary disposition motion under MCR 2.116(C)(7).

Affirmed, but remanded for further proceedings consistent with the opinion of the Court of Appeals.

1. GOVERNMENTAL IMMUNITY — WORDS AND PHRASES — GOVERNMENTAL FUNCTIONS.

A governmental agency is generally immune from tort liability if it is engaged in the exercise or discharge of a governmental function; a governmental function is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law (MCL 691.1401[f], 691.1407[1]).

2. COUNTIES — WASTE DISPOSAL FACILITIES — LICENSES — ULTRA VIRES ACTIVITIES.

Counties are authorized by statute to own and run waste disposal facilities; although certain provisions of the Natural Resources and Environmental Protection Act prohibit the operation of an unlicensed landfill by a county, those provisions do not show a legislative intent to withdraw a county's authority to operate a waste disposal facility for a violation of the environmental protection laws; a county landfill operating in violation of state licensing and environmental protection laws does not constitute an ultra vires activity (MCL 123.737, 324.11509, 324.11512[2]).

3. GOVERNMENTAL IMMUNITY — PROPRIETARY FUNCTION EXCEPTION.

An activity conducted by a governmental agency, before it may be deemed a proprietary function, must satisfy two tests: the activity must be conducted primarily for the purpose of producing a pecuniary profit and it cannot normally be supported by taxes or fees; whether a profit is actually generated, where a profit is deposited, and how it is spent must first be considered in determining whether the agency's primary purpose is to produce a pecuniary profit (MCL 691.1413).

4. GOVERNMENTAL IMMUNITY — PROPRIETARY FUNCTION EXCEPTION.

The proprietary function exception to governmental immunity does not apply to an activity if the activity is normally supported by taxes or fees, even if the activity is conducted for the primary purpose of making a pecuniary profit; it is important to consider the type of activity under examination when deciding whether an activity is normally supported by taxes or fees (MCL 691.1413).

5. WITNESSES — MOTIONS AND ORDERS — EXPERT WITNESSES — AFFIDAVITS — SUMMARY DISPOSITION.

The qualifications and methods employed by an expert need not be incorporated into an affidavit by the expert submitted in support of, or opposition to, a motion for summary disposition; the content of the affidavit must be admissible in substance, not form (MCR 2.116[G][6], 2.119[B][1]).

6. GOVERNMENTAL IMMUNITY — PROPRIETY FUNCTION EXCEPTION.

The determination whether the proprietary function exception to governmental immunity is applicable in an action is a question of law for the court; a trial court may hold an evidentiary hearing to obtain the factual development necessary to determine whether a governmental agency's activities are subject to the proprietary function exception (MCL 691.1413).

Olson, Bzdok & Howard, P.C. (by *Christopher M. Bzdok* and *Jeffrey L. Jocks*), for Ron Dextrom and others.

Law Offices of James P. O'Neill & Associates (by *James P. O'Neill*) and *Davis Listman PLLC* (by *Robert C. Davis*) for Tony and Donota Cassone and others.

Miller, Canfield, Paddock and Stone, P.L.C (by *Dean M. Altobelli*), for Wexford County, Wexford County Landfill, and Wexford County Department of Public Works.

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

PER CURIAM. This case arises from the operation of a landfill by defendants, Wexford County, Wexford County Landfill, and the Wexford County Department of Public Works. Plaintiffs are property owners who allege that contaminants from the landfill entered their groundwater, causing property damage and other economic injuries. Defendants asserted a defense of governmental immunity. The trial court found that, although defendants' unlicensed operation of the landfill was not ultra vires, there were questions of material fact concerning whether the operation fell within the proprietary function exception to governmental immunity.[1] Defendants now appeal as of right the trial court's order denying their motion for summary disposition. And certain plaintiffs[2] cross-appeal, challenging the trial court's denial of their cross-motion for summary disposition. We affirm, but remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

In late 1973, Wexford County and its Department of Public Works commenced operation of the Wexford County Landfill. A special use permit that the state of Michigan issued allowed Wexford County and the Department of Public Works to establish the landfill on an 80-acre site of state-owned land in Cedar Creek Township. Throughout the 1970s and 1980s, the landfill

[1] MCL 691.1413.

[2] Plaintiffs have divided themselves into two groups represented by different counsel. We refer to the group that filed a summary disposition motion in the trial court, and now cross-appeal, as "certain plaintiffs."

accepted waste only from Wexford County residents. In 1990, the landfill began accepting waste from Missaukee County, which borders Wexford County. The Missaukee County waste that the landfill accepted has never accounted for more than 13.2 percent of the landfill's total refuse intake.

During the 1980s, concerns emerged regarding possible contamination of the groundwater flowing beneath the landfill. In 1984, analysis of water collected from monitoring wells revealed the presence of chemical contaminants attributable to the landfill, and in 1986, the Michigan Department of Natural Resources recommended capping portions of the landfill to prevent further contamination. Defendants and the Department of Natural Resources engaged in a lengthy and contentious dispute over the measures necessary to prevent further groundwater contamination. In 1989, the Department of Public Works and the Department of Natural Resources entered into a consent order, which observed, in relevant part, "The Department alleges, but the County DPW does not admit, that past landfill operations and other disposal activities at the disposal site has [sic] resulted in, and continues to cause, unpermitted discharges to, and resultant contamination of, the groundwaters of the State . . . ." Pursuant to the consent order, the Department of Public Works agreed to implement a remedial action plan calling for the complete closure of unlined landfill areas, additional investigation of the extent of landfill-connected groundwater contamination, and maintenance of monitoring wells. Later, Wexford County also agreed to install a "groundwater pump and treat[ment] system, consisting of five . . . extraction wells and an aeration pond."

Defendants did not promptly close all unlined landfill locations, and for several years after the consent agreement's execution, the Department of Natural Resources refused to license the facility. Defendants eventually implemented remediation efforts satisfactory to the Department of Natural Resources, and the landfill regained its license. Cleanup and monitoring activities continued through the 1990s, and in 2002, defendants entered into a second consent order with the Department of Natural Resources and Environment.[3] Subsequent detection of more contamination obligated Wexford County to expend substantial sums for wells, pumps, and other equipment. In 2004, Wexford County agreed to provide an alternate water system for residents with contaminated wells.

Notwithstanding significant Wexford County expenditures related to environmental remediation, the landfill generated a profit from 1984 through 2002. Historical audit information that Wexford County submitted revealed that the landfill achieved its greatest profit in 2000, when its assets minus liabilities totaled slightly more than $12 million. Between 2000 and 2006, Wexford County spent approximately $27.6 million of landfill revenues on activities directly related to the landfill, including contamination investigation, contamination cleanup, and preventative measures mandated by the consent orders. Within the same period, Wexford County spent 10 percent of landfill profits, about $2.7 million, on activities unrelated to the landfill, including insurance expenses, courthouse bond payments, contributions to the general fund, and a 911 radio project.

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[3] The Department of Natural Resources is now known as the Department of Natural Resources and Environment.

Plaintiffs commenced this action in September 2006, asserting claims for nuisance, nuisance per se, trespass, negligence, gross negligence, and negligence per se.[4] In May 2007, defendants moved for summary disposition of plaintiffs' tort claims on the basis of governmental immunity, citing MCR 2.116(C)(7) and (10). Defendants argued that (1) the landfill operation qualified as a governmental function, (2) defendants had not operated the landfill for the primary purpose of making a profit, and (3) user fees had always "almost exclusively" supported the landfill. Defendants further argued that the contamination had taken place in the 1970s and 1980s, when the landfill was still using unlined cells, well before there were any transfers out of the landfill's fund to pay for unrelated projects.

Certain plaintiffs filed a brief in opposition to defendants' motion, arguing that defendants were not entitled to immunity because their operation of the landfill was in violation of the law and, therefore, ultra vires. Further, certain plaintiffs argued that defendants were not entitled to immunity because the landfill operation was proprietary, conducted for the purpose of making a profit, and not of the size or scope normally supported by fees or taxes in a community the size of Wexford County. Certain plaintiffs added that even if the landfill was covered by governmental immunity in the 1970s and 1980s, defendants could not show that the contamination originated at that time. Certain plaintiffs submitted the affidavit of Christopher Grobbel, who opined that contamination was still flowing from the landfill at the present time. Certain plaintiffs asked that summary disposition be entered in their favor.

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[4] The complaint also contains an inverse condemnation count, which is not involved in this appeal. In January 2007, an amended complaint was filed that added more plaintiffs, but reiterated the same counts in the original complaint.

The remaining plaintiffs filed a brief in opposition to defendants' motion, also requesting that summary disposition be entered in their favor under MCR 2.116(I)(2). Like certain plaintiffs, these plaintiffs argued that defendants were not entitled to immunity because the landfill operation was proprietary, and was not of the size or scope normally supported by fees or taxes in a community the size of Wexford County.

At a hearing on the cross-motions for summary disposition, defendants briefly argued, for the first time, that Grobbel's affidavit was inadmissible because it did not list his expert qualifications or explain his methods, and, therefore, should not be considered by the trial court. The trial court took the parties' cross-motions under advisement.

The trial court later issued a written opinion and order denying both motions for summary disposition. After reciting some of the landfill revenue and expenditure evidence, the trial court deemed summary disposition inappropriate on the first prong of the proprietary function test, because "[t]he County's purpose in operating the landfill for pecuniary profit has not been conclusively proved or refuted by the numerous exhibits filed by the parties. Trial testimony of the people who made these decisions is necessary to accurately adjudicate this issue." The trial court opined that questions of fact also existed regarding whether "units of government like Wexford County" commonly "engage in business activities of this magnitude primarily to meet the garbage disposal needs of their residents, or are landfills of this size and type usually maintained for profit by public or private entities[.]" Accordingly, the trial court stated that "[t]his question is unanswered by the documentary evidence and presents a genuine issue

of material fact that must be addressed at trial." The trial court also noted the possibility that the landfill's primary purpose might have changed over time, and that "[i]f facts at trial show this to be true, the time when the contamination occurred becomes material to the issue of governmental immunity."

Therefore, the trial court found that the parties' competing expert testimony "discloses the time of contamination to be a disputed issue of fact." The trial court also rejected plaintiffs' suggestion that defendants had engaged in ultra vires conduct, finding that "[a] landfill operating in violation of state licensing requirements is not a [sic] *ultra vires* activity and must be afforded governmental immunity, unless another specific exception applies."

II. MOTIONS FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

A. STANDARD OF REVIEW

We first consider the motions for summary disposition under MCR 2.116(C)(10). Under that court rule, a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[5] When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a court must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact

[5] MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

exists.[6] A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence.[7]

This Court reviews de novo a trial court's decision on a motion for summary disposition,[8] as well as questions of statutory interpretation[9] and the construction and application of court rules.[10]

B. ULTRA VIRES ACTIVITY

A governmental agency is generally immune from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function."[11] And a governmental function is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law."[12]

Here, there can be no dispute that operation of a landfill is ordinarily a governmental function. In *Coleman v Kootsillas*,[13] the Michigan Supreme Court noted

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[6] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120; *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996); see also *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455 & n 2; 597 NW2d 28 (1999).

[7] *Glittenberg v Doughboy Recreational Indus* (*On Rehearing*), 441 Mich 379, 398-399; 491 NW2d 208 (1992), reh den sub nom *Spaulding v Lesco Int'l Corp*, 441 Mich 1202 (1992).

[8] *Maiden*, 461 Mich at 118; *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007); *Guerra v Garratt*, 222 Mich App 285, 288; 564 NW2d 121 (1997).

[9] *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996).

[10] *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 133; 624 NW2d 197 (2000).

[11] MCL 691.1407(1).

[12] MCL 691.1401(f).

[13] *Coleman v Kootsillas*, 456 Mich 615, 619; 575 NW2d 527 (1998).

that, "with respect to a municipality's collection and disposal of its own garbage, its activities involve a governmental function." "Cities have a statutory right to own and run facilities to dispose of their own waste and garbage."[14] "Moreover, they may form agreements jointly to run the facilities."[15] Garbage collection and disposal is "a matter of public health and a governmental function," even if the garbage comes from other jurisdictions.[16]

However, certain plaintiffs' contend that defendants' operation of the landfill without a license and in disregard of applicable environmental regulations constituted an ultra vires activity not subject to the protection of governmental immunity.

In *Richardson v Jackson Co*,[17] the Michigan Supreme Court contrasted governmental functions with ultra vires activities, explaining that "governmental agencies are not entitled to immunity under the act for injuries arising out of ultra vires activity, defined as activity *not* expressly or impliedly mandated or authorized by law." In *Richardson*, a person drowned at a public beach located in a county park and the plaintiff alleged that governmental immunity did not apply because the county's operation of a swimming beach was in violation of various sections of the Marine Safety Act.[18, 19] However, the county was statutorily authorized "to operate, equip, and maintain this beach as a recre-

[14] *Id*. at 619-620, citing MCL 123.261 and MCL 324.4301.

[15] *Id*. at 620.

[16] *Id*.

[17] *Richardson v Jackson Co*, 432 Mich 377, 381; 443 NW2d 105 (1989) (emphasis in original).

[18] Then codified as MCL 281.1001 *et seq*.

[19] *Richardson*, 432 Mich at 380.

ational facility."[20] Accordingly, the Supreme Court framed the issue presented in *Richardson* as "how the . . . governmental function test applies to an activity authorized generally by one statute, yet regulated by another."[21]

In resolving the issue, the Supreme Court explained that activities authorized by one statute, yet regulated by another, generally remain subject to and protected by governmental immunity:

> Enabling acts, which grant authority in broad terms, must be distinguished from regulatory statutes. Improper performance of an activity authorized by law is, despite its impropriety, still "authorized" within the meaning of the . . . governmental function test. An agency's violation of a regulatory statute that requires the agency to perform an activity in a certain way cannot render the activity ultra vires, as such a conclusion would swallow the [governmental immunity] rule by merging the concepts of negligence and ultra vires.
>
> In applying the "governmental function" test of the immunity statute, this Court must consider that statute's breadth. The statute extends immunity "to *all* governmental agencies for *all* tort liability *whenever* they are engaged in the exercise or discharge of a governmental function."[22] Nothing in the governmental immunity act suggests [that] the Legislature intended to treat the failure to meet a "condition precedent," *such as obtaining a license or permit*, any differently for immunity purposes than the failure to meet other sorts of regulatory duties. None of the act's four narrowly drawn exceptions single out activity conditioned on permits or licenses for special treatment. . . . [A]ctivities conducted in violation of regulations other than approval requirements are as "unauthorized" as activities

[20] *Id*. at 385; see MCL 123.51.

[21] *Richardson*, 432 Mich at 381.

[22] Emphasis in original.

> conducted without proper approval. *Licensing is nothing more than an intense form of regulation*.
>
> The Legislature did not intend that the term "governmental function" be interpreted so that immunity for activity authorized generally by statute should evaporate upon the failure to perform a regulatory condition contained in another statute. *In sum, ultra vires activity is not activity that a governmental agency performs in an unauthorized manner*. *Instead, it is activity that the governmental agency lacks legal authority to perform in any manner*.[23]

The Supreme Court held that the Legislature's imposition of a "regulatory duty" on operators of public beaches did not signal its intent "to condition all authority to engage in that activity upon compliance with that duty."[24]

Here, the statute authorizing defendants' landfill operation reads:

> A county establishing a department of public works shall have the following powers to be administered by the board of public works subject to any limitations thereon:
>
> * * *
>
> (c) To acquire a refuse system[25] within 1 or more areas in the county and to improve, enlarge, extend, operate, and maintain the system.[26]

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[23] *Richardson*, 432 Mich at 385-387 (emphasis added; citations omitted).

[24] *Id*. at 383.

[25] The term "refuse system" means "disposal, including all equipment and facilities for storing, handling, processing, and disposing of refuse, including plants, works, instrumentalities, and properties, used or useful in connection with the salvage or disposal of refuse and used or useful in the creation, sale, or disposal of by-products, including rock, sand, clay, gravel, or timber, or any portion or any combination thereof." MCL 123.731(e).

[26] MCL 123.737.

Counties thus have statutory authority to own and run waste disposal facilities.

Certain plaintiffs nevertheless contend that defendants' violations of MCL 324.11509 and MCL 324.11512(2), which are parts of the Natural Resources and Environmental Protection Act (NREPA),[27] divested defendants of their authority to operate the landfill. Both of these NREPA sections prohibit the operation of an unlicensed landfill, as defendants did in this case. However, neither of these NREPA provisions evinces a legislative intent to withdraw defendants' authority to operate a "refuse system" for a violation of the environmental protection laws. Therefore, the trial court correctly concluded that a landfill operating in violation of state licensing and environmental protection laws does not constitute an ultra vires activity.

C. THE PROPRIETARY FUNCTION EXCEPTION TO GOVERNMENTAL IMMUNITY

As explained above, defendants' operation of a landfill constitutes a governmental function, for which a governmental agency is generally immune.[28] However, there are exceptions to the rule of governmental immunity, including the proprietary function exception, which provides, in pertinent part:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. *Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit* for the governmental agency, *excluding, however, any activity normally supported by taxes or fees*.[29]

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[27] MCL 324.101 *et seq*.

[28] MCL 691.1407(1); *Coleman*, 456 Mich at 619.

[29] MCL 691.1413 (emphasis added).

In *Hyde v Univ of Mich Bd of Regents*,[30] the Supreme Court found that this definition is "quite specific and needs no interpretation." The Court explained that before an activity is deemed a proprietary function, it must satisfy two tests: "1) [t]he activity must be conducted primarily for the purpose of producing a pecuniary profit, *and* 2) [t]he activity cannot normally be supported by taxes or fees."[31]

1. PECUNIARY PROFIT PURPOSE

Defendants argue that the landfill was operated primarily to meet its citizens' waste disposal needs, not primarily to make a profit.

In determining whether the agency's primary purpose is to produce a pecuniary profit, a court must first consider "whether a profit is actually generated," and second must consider " 'where the profit generated by the activity is deposited and how it is spent.' "[32]

In *Hyde*, the Supreme Court noted that the proprietary function exception turns on the agency's motive; it does not *require* that the activity "actually generate a profit . . . ."[33] The Court explained that "[i]f the availability of immunity turned solely upon an examination of the ledgers and budgets of a particular activity, a fiscally responsible governmental agency would be 'rewarded' with tort liability for its sound management decisions."[34] "Such a rule could discourage implementation of cost-efficient measures and encourage deficit

[30] *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 257; 393 NW2d 847 (1986).

[31] *Id*. at 258 (emphasis in original).

[32] *Coleman*, 456 Mich at 621.

[33] *Hyde*, 426 Mich at 258.

[34] *Id*.

spending."[35] It would also be difficult to implement, in that a particular activity could generate a profit one year and operate at a loss the next.[36] Conversely, "[t]he existence of a profit is not an irrelevant consideration . . . ."[37] Consistently operating at a loss may be evidence that the primary purpose of the activity is something other than to make a profit, while consistently making a profit may be evidence of intent to make a profit.[38] "However, § 13 permits imposition of tort liability only where the *primary* purpose is to produce a pecuniary profit."[39] "It does not penalize a governmental agency's legitimate desire to conduct an activity on a self-sustaining basis."[40]

"Another relevant consideration is where the profit generated by the activity is deposited and how it is spent."[41] If the profit is deposited in a general fund and used to finance unrelated activities, this could indicate that the activity was intended as "a general revenue-raising device."[42] Conversely, "[i]f the revenue is used only to pay current and long-range expenses involved in operating the activity, this could indicate that the primary purpose of the activity was not to produce a pecuniary profit."[43]

The evidence in this case showed that until 1989, all garbage that the landfill processed came from Wexford County. Since 1990, approximately six percent of the

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[35] *Id*.

[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] *Id*. at 258-259 (emphasis in original).

[40] *Id*. at 259.

[41] *Id*.

[42] *Id*.

[43] *Id*.

garbage that the landfill receives comes from neighboring Missaukee County. The percentage of the landfill's yearly operating revenue attributable to Missaukee County waste has fluctuated from 0.6 percent the first year (1990) to a high of 13.2 percent in 2005, during a special project.

The landfill has been making a profit since 1984. The landfill's profits and interest on those profits were deposited into a landfill fund. Between 1989 and 2000, the fund's unrestricted assets increased from $948,894 to $13,710,372. Through 1999, these funds were not used for any purpose unrelated to the landfill. *But* between 2000 and 2005, the landfill transferred approximately $2.7 million out of the landfill fund for uses unrelated to the landfill. As the following chart shows, for the first three years, the amounts of these unrelated transfers were approximately half of the landfill's annual net earnings plus interest, until the landfill started losing money. The unrelated transfers continued for three years after the landfill began losing money, but stopped in 2006.

Year	Net Earnings (operating earnings)	Interest (non-operating earnings)	Net Earnings plus Interest	Unrelated Transfers	Percentage (of net Earnings plus Interest)
2000	379,440	725,157	1,155,869	752,175	65.0%
2001	428,376	368,329	1,153,533	566,559	49.1%
2002	262,554	256,077	630,883	395,091	62.6%
2003	(630,521)	264,692	(374,444)	339,713	N/A
2004	(1,777,797)	288,982	(1,513,105)	334,015	N/A
2005	(3,193,570)	205,130	(2,904,588)	330,000	N/A

The evidence shows that in approximately 1990, the landfill began generating and accumulating substantial profits, although no monies were spent on unrelated projects. However, from 2000 until 2005, substantial sums were transferred out of the landfill fund to finance unrelated projects. Additionally, statements from various county officials raise questions about the motivation behind operation of the landfill. Plaintiffs cite numerous instances of county officials making statements that indicate a profit-making motive. The evidence raises a question concerning whether defendants' motivation changed over time and supports an inference that since 2000, perhaps earlier, the landfill was operated for the primary purpose of making a profit. Further, contrary to defendants' contentions, the mere fact that defendants did not spend the primary portion of the landfill's profits on unrelated expenses is not conclusive proof that defendants were not nevertheless operating the landfill primarily for the purpose of producing a pecuniary profit.

Thus, in considering the motions for summary disposition under MCR 2.116(C)(10), we conclude that the trial court did not err by concluding that there was a question of material fact concerning whether the landfill was being operated for the primary purpose of making a pecuniary profit, including whether that motive changed over time.

2. ACTIVITY NORMALLY SUPPORTED BY TAXES OR FEES

The Supreme Court has stated that even if an activity is conducted for the primary purpose of making a profit, the proprietary function exception does not apply if the activity is normally supported by taxes or fees.[44] "When deciding whether an activity satisfies the

[44] *Coleman*, 456 Mich at 622 n 8; *Hyde*, 426 Mich at 259-260.

second part of the proprietary function test, it is important to consider the type of activity under examination."[45]

In *Coleman*, the city of Riverview accepted garbage, not just from its residents, but from numerous other sources, including Wayne County and the province of Ontario, Canada.[46] The *Coleman* Court found that "[a]n enterprise of such vast and lucrative scope is simply not normally supported by a community the size of the city of Riverview [with 14,000 residents] either through taxes or fees."[47] The Court added:

> The fact that the city charges fees to garbage haulers unloading refuse into its landfill does not alter this conclusion. *Any governmental activity must exact a fee if it is to produce a pecuniary profit*. If imposition of a use fee like Riverview's would suffice to defeat the proprietary function exception to governmental immunity, almost no city activity would subject a city to liability. That could not have been the intention of the Legislature.[48]

The Court concluded that the proprietary function test had been met and that the city of Riverview was not immune from tort liability.[49]

Here, it is undisputed that fees exclusively support the landfill. However, as *Coleman* states, that fact alone is not sufficient to avoid the proprietary function exception. Defendants argue that the trial court erred when, in examining the issue whether an activity is "normally supported by taxes or fees," it sought evidence of how other communities support their landfills. In applying this part of the proprietary function test, however, the

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[45] *Coleman*, 456 Mich at 622.

[46] *Id*. at 616-617, 622-623.

[47] *Id*. at 623.

[48] *Id*. (emphasis added).

[49] *Id*. at 623-624.

Coleman Court compared the scope and profitability of the landfill in relation to the size of the community.[50] Thus, the Court looked at how other communities supported their landfills, rather than merely the funding history of the activity in question. Therefore, under *Coleman*, the trial court must consider the scope of defendants' landfill in relation to the size of the community, its profitability, and how other communities of similar size support their landfills.

Thus, in considering the motions for summary disposition under MCR 2.116(C)(10), we conclude that the trial court did not err by finding that there was a question of fact whether defendants' operation of the landfill was subject to the proprietary function exception to governmental immunity.

D. CONTAMINATION

Defendants argue that the trial court erred by considering the affidavit of certain plaintiffs' expert Christopher Grobbel in finding that a question of material fact existed with regard to when the alleged contamination occurred. Defendants contend that Grobbel's affidavit should not have been considered because the reliability standards required by MRE 702 were not satisfied.

The evidentiary rule that governs expert testimony, MRE 702, provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on

[50] *Id*. at 623.

> sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[51]

Further, MCR 2.116(G)(6) provides that "[a]ffidavits . . . offered in support of or in opposition to a motion based on subrule (C)(1)–(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." However, in addressing this requirement, the Michigan Supreme Court in *Maiden v Rozwood*,[52] approvingly quoted *Winskunas v Birnbaum*,[53] which explained:

> "The evidence need not be in admissible form; affidavits are ordinarily not admissible evidence at a trial. But it must be admissible in content . . . . Occasional statements in cases that the party opposing summary judgment must present admissible evidence . . . should be understood in this light, as referring to the content or substance, rather than the form, of the submission."

Moreover, MCR 2.119(B)(1) provides:

> If an affidavit is filed in support of or in opposition to a motion, it must:
>
> (a) be made on personal knowledge;
>
> (b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and
>
> (c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

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[51] See also *Craig v Oakwood Hosp*, 471 Mich 67; 684 NW2d 296 (2004); *Gilbert v DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004).

[52] *Maiden*, 461 Mich at 124 n 6.

[53] *Winskunas v Birnbaum*, 23 F3d 1264, 1267-1268 (CA 7, 1994) (citations omitted; original emphasis in *Winskunas* omitted).

Thus, there is no requirement that an expert's qualifications and methods be incorporated into an affidavit submitted in support of, or opposition to, a motion for summary disposition. Rather, the *content* of the affidavits must be admissible in *substance*, not form.[54] And the requirements of MRE 702 are foundational to the admission of the expert's testimony at trial. Thus, it is significant that defendants here do not attack the admissibility of the content of Grobbel's affidavit, only its foundation. As MCR 2.119(B)(1)(c) provides, the affidavit need only show that the affiant, *if sworn as a witness*, can testify competently to the facts stated in the affidavit. Whether Grobbel will ultimately meet the MRE 702 requirements to be sworn as a witness is a matter reserved for trial. Thus, in considering the motions for summary disposition under MCR 2.116(C)(10), we conclude that the trial court did not err by considering Grobbel's affidavit in ruling that a genuine issue of material fact existed concerning when the contamination occurred.

III. MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(7)

A. STANDARD OF REVIEW

Of crucial importance here is that defendants also brought their motion for summary disposition under MCR 2.116(C)(7). MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law. When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them.[55]

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[54] MCR 2.116(G)(6); *Maiden*, 461 Mich at 124 n 6.

[55] *Maiden*, 461 Mich at 119; *Guerra*, 222 Mich App at 289.

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.[56] 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.[57] However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate.[58]

B. THE TRIAL COURT'S OPINION

In resolving the motions for summary disposition, the trial court found that summary disposition must be denied because there existed questions of fact that would best be resolved at a trial. Specifically, with respect to the pecuniary-profit-purpose test of the proprietary function exception, the trial court concluded that "*[t]rial* testimony of the people who made these decisions [regarding the landfill's purpose] is necessary to accurately adjudicate this issue."[59] Further, with respect to the question whether the landfill is the type of activity normally supported by taxes or fees, the trial court concluded that "[t]his question is unanswered by the documentary record and presents a genuine issue of material fact that must be addressed *at trial*."[60] The trial court made no particular distinction between MCR 2.116(C)(7) and MCR 2.116(C)(10), and did not state or imply that it recognized that a motion under MCR

[56] MCR 2.116(G)(5); *Maiden*, 461 Mich at 119; *Guerra*, 222 Mich App at 289.

[57] *Guerra*, 222 Mich App at 289.

[58] *Id.*

[59] Emphasis added.

[60] Emphasis added.

2.116(C)(7) ultimately presents a question of law for the court to decide rather than a question of fact within the jury's province.

C. GOVERNMENTAL IMMUNITY AS A QUESTION OF LAW

As we have stated above, when reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the court must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists.[61] If the court does determine that a genuine issue of material fact exists, then the motion must be denied and the issues are left to a fact-finder to resolve at a trial. Thus, we have stated, the trial court did not err by finding that there were unresolved questions of fact as to whether defendants' operation of the landfill was subject to the proprietary function exception to governmental immunity. And we agree with the trial court that the inconclusive nature of the evidence requires further inquiry and clarification.

However, to the extent that the trial court envisioned that such further inquiry and clarification would be arrived at during a *trial*, with either the court sitting as a finder of fact or a jury serving the same function, we disagree. A *trial* is not the proper remedial avenue to take in resolving the factual questions under MCR 2.116(C)(7) dealing with governmental immunity. Indeed, the crux of the case is the determination of the threshold issue whether governmental immunity protects defendants' conduct or whether that conduct fell outside the immunity protection through application of the proprietary function exception.

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[61] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120; *Quinto*, 451 Mich at 361-362; see also *Smith*, 460 Mich at 454-455 & n 2.

Although courts should start with the pleadings when reviewing a motion brought under MCR 2.116(C)(7), courts must also consider any affidavits, depositions, admissions, or other documentary evidence that the parties submit to determine whether there is a genuine issue of material fact.[62] "[T]he trial court [is] obligated to evaluate the specific conduct alleged to determine whether a valid exception exists."[63] If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred is an issue of law for the court.[64] *But* if a question of fact exists so that factual development could provide a basis for recovery, caselaw states that dismissal without further factual development is inappropriate.[65] And it is under this latter circumstance—where there are questions of fact necessary to resolve the ultimate issue whether governmental immunity applies—that we believe the (C)(7) procedure diverges from the (C)(10) procedure.

As we stated above, under MCR 2.116(C)(10), if the court does determine that a genuine issue of material fact exists, then it must deny the motion and leave the issues of *fact* to a fact-finder to resolve *at a trial*. But we must reconcile this procedure with the fact that application of the proprietary function exception to governmental immunity remains a question of *law* for the court.[66]

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[62] MCR 2.116(G)(5); *Maiden*, 461 Mich at 119; *Coleman*, 456 Mich at 618; *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004); *Guerra*, 222 Mich App at 289.

[63] *Walsh v Taylor*, 263 Mich App 618, 624; 689 NW2d 506 (2004).

[64] *Guerra*, 222 Mich App at 289.

[65] *Id.*

[66] *Briggs v Oakland Co*, 276 Mich App 369, 371; 742 NW2d 136 (2007); *Laurence G Wolf Capital Mgt Trust v City of Ferndale*, 269 Mich App 265, 270; 713 NW2d 274 (2005).

Our review of relevant caselaw fails to definitively resolve this dilemma.[67] However, we conclude that caselaw supports a remand for an evidentiary hearing as an acceptable remedy under the circumstance. In *Laurence G Wolf Capital Mgt Trust v City of Ferndale*,[68] the trial court held that "further factual development was required" with regard to the defendants' motion for summary disposition on the ground of governmental immunity. And in *Hyde*, a trial court conducted a "full evidentiary hearing" and made "findings of fact and law" to determine whether the defendant's conduct constituted a proprietary function.[69]

Accordingly, we instruct the trial court to hold an evidentiary hearing for the purpose of obtaining such factual development as is necessary to determine whether defendants' operation of the landfill was subject to the proprietary function exception to governmental immunity. On the basis of the further factual development presented at that hearing, if the trial court determines that defendants' operation of the landfill *is* subject to the proprietary function exception to governmental immunity *as a matter of law*, then it should deny

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[67] In *Delaney v Mich State Univ*, unpublished opinion per curiam of the Court of Appeals, issued March 16, 1999 (Docket No. 202391), in considering a motion brought under MCR 2.116(C)(7) and (C)(10), a panel of this Court concluded that the "plaintiff ha[d] submitted allegations and proofs sufficient to withstand [the] defendant's motion for summary disposition on the basis of governmental immunity." Accordingly, the panel reversed and remanded "for proceedings consistent with this opinion." However, the panel did not specifically indicate what such proceedings should actually entail, that is, a trial or merely an evidentiary hearing.

[68] *Laurence G Wolf*, 269 Mich App at 268; see also *Huron Tool & Engineering Co v Precision Consulting Servs*, 209 Mich App 365, 377; 532 NW2d 541 (1995) ("However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate.").

[69] *Hyde*, 426 Mich at 255.

defendants' summary disposition motion under MCR 2.116(C)(7) and proceed to trial on the substance of plaintiffs' claims. However, if the trial court determines that defendants' operation of the landfill is *not* subject to the proprietary function exception to governmental immunity *as a matter of law*, then the trial court should grant defendants' summary disposition motion under MCR 2.116(C)(7).

We affirm, but remand for proceedings consistent with this opinion. We do not retain jurisdiction.

PRACTICAL POLITICAL CONSULTING, INC v
SECRETARY OF STATE

Docket No. 291176. Submitted November 10, 2009, at Lansing. Decided March 9, 2010, at 9:05 a.m.

Practical Political Consulting, Inc., brought an action in the Ingham Circuit Court, Joyce A. Draganchuk, J., against the Secretary of State and the office of the Secretary of State, alleging that the defendants wrongfully denied plaintiff's March 26, 2008, request under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, for "a copy of all vote history of the [January 15, 2008] presidential primary including which ballots each voter selected (D[emocratic]) or R[epublican])." Defendants denied the request on the bases that the party preference information collected during the primary was not a public record as defined by FOIA and was exempt from disclosure under FOIA's privacy exemption, MCL 15.243(1)(a), and statutory exemption, MCL 15.243(1)(d). The trial court denied defendants' motion for summary disposition and entered a judgment against defendants. Defendants appealed, asserting that the records sought were exempt from disclosure under the privacy and statutory exemptions from disclosure of FOIA. Defendants did not assert that the records sought were not public records.

The Court of Appeals *held*:

1. MCL 168.615c(1), as amended by 2007 PA 52, required at the time of the 2008 presidential primary election that, in order to vote, an elector must indicate in writing at the time the elector appears to vote which participating political party ballot the elector wished to vote.

2. MCL 168.615c(3), as added by 2007 PA 52, provided at the time of the 2008 presidential primary election that the Secretary of State was required to develop a procedure for city and township clerks to use when keeping a "separate record" at the primary that contained the printed name, address, and qualified voter file number of each elector and the participating political party ballot selected by the elector.

3. 2007 PA 52, enacting § 2, repealed the 1995 FOIA provision

that provided in MCL 168.495a(1), as amended by 1995 PA 213, for the removal from the precinct registration file, the master registration file of the elector, and the precinct registration list an elector's prior declaration of a party preference or no party preference, and which provided in MCL 168.495a(2), as amended by 1995 PA 213, that beginning on November 29, 1995, a person making a request under FOIA was not entitled to receive a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference by an elector and a clerk or any other person shall not release a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector.

4. Although the changes to the election law adopted in 2007 for the 2008 presidential primary repealed the 1995 FOIA provision and substituted an exemption from disclosure for the information acquired or in the possession of a public body that indicated which participating political party ballot an elector selected at a presidential primary, after the 2008 primary, a federal court declared part of 2007 PA 52 unconstitutional. Because 2007 PA 52 contained a nonseverability clause, 2007 PA 52 became null and void and the 1995 FOIA provision came back into effect.

5. Under MCL 168.495a(2), as amended by 1995 PA 213, the questions presented by plaintiff's request are, first, was the March 26, 2008, FOIA request a request for a copy of an identifiable public record specifically described and exempted from disclosure under MCL 168.495a(2), as amended by 1995 PA 213? Second, even if the March 26, 2008, FOIA request was not a request for a copy of indentifiable public record specifically described and exempted from disclosure under amended § 495a(2), was the information in that public record specifically described and exempted from disclosure under amended § 495a(2)?

6. The public records sought by plaintiff are the "separate record[s]" created under MCL 168.615c(3), as added by 2007 PA 52, that contain the printed name, address, and qualified voter file number of each elector and the participating political party ballot selected by that elector at the 2008 presidential primary. It is clear that these "separate record[s]" are not specifically described and exempted from disclosure under § 495a(2), as amended by 1995 PA 213, which refers to "voter registration record[s]." The "voter registration record[s]" that amended § 495a(2) exempts from disclosure are completely distinct from

the "separate record[s]" kept under § 615c(3) of 2007 PA 52 and are not exempt from disclosure under § 495a(2) as amended by 1995 PA 213.

7. The information kept under § 615c(3) of 2007 PA 52 is not an elector's declaration of party preference, or no party preference. And it is only such declarations of party preference that § 495a(2), as amended by 1995 PA 213, exempts from disclosure. The only "information" kept under § 615c(3) of 2007 PA 52 is "information" regarding the political party ballots, along with the printed name, address, and qualified voter file number of each elector, that electors selected in order to vote in the 2008 presidential primary. Such selections by electors are not declarations of party preference. Amended § 495a(2) does not exempt from disclosure the "information" regarding party preference contained in the "separate record[s]" kept under § 615c(3) of 2007 PA 52 because that information is not a "declaration of party preference," or no preference. Therefore, § 13(1)(d) of FOIA, MCL 15.243(1)(d), does not apply to that information because no statutory exemption covers it. A declaration of party preference under amended § 495a(2) is not the same as a selection of a ballot under § 615c(3) of 2007 PA 52.

8. A two-pronged inquiry must be engaged in to ascertain whether the privacy exemption, MCL 15.243(l)(a), is applicable. First, it must be determined whether the information sought is "of a personal nature." Second, it must be determined whether the "public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." The future use of the information is irrelevant to determining whether the privacy exemption exists. Only the circumstances known to the public body at the time of the request are relevant to whether a FOIA exemption precludes disclosure.

9. The thrust of the sacrosanct concept of ballot secrecy is to protect from disclosure the identity of the candidates for which an elector voted. The disclosure of the ballot, Republican, Democratic, or other, that an elector voted in the 2008 presidential primary is not the disclosure of the candidate for which that elector voted. The indication of a ballot that an elector wished to vote in the 2008 presidential primary election is not information of a personal nature under MCL 15.243(1)(a).

10. The inquiry under MCL 15.243(1)(a) whether the disclosure of the information would constitute a "clearly unwarranted" invasion of an individual's privacy requires the Court of Appeals to balance the public interest in disclosure against the interest that the Legislature intended the exemption to protect. The relevant

public interest in disclosure here is the extent to which disclosure would serve the core purpose of FOIA, which is contributing significantly to the public understanding of the operations or activities of the government. Here, there is a strong public interest in disclosure. Even if the indication of a ballot that an elector wished to vote in the 2008 presidential primary election were to be viewed as being of a personal nature, its disclosure, when weighed against the public interest in disclosure, would not be a clearly unwarranted invasion of that elector's privacy.

Affirmed.

K. F. KELLY, J., dissenting, stated that the information collected during the 2008 presidential primary is information protected by statute and its disclosure would constitute a clearly unwarranted invasion of an individual's privacy. Therefore, the information is exempt from disclosure under MCL 15.243(1)(a) and (d). The judgment of the trial court should be reversed. The FOIA's statutory exemption, MCL 15.243(1)(d), protects from disclosure records that are specifically described by statute or information that is specifically described by statute. The Legislature intended to accomplish two things through the enactment of the 1995 FOIA provision, MCL 168.495a, as amended by 1995 PA 213. First, under MCL 168.495a(1), it permits the removal of all party preference information previously captured. Second, MCL 168.495a(2) prohibits the disclosure of party preference information in the future, not limited to political preference information collected under the prior law. Therefore, the protection from disclosure provided by subsection (2) applies to all portions of voter registration records containing a party declaration, including those records created in the future. The information collected during the 1988-1995 closed primaries and during the 2008 primary, although collected by a different procedure, is the same. An elector wishing to vote was required to "proclaim" the party's primary he or she wished to vote in. In both instances, voters made a "declaration" of party preference. The phrase "declaration of party preference" encompasses an elector's selection of a party's ballot. The requested information is protected from disclosure by MCL 168.495a(2), as amended by 1995 PA 213, and is therefore exempt under the FOIA's statutory exemption, MCL 15.243(1)(d). The information sought is information of a personal nature that implicates two separate privacy interests: an individual's privacy interest in his or her political convictions and an individual's privacy interest in his or her personal identifying information. Voters' names and home addresses,

when coupled with their party preferences in the 2008 primary election, is personal information that is intimate and private, and is undoubtedly of a "personal nature." The public's interest in the disclosure of voters' names and addresses coupled with their party preference information is negligible and the disclosure of this information in this form is not necessary to shed light on the government's operations. Weighing the virtually nonexistent public interest in disclosure against electors' interests in controlling their personal information dictates the conclusion that disclosure would be an unwarranted invasion of voters' privacy. The public's interest in disclosure is outweighed by the privacy interest the Legislature intended to protect under MCL 15.243(1)(a).

1. ELECTIONS — WORDS AND PHRASES — SEPARATE RECORDS — VOTER REGISTRATION RECORDS.

The "separate record[s]" created under MCL 168.615c(3), as added by 2007 PA 52, which contain the printed name, address, and qualified voter file number of each elector and the participating political party ballot selected by that elector at the 2008 presidential primary, are public records that are not specifically described and exempted from disclosure under MCL 168.495a(2), as amended by 1995 PA 213; the "voter registration record[s]" that amended § 495a(2) exempts from disclosure are completely distinct from the "separate records[s]" kept under § 615c(3) of 2007 PA 52.

2. ELECTIONS — WORDS AND PHRASES — INFORMATION — DECLARATIONS OF PARTY PREFERENCE.

The "information" kept under MCL 168.615c(3), as added by 2007 PA 52, following the 2008 presidential primary election that includes the printed name, address, and qualified voter file number of each elector and the participating political party ballot selected by the elector is not an elector's "declaration of party preference" or no party preference under MCL 168.495a(2), as amended by 1995 PA 213.

3. ELECTIONS — FREEDOM OF INFORMATION ACT — EXEMPTIONS FROM DISCLOSURE — PRIVACY EXEMPTION.

The disclosure of information regarding which participating political party ballot an elector voted in the 2008 presidential primary is not the disclosure of personal information for purposes of the privacy exemption to disclosure of the Freedom of Information Act, MCL 15.243(1)(a); even if it were the disclosure of personal

> information, the disclosure would not constitute a clearly unwarranted invasion of an individual's privacy for purposes of the privacy exemption.

Brookover, Carr & Schaberg, P.C. (by *Diane S. Carr*), for plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Susan Leffler*, *Denise C. Barton*, and *Ann M. Sherman*, Assistant Attorneys General, for defendants.

Amicus Curiae:

Foster, Swift, Collins & Smith, P.C. (by *Eric E. Doster*), for the Michigan Republican Party.

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

WHITBECK, J. This appeal concerns the provisions of the Freedom of Information Act (FOIA) relating to public records.[1] But the central question here is not the availability of public records. Rather it is whether the disclosure, or concealment, of these records will lead to, or detract from, the public's ability to hold its elected and appointed public officials accountable for carrying out the law. The Secretary of State (the Secretary) and her office would have us hold that these records are statutorily exempt from disclosure and that they are of such a "personal nature" that their public disclosure would constitute a "clearly unwarranted invasion" of an individual's privacy. We cannot, and do not, agree.

The records here relate to the 2008 presidential primary election, in which there was to be a "separate record" kept containing the printed name, address, and

[1] MCL 15.231 *et seq*.

qualified voter file number of each elector and the "participating political party" ballot selected by that elector. The main "participating" political parties were the Democratic Party and the Republican Party. The 2008 presidential primary in Michigan was conducted amid a swirl of controversy, charges, and countercharges. Ultimately, a federal court found the act that authorized that primary to be unconstitutional on equal protection grounds. But these complexities should not cloud the basic issue. That issue here is whether we should shield from public disclosure the "separate records" that contain information as to which *ballot*—not which *candidate*—each voter selected in the 2008 presidential primary. We do not view FOIA and the cases interpreting it as providing such a shield. We therefore affirm the decision of the trial court.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. THE VARIOUS PRESIDENTIAL PRIMARY SYSTEMS

The law relating to recent presidential primary elections in Michigan falls into three categories:

- First, by statute from 1988 to 1995, Michigan had a "closed" presidential primary system, with certain requirements regarding eligibility to vote in party presidential primaries.
- Second, by statute from 1995 to 2007, Michigan had an "open" presidential primary system that allowed voting in party primaries without the eligibility requirements that the former election law imposed.
- Third, by statute in 2008, Michigan had what might reasonably be called a "semi-open" presidential primary, with certain requirements—less onerous than those that the law imposed in 1988 to 1995—regarding eligibility to vote in a party's presidential primary.

More specifically, the law in these three categories contained the following provisions:

1988-1995 Closed Presidential Primary System: Declaration of Party Preference By Elector	A "registration affidavit" kept at the township, city, or village level was required to contain a space in a presidential primary election for the "elector to declare a party preference or that the elector has no party preference."[2] Even if currently registered to vote, an elector would not be eligible to vote in a presidential primary election unless the elector "declare[d] in writing . . . a party preference at least 30 days before the presidential primary election."[3] Thus, only those electors who declared a party preference 30 days before the presidential primary election could vote for the candidates in any of the parties' respective presidential primaries.
1995-2007 Open Presidential Primary System: No Declaration of Party Preference By Elector	The "registration affidavit" was no longer required to contain the space for an elector to declare a party preference 30 days (or any other period) before the presidential primary election.[4] Thus, any elector, who had otherwise completed a valid registration affidavit could vote for the candidates in any of the parties' respective presidential primaries.
2008 Semi-Open Presidential Primary: Indication of Which Party Ballot Elector Wished to Vote	In order to vote in a presidential primary, an elector was required to "indicate in writing, on a form prescribed by the secretary of state, which participating political party ballot he or she wishes to vote when appearing to vote at a presidential primary."[5] Thus, only the electors who indicated, at the time they appeared to vote, which participating political party ballot "he or she wishes to vote" could vote for the candidates in any of the parties' respective presidential primaries.

There is a significant difference between the three categories. Under the 1988-1995 closed primary system, an elector had to "*declare*" a "party preference" 30 days in advance in order to vote in a presidential primary. Under the 1995-2007 open primary system, by contrast, there were no requirements regarding party preference or ballot selection, by declaration or otherwise, and any qualified elector could vote in any of the parties' respective presidential primaries. In 2008, an elector was not required to "*declare*" a "party preference" but rather that elector was required to "*indicate*" which "participating political party ballot he or she wish[ed] to vote . . . ." And the elector

[2] MCL 168.495(1)(k), as amended by 1988 PA 275.

[3] MCL 168.495(2)(c), as amended by 1998 PA 275; MCL 168.523(3), as amended by 1988 PA 275.

[4] MCL 168.495, as amended by 1995 PA 87.

[5] MCL 168.615c(1), as added by 2007 PA 52.

could indicate his or her choice of ballot when he or she appeared at the polling place to vote in the presidential primary, rather than 30 days in advance.

B. RECORD-KEEPING REQUIREMENTS

The three categories also had significantly different record-keeping requirements. In summary, the law in these three categories contained the following provisions:

1988-1995 Closed Presidential Primary System: Declaration of Party Preference By Elector	The clerk of each township, city, and village was required to provide blank forms, designated as "registration cards," to be used in the registration of electors. These "registration cards" were to include an affidavit designated as a "registration affidavit" to be executed by the registrant.[6] This "registration affidavit" was to contain: ■ the name of the elector; ■ the residence address, street and number or rural route and box number, if any, of the elector; ■ the birthplace and birth date of the elector; ■ the driver's license or state identification card number of the elector, if available; ■ a statement that the elector was a citizen of the United States; ■ a statement that the elector at the time of completing the affidavit, or on the date of the next election, was not less than 18 years of age; ■ a statement that the elector has or will have lived in the state not less than 30 days before the election; ■ a statement that the elector has or will have established his or her residence in the township, city, or village in which the elector is applying for registration not less than 30 days before the next election; ■ a statement that the elector is or will be a qualified elector of the township, city, or village on the date of the next election; ■ a space in which the elector shall state the place of the elector's last registration; and, as mentioned above, ■ a space for the elector to declare a party preference or that the elector has no party preference.[7] In addition, if authorized by the election commission of the city, village, or township, the clerk of a city, village, or township was to create a "registration list," alphabetically arranged and containing the name, address, date of birth of the elector and, "for the purpose of voting in a presidential primary election, the party preference or declaration of no party preference of theelector, if any."[8]

[6] MCL 168.493, as amended by 1989 PA 142.

[7] MCL 168.495(1)(a) through (k), as amended by 1988 PA 275.

[8] MCL 168.501a, as amended by 1988 PA 275.

1995-2007 Open Presidential Primary System: No Declaration of Party Preference By Elector	As noted above, the "registration affidavit" no longer contained the requirement that an elector declare a party preference 30 days (or any other period) before the presidential primary election.[9] In 2005, the Legislature repealed MCL 168.501a, relating to registration lists.[10] The other record-keeping requirements remained the same.
2008 Semi-Open Presidential Primary: Indication of Which Party Ballot Elector Wished to Vote	The Secretary of State was required to "develop a procedure for city and township clerks to use when keeping a separate record at a presidential primary that contains the printed name, address, and qualified voter file number of each elector and the participating political party ballot selected by that elector at the presidential primary."[11]

Thus, from 1988 to 1995, under the closed presidential primary system, the registration affidavits contained extensive information about electors, including an elector's declaration of party preference (or no preference) for the purpose of voting in a presidential primary. But from 1995 to 2007, under the open presidential primary system, the elector's declaration of party preference was no longer kept in the registration affidavits. In 2008, however, there was to be a "separate record" in the semi-open presidential primary that contained the printed name, address, and qualified voter file number of each elector and the selection of the participating political party ballot by that elector.

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[9] MCL 168.495, as amended by 1995 PA 87.

[10] 2005 PA 71, enacting § 1.

[11] MCL 168.615c(3), as added by 2007 PA 52.

C. DISCLOSURE RESTRICTIONS

The law in these three categories also contained signifi cantly different restrictions upon disclosure. In summary, the law in these three categories contained the following provisions:

1988-1995 Closed Presidential Primary System: Declaration of Party Preference By Elector	There were no explicit restrictions on the disclosure of the public records required to be kept.
1995-2007 Open Presidential Primary System: No Declaration of Party Preference By Elector	In 1995, the Legislature adopted two explicit restrictions with respect to the disclosure of public records required to be kept (the 1995 FOIA provision). First, in amended § 495a(1), the Legislature provided: > If an elector declared a party preference or no party preference as previously provided under this act for the purpose of voting in a statewide presidential primary election, a clerk or authorized assistant to the clerk may remove that declaration from the precinct registration file and the master registration file of that elector and the precinct registration list, if applicable.[12] Second, in amended § 495a(2), the Legislature provided: > Beginning on the effective date of the amendatory act that added this sentence [November 29, 1995], a person making a request under the freedom of information act . . . is not entitled to receive a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector. Beginning on the [same date], a clerk or any other person shall not release a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector.[13]

[12] MCL 168.495a(1), as amended by 1995 PA 213.

[13] MCL 168.495a(2), as amended by 1995 PA 213.

2008 Semi-Open Presidential Primary: Indication of Which Party Ballot Elector Wished to Vote	In 2007, the Legislature repealed the 1995 FOIA provision relating to the disclosure of public records required to be kept.[14] The Legislature then provided: "Except as otherwise provided in this section, the information acquired or in the possession of a public body indicating which participating political party ballot an elector selected at a presidential primary is confidential, exempt from disclosure under the freedom of information act . . . and shall not be disclosed to any person for any reason."[15] The exception to this restriction was the requirement that the Secretary "provide to the chairperson of each participating political party a file of the records for each participating political party described under subsection (3)."[16] This "subsection (3)" file contained the "printed name, address, and qualified voter file number of each elector and the participating political party ballot selected by that elector at the presidential primary."[17]

As noted, the changes to the election law that the Legislature adopted in 2007 for the 2008 presidential primary repealed the 1995 FOIA provision and substituted an exemption from disclosure for the information acquired or in the possession of a public body that indicated which participating political party ballot an elector selected at a presidential primary. However, after the 2008 primary, a federal court declared § 615c of 2007 PA 52 unconstitutional on equal protection grounds.[18] 2007 PA 52 contained a nonseverability clause.[19] Thus, 2007 PA 52 became null and void in its entirety.[20] And, accordingly, the repealer of the 1995 FOIA provision was also struck down. As the parties agree, following this federal court decision, Michigan election law, including the 1995 FOIA provision, reverted back to the position that it was in before the Legislature enacted 2007 PA 52. Thus, § 495a(1), as amended by 1995 PA 213, and § 495a(2), as amended by 1995 PA 213, came back into effect.

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[14] 2007 PA 52, enacting § 2.

[15] MCL 168.615c(4), as added by 2007 PA 52.

[16] MCL 168.615c(6), as added by 2007 PA 52.

[17] MCL 168.615c(3), as added by 2007 PA 52.

[18] *Green Party of Mich v Mich Secretary of State*, 541 F Supp 2d 912, 924 (ED Mich, 2008).

[19] 2007 PA 52, enacting § 1.

[20] See *John Spry Lumber Co v Sault Savings Bank Loan & Trust Co*, 77 Mich 199, 200-202; 43 NW 778 (1889).

D. PRACTICAL POLITICAL CONSULTING'S FOIA REQUEST AND THE SECRETARY'S DENIAL

On March 26, 2008, plaintiff, Practical Political Consulting, Inc., through Jon Hansen, faxed a handwritten request to officials of the Secretary's department requesting "a copy of all vote history of the 1/15/08 presidential primary including which ballots each voter selected (D or R)." Practical Political Consulting, again through Jon Hansen, then sent a confirming e-mail requesting "all voter history pertaining to that (the January 15, 2008 presidential primary) election including which ballot, D or R, each voter selected." Although the language of these two requests is somewhat different, the substance is essentially the same. Collectively, therefore, they constitute the March 26, 2008 FOIA request.

On April 17, 2008, the Secretary, through FOIA Coordinator Melissa Malerman, denied Practical Political Consulting's request. The Secretary set forth three grounds for this denial. First, she asserted that the "party preference information collected during the primary" was not a public record as defined by FOIA. Second, the Secretary asserted that the "party preference data" was exempt from disclosure under § 13(1)(a) of FOIA, the privacy exemption.[21] Third, the Secretary asserted that the "voter preference information" was exempt from disclosure under § 13(1)(d) of FOIA, the statutory exemption.[22]

Importantly, the Secretary then went on to offer the release of the names and addresses of those who voted in the January 15, 2008, primary. She stated:

> Although the nature of the Department's duties have changed as described above, and under the present circumstances the information you seek does not meet the defini-

[21] MCL 15.243(1)(a).

[22] MCL 15.243(1)(d).

> tion of a public record under the FOIA, the Department does have in its possession the names and addresses of those who voted on January 15, 2008. Despite the denial of your request, in the spirit of cooperation, the Department wishes to extend to you the opportunity to obtain this information. By extending this opportunity, the Department does not waive any legal positions that could be asserted in the event of litigation.

E. THE FOIA LITIGATION

Practical Political Consulting then brought suit against the Secretary, as allowed by FOIA.[23] The Secretary moved for summary disposition, but the trial court denied her motion and entered a judgment against her as well as granted a request for injunctive relief enjoining her from violating FOIA by "claiming that the records sought in this case are not public records, or claiming exemptions to the production of the records sought in this case under §13(1)(a) and/or § 13(1)(d) of the FOIA." However, the trial court granted the Secretary's request for a stay pending appeal. The Secretary then appealed, asserting that the "records requested by" Practical Political Consulting were exempt under § 13(1)(a) of FOIA, the privacy exemption, and § 13(1)(d) of FOIA, the statutory exemption. Significantly, the Secretary dropped her assertion that the records Practical Political Consulting requested were not public records.

II. THE STATUTORY EXEMPTIONS TO DISCLOSURE UNDER FOIA

A. STATUTORY PROVISIONS

Section 13(1)(d)[24] of FOIA sets out the "statutory exemption" to disclosure under FOIA as follows:

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[23] MCL 15.240(1)(b).

[24] MCL 15.243(1)(d).

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (d) Records or information specifically described and exempted from disclosure by statute.

The specific statutory exemption at issue here, the 1995 FOIA provision, is contained in amended § 495a of the Michigan Election Law relating to restrictions on disclosure.[25] As noted above, the 1995 FOIA provision contained two new subsections. The first, amended § 495a(1),[26] is backward looking in that it pertains to declarations of party preferences "as previously provided under this act . . . ." This subsection is therefore not at issue here.

The second subsection, amended § 495a(2), of the 1995 FOIA provision is, however, forward looking and directly relevant. This subsection states:

> Beginning on the effective date of the amendatory act that added this sentence [November 29, 1995], a person making a request under the freedom of information act . . . is not entitled to receive a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector. Beginning on the [same date], a clerk or any other person shall not release a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector.[27]

As noted above, 2007 PA 52 repealed the 1995 FOIA provision. But a federal court later found § 615c of 2007 PA 52 to be unconstitutional. Because 2007 PA 52

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[25] MCL 168.495a, as amended by 1995 PA 213.

[26] MCL 168.495a(1), as amended by 1995 PA 213.

[27] MCL 168.495a(2), as amended by 1995 PA 213 (citation omitted).

contained a nonseverability clause, the entire act, including the repealer, was null and void. Therefore, the 1995 FOIA provision, including amended § 495a(2), is now back in effect. Under that subsection, the question before us is twofold. First, was the March 26, 2008, FOIA request a request for a copy of an identifiable public record specifically described and exempted from disclosure under amended § 495a(2)? Second, even if the March 26, 2008, FOIA request was not a request for a copy of an identifiable public *record* specifically described and exempted from disclosure under amended § 495a(2), was the *information* in that public record specifically described and exempted from disclosure under amended § 495a(2)?

B. THE "SEPARATE RECORD" AND AMENDED § 495a(2)

Section 1(1) of FOIA[28] titles it the " 'freedom of information act,' " and it has been referred to in that fashion since its enactment. However, in at least some respects, it could more accurately be described as the "access to public records act." Indeed, § 3(1) of FOIA, its basic enabling section, states:

> Except as expressly provided in section 13, upon providing a public body's FOIA coordinator with a written request that describes a *public record* sufficiently to enable the public body to find the *public record*, a person has the right to inspect, copy, or receive copies of the requested *public record* of the public body.[29]

Here, the public records in question are the "separate record[s]" created under § 615c(3) of 2007 PA 52[30] for the 2008 presidential primary that contain the printed

[28] MCL 15.231(1).

[29] MCL 15.233(1) (emphasis added).

[30] MCL 168.615c(3), as added by 2007 PA 52.

name, address, and qualified voter file number of each elector and the participating political party ballot selected by that elector at the 2008 presidential primary. The Secretary apparently now concedes that these "separate record[s]" are public records and it is fairly clear, although Practical Political Consulting's request was informally worded and not overly precise, that these "separate record[s]" were also the public records that Practical Political Consulting sought in its March 26, 2008, FOIA request.

But it is also equally clear that these "separate record[s]" are *not* specifically described and exempted from disclosure under amended § 495a(2). That subsection refers to "voter registration record[s]." Presumably, these "voter registration record[s]" include "registration affidavits," along with considerable other information, declarations of party preference by electors[31] and, if applicable, "registration list[s]"[32] that also include, along with other information, declarations of party preference by electors.

The "voter registration record[s]" that amended § 495a(2) exempts from disclosure are completely distinct from the "separate record[s]" kept under § 615c(3) of 2007 PA 52. And there is simply no way of reasonably construing the statutory exemption from disclosure for "voter registration record[s]" under amended § 495a(2) as specifically describing and exempting the "separate record[s]" kept under § 615c(3) of 2007 PA 52. These "separate record[s]" are not "voter registration record[s]" at all. Rather, they are records of the participating political party ballots—along with the printed name, address, and qualified voter file number of each

[31] See MCL 168.495(1)(a) through (k), as amended by 1988 PA 275.

[32] See MCL 168.501a, as amended by 1987 PA 37.

elector—that electors selected at their polling places in order to vote in the 2008 presidential primary.

As such, these "separate record[s]" have nothing whatever to do with voter registration. Again, they are simply the names, addresses, and the qualified voter file number of electors voting in the 2008 presidential primary along with the participating political party ballot selected by such electors in that presidential primary. Because they are not "voter registration record[s]," they are not exempt from disclosure under amended § 495a(2).

C. THE "INFORMATION" KEPT UNDER § 615c(3) OF 2007 PA 52

There is, however, a more subtle point to be explored. Section 13(1)(d) of FOIA, the provision that contains the statutory exemption,[33] refers not only to *records* but also to *information*, and there is an "or" between these two words. Arguably, the *information* is a term to be interpreted separately and distinctly from the term *records*. Thus, it could be argued—and the dissent does argue—that amended § 495a(2)[34] of the 1995 FOIA provision prohibits the disclosure of all party preference *information* in the future.

Section 13(1)(d) of FOIA clearly refers not only to "[r]ecords" but also to "information." But the "information" kept under § 615c(3) of 2007 PA 52 is not an elector's "*declaration* of party preference" (or no preference). And it is *only* such *declarations* of party preference that amended § 495a(2)[35] exempts from disclosure. On its face, the only "information" kept under § 615c(3) of 2007 PA 52 is "information" regarding the

[33] MCL 15.243(1)(d).

[34] MCL 168.495a(2), as amended by 1995 PA 213.

[35] *Id*.

participating political party ballots—along with the printed name, address, and qualified voter file number of each elector—that electors selected in order to vote in the 2008 presidential primary. Such *selections* by electors are manifestly not *declarations* of party preference.

Perhaps the best way of illustrating this rather technical linguistic distinction is by example. Under the 1988-1995 closed presidential primary system, in order to vote in a presidential primary an elector had to *declare* a party preference (or that the elector had no party preference).[36] Thus, in effect, the elector was required to declare that he or she was a Democrat, a Republican, or a member of another party. Alternatively, the elector could declare no party preference. Only those electors who declared a party preference 30 days before the presidential primary election could vote for the candidates in any of the parties' respective presidential primaries. Thus, without a previous declaration, a Democrat, for example, could not vote in the Democratic Party's presidential primary. The declaration of party preference, therefore, had real meaning. It effectively excluded those persons who were unwilling to make such a declaration at least 30 days in advance from voting in their respective political parties' presidential primaries.

By contrast, the "information" kept under § 615c(3) of 2007 PA 52 is "information" regarding the participating political party ballots—along with the printed name, address, and qualified voter file number of each elector—that electors selected in order to vote in the 2008 presidential primary. Such "information" is not the "*declaration* of party preference" (or no party preference) that amended § 495a(2)[37] exempts from disclosure.

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[36] MCL 168.495(1)(k), as amended by 1988 PA 275.

[37] MCL 168.495a(2), as amended by 1995 PA 213.

To illustrate, again by way of example, in 2008, a Democrat, knowing that the Democratic Party candidates were choosing not to campaign in the presidential primary in Michigan, could have selected the ballot for and voted in the Republican Party's presidential primary. That Democrat was not making a "declaration" of party preference. Rather, he or she was simply choosing to vote in the Republican Party's 2008 presidential primary. This choice—a ticket to ride obtained at the polling place, good for that day only and not applicable to any other trains (in the form of future presidential primaries) that might leave the station—is not voter *registration* information and it certainly is not a *declaration* of party preference. Thus, amended § 495a(2)[38] does not exempt from disclosure the "information" regarding party preference contained in the "separate record[s]" kept under § 615c(3) of 2007 PA 52 because that information is not a "declaration of party preference" (or no preference). It follows, therefore, that § 13(1)(d) of FOIA does not apply to that "information," because no statutory exemption covers it.

The dissent concedes that the voter registration records protected under amended § 495a(2) are not the "exact same records" as the separate records kept under § 615c(3) of 2007 PA 52.[39] But the dissent contends that the information contained in these records is nevertheless the same.[40] This can be so only if a declaration by an elector of a party preference—30 days in advance of a presidential primary—is the same as a selection by an elector—on the day of the presidential primary—of a participating political party ballot on which that elector wishes to cast his or her vote. If we

[38] *Id.*

[39] *Post* at 479.

[40] *Post* at 479.

are to assume—and we do—that words have meaning, and if we are required to operate under the presumption—and we are certainly so required—that the Legislature chooses the words it uses both purposefully and precisely, then a declaration of a party preference under amended § 495a(2) is *not* the same as a selection of a ballot under § 615c(3) of 2007 PA 52.

The fact that eligibility to vote was "conditioned"[41] upon both a declaration of party preference, on the one hand, and the selection of a ballot, on the other, does not make the information collected under amended § 495a(2) and § 615c(3) of 2007 PA 52 the same, or even similar, information. The distinction in the terms that the Legislature used is one *with* a difference. Accordingly, the phrase "declaration of party preference" does *not* "plainly and unambiguously encompass[] an elector's selection of a party's ballot."[42] These are two separate and distinct acts and, the dissent to the contrary, the information relating to them is similarly separate and distinct.

III. THE PRIVACY EXEMPTION TO DISCLOSURE UNDER FOIA

A. STATUTORY PROVISIONS

Section 13(1)(a) of FOIA sets out the "privacy exemption" to disclosure under FOIA as follows:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
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> (a) Information of a personal nature if public disclosure of the information would constitute a *clearly unwarranted* invasion of an individual's privacy.[43]

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[41] *Post* at 479.

[42] *Post* at 480.

[43] MCL 15.243(1)(a) (emphasis added).

B. OVERVIEW

It is well at the outset to be clear about exactly what information is at issue here. First, the information at issue is *not* the names and addresses of the persons who voted in the 2008 presidential primary. As the Secretary concedes, she has released the names and addresses of registered voters in the past. And there is ample precedent, in a number of different contexts, for the release of names and addresses.[44]

Second, the information at issue is *not* simply the listing of the number of votes cast in any of the political parties' 2008 presidential primaries, with names and addresses redacted. Self-evidently, this information is available to any interested citizen who cares to inspect the publicly published results of the 2008 presidential primaries. Indeed, that same citizen could quickly learn how many votes were cast for each *candidate* of the respective parties in each of the 2008 presidential primaries by inspecting the same publicly available results.

Rather, it is the names and addresses of the persons who voted in the 2008 presidential primary *coupled with* the party preference that those persons indicated in order to obtain a ballot relating to one of the participating political parties. It is this information that the Secretary asserts is exempt from disclosure under the privacy exemption of FOIA.

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[44] See, for example, *Int'l Union, United Plant Guard Workers of America v Dep't of State Police*, 422 Mich 432; 373 NW2d 713 (1985) (list containing names and home addresses of individuals employed by private security guard agencies was not so personal and private that it should not be disclosed); *Tobin v Civil Serv Comm*, 416 Mich 661; 331 NW2d 184 (1982) (FOIA does not prohibit disclosure of names and addresses of classified civil service employees to public employee labor organizations); *Mich State Employees Ass'n v Dep't of Mgt & Budget*, 135 Mich App 248; 353 NW2d 496 (1984) (employees' home addresses do not fall under privacy exemption of FOIA).

We are to engage in a two-pronged inquiry to ascertain whether the privacy exemption is applicable. First, we must determine whether the information is " 'of a personal nature.' " Second, we must determine whether the "public disclosure of that information 'would constitute a clearly unwarranted invasion of an individual's privacy.' "[45]

In interpreting statutes, our goal is to ascertain the Legislature's intent.[46] And in so doing, our first step is to look at the language that the Legislature used.[47] This is so because "[t]he words of a statute provide 'the most reliable evidence of [the Legislature's] intent . . . .' "[48] But, here, the Secretary implies that we should go beyond the words of the statute and consider "a sampling of public outrage expressed during the 1992 closed presidential election." She then quotes at length from newspaper articles, editorials, and letters to the editor concerning the 1992 primary and suggests, without any supporting authority, that we can take judicial notice of these articles, editorials, and letters to the editors. We decline to do so. Our inquiry here is, and must be, limited to the words of the statute.

The dissent similarly relies on the deus ex machina of public outcry to underpin its analysis of the enactment of the 1995 FOIA provision.[49] The dissent states that, "A Senate Fiscal Agency bill analysis cited 'public outrage' as a reason for changing the primary election system

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[45] *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 675; 753 NW2d 28 (2008).

[46] *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004).

[47] *Id.* at 549.

[48] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981).

[49] See *post* at 468 n 1.

from a closed system to an open one."[50] The Legislature did no such thing. One legislative analyst reached that conclusion. That analyst's views reflected the analyst's own opinion, nothing more. Those views may not have been the views of a single legislator, much less of the entire Legislature at the moment it voted upon the legislation in question.[51]

Upon this highly suspect basis, the dissent piles a goodly number of imaginary horribles that it anticipates may occur if the Secretary releases the names and addresses of the persons who voted in the 2008 presidential primary coupled with the party preference that those persons ostensibly indicated. The dissent asserts that disclosure "could subject electors to unwanted or unwarranted attention from peers, colleagues, and neighbors and could result in serious discomfort amongst family members."[52] And, the dissent states, "[I]n some instances, disclosure could subject electors to harassment or ridicule from those same groups and could impact a person's professional career, especially if that person is employed in a political profession, such as a public officer or an employee of a nonprofit political organization."[53]

We can only emphasize that this is pure speculation, with not a speck of evidence—other than the alleged "public outcry" over disclosure of party declaration information taken whole cloth from a single legislative analysis by an unknown author—to support it.

Moreover, the future use of the information is irrelevant to determining whether the privacy exemption

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[50] *Post* at 468 n 1.

[51] *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587 n 7; 624 NW2d 180 (2001).

[52] *Post* at 484.

[53] *Post* at 484.

applies.[54] And, as the Michigan Supreme Court has recently proclaimed, only the circumstances known to the public body at the time of the request are relevant to whether an exemption precludes disclosure.[55] Because Practical Political Consulting did not reveal the purposes for its March 26, 2008, FOIA request, the Secretary could not have known those purposes at the time of her denial. And no matter what use Practical Political Consulting may make of the requested information—even if Practical Political Consulting intends to send unwanted mass mailings or a deluge of junk mail or make telephone solicitations or personal visits[56]—such future use is irrelevant.

We also note the dissent's reliance[57] on the "explicit" provision of 2007 PA 52 that exempts "information acquired or in the possession of a public body indicating which participating political party ballot an elector selected at a presidential primary" from disclosure under FOIA.[58] We agree that such an exemption from disclosure under FOIA existed in 2007 PA 52. But we note that 2007 PA 52 also contained an *explicit* nonseverability provision.[59] Therefore, while it is clear that the Legislature intended to exempt from disclosure information regarding which participating political party ballot an elector selected in the 2008 presidential primary, it is also clear that the Legislature intended that if any provision of 2007 PA 52 were to be found

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[54] *State Employees Ass'n v Dep't of Mgt & Budget*, 428 Mich 104, 121; 404 NW2d 606 (1987).

[55] *State News v Mich State Univ*, 481 Mich 692, 703; 753 NW2d 20 (2008).

[56] See *post* at 497-498.

[57] See *post* at 488.

[58] MCL 168.615c(4), as added by 2007 PA 52.

[59] 2007 PA 52, enacting § 1.

invalid, the remainder of the statute would likewise be "invalid, inoperable, and without effect."[60] And, of course, that is exactly what happened.

In essence, then, in 2007 PA 52, the Legislature created a structure that was whole and complete unto itself. But the Legislature also provided that if any component of that structure were to be removed, the entire edifice would crumble. Therefore, the exemption from disclosure under the FOIA provision of 2007 PA 52, like all other provisions of the statute, would fall of its own weight and would henceforth be "invalid, inoperable, and without effect." Under such circumstances, there can be no other conclusion but that the Legislature clearly intended that the situation would revert to the *status quo ante* and that amended § 495a(2)[61] would be once again of full force and effect. Thus, of necessity, we are left with the language of amended § 495a(2) as it existed *before* the Legislature enacted 2007 PA 52, with the language of the FOIA privacy exemption itself, and with the cases interpreting or relevant to that language. And that is where we should start our analysis and where we should end it.

C. INFORMATION OF A PERSONAL NATURE

Although the Secretary and the dissent discount its importance, the decision in *Ferency v Secretary of State*[62] is of direct relevance to whether the names and addresses of the persons who voted in the 2008 presidential primary coupled with the party preference that those persons indicated is information of a personal nature. In deciding a similar—although admittedly not exactly the same—question, this Court in *Ferency* stated:

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[60] *Id.*

[61] MCL 168.495a(2), as amended by 1995 PA 213.

[62] *Ferency v Secretary of State*, 190 Mich App 398; 476 NW 2d 417 (1991).

> This [the disclosure of party affiliation] does not violate the secrecy of the ballot, *because there is no legitimate interest by the voter to shield his affiliation from a party where that voter decides to participate in the party activities and where the ballot remains secret once the voter gets in the primary election booth*.[63]

It is helpful to break this quotation down in order to understand it fully. The disclosure of party affiliation in question was the declaration of party preference that, under the 1988-1995 closed primary system, an elector had to make 30 days in advance in order to vote in a party's presidential primary. As noted, in effect, the elector was then declaring that he or she was a Democrat, a Republican, or a member of another party.

By contrast, in 2008, an elector was not making a declaration of a party preference. Rather, that elector was simply indicating the ballot—Democratic, Republican, or a third party—that he or she wished to vote. Certainly, the indication of a ballot that an elector wished to vote in the 2008 presidential primary is information of a less personal nature than is a declaration of a party preference that an elector was required to make, if he or she wished to vote in a presidential primary, between 1988 and 1995.

It is possible to distinguish *Ferency* on the ground that it relates to information that was to be given to a political *party* rather than, as is the case here, information that is available to *the general public*. This is certainly relevant to the party's interest in conducting its presidential primaries. But we do not understand how a wider distribution to the general public, as would be the case here, as contrasted to a more limited distribution to the political parties, as was the case between 1988 and 1995, makes

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[63] *Id.* at 418 (emphasis added).

the information in question here any more personal in nature than it would otherwise be.

Last, and perhaps most fundamentally, the whole thrust of the sacrosanct concept of ballot secrecy[64] is to protect from disclosure the identity of the *candidates* for which an elector voted. This is, after all, why we vote in secret. But, the dissent to the contrary,[65] the disclosure of the *ballot*—Republican, Democratic, or other—that an elector voted in the 2008 presidential primary is obviously *not* the disclosure of the *candidate* for which that elector voted. As this Court said in *Ferency:*

> The requirement that a voter publicly register as being affiliated with one party or the other in order to be eligible to vote in the presidential primary does not itself directly affect the secrecy of the voter's ballot. That is, the voter is not required to disclose which individual candidate he is voting for, but is merely required to disclose from which group of candidates he is making his selection (i.e., which party primary he is voting in).[66]

We therefore conclude that the indication of a ballot that an elector wished to vote in the 2008 presidential primary is not information of a personal nature.

D. CLEARLY UNWARRANTED INVASION OF AN INDIVIDUAL'S PRIVACY

Even if the disclosure of information regarding the ballots that electors voted in the 2008 presidential

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[64] See Const 1963, art 2, § 4.

[65] See *post* at 483: "Disclosure would reveal that a person voted for particular types of candidates *and an inference could be drawn as to whom an individual voted for on the basis of the makeup of the ballot*." (Emphasis added). We fail to see how, for example, the disclosure that an individual selected the Republican ballot as the one on which he or she preferred to vote in the 2008 presidential primary would permit an inference that the individual voted for John McCain rather than Mitt Romney.

[66] *Ferency*, 190 Mich App at 414.

primary is the disclosure of personal information, this is not enough to exempt this information from disclosure. Such disclosure must also constitute a "clearly unwarranted" invasion of an individual's privacy.[67] This inquiry requires us to

> balance the public interest in disclosure against the interest [the Legislature] intended the exemption to protect[.] . . . [T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government.[68]

In Michigan, from 1988 to 1995, there was no restriction upon the release not only of electors' names and addresses but also upon their declarations of party preference. This disclosure of the names and addresses was a warranted invasion of personal privacy because that disclosure was necessary to inform the general public whether voters were properly registered and whether they were voting in the proper precinct. Disclosure of such information, if requested, was necessary to hold government accountable for the integrity and purity of this state's elections.

This is the core purpose of FOIA. That purpose is to provide the people of this state with full and complete information regarding the government's affairs and the official actions of governmental officials and employees.[69] As this Court said in *State News v Mich State Univ*:[70]

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[67] MCL 15.243(1)(a); *Mich Federation of Teachers*, 481 Mich at 675.

[68] *Mich Federation of Teachers*, 481 Mich at 673 (quotation marks and citations omitted).

[69] MCL 15.231(2); *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 204; 725 NW2d 84 (2006).

[70] *State News v Mich State Univ*, 274 Mich App 558, 567-568; 735 NW2d 649 (2007), rev'd in part on other grounds 481 Mich 692 (2008).

> Central to both the broad policy and the implementing mechanisms of FOIA is the concept of accountability. FOIA, through its disclosure provisions, allows the citizens of Michigan to hold public officials accountable for the decisions that those officials make on their behalf. By shifting the balance away from restricted access to open access in all but a limited number of instances, the Legislature necessarily determined that, except in those limited instances, disclosure facilitates the process of governing because it incorporates the concept of accountability.

The Secretary clearly recognizes the concept of accountability. But she turns away from that concept when she argues that, assuming the public has an interest in knowing how public officials performed their tasks associated with the 2008 presidential primary, "the linking of party preference information with voter name, address, and qualified voter number, does nothing to inform the public about how local clerks of the Secretary . . . are performing their statutory and public duties with regard to elections." To the contrary, we conclude that disclosure of such information *would* inform the public to what extent the Secretary and the various local clerks carried out the requirements of 2007 PA 52. Indeed, there is no other way by which these individuals can be held accountable for their implementation of a then-valid statute. And, we emphasize, there is no doubt that the public has a strong and ongoing interest in knowing how public officials perform the tasks that the law assigns to them.

Thus, there is a strong—not a "virtually nonexistent"[71]—public interest in disclosure. And, conversely, in order to avoid disclosure, a party must show a "clearly unwarranted" invasion of an individual's

[71] *Post* at 497.

privacy.[72] In a manner of speaking, the Legislature when enacting, and courts when interpreting, the privacy exemption of FOIA have weighted the scales heavily in favor of disclosure: the balance to be struck is between the public's ongoing interest in governmental accountability, on the one hand, and *clearly unwarranted* invasions of privacy on the other. Under this exemption, the scales are not balanced equally at the outset, and for good reason. In all but a limited number of circumstances, the public's interest in governmental accountability prevails over an individual's, or a group of individuals', expectation of privacy. As Louis D. Brandeis stated so many years ago, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[73]

And, we emphasize, if there ever was an area in which that disinfectant is the most needed, it is in the conducting of elections. Elections constitute the bedrock of democracy and the public's interest in the purity of such elections is of paramount importance. If we cannot hold our election officials accountable for the way in which they conduct our elections, then we risk the franchise itself. And we cannot hold our election officials accountable if we do not have the information upon which to evaluate their actions. We therefore conclude that, even if the indication of a ballot that an elector wished to vote in the 2008 presidential primary were to be viewed as being of a personal nature, its disclosure would not be a clearly unwarranted invasion of that elector's privacy.

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[72] MCL 15.243(1)(a); *Mich Federation of Teachers*, 481 Mich at 675.

[73] Brandeis, *Other People's Money—and How the Bankers Use It* 92 (Fredericks A. Stokes Co, 1914).

IV. CONCLUSION

FOIA is a pro disclosure statute that we are to interpret broadly to allow public access. Conversely, we are to interpret its exemptions narrowly so that we do not undermine its disclosure provisions.[74] Simply put, the core purpose of FOIA is disclosure of public records in order to ensure the accountability of public officials.[75] Here, there is no question that the "separate record[s]" created under § 615c(3) of 2007 PA 52[76] for the 2008 presidential primary that contain the printed name, address, and qualified voter file number of each elector and the participating political party ballot selected by that elector at the 2008 presidential primary are public records. And there is no question that these "separate record[s]" were also the public records that Practical Political Consulting sought in its March 26, 2008, FOIA request.

As we have outlined above, these "separate record[s]" are *not* specifically described and exempted from disclosure under amended § 495a(2). The "voter registration record[s]" that amended § 495a(2) exempts from disclosure are completely distinct from the "separate record[s]" kept under § 615c(3) of 2007 PA 52. Further, "information" kept under § 615c(3) of 2007 PA 52 is not an elector's "declaration of party preference" (or no preference). And it is *only* such *declarations* of party preference that amended § 495a(2) exempts from disclosure. With this in mind, we conclude that the statutory exemption from disclosure under FOIA applies neither to these "separate record[s]," nor to the information contained therein.

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[74] *State News*, 274 Mich App at 567.

[75] *Id.*

[76] MCL 168.615c(3), as added by 2007 PA 52.

Moreover, the disclosure of information regarding the ballots that electors voted in the 2008 presidential primary is not the disclosure of personal information. But even if it were, such disclosure would not constitute a "clearly unwarranted" invasion of an individual's privacy. Thus, we conclude that the privacy exemption from disclosure under FOIA also does not apply to these "separate record[s]" or to the information contained in them.

Affirmed. No costs, a public question being involved.

BORRELLO, P.J., concurred.

K. F. KELLY, J. (*dissenting*). I respectfully dissent from my distinguished colleagues' conclusion that the requested records are not exempt from disclosure under the statutory and privacy exemptions of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. In my view, the information collected during the 2008 presidential primary is information protected by statute and its disclosure would constitute a "clearly unwarranted invasion" of an individual's privacy, and thus is exempt from disclosure under the FOIA.

I. HISTORICAL BACKGROUND AND PROCEDURAL HISTORY

Michigan's election law governs the selection of public officials to public office and is meant to ensure the purity and integrity of elections. 1954 PA 116, enacting MCL 168.1 *et seq*.; *Taylor v Currie*, 277 Mich App 85, 96; 743 NW2d 571 (2007). A particular set of rules applies to presidential primary elections, by which voters of political parties determine which nominees will run in the general presidential election. See *O'Hara v Wayne Co Clerk*, 238 Mich App 611, 614-615; 607 NW2d 380 (1999). The presidential primary election rules control

the selection of nominees for each party, the choice of delegates, and voting requirements for individuals voting in the primary. Michigan Department of State, Bureau of Elections, *Michigan Presidential Primary Facts & Statistics* (October 16, 2006). Historically, Michigan has employed either a "closed" or an "open" primary election system; generally, the former system requires voters to disclose their political party preference before they are eligible to vote in the election, while the latter allows electors to vote in the primary without disclosing any party preference beforehand. Because an overview of Michigan's primary election system informs my viewpoint, I briefly discuss the relevant history below.

A. MICHIGAN'S 1988 PRIMARY ELECTION LAW

In 1988, Michigan used a closed primary system. MCL 168.495(1)(k), as amended by 1988 PA 275 (1988 election law). In order to vote in the primary, individuals were required to declare their party preference on their registration record at least 30 days before the primary. MCL 168.523(3), as amended by 1988 PA 275. An individual who properly declared himself or herself as a Republican, for example, would be eligible to vote only for Republican candidates, as well as nonpartisan candidates. The converse would be true for a Democrat. Voters who did not declare a preference were not eligible to vote in the presidential primaries. For voters who did submit a declaration, the information regarding the voters' party preference was captured, recorded, and maintained on their registration files with the Secretary of State. MCL 168.495a, as added by 1988 PA 275. The 1988 election law did not address whether this information, including voters' identifying information and party preference infor-

mation, was disclosable to the general public or whether this information could be deleted from a voter's file.

B. MICHIGAN'S PRIMARY ELECTION LAW BETWEEN 1995 AND 2003

The requirement that voters declare a political preference, and the lack of protection as to that information, caused a public outcry.[1] In response to the public's concern over the privacy of their political preferences, the Legislature amended the election law to require open primaries. MCL 168.495, as amended by 1995 PA 87. Under this system, it was no longer necessary for electors to disclose their party preferences in order to vote in the primary. Rather, voters arriving at the polls on the day of the primary election were given access to both parties' ballots. The voter would then, in the privacy of the election booth, select the party primary in which he or she wanted to

[1] A Senate Fiscal Agency bill analysis cited "public outrage" as a reason for changing the primary election system from a closed system to an open one. Specifically, it reasoned:

> It has become clear that while some voters will register their party preference before voting, many feel that it is an intrusion on their right to a secret ballot, and simply will not divulge that information in order to be allowed to vote. . . . While [changes to party rules allowing undeclared voters to vote] made it less likely that a registered voter would be turned away at the polls, the fact remained that an examination of voting records would reveal [the] party's primary in which the person voted. What the voters of Michigan want is a return to the time-honored tradition of the secret ballot. The bill, by re-establishing an open primary, would fulfill that desire. [Senate Fiscal Agency Bill Analysis, HB 4435, May 30, 1995.]

While legislative history is not relevant in construing the meaning of a statute, amendments to legislation *are* relevant in the context of the FOIA's privacy exemption. When FOIA exemptions are at issue, Legislative enactments may be considered as some evidence of the community's mores and values. See *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 677 n 59; 753 NW2d 28 (2008) (noting recent legislative changes as indicative of a community's customs).

participate. The ballot the voter selected was not recorded by voting officials and no reference whatsoever to a voter's selection was created, or maintained, in a voter's registration file. Nonetheless, for voters who previously voted in a closed primary, their prior political declarations remained on file as a public record.

Also in 1995, the Legislature further amended the election law to provide that voters' declarations of party preferences are not disclosable through the FOIA. MCL 168.495a, as amended by 1995 PA 213 (the 1995 FOIA provision). Specifically, that provision provided:

> (1) If an elector declared a party preference or no party preference as previously provided under this act for the purpose of voting in a statewide presidential primary election, a clerk or authorized assistant to the clerk may remove that declaration from the precinct registration file and the master registration file of that elector and the precinct registration list, if applicable.
>
> (2) Beginning on [November 29, 1995], a person making a request under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws, is not entitled to receive a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector. Beginning on the effective date of the amendatory act that added this sentence, a clerk or any other person shall not release a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector. [MCL 168.495a, as amended by 1995 PA 213.]

In other words, as of 1995, Michigan employed an open primary system that did not require a declaration of, and did not record, electors' political preferences, and which also prohibited the disclosure through the FOIA of voter registration records containing any such political preference. Between 1995 and 2007, a number of

additional amendments were made to Michigan's presidential primary election law, the last in 2003, but none of these affected the election system's status as an open primary system that prohibited disclosure of voter registration records containing political preferences. See 1999 PA 72; 2003 PA 13.

C. MICHIGAN'S 2007 PRIMARY ELECTION LAW

Before the 2008 presidential primary, the Legislature again amended Michigan's election law to employ a semi-closed primary process. See MCL 168.615c, as added by 2007 PA 52 (2007 election statute). Under this new amendatory act,[2] there was no requirement that a voter declare a party preference 30 days ahead of time in order to vote in the presidential primary. Rather, voters arriving at the polls were required to indicate in writing on a form provided by the Secretary of State's office which ballot they preferred, Democratic or Republican. MCL 168.615c(1). When the voter selected his or her ballot, city or township clerks were required to capture this information in a separate record, which contained the printed name, address, qualified voter file number of each voter, and the political party ballot the voter had selected. MCL 168.615c(3).

Significantly, the 2007 election statute also included a nonseverability clause. 2007 PA 52, enacting § 1. That provision provided:

> If any portion of this amendatory act or the application of this amendatory act to any person or circumstances is found invalid by a court, it is the intent of the legislature that the provisions of this amendatory act are nonseverable and that the remainder of the amendatory act shall be invalid, inoperable, and without effect.

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[2] The 2007 election law amended seven provisions of the existing election law, added three new sections, and contained two enactments.

In addition, the 2007 election statute repealed certain sections of Michigan's election law, including the 1995 FOIA provision, MCL 168.495a. 2007 PA 52, enacting § 2 (the repealer). In its place, the 2007 election law provided its own FOIA provision, which provided:

> Except as otherwise provided in this section, the information acquired or in the possession of a pubic body indicating which participating political party ballot an elector selected at a presidential primary is confidential, exempt from disclosure under the [FOIA], and shall not be disclosed to any person for any reason. [MCL 168.615c(4), as added by 2007 PA 52.]

The 2007 election statute went into effect on September 4, 2007.

D. THE 2008 PRESIDENTIAL PRIMARY

The 2008 primary election was carried out according to the 2007 election statute. However, shortly after the 2008 primary, a federal district court declared § 615c of the 2007 election statute unconstitutional as a violation of the United States Constitution's Equal Protection Clause in *Green Party of Mich v Mich Secretary of State*, 541 F Supp 2d 912, 924 (ED Mich, 2008). Accordingly, because of the 2007 election law's non-severability clause, the entire amendatory act fell together and it became null and void. See, e.g., *John Spry Lumber Co v Sault Savings Bank Loan & Trust Co*, 77 Mich 199, 200-202; 43 NW 778 (1889) (concluding that all provisions of a nonseverable unconstitutional statute fall together, leaving the prior law intact); *M & S Builders v Dearborn*, 344 Mich 17, 19-20; 73 NW2d 283 (1955) (finding that a repeal became invalid with the rest of an amendment that was declared invalid, thus reviving the prior law). Thus, the repealer was struck down, as was the 2007 election law's FOIA

provision. As a result, and as the parties agree, Michigan's prior election law, as it stood in 2003, applies to this matter.

E. PLAINTIFF'S FOIA REQUEST

On March 26, 2008, the same day the federal court announced its decision, plaintiff, Practical Political Consulting, Inc., submitted a FOIA request to defendants. Specifically, plaintiff requested "all voter history [of the 2008 presidential primary election] including which ballot, [Democratic or Republican], each voter selected." This information was the information collected pursuant to the 2007 election statute.

On April 17, 2008, defendants denied the FOIA request, reasoning that the requested documents were not public records and were exempt from disclosure under the statutory exemption of the FOIA, MCL 15.243(1)(d), which provides:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (d) Records or information specifically described and exempted from disclosure by statute.

Defendants also reasoned that the party preference information was exempt under the FOIA's privacy exemption, which states:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. [MCL 15.243(1)(a).]

More specifically, defendants posited that the information was protected from disclosure under either the 2007 election statute's FOIA provision or its predecessor provision, the 1995 FOIA provision, MCL 168.495a; and, further, that the records contained information of a personal nature, the disclosure of which would not provide meaningful insight into the workings of the government, and would be a clearly unwarranted invasion of individuals' privacy.

As a result of defendants' denial, plaintiff sought a judgment in the trial court declaring defendants to be in violation of the FOIA. On the parties' cross-motions for summary disposition, the trial court ruled in plaintiff's favor. It found that the records created were public records and that neither exemption applied.

Defendants appeal as of right, asserting that the records, and the information contained therein, are exempt under the FOIA.[3] Disclosure of the requested records was stayed pending the outcome of this appeal.

II. STANDARDS OF REVIEW

Whether a public record is exempt from disclosure pursuant to the FOIA is a question of law reviewed de novo. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006). In addition, review of the trial court's decision on the parties' motions for summary disposition is also de novo.[4] *Campbell v Dep't of Human Servs*, 286 Mich App

[3] On appeal, defendants no longer contend that the records are not "public records."

[4] Because the trial court considered information outside the pleadings, I consider the court's decision to be based on MCR 2.116(C)(10). A motion under this subrule is properly granted if there is no genuine issue of material fact and judgment is proper as a matter of law. *Farm Bureau Ins Co v Abalos*, 277 Mich App 41, 43-44; 742 NW2d 624 (2007).

230, 234-235; 780 NW2d 586 (2009). Further, to the extent that this Court must engage in statutory construction, review is, again, de novo. *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 664; 753 NW2d 28 (2008). The goal in interpreting a statute is to ascertain the Legislature's intent. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). The first step in doing so is looking to the language used. *Id*. at 549. Effect must be given to each word, reading provisions as a whole, and in the context of the entire statute. *Green v Ziegelman*, 282 Mich App 292, 301-302; 767 NW2d 660 (2009). If the language is clear and unambiguous, the statute must be applied as written. *Beattie v Mickalich*, 284 Mich App 564, 570; 773 NW2d 748 (2009). In such instances, judicial construction is neither necessary nor permitted. *Id*. Further, because the FOIA is a prodisclosure statute, "its disclosure provisions [are interpreted] broadly to allow public access, and . . . its exceptions [are interpreted] narrowly so that . . . its disclosure provisions [are not undermined]." *State News v Mich State Univ*, 274 Mich App 558, 567; 735 NW2d 649 (2007) (*State News I*), rev'd in part on other grounds 481 Mich 692 (2008).

III. THE FOIA

The purpose of Michigan's FOIA statute is to provide the people of Michigan full and complete information regarding the government's affairs and the official actions of governmental officials and employees. MCL 15.231(2); *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 204; 725 NW2d 84 (2006). Disclosure of this information is designed to promote governmental accountability and is imperative to a democracy; full disclosure of governmental activity informs the citizenry so that they may fully participate in the democratic process. See MCL 15.231(2);

State News I, *supra* at 567-568. Stated differently, the FOIA functions to allow the citizenry to hold public officials accountable for the decisions they make on behalf of those citizens. See, e.g., *Detroit Free Press, Inc v City of Warren*, 250 Mich App 164, 168-169; 645 NW2d 71 (2002) ("Under . . . FOIA, citizens are entitled to obtain information regarding the manner in which public employees are fulfilling their public responsibilities."); *Manning v East Tawas*, 234 Mich App 244, 248; 593 NW2d 649 (1999) (noting that the FOIA is a manifestation of the state's public policy recognizing the need that public officials be held accountable for their official actions and citizens be informed); *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002) (explaining that the FOIA was enacted "recognizing the need for citizens to be informed so that they may fully participate in the democratic process and thereby hold public officials accountable for the manner in which they discharge their duties"). Accordingly, Michigan's FOIA statute requires a public body to disclose public records to individuals who request to inspect, copy, or receive copies of its public records. MCL 15.233; *Scharret v City of Berkley*, 249 Mich App 405, 411-412; 642 NW2d 685 (2002).

However, certain public records need not be disclosed if they are exempt from disclosure under one of the exemptions articulated in MCL 15.243. If the requested public records fall within one of these exceptions, it is within the public body's discretion whether to release the information. *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 293; 565 NW2d 650 (1997). In determining whether an exemption applies, the identity of the requester is irrelevant, as is the initial and the future use of the information. *State Employees Ass'n v Dep't of Mgt & Budget*, 428 Mich 104, 121; 404 NW2d 606 (1987) (opinion by CAVANAGH, J.). Moreover, only the circumstances known to the public body at the time of

the request are relevant to whether an exemption precludes disclosure. *State News v Mich State Univ*, 481 Mich 692, 703; 753 NW2d 20 (2008) (*State News II*). Further, because the FOIA's core purpose is the disclosure of public records, the courts of this state have narrowly construed the FOIA's exemptions in favor of disclosure. *State News I*, *supra* at 567.

IV. MCL 15.243(1)(d): THE FOIA'S STATUTORY EXEMPTION

On appeal, defendants first argue that the trial court erred by determining that the information collected at the 2008 primary election was not exempt from disclosure under the FOIA's statutory exemption. I would agree.

The FOIA's statutory exemption provides:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (d) Records *or information specifically described* and exempted from disclosure by statute. [MCL 15.243(1)(d) (emphasis added).]

By its terms, this exemption incorporates statutes that specifically exempt certain records or information from disclosure through the FOIA. Accordingly, there must be a statute specifically exempting the "[r]ecords or information specifically described" in order for this exemption to apply. Significantly, the provision uses the conjunction "or" between the words "[r]ecords" and "information." The term "or" is to be interpreted literally unless it renders a statute dubious; the word "or" denotes a choice or alternative. *Random House Webster's College Dictionary* (1997); see *Amerisure Ins Co v Plumb*, 282 Mich App 417, 429; 766 NW2d 878

(2009). Thus, a statute may specifically describe records that are exempt from disclosure or may specifically describe information that is exempt from disclosure. The term "record" means information preserved in writing or some other documentary medium, whereas "information" denotes knowledge communicated or received. *Random House Webster's College Dictionary* (1997). Accordingly, the FOIA's statutory exemption, MCL 15.243(1)(d), protects from disclosure records that are specifically described by statute *or* information that is specifically described by statute.

Here, the relevant statutory provision, the 1995 FOIA provision, states:

> (1) If an elector declared a party preference or no party preference *as previously provided under this act* for the purpose of voting in a statewide presidential primary election, a clerk or authorized assistant to the clerk may remove that declaration from the precinct registration file and the master registration file of that elector and the precinct registration list, if applicable.
>
> (2) *Beginning on [November 29, 1995]*, a person making a request under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws, is not entitled to receive a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector. Beginning on the effective date of the amendatory act that added this sentence, a clerk or any other person shall not release a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector. [MCL 168.495a, as amended by 1995 PA 213 (emphasis added).]

It is plaintiff's contention that when these subsections are read together, subsection (2) only applies to voter registration records created before the 1995 FOIA provision. I disagree. Subsection (1) of this provision

permits a clerk or other authorized person to remove, in his or her discretion, "a party preference or no party preference *as previously provided under this act* for the purpose of voting in a statewide presidential primary election . . . ." This subsection specifically references removal of party preference information that was previously captured and recorded pursuant to previous versions of the election law.

Comparatively, subsection (2) prohibits disclosure through the FOIA of "a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector" from November 29, 1995, on and forward. Importantly, subsection (2), unlike subsection (1), makes no reference whatsoever to whether the party preference information was collected under the previous election law; it merely forbids disclosure of "a copy of a portion of a voter registration record that contains a declaration of party preference," effective November 29, 1995. The phrase "as previously provided under this act," or other limiting language on how party preference information was obtained, is specifically absent from subsection (2).

Given the plain language of these two provisions, it is my view that the Legislature intended to accomplish two things through the 1995 FOIA provision. First, under subsection (1), it permits the removal of all party preference information previously captured. Clearly, this position does not diverge from the majority's view on this point. Second, it prohibits the disclosure of party preference information in the future. The Legislature did not intend to limit subsection (2)'s terms to political preference information collected under the prior law because the Legislature explicitly chose not to use the phrase "as previously provided under this act," or other similar limiting language. Cf. *Houghton Lake Area*

Tourism & Convention Bureau v Wood, 255 Mich App 127, 151; 662 NW2d 758 (2003) (explaining doctrine of *expressio unius est exclusio alterius*). Thus, contrary to plaintiff's argument, the protection from disclosure provided by subsection (2) applies to all portions of voter registration records containing a party declaration, including those records created in the future. It is in the application of this provision to the present matter that my viewpoint diverges from the majority's opinion.

The majority agrees with plaintiff that § 495a(2) does not apply to the records created in the 2008 primary because neither the records nor the information specifically described is the same as that protected by the 1995 FOIA provision, § 495a(2). While it may be true that the "voter registration record[s]" protected by § 495a(2) are not the exact same records in form that are specifically described, the substance, or the information specifically described by § 495a(2) and contained in those records, is the same.

Section 495a(2), the 1995 FOIA provision, specifically protects from disclosure through the FOIA an elector's "declaration of party preference . . . ." A "declaration" is a "proclamation," an "announcement," or an "act of declaring" something. *Random House Webster's College Dictionary* (1997). "Preference" is defined as "something preferred [or given priority]; choice; [or] selection." *Random House Webster's College Dictionary* (1997). Clearly, an elector arriving at the polls for the 2008 primary had to proclaim which party he or she preferred to vote for in order to vote, just as voters who voted in previous closed primaries had to declare which party they wished to vote for in order to vote. In both instances, eligibility to vote was conditioned upon a party preference declaration. In my view, this information is specifically described and protected by the 1995 FOIA provision, § 495a(2).

The majority, however, like plaintiff, attempts to draw a distinction between a voter's "declaration of party preference" in the closed primaries and a voter's selection of a party ballot in the semi-closed primary of 2008, to conclude that the information described is not protected by the 1995 FOIA provision, § 495a(2). Stated more succinctly, the majority posits that the selection of a party ballot is not synonymous with a declaration of party preference. This is an exercise in semantics and, in my view, the "distinction" created is one without a difference. Whether the information was collected during the closed primaries of 1988-1995 or during the 2008 primary election is immaterial. In each instance, the information captured, although collected by a different procedure, is the same: an elector wishing to vote in the primary was required to "proclaim" the party's primary he or she "preferred" to vote in. In both instances, voters made a "declaration" of party preference. Further, I would point out that the Legislature deliberately chose to use the phrase "declaration of party preference" without any conditional limiting language, such as "declaration of party preference made 30 days before the primary election." The majority's reading of the 1995 FOIA provision, § 495a(2), equates its language with the latter. In my view, such a reading is inapposite to our judicial role. The Legislature chose to use the broad phrase, "declaration of party preference," which plainly and unambiguously encompasses an elector's selection of a party's ballot. Accordingly, I would conclude that the requested information is protected from disclosure by MCL 168.495a(2), as amended by 1995 PA 213, and is therefore exempt under the FOIA's statutory exemption. MCL 15.243(1)(d).

V. MCL 15.243(1)(a): THE FOIA'S PRIVACY EXEMPTION

I would also conclude, contrary to the majority's position, that the requested records are exempt under the FOIA's privacy provision. That exemption excludes from disclosure public records that would result in an unwarranted invasion of an individual's privacy. MCL 15.243(1)(a) states:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

In *Mich Federation of Teachers*, *supra* at 675, the Michigan Supreme Court articulated the applicable test under this provision as a two-pronged inquiry. To satisfy the test, (1) the information must be "of a personal nature" and (2) "it must be the case that the public disclosure of that information would constitute a clearly unwarranted invasion of an individual's privacy." *Id*. (quotation marks omitted).

Before engaging in this analysis, I note that this notion of the right to privacy embodied by MCL 15.243(1)(a) is not defined by the Legislature. In recognition of the nebulous nature of that term,[5] our Supreme Court has indicated that the courts of this state may "look to the common law and constitutional law to guide [them] in determining whether disclosure of the

[5] Indeed, after over a century since Samuel D. Warren and future Supreme Court Justice Louis D. Brandeis recognized the individual's common-law claim to a right of privacy, see Warren & Brandeis, *The right to privacy*, 4 Harv L R 193 (1890), the concept remains problematic and unwieldy. The concept is often equated with personal autonomy, e.g., the right to be free from unwarranted searches and seizures and the right to reproductive freedom, and courts have struggled to define its contours with exactness.

requested information would violate any privacy rights under the FOIA." *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 547; 475 NW2d 304 (1991); see also *Bradley*, *supra* at 294. In doing so, "[t]he contours and limits [of privacy under MCL 15.243(1)(a)] are . . . to be determined by the court, as the trier of fact, on a case-by-case basis in the tradition of the common law." *State Employees Ass'n*, *supra* at 123 (opinion by CAVANAGH, J.). Further, in applying this provision, the courts of this state have looked to federal law for guidance. *Mager v Dep't of State Police*, 460 Mich 134, 144; 595 NW2d 142 (1999).[6] Thus, in my view, the test articulated in *Mich Federation of Teachers* must be applied to the facts of the present matter consistently with these overarching principles.

A. PERSONAL NATURE

As already stated, the first prong of the test is satisfied if the requested information is of a "personal nature." Information is of a personal nature if it is "intimate, embarrassing, private, or confidential . . . ." *Mich Federation of Teachers*, *supra* at 676 (emphasis omitted). The inquiry must be guided by, and evaluated in light of, "the customs, mores, or ordinary views of the community . . . ." *Herald Co v Bay City*, 463 Mich 111, 123-124; 614 NW2d 873 (2000) (quotation marks and citations omitted). In

[6] The federal FOIA privacy exemption is worded differently than Michigan's sister provision. It states that the federal FOIA does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 USC 552(b)(6). The only significant distinction between the federal statute and the Michigan statute, is the federal provision's use of the terms, "personnel and medical files and similar files." The Michigan statute simply uses the phrase "personal nature." Despite this difference, the second part of the analysis requiring a balancing of the public's interest against individuals' privacy interests is largely the same.

considering the information in this context, it is important to recognize that simply because the information may be disclosed in one public sphere, does not necessarily mean that the information is not of a personal nature. *Mich Federation of Teachers*, *supra* at 680. Moreover, an individual's ability to control the dissemination of the information, for example, by choosing to withhold it from disclosure despite the fact that it may be available elsewhere, is indicative of whether the information is of a personal nature. *Id*.

Oddly, in determining whether the subject information is of a personal nature, the majority ignores this well-established jurisprudence and relies entirely on the language of the 1995 FOIA provision, § 495a(2), and a single case interpreting that provision in an unrelated context. I cannot make sense of, let alone agree with, such a myopic application of the law. In any event, an application of these well-established rules dictates the conclusion that the information is of a personal nature. Specifically, the information requested implicates two separate privacy interests—an individual's privacy interest in his or her political convictions and an individual's privacy interest in his or her personal identifying information—each of which is discussed separately.

i. PRIVACY INTEREST IN POLITICAL CONVICTIONS

Here, the party preference information, if disclosed, would reveal to the general public that an individual voted on a strictly Republican, or strictly Democratic, ballot in the 2008 presidential primary election. Disclosure would reveal that a person voted for particular types of candidates and an inference could be drawn as to whom an individual voted for on the basis of the makeup of the ballot. It is not difficult to see why an elector might consider this information "intimate, . . .

private, or confidential" and would want to keep this information confidential. Envision a situation, for example, where an elector votes inconsistently with his or her normal political preference.[7] Obviously, some voters would not wish to disclose this fact to third parties. In such instances, public disclosure of party preference information could subject electors to unwanted or unwarranted attention from peers, colleagues, and neighbors and could result in serious discomfort amongst family members. Many electors would undoubtedly avoid disclosing which primary they voted in to avoid these same unpleasant ramifications.[8] Further, in some instances, disclosure could subject electors to harassment or ridicule from those same groups and could impact a person's professional career, especially if that person is employed in a political profession, such as a public officer or an employee of a nonprofit political organization. It is not difficult to imagine that some

[7] Electors cross political boundaries for any number of reasons, not limited to: voting for a friend, voting for a preferred candidate, or voting for a weak rival candidate.

[8] I note in passing that the release of this information could also have a chilling effect on some voters' decisions to cross political boundaries and vote for a candidate not associated with the voters' typical political party choices. This is precisely because the release of the information would tend to erode the protections guaranteed by the right to a secret ballot in all elections. Const 1963, art 2, § 4; *Belcher v Ann Arbor Mayor*, 402 Mich 132, 134; 262 NW2d 1 (1978). Electors' votes would no longer be fully cloaked by the shroud of secrecy. A voter's ability to vote his or her conscience without fear of reprisal or retaliation is imperative to a well-functioning democracy. *McIntyre v Ohio Elections Comm*, 514 US 334, 343; 115 S Ct 1511; 131 L Ed 2d 426 (1995). Disclosure of the records in this case would denigrate the protections that the right to a secret ballot is meant to protect and could subject voters to reprisal. As Chief Justice Burger recognized in *Buckley v Valeo*, 424 US 1, 237; 96 S Ct 612; 46 L Ed 2d 659 (1976) (Burger, C.J., concurring in part and dissenting in part), the advent of the secret ballot as a universal practice was one of our nation's greatest political reforms, because privacy with regard to one's political preference is fundamental to a free society.

individuals may interpret a particular elector's vote as a personal affront or a betrayal.

Having listed these possible ramifications as reasons why a person may consider their political preference to be private, I must object to the majority's accusation that such concerns are based on pure speculation, are "imaginary horribles," and are invented out of "whole cloth." First, these concerns are based on plain and simple common sense. It is not surprising, given this nation's political history, that politics, political speech, and support for or opposition to a particular candidate can create arguments and result in heated debates. The majority's refusal to recognize these commonsense concerns and the historical and social context in which a FOIA privacy analysis must be undertaken is baffling.

Second, the newspaper articles, editorials, and letters to the editor referred to in defendants' reply brief on appeal reinforce my position. These articles show that a great deal of discussion was generated regarding the revealing of electors' political preferences during the 1992 presidential primary election. A sampling of these articles include:

> • Simon, *State primary law an invasion of political privacy*, Detroit News (March 24, 1992) ("The ACLU offices were besieged on primary day with calls from voters complaining about . . . having their political party affiliation made a permanent and publicly accessible part of their voting record.").
>
> • Roelofs and Brandt, *Closed primary shaping up to get a vote of no confidence*, Grand Rapids Press (November 18, 1991) (citing opinions of constituents complaining that closed primary system constituted an "infringement of my privacy").
>
> • *Keep it open primary preference a private decision*, Lansing State Journal (January 12, 1992) (characterizing system as "traumatic" because it requires a declaration of

party preference "for all the world—most particularly friends, neighbors, and political hacks—to hawk and herald").

• Mitzelfeld, *Requirement to list party angers, turns away voters*, Detroit News (March 18, 1992) ("Voters were so angry Tuesday over Michigan's new party declaration requirement that many stormed out of polling places and refused to cast ballots.").

• Weeks, *March 17 primary turns off voters who don't want to find their names on either party's list*, Detroit News (January 23, 1992) ("State law has the outrageous requirement that the declaration be made 30 days before the election.").

• Waldmeir, *Unless something's done soon, state's closed primary could be the most embarrassing ever*, Detroit News (February 9, 1992) ("Voters are rebelling at being forced to announce to the world—30 days before an election, yet—exactly where they stand . . . .").

While it would not be appropriate for this Court to take judicial notice of these articles for the *truth* of the matters asserted therein, see *People v McKinney*, 258 Mich App 157, 161 n 4; 670 NW2d 254 (2003), I would take judicial notice of the *fact* that a plethora of articles were published and that strong sentiments were in *fact* expressed. The clear conclusion to be drawn is that the public was, indeed, concerned about the privacy of their political convictions and that their concerns were very real. This evidence discredits the majority's contention that no evidence exists to support the public's concern over the privacy of their political information.

But further, these articles are not the only evidentiary measure by which to determine whether the information requested is of a personal nature. Legislative changes are also indicative of the customs, mores, and ordinary views of the community. See *Mich Federation of Teachers*, *supra* at 677 n 59. It is not difficult to understand why the

caselaw has adopted consideration of legislative changes as an indicator of what a community considers to be important: it is a basic principle of the separation of powers doctrine that the people speak through their elected representatives, not through the courts.

Here, a review of relevant legislative changes lends additional credence to my view, and is additional evidence, that an individual's party preference information is of a personal nature. Michigan's election law has protected this particular information from disclosure for nearly 15 years, since the 1995 FOIA provision was added to the statute. See MCL 168.495a, as amended by 1995 PA 213; MCL 168.615c(4), as added by 2007 PA 52. Equally significant is the fact that the Legislature amended the election law in 1995 from a closed primary system to an open primary system in response to the public's concern regarding the privacy of their political convictions. MCL 168.495, as amended by 1995 PA 87; see also Senate Fiscal Agency Bill Analysis, HB 4435, May 30, 1995. And, just a few months later, the Legislature added the 1995 FOIA provision in order to protect from disclosure party preference information, previously collected or collected in the future. MCL 168.495a, as amended by 1995 PA 213. The 1995 FOIA provision remained the law until the 2007 election statute repealed it and replaced it with its own version that *continued* to protect party preference information from disclosure through the FOIA. The 2007 election statute provided:

> Except as otherwise provided in this section, the information acquired or in the possession of a pubic body indicating which participating political party ballot an elector selected at a presidential primary is confidential, exempt from disclosure under the [FOIA], and shall not be disclosed to any person for any reason. [MCL 168.615c(4), as added by 2007 PA 52.]

Given these unequivocal legislative amendments and the Legislature's *explicit* decision to continue protecting from disclosure party preference information, there can be no clearer signal that the customs, mores, and ordinary views of the community regard party preference as information of a "personal nature." See *Mich Federation of Teachers*, *supra* at 677 n 59 (noting recent legislative changes as indicative of a community's mores).

As I have pointed out, the majority's opinion largely ignores this analysis and asserts that I have wrongly considered a 1995 Senate Fiscal Agency bill analysis in support of my conclusion that the Legislature changed the law in reaction to the public's outrage. However, the majority overlooks, or chooses to ignore, the fact that this analysis is not one of statutory interpretation, where the traditional rules of construction would apply, and would generally preclude the consideration of a legislative bill analysis, but rather is an analysis whether certain information should be considered *of a personal nature* under the FOIA's privacy exemption. And our Supreme Court has directed that this inquiry be undertaken with the mores, values, and ordinary customs of the community in mind, which may include a consideration of legislative changes. Thus, in my view, the legislative changes, the legislative bill analysis, and the various news articles, are some evidence of the community's values and mores, and are indicative of its ordinary customs.

I must emphasize that the majority has taken a "hear no evil, see no evil" approach to this matter by ignoring the social and historical context in which these legislative changes were made. It is true that a Senate Fiscal Agency analysis reflects the opinion of one legislative analyst, not the Legislature. However, it does not logically follow that the Legislature had deaf ears to the

ongoing discussion occurring in the public and that it simply amended the election law randomly. Rather, the clear inference is that the Legislature's amendment at that particular time, amidst the public debate, was in reaction to the public's concerns. The majority displays its opinion in a vacuum. I would conclude, on the basis of the foregoing, that an individual's political preference information is of a personal nature.

ii. PRIVACY INTEREST IN PERSONAL IDENTIFYING INFORMATION

The second privacy interest implicated in this matter is the individual's interest in protecting his or her personal identifying information. Of initial importance is the fact that information regarding a voter's political preference would be coupled with a voter's name and home address. In *Mich Federation of Teachers*, our Supreme Court, noting the "checkered history" of conflicting jurisprudence on the issue whether home addresses and telephone numbers are of a personal nature, held that personal identifying information, including "home addresses and telephone numbers[,] constitute private information about individuals." *Mich Federation of Teachers*, *supra* at 677 n 58. The Court stated, "The potential abuses of an individual's identifying information, including his home address and telephone number, are legion." *Id*. at 677. As examples, the Court cited unwelcome masses of junk mail and telephone solicitations. *Id*. On the basis of this reasoning, the Court determined that university employees' addresses and phone numbers was information of a personal nature, even though employees had voluntarily provided the university that information, and that that information was not disclosable to the general public through the FOIA. *Id*. at 682-683.

Similarly, in *United States Dep't of Defense v Fed Labor Relations Auth*, 510 US 487, 500-501; 114 S Ct 1006; 127 L Ed 2d 325 (1994), the United States Supreme Court considered the names and home addresses of nonunion employees to be private information of which the employees had "*some* nontrivial privacy interest in [its] nondisclosure. . . ." In that case, several unions were seeking the names and home addresses of nonunion employees through the federal FOIA statute. *Id*. at 489-490. The Court noted the innumerous and unwanted intrusions into the home that disclosure would result in, including unwanted mail and possibly visits, and reasoned that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *Id*. at 501. Ultimately, the Court did not release the records in light of the public's nonexistent interest in the records. *Id*. at 502.

The same concerns are at play in the instant case. Disclosure of electors' names, party preferences, and home addresses would subject many individuals to unwanted mass mailings and a deluge of junk mail. Anyone in the general public, including commercial vendors and other special interest groups, would be able to access the information and would be able to solicit electors through the mail or in person by going door-to-door. Many individuals would find this intrusion into their homes to be an unwanted annoyance and a hassle. It is also not difficult to see, as I have already discussed, how the party preference information in particular could subject some individuals to unwanted attention, discomfort, harassment, or retaliation. Given the foregoing, and the Court's decision in *Mich Federation of Teachers* as well as the Supreme Court's decision in *United States Dep't of Defense*, I would hold that voters' names and home addresses, *when coupled with their*

party preferences in the 2008 primary election, is personal information that is intimate and private, and is undoubtedly of a "personal nature."

iii. *FERENCY v SECRETARY OF STATE*

I also disagree with the majority's conclusion, relying on dicta from *Ferency v Secretary of State*, 190 Mich App 398; 476 NW2d 417 (1991), that the requested information is not of a personal nature because an individual has no privacy expectation in his or her party affiliation voluntarily disclosed in a primary election. I respectfully submit that the majority's reliance on *Ferency* is misplaced.

In *Ferency*, the plaintiff sued alleging that Michigan's 1988 election law violated several provisions of Michigan's Constitution. Relevant to this appeal was the plaintiff's argument that the 1988 election law violated the secrecy of the ballot, Const 1963, art 2, § 4, because the 1988 election law required voters to declare their party preference in order to vote in the primary. *Ferency*, *supra* at 413. The *Ferency* Court disagreed. It reasoned that electors' exact votes could not be ascertained by knowledge of an elector's party preference declaration and therefore there was no violation of the right to a secret ballot. *Id.* at 414. It further stated, in passing:

> [P]rimaries remain primarily party functions and thus *there is a legitimate state interest in restricting access by voters to the primary elections* and, more to the point, *in requiring voters to publicly identify their party affiliation in order to be eligible to vote in a primary election*. That is, because primary elections are primarily party functions, it is not unreasonable to expect the voter *to be willing* to disclose his party affiliation in order to participate in that party's internal operations, such as the selection of its nominee for a particular office. This does not violate the secrecy of the ballot, because there is no legitimate interest

> by the voter *to shield his affiliation from a party* where that voter decides to participate in the party activities and where the ballot remains secret once the voter gets in the primary election booth. [*Id.* at 418 (emphasis added).]

The *Ferency* Court's statements, while largely dicta, indicate that electors have no privacy interest in their party preference when they *voluntarily* decide to disclose it to their party. These statements further suggest that the individual's privacy interest must be balanced against a party's legitimate interest in restricting voter access to its primary elections, e.g., by preventing nonparty members from hijacking the party by voting for the weaker party candidate. *Id*. This latter concern implicates political parties' freedom of association in the context of primary elections and balances that interest against electors' interest in the secrecy of the ballot. See, e.g., *California Democratic Party v Jones*, 530 US 567, 583-585; 120 S Ct 2402; 147 L Ed 2d 502 (2000).[9] It is important to note, however, that *Ferency*'s statements are not central to its holding regarding the secrecy of the ballot.

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[9] *California Democratic Party*, which plaintiff also relies on, was a First Amendment case that applied an analysis similar to *Ferency*. In that case, several Californian political parties brought suit alleging that California's "blanket" primary system violated their right to freedom of association under the First Amendment. *California Democratic Party*, *supra* at 571. This system, adopted by initiative Proposition 198, allowed all Californian voters to vote on a ballot containing all the primary candidates from all the political parties. *Id*. at 570. On certiorari to the United States Supreme Court, the Court found that Proposition 198 violated political parties' freedom of association by forcing association with unaffiliated voters and was unconstitutional unless it was narrowly tailored to advance a compelling state interest. *Id*. at 584-585. The state of California asserted voters' right to privacy as a compelling interest in an attempt to justify Proposition 198. *Id*. at 584. The Supreme Court, however, concluded that voters' privacy interests in their party affiliations when voting in a primary is not a compelling interest that would justify California's "blanket" primary system. *Id*. at 584-585. In determining that voters' privacy did not constitute such a compelling interest, the Court stated:

I have no quarrel with the proposition that *Ferency* stands for. However, *Ferency* does not address Michigan's FOIA statute. Instead, it addresses entirely different claims and concepts than those advanced in this case. *Ferency* addressed whether Michigan's 1988 election law violated the secrecy of the ballot protected by the Michigan Constitution. It is true that voters' "privacy" interests were implicated; however, it arose as an issue ancillary to the main thrust of the litigants' claims and it was viewed in the context of, and balanced against, political parties' right to freedom of association. As such, how privacy conceptually relates to the underlying claims in *Ferency* is entirely different from how that concept relates to the claim in this case. This is because the interests at stake in *Ferency* are not at stake in the instant matter; political parties' interests in controlling who votes in their primaries are not implicated under the FOIA. Thus, *Ferency* is simply not instructive on whether an elector has a legitimate privacy interest in shielding political party preference information from the *general public at large* and is not indicative, under a FOIA analysis, whether such information is of a personal nature. Thus, it is my view that *Ferency* is not controlling in the present matter and is largely irrelevant.

> As for the protection of privacy: The specific privacy interest at issue is not the confidentiality of medical records or personal finances, but confidentiality of one's party affiliation. Even if (as seems unlikely) a scheme for administering a closed primary could not be devised in which the voter's declaration of party affiliation would not be public information, we do not think that the State's interest in assuring the privacy of this piece of information in all cases can conceivably be considered a "compelling" one. If such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appointment to certain offices. [*Id.* at 585.]

Thus, like the *Ferency* case, *California Democratic Party* considers electors' privacy interests in primary elections, but only through the lens of the First Amendment.

However, to the limited extent that *Ferency* is instructive, its rationale does not support a conclusion that voters have no privacy interest in their political preferences declared for purposes of voting in a primary. *Ferency* balanced voters' privacy interests against *political parties' interests* in controlling the type of voters who vote in their primaries. It also indicated that voters have no privacy interest when they *consent* to disclosure of their political party preferences *to their parties*. Let me be clear that I agree with this statement; certainly, a voter's name, home address, and party preference is not of a private nature when the voter *consents* to its disclosure to his or her party of choice. However, this does not translate to mean that a voter has no legitimate privacy interest in preventing the disclosure of that same information to others or *to the general public*. Here, it is the *public's* right to know the information and to hold the government accountable for its actions that must be balanced against individuals' privacy interests. A voter may, understandably, refuse to disclose that information to an employer, a friend, or even a family member. "The disclosure of information of a personal nature into the public sphere in certain instances does not automatically remove the protection of the privacy exemption and subject the information to disclosure in every other circumstance." *Mich Federation of Teachers*, *supra* at 680; see also *United States Dep't of Defense*, *supra* at 500 ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."). This nuance is one that the majority has overlooked. I would conclude that the information requested is of a personal nature.

B. UNWARRANTED INVASION OF PRIVACY

But simply because the information sought is of a

personal nature does not necessarily compel the conclusion that its disclosure is prohibited. Rather, it is the second prong of the test announced in *Mich Federation of Teachers* that must be considered: whether public disclosure of the party preference information coupled with voters' names and addresses would constitute a "clearly unwarranted invasion" of an individual's privacy. *Mich Federation of Teachers*, *supra* at 675. This inquiry requires "balanc[ing] the public['s] interest in disclosure against the interest [the Legislature] intended the exemption to protect[.] . . . [T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." *Id*. at 673 quoting *Mager*, *supra* at 145, quoting *United States Dep't of Defense*, *supra* at 495 (quotation marks omitted). Under the circumstances of this case, special emphasis must be placed on the fact that it is the *public's interest* that is to be weighed against individuals' privacy interests—the special interests of the requester puts it in no better position than a member of the general public. See *United States Dep't of Defense*, *supra* at 499-500. In other words, the *identity of the requester and the requester's interest in the information is irrelevant*, as is the requestor's initial and future use of that information. *State Employees Ass'n*, *supra* at 121 (opinion by CAVANAGH, J.).

Here, defendants concede that the Secretary of State's office has released the names and addresses of registered voters. And, although this information is of a personal nature, see *Mich Federation of Teachers*, *supra* at 677 n 58, it is clear that disclosure of these names and addresses alone is a warranted invasion of personal

privacy. Namely, disclosure of that information is necessary to inform the general public whether voters are properly registered and whether they are voting in the proper local precinct. Disclosure of such information, if requested, is necessary to hold the government accountable for the integrity and purity of this state's elections.

However, the public's interest in the disclosure of voters' names and addresses coupled with their party preference information is negligible. Contrary to the majority's conclusion, I simply fail to see how disclosure of this information in this form is necessary to shed light on the government's operations. Indeed, disclosure would reveal whether the Secretary of State's office actually performed the task required of it under 2007 PA 52. This result, however, could just as easily be obtained by releasing redacted versions of the records, i.e., by redacting voter's names and addresses and releasing the ballot selections alone.[10] Given the foregoing, it is likely that plaintiff is not asking for the records

[10] The majority asserts that disclosure of the requested information "*would* inform the public to what extent the Secretary and the various local clerks carried out the requirements of 2007 PA 52." It then states, "[T]here is *no other way by which* these individuals can be held accountable for their implementation of a then-valid statute." (Emphasis added.) This position is simply wrong. Logistically, the same goal can be accomplished without intruding on individual's privacy. The Secretary of State's office has already released the names and addresses of those individuals who voted in the 2008 primary. This information allows the general public to make certain that the state ensured that individuals voted in the proper precinct, but it would not show, for example, whether the number of voting Democrats matches the number reported, and vice versa for Republicans. However, the release of the same records, containing redacted names and addresses but showing the party ballot selected, would have the result of showing that the correct, or incorrect, numbers voted in each primary. Ultimately, the same goal is reached without violating individuals' privacy—the general public would be able to know whether election officials properly carried out their task under 2007 PA 52. Nothing additional would be gained by releasing the information in the form requested.

to find out "what the government is up to" but to obtain the names and addresses of individuals affiliated with particular political parties for its business purposes. The requester's identity and special interests are completely irrelevant to a FOIA analysis. *State Employees Ass'n*, *supra* at 121. Further, "disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct [would not advance the core purpose of FOIA]." *Mager*, *supra* at 145 (quotation marks and citation omitted). And, in the absence of any compelling public interest in the information in the form requested, "supplying lists of voters to private parties . . . [smacks of] an abuse of the elective franchise." *Grebner v Michigan*, 480 Mich 939, 944 (2007) (CAVANAGH, J., dissenting).

Finally, weighing this virtually nonexistent public interest in disclosure against electors' interests in controlling their personal information dictates the conclusion that disclosure would be an unwarranted invasion of voters' privacy. Because the public's interest in the information is small, even a very slight privacy interest would suffice to outweigh the public's interest in the records. Thus, it is not necessary to quantify the privacy interest involved. However, I would go so far as to surmise that the interest involved is, at the very least, a moderate to strong one. As I have already discussed, electors have an interest in avoiding harassment, reprisal, or retaliation that may result from public disclosure of such information. Obviously, some electors will have a more heightened interest in keeping this information private than others. For example, disclosure could potentially be particularly damaging to a public official or to an employee of a nonprofit political organization. Moreover, many voters may wish to avoid the perceived annoyance and hassle of receiving large

amounts of junk mail and solicitations that would result from the disclosure of their particular political convictions. Indeed, the privacy interest implicated here is far from insubstantial in consideration of the fact that the information would be accessible to all members of the public, including commercial advertisers and other solicitors. I would follow the lead of the United States Supreme Court and avoid a decision that would disparage the privacy of the home. *United States Dep't of Defense*, *supra* at 501. Accordingly, I would conclude that the public's interest is outweighed by the privacy interest the Legislature intended to protect under MCL 15.243(1)(a).

I would reverse.

PEOPLE v CORR

Docket No. 289330. Submitted January 6, 2010, at Lansing. Decided January 19, 2010. Approved for publication March 9, 2010, at 9:10 a.m.

Linda S. Corr was charged in the 56A District Court with two counts of assaulting, resisting, and obstructing a police officer, MCL 750.81d(1). The district court, Harvey J. Hoffman, J., refused to bind defendant over on the charges, finding that the police unlawfully detained defendant and that she did not refuse to obey a lawful command. The Eaton Circuit Court, Calvin E. Osterhaven, J., affirmed, holding that, although defendant was illegally detained by the police, the unlawful arrest did not preclude the prosecution. Instead, the circuit court held that the illegal arrest required application of the exclusionary rule to bar the officers' testimony and that, without that testimony, probable cause could not be established. The prosecution appealed by leave granted.

The Court of Appeals *held*:

1. The district court erred by deciding not to bind defendant over for trial. The evidence established probable cause to believe that defendant committed the offense. Defendant's conduct constituted the type of conduct specifically prohibited under MCL 750.81d(1), regardless of the lawfulness of the police officers' commands to defendant to stay in the vehicle.

2. Defendant knew or had reason to know that the persons she assaulted were police officers performing duties in their official capacity.

3. Although it was evident that the criminal investigation had likely been completed by the time defendant got out of the vehicle and assaulted the officers, the officers were still performing noninvestigatory official duties at the time. Defendant had reasonable cause to belief, under the circumstances, that the police officers were engaged in the performance of their duties in their official capacity when defendant failed to comply with their commands and assaulted them.

4. Whether defendant's continued detention in the vehicle by the officers was lawful depends on its reasonableness. It was

reasonable, under the circumstances, for the officers to command defendant to remain in the vehicle. The officers' commands to remain in the vehicle were lawful. There was no bad faith or misconduct on the part of the officers.

5. Even if the detention of defendant were unlawful, the circumstances do not warrant exclusion of the officers' testimony. The officers did not exploit the detention to obtain evidence, act in bad faith, or use the detention as a tool to obtain evidence from defendant. The exclusionary rule does not bar the introduction of evidence of independent crimes directed at police officers as a reaction to an illegal arrest or search. The order of the trial court must be reversed and the matter must be remanded for the reinstatement of the charges.

Reversed and remanded.

1. CRIMINAL LAW — ASSAULTING POLICE OFFICERS — OFFICER'S DUTIES.

It is illegal for a person to assault, batter, resist, or obstruct a police officer, even if the officer is taking unlawful action, as long as the officer's actions are done in the performance of the officer's duties (MCL 750.81d[1]).

2. CRIMINAL LAW — ASSAULTING POLICE OFFICERS — OFFICER'S DUTIES.

The statute that makes it a crime for an individual to assault, batter, wound, resist, obstruct, oppose, or endanger a person who the individual knows or has reason to know is performing his or her duties as a police officer encompasses all the duties of a police officer as long as the officer is acting in the performance of those duties (MCL 750.81d[1]).

3. SEARCHES AND SEIZURES — TRAFFIC STOPS — TEMPORARY SEIZURES.

The temporary seizure of the driver and passengers of a vehicle stopped by the police ordinarily continues, and remains reasonable, for the duration of the stop, which normally ends when the police have no further need to control the scene and inform the driver and passengers that they are free to leave.

4. EVIDENCE — EXCLUSIONARY RULE.

The exclusionary rule does not act to bar the introduction of evidence of independent crimes directed at police officers as a reaction to an illegal arrest or search.

Michael A. Cox, Attorney General*, B. Eric Restuccia,* Solicitor General*, Jeffrey L. Sauter*, Prosecuting Attor-

ney, *William M. Worden*, Senior Assistant Prosecuting Attorney, and *D. Sunny Matz*, Assistant Prosecuting Attorney, for the people.

Kronzek & Cronkright PLLC (by *Steven A. Freeman* and *Brandy J. Thompson*) for defendant.

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

PER CURIAM. The prosecution appeals by leave granted the circuit court's order affirming the district court's decision not to bind over defendant for trial on two counts of assaulting, resisting, and obstructing a police officer, MCL 750.81d(1). We reverse and remand for reinstatement of the charges.

The charges in this case stem from defendant's violent behavior against police officers after a pickup truck in which she was a passenger was stopped on suspicion that it was being operated by a drunk driver. Defendant's son was driving the truck and both he and defendant were intoxicated. Defendant got out of the pickup truck and disobeyed the officers' instructions to return to the vehicle. She kicked, shoved, and elbowed the officers. The facts were disputed regarding whether this conduct occurred while defendant's son was sitting in the back of a patrol car after having been arrested, or after he had been taken to jail.[1]

[1] Although a fair reading of the testimony indicates that defendant's behavior began before her son's removal from the scene, at the preliminary examination, the district court summarized the facts, to which the parties stipulated, to indicate that defendant's actions only occurred after her son had been removed. For this opinion, we have relied on the facts as stipulated at the preliminary examination. However, on remand, the parties are not precluded from arguing, consistent with the evidence, that some of the actions took place before the son's removal from the scene.

The district court found no probable cause to bind over defendant for resisting or obstructing police officers because the police unlawfully detained defendant. The district court concluded that defendant did not "obstruct" as defined in the statute because she did not refuse to obey a lawful command to return to the truck.

The circuit court affirmed on different grounds. The circuit court found that there was probable cause to believe that defendant's actions satisfied the elements of resisting or obstructing a police officer. The court agreed that defendant was illegally detained, but acknowledged that an unlawful arrest does not preclude prosecution for resisting and obstructing a police officer. Instead, the circuit court concluded that the illegal arrest required application of the exclusionary rule to bar the officers' testimony, without which probable cause could not be established. The prosecution now appeals.

In reviewing a decision to bind a defendant over for trial, we apply the following standards:

> A magistrate's ruling that alleged conduct falls within the scope of a criminal statute is a question of law reviewed [de novo] for error, and a decision to bind over a defendant is reviewed for abuse of discretion. In reviewing the district court's decision to bind over a defendant for trial, a circuit court must consider the entire record of the preliminary examination, and it may not substitute its judgment for that of the magistrate. Reversal is appropriate only if it appears on the record that the district court abused its discretion. . . . Similarly, this Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion. [*People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997) (citations omitted).]

"The district court must bind over a defendant if the evidence presented at the preliminary examination establishes that a felony has been committed and there is

probable cause to believe that the defendant committed the crime." *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). "Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support a bindover." *Id.*

After reviewing the testimony of the officers at the preliminary examination, we find that the district court erred in its decision not to bind defendant over for trial because the evidence established probable cause to believe that defendant committed the offense. Under MCL 750.81d(1), the elements required to establish criminal liability are: (1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties. MCL 750.81d(1); MCL 750.81d(7)(b)(*i*); *People v Ventura*, 262 Mich App 370, 374-375; 686 NW2d 748 (2004). " 'Obstruct' includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." MCL 750.81d(7)(a).

First, testimony by the police officers who were at the scene established probable cause to believe that defendant assaulted, battered, resisted, or obstructed a police officer. The testimony revealed that defendant pushed, shoved, elbowed, and kicked the officers after they repeatedly commanded or warned her to stay in the vehicle. Rather than submitting, defendant disobeyed the officers' commands and aggressively came into physical contact with them (1) when she got out of the vehicle and "pushed" an officer in an attempt to get by the officer, (2) when she struggled with and elbowed the officer when the officer was trying to get her back into

the vehicle, and (3) when she struggled with and kicked and shoved the officers who were trying to confine her during her arrest. We agree with the circuit court that defendant's conduct constituted the type of conduct specifically prohibited under MCL 750.81d(1), regardless of the lawfulness of the officers' commands to stay in the vehicle. Under MCL 750.81d(1), it is illegal to assault, batter, resist, or obstruct an officer even if the officer is taking unlawful action, as long as the officer's actions are done in the performance of the officer's official duties. *Ventura*, 262 Mich App at 377.

The testimony also provided credible evidence that defendant knew or had reason to know that the person that she assaulted, battered, resisted, or obstructed was a police officer performing his or her duties. The phrase "has reason to know" "requires the fact-finder to engage in an analysis to determine whether the facts and circumstances of the case indicate that when resisting, defendant had 'reasonable cause to believe' the person he was assaulting was performing his or her duties." *People v Nichols*, 262 Mich App 408, 414; 686 NW2d 502 (2004). Given that the vehicle was pulled over during a traffic stop by a patrol car with activated emergency lights, additional officers arrived on the scene to assist the officer, and the officers performed ordinary police functions during the stop, such as checking defendant's identification, performing sobriety tests on the driver, arresting the driver, maintaining control over the scene, ordering defendant to remain in the vehicle, and administering breathalyzer tests in an attempt to locate a sober driver to move the vehicle from the roadway, defendant knew or had reason to know that the persons she assaulted were police officers performing duties in their official capacity. Therefore, defendant's conduct provided probable cause to believe that defendant violated MCL 750.81d(1).

We do not agree with the district court's reasoning that defendant's assaultive conduct could not be used to establish liability under MCL 750.81d(1) because the officers no longer possessed the lawful authority to command her to stay in the vehicle after they completed the criminal investigation. The statutory language of MCL 750.81d(1) is not so limiting. To the contrary, the unambiguous language, "an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is *performing his or her duties*" (emphasis added), shows that the Legislature intended that the statute encompass all the duties of a police officer as long as the officer is acting in the performance of those duties. See *Ventura*, 262 Mich App at 375-376. Here, even though it was evident that the criminal investigation had likely been completed by the time defendant got out of the vehicle and assaulted the officers, the officers were still performing duties at the scene, including maintaining the peace and controlling the scene, locating a sober driver to move the vehicle from the roadway, and protecting the safety of defendant, especially considering her intoxicated state and the inclement weather conditions. Such noninvestigatory duties have been recognized by our courts as official duties of the police. See *People v Davis*, 442 Mich 1, 20; 497 NW2d 910 (1993) ("The police perform a variety of functions that are separate from their duties to investigate and solve crimes," which are "sometimes categorized . . . [as] 'community caretaking' or 'police caretaking' functions," including, but not limited to, the impoundment of vehicles, inventory searches, and rendering aid or assistance to persons in distress); *People v Vasquez*, 465 Mich 83, 88; 631 NW2d 711 (2001), quoting *People v Little*, 434 Mich 752, 759; 456 NW2d 237 (1990) (" '[A]n

officer's efforts to "keep the peace" include ordinary police functions that do not directly involve placing a person under arrest.' ").

Accordingly, under the circumstances of this case, defendant had "reasonable cause to believe" that the officers' conduct in maintaining the peace at the scene, attempting to move the vehicle from the roadway, and protecting defendant's safety, constituted the performance of their duties in their official capacity when she failed to comply with their commands to stay in the vehicle and physically assaulted them. *Nichols*, 262 Mich App at 414. The district court abused its discretion by refusing to bind defendant over for trial on the assaulting, resisting, and/or obstructing charges. *Orzame*, 224 Mich App at 557.

Although we agree with the circuit court that defendant's conduct established probable cause to support her bindover for trial, we find that the court erred in its determination that the officers' testimony must be excluded as the "fruit" of defendant's illegal detention. We review de novo "whether the Fourth Amendment was violated and whether an exclusionary rule applies." *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009), citing *People v Fletcher*, 260 Mich App 531, 546; 679 NW2d 127 (2004).

"Both the United States and the Michigan Constitutions guarantee the right against unreasonable searches and seizures." *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000), citing US Const, Am IV; Const 1963, art 1, § 11. "Generally stated, the test for what constitutes a seizure is whether, 'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *People v Bolduc*, 263 Mich App 430, 438; 688 NW2d 316 (2004) (citations omitted). Whether defen-

dant's continued detention in the vehicle was lawful depends on its reasonableness. *Snider*, 239 Mich App at 406. "The benchmark for satisfaction of Fourth Amendment rights is reasonableness, and reasonableness requires a fact-specific inquiry that is measured by examining the totality of the circumstances." *Hyde*, 285 Mich App at 436.

The officers' commands to stay in the vehicle constituted a seizure under the Fourth Amendment because a reasonable person in defendant's situation would have believed that she was not free to leave. *Bolduc*, 263 Mich App at 438, 441. However, under the circumstances of this case, we find that it was reasonable, for the officer's safety as well as for defendant's safety, for the officers to command defendant to remain in the vehicle while they completed their noninvestigatory duties at the traffic stop, particularly considering that defendant was intoxicated and aggressive toward the officers during the stop, bystanders had arrived on the scene, and the weather conditions were dangerous. Under these circumstances, the officers, still had a need to maintain control over the scene even though the driver had been arrested and secured in the patrol car. *Arizona v Johnson*, 555 US 323; 129 S Ct 781, 788; 172 L Ed 2d 694, 704-705 (2009). It is "reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety." *Brendlin v California*, 551 US 249, 258; 127 S Ct 2400; 168 L Ed 2d 132 (2007). Furthermore, "[t]he temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop," which normally "ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." *Johnson*, 555 US at 333. Accordingly, we

find the officers' commands to stay in the vehicle, which resulted in defendant's detention beyond the time of the driver's arrest but before the time that the officers had completed their duties at the scene, to be lawful. Moreover, we find no evidence of bad faith or misconduct on the part of the officers to indicate that defendant was being detained for the purpose of searching for or obtaining evidence against her. Instead, by ordering defendant to stay in the vehicle, the officers were merely attempting to keep defendant safe and maintain order and control over the scene so they could perform their noninvestigatory police functions.[2]

Finally, even if defendant's detention had been unlawful, we conclude that the circumstances do not warrant the exclusion of the officers' testimony in this case. "[T]he exclusionary rule is a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of constitutional rights" and "should be used only as a last resort." *People v Frazier*, 478 Mich 231, 247; 733 NW2d 713 (2007) (quotation marks and citations omitted). "In determining whether exclusion is proper, a court must evaluate the circumstances of the case in the light of the policy served by the exclusionary rule . . . ." *Id.* at 249 (quotation marks and citations omitted).

The mere fact of an illegal arrest does not per se require the suppression of evidence. *People v Kelly*, 231 Mich App 627, 634; 588 NW2d 480 (1998). "It is only when an 'unlawful detention has been employed as a tool to directly procure *any* type of evidence from a

[2] It was evident from the testimony that, during the detention, the officers diligently pursued their investigation and did not exceed the original justification for the stop. *People v Chambers*, 195 Mich App 118, 123; 489 NW2d 168 (1992), citing *United States v Sharpe*, 470 US 675, 686; 105 S Ct 1568; 84 L Ed 2d 605 (1985).

detainee' that the evidence is suppressed under the exclusionary rule." *Id.*, quoting *People v Mallory*, 421 Mich 229, 240-241; 365 NW2d 673 (1984) (emphasis in original).

Here, there is no indication from the testimony that the officers exploited the detention to obtain evidence, acted in bad faith, or that the detention was employed as a tool to procure evidence from defendant. Instead, it is apparent that the officers detained defendant to maintain control of the scene and protect their safety as well as defendant's safety while they finished performing their duties at the scene. Furthermore, the evidence at issue (the officers' testimony) was obtained when defendant, subsequent to the detention, illegally assaulted, battered, resisted, or obstructed the officers' performance of their duties. MCL 750.81d(1). As we have previously held:

> [T]he exclusionary rule does not act to bar the introduction of evidence of independent crimes directed at police officers as a reaction to an illegal arrest or search. Any other conclusion would effectively give a person who has been the victim of an illegal seizure the right to employ whatever means available, no matter how violent, to elude capture. [*People v Daniels*, 186 Mich App 77, 82; 463 NW2d 131 (1990) (citation omitted).]

We know of no law that permits a suspect to avoid prosecution for crimes committed when illegally detained, and decline to adopt such a rule. Defendant did not have a right, based on the alleged unlawful detention, to resist and obstruct the officers in the discharge of their duties. *Ventura*, 262 Mich App at 376-378. Once defendant used force against the officers, they had probable cause to arrest her under MCL 750.81d(1). Pursuant to this lawful arrest, any evidence seized would be admissible. See *People v Lambert*, 174 Mich

App 610, 617-618; 436 NW2d 699 (1989) (holding that where there is "no exploitation of the primary illegality . . . , the 'fruit of the poisonous tree' doctrine [is] inapplicable" to a subsequent lawful arrest).

Reversed and remanded for reinstatement of the charges. We do not retain jurisdiction.

TINNIN v FARMERS INSURANCE EXCHANGE

Docket No. 286141. Submitted January 5, 2010, at Lansing. Decided February 2, 2010. Approved for publication March 11, 2010, at 9:00.

Minnie Tinnin, as personal representative of the estate of Dolphus Tinnin, deceased, brought an action in the Wayne Circuit Court, John A. Murphy, J., against Farmers Insurance Exchange, seeking benefits under the no-fault motor vehicle insurance act, MCL 500.3101 *et seq.*, for injuries sustained when Dolphus was struck by an automobile while he was crossing the street. Dolphus died two years after the accident. At trial, plaintiff sought to recover, in part, the cost of four office visits related to physical medicine and rehabilitation (PM&R) treatment and $90,000 for attendant care services. The jury determined that plaintiff was entitled to $1,235 for the PM&R bills and awarded plaintiff $218.95 in interest for those overdue benefits. The jury declined to award any benefits for attendant care. The trial court granted plaintiff's motion for no-fault attorney fees and awarded plaintiff $57,690 in attorney fees and $9,651.67 in taxable costs. Defendant appealed the award of attorney fees and costs.

The Court of Appeals held:

1. The trial court did not clearly err by determining that defendant acted unreasonably in refusing to reimburse plaintiff for Dolphus's PM&R treatment in the amount of $1,235. Although an insurer may reasonably rely on the medical opinion of its physicians and the independent medical evaluations of those physicians, here defendant simply failed to clarify the results provided in a doctor's independent medical evaluation that defendant relied on to deny plaintiff's claim for PM&R treatment expenses.

2. The trial court did not abuse its discretion by awarding the full amount of attorney fees and costs sought by plaintiff. The trial court did not clearly err by finding that Dolphus's PM&R treatment was sufficiently related to his closed head injury. The trial court did not abuse its discretion by refusing to apportion plaintiff's award of attorney fees to reflect the time spent in pursuit of the successful PM&R claim and the time spent pursuing the unsuc-

cessful attendant care services claim. MCL 500.3148(1) does not unambiguously require such apportionment.

3. The trial court did not abuse its discretion by awarding plaintiff attorney fees. While it is within the discretion of the trial court to adjust the award of attorney fees in light of the results achieved, it is not required to do so as long as the ultimate award remains reasonable.

4. The trial court did not abuse its discretion by awarding plaintiff the costs of procuring the expert testimony presented by plaintiff.

Affirmed.

TRIAL — ATTORNEY FEES — ADJUSTMENT OF AWARDS.

Although it is within a trial court's discretion to adjust an award of attorney fees in light of the result achieved, it is not required to do so as long as the ultimate award remains reasonable.

Logeman, Iafrate & Pollard, P.C. (by *James A. Iafrate*), for plaintiff.

Cory & Associates (by *Patrick W. Bennett*) for defendant.

Before: BECKERING, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM. Defendant appeals by right the circuit court's judgment awarding plaintiff attorney fees pursuant to MCL 500.3148(1) and taxable costs pursuant to MCR 2.625(A)(1). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Dolphus Tinnin was struck by a car as he crossed a street. At the time, Tinnin was 57 years old and resided with his mother. Tinnin was treated for bone fractures in his right leg and a possible closed head injury. A neuropsychological evaluation found that Tinnin suffered from mild mental retardation and borderline intelligence and that he had suffered a mild closed head

injury in the accident. For approximately 2½ years after the accident, defendant reimbursed Tinnin for the cost of attendant care services, which were primarily provided by Tinnin's mother, and for other medical expenses. Later, defendant discontinued Tinnin's benefits after obtaining the results of two independent medical evaluations (IME). Defendant denied Tinnin's claims for physical medicine and rehabilitation (PM&R) treatment on the basis of an IME performed by Dr. Nathan Gross, who opined that Tinnin did not require ongoing physical therapy, but that it would have been reasonable for Tinnin to continue to see a PM&R specialist to monitor his condition on an "as needed" basis. At trial, defendant's claims adjuster agreed that the discontinuation of Tinnin's PM&R benefits was improper in light of Dr. Gross's testimony that such treatment would have been reasonable on an "as needed" basis. Defendant denied Tinnin's claims for attendant care services on the basis of an IME performed by Dr. Manfred Greiffenstein, who believed that Tinnin's need for supervision resulted from Tinnin's pre-existing borderline intelligence and not from injuries suffered in the accident.

Tinnin filed suit seven months after the accident,[1] but the case did not go to trial until nearly three years after the accident, evidently because the parties engaged in multiple settlement conferences and facilitation and adjourned the trial date several times. Apparently, defendant did not make a settlement offer.

At trial, plaintiff sought to recover the cost of four office visits with Dr. Ifey Ilechukwu related to PM&R

[1] Dolphus Tinnin died just over two years after the accident. Minnie Tinnin, Dolphus Tinnin's mother, was appointed personal representative of his estate. "Plaintiff" hereinafter refers to the personal representative of Dolphus Tinnin's estate.

treatment. Plaintiff also sought more than $90,000 for attendant care services. In support of her claim for attendant care, plaintiff presented the testimony of a psychiatrist and a psychologist, both of whom opined that Dolphus suffered a closed head injury in the accident and that attendant care would be appropriate.

The jury determined that plaintiff was entitled to payment of Dolphus's PM&R bills, and awarded her $1,235. The jury also determined that those benefits were overdue as defined by MCL 500.3142(2), and awarded plaintiff $218.95 in no-fault interest. The jury declined to award plaintiff any benefits for attendant care.

The trial court granted plaintiff's motion for no-fault attorney fees under MCL 500.3148(1), concluding that defendant's failure to pay the PM&R expenses was unreasonable. Plaintiff sought $57,690 in attorney fees, and $9,651.67 in taxable costs. Defendant argued that plaintiff's request for attorney fees was excessive in light of the verdict, and that in excess of $7,000 of the taxable costs plaintiff sought related to her unsuccessful claim for attendant care and should not be granted. The trial court granted plaintiff the full amount of attorney fees and costs requested.

A trial court's award of attorney fees under MCL 500.3148(1) presents a mixed question of law and fact. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). "What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact." *Id*. We review questions of law de novo, and review a trial court's findings of fact for clear error. *Id*. "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen v Kitchen*, 465 Mich

654, 661-662; 641 NW2d 245 (2002). We review a trial court's award of attorney fees and costs for an abuse of discretion. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*.

The no-fault act, MCL 500.3101 *et seq.*, was intended to provide insured persons who have sustained injuries in automobile accidents with assured, adequate, and prompt compensation for certain economic losses. *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978). To ensure prompt payments to the insured, the act includes a provision for attorney fees. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994). MCL 500.3148(1) provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

In *Moore*, our Supreme Court explained the statutory prerequisites that must be met before attorney fees may be awarded under MCL 500.3148(1):

> First, the benefits must be overdue, meaning "not paid within 30 days after [the] insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). Second, in postjudgment proceedings, the trial court must find that the insurer "unreasonably refused to pay the claim or unreasonably delayed in making proper payment." MCL 500.3148(1). [*Moore*, 482 Mich at 517.]

An insurer's refusal to pay benefits or delay in making payment creates a rebuttable presumption of unreasonableness, and the insurer bears the burden of justifying

the refusal or delay. *McKelvie*, 203 Mich App at 335. "The insurer can meet this burden by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty," *Ross*, 481 Mich at 11, including bona fide questions whether a particular medical procedure is reasonably necessary. *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 104-105; 527 NW2d 524 (1994).

On appeal, defendant argues that it did not act unreasonably by denying plaintiff's entire claim because a bona fide factual dispute existed regarding causation and the amount of benefits owed to plaintiff, if any. We disagree.

"[A]n insurer's initial refusal to pay no-fault benefits can be deemed reasonable even if it is later determined that the insurer was required to pay those benefits." *Moore*, 482 Mich at 526. But, if it is determined that an insurer is not liable for no-fault benefits, they cannot be overdue, and the insurer's initial refusal or delay of payments cannot be deemed unreasonable. *Id*. In the instant case, the trial court found that defendant's denial of benefits was unreasonable only with respect to the $1,235 related to Dolphus's PM&R treatment and did not opine about the reasonableness of defendant's denial of plaintiff's claim for attendant care services. Defendant denied plaintiff reimbursement of the PM&R costs solely on the basis of Dr. Gross's report. While our Supreme Court has held that an insurer may reasonably rely on the medical opinion of its physicians and the IMEs the physicians perform, *id*. at 522, defendant simply failed to clarify the results provided in Dr. Gross's report. Dr. Gross's report did not specifically address whether it was reasonable for Dolphus to continue to obtain PM&R treatment on an "as needed" basis, but Dr. Gross testified in his deposition that he

believed it was reasonable for Dolphus to continue to receive PM&R treatment on an "as needed" basis. The claims adjuster agreed that had she been aware of Dr. Gross's opinion regarding PM&R treatment, she would not have denied plaintiff's PM&R claim. The trial court did not clearly err by determining that defendant acted unreasonably in refusing to reimburse plaintiff for Dolphus's PM&R treatment in the amount of $1,235.

Defendant next argues that the trial court abused its discretion by awarding the full amount of attorney fees and costs plaintiff sought, $57,690 and $9,651.67, respectively. We disagree.

An award of attorney fees under MCL 500.3148(1) must be reasonable. *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982). There is no precise formula for assessing the reasonableness of an attorney fee. *In re Temple Marital Trust*, 278 Mich App 122, 138; 748 NW2d 265 (2008). In *Wood*, our Supreme Court identified the following factors for courts to consider when determining what constitutes a reasonable attorney fee under MCL 500.3148(1): " '(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.' " *Wood*, 413 Mich at 588, quoting *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). The factors are not exclusive[2] and a trial court "need not detail its findings as to each specific factor considered." *Wood*, 413 Mich at 588. The burden of proving the fees rests upon the claimant of those fees. *Petterman*

[2] See MRPC 1.5(a), which provides eight factors for courts to consider when determining the reasonableness of attorney fees, some overlapping with the *Wood* factors.

v Haverhill Farms, Inc, 125 Mich App 30, 33; 335 NW2d 710 (1983). The party seeking attorney fees also bears the burden of establishing they are reasonable. *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 382; 652 NW2d 474 (2002).

Plaintiff sought to recover attorney fees for 192.30 hours of work at a rate of $300 an hour. The 192.30 hours reflected only the amount of time one attorney expended on plaintiff's case over approximately 2½ years, and did not include the time of a second attorney who attended and participated in the trial. Plaintiff submitted an affidavit from her principal attorney stating that the attorney had tried several first-party no-fault cases, five of which resulted in an award of attorney fees. The attorney's hourly rate in those cases ranged from $250 to $300. The trial court granted plaintiff her entire request for attorney fees and costs, explaining its decision as follows:

> In looking at the amount per hour, that appears to be a reasonable hourly rate in light of the court's familiarity with the plaintiff's counsel and experience in the area and the court's familiarity with the Wood criteria we look at in the area of attorney fees.
>
> The hours involved here appear to be reasonably related to the result that occurred and you are entitled to that under the provisions of the act.
>
> PM&R bill we believe is sufficiently relates [sic] to the closed head injury such that the work-up for the case and the witness testimony on the issue would support attorney fees for the whole case. This would include the testimony of the doctors indicating that the–I will say that another way. The testimony of the physicians would be sufficient and apparently was used by the jury in making the call as to whether or not the PM&R bill was related to the accident. It was close enough for them to hang their hat on as a basis for allowing for approval of that bill even though it was not their specific bill, enough of a relationship in terms of the

> closed head injury testimony to allow for it and they accepted that testimony as best as we can tell and the totality of the testimony in making the call as to whether or not that bill was reasonably related to the accident.
>
> So all of the testimony went to the issue that the jury found with regard to the support for the bill and for those reasons the entire work-up of the case would be awarded.
>
> The obvious problem with the defendant's suggestion would be that we go back and somehow or another dissect the hours submitted during the course of the trial and the work-up of the trial to determine what was related to the bill, what was unrelated to the bill.
>
> This case, it was all interrelated. This is the case where there was a closed head injury and everything is related. The jury for whatever reason didn't go along with the attended [sic] care. I suspect it was a reason that I had placed on the record but that day she had testified, the mother, that she was doing all these things before the injuries to her son and she was doing the things for him along with preparing meals and so forth for the other son in the home. She was doing it as a mother before the crash but she had to do it as a caregiver after the crash because he couldn't do it for himself.
>
> The jury may very well have used that as a rationale but I am not going to limit the plaintiff or discourage the plaintiff from bringing these kinds of cases and not award the attorney fees because I believe the bill not being paid was unreasonable.

Defendant argues that the bulk of plaintiff's suit revolved around plaintiff's claim for attendant care services totaling over $90,000, which the jury denied completely. Defendant argues that plaintiff's claim for attendant care can be separated from plaintiff's claim for PM&R treatment, and that the award of attorney fees should reflect the amount plaintiff recovered as opposed to how much she sought. Defendant characterizes plaintiff's claim for attendant care benefits as

cognitive in nature and links it to Dolphus's alleged closed head injury, whereas defendant characterizes plaintiff's claim for PM&R benefits as primarily physical in nature, apparently linking it to the leg fractures Dolphus suffered in the accident.

The extent of each injury's relationship to plaintiff's claim for PM&R treatment and attendant care services is unclear from the record. The trial court found the PM&R bill to be sufficiently related to the closed head injury and thus considered unrealistic any attempt to separate the time and costs expended in pursuit of the PM&R claim from the time and costs expended in pursuit of the attendant care services. Defendant fails to provide factual support for its attempt to draw clear lines between plaintiff's claims for PM&R and attendant care. The PM&R bill was based solely on Dr. Ilechukwu's treatment of Dolphus. Dr. Ilechukwu is board-certified in PM&R as well as occupational medicine. He diagnosed Dolphus as having suffered a closed head injury in the accident and believed that his lower back pain was related to the accident. Dr. Ilechukwu testified that the brain trauma Dolphus suffered in the accident exacerbated his preexisting cognitive problems and resulted in a deterioration of both his cognitive and physical functioning. Dr. Ilechukwu recommended that Dolphus receive "case management to coordinate his care," home health care, assistance with his chores and transportation, and eight hours of attendant care a day. Dr. Ilechukwu saw Dolphus three more times over the following year and did not change his diagnoses or recommendations with respect to Dolphus's care. On this record we are unable to say that the trial court clearly erred by finding that Dolphus's PM&R treatment was sufficiently related to his closed head injury.[3]

[3] Defendant's apparent reason for attempting to link plaintiff's claim for attendant care exclusively to Dolphus' closed head injury is to argue

Defendant argues that the trial court abused its discretion when it refused to apportion the award of attorney fees so that plaintiff was compensated only for the time and effort directly attributable to securing the overdue PM&R benefits. Defendant, however, points to no authority that requires a court to apportion attorney fees "where a defendant has unreasonably refused to pay certain benefits even where its refusal to pay other benefits was found not to be unreasonable." *Cole v Detroit Auto Inter-Ins Exch*, 137 Mich App 603, 614; 357 NW2d 898 (1984). In *Moore*, the jury awarded the plaintiff $50,000 in noneconomic damages and $42,755 in unpaid work loss benefits. The jury found that only $822.52 of the work loss benefits were overdue and awarded $98.71 in penalty interest accordingly. *Moore*, 482 Mich at 511, 523. The *Moore* Court explained that although an award of attorney fees incurred to collect overdue benefits would normally be appropriate, the plaintiff was not entitled to attorney fees because,

> before plaintiff's suit went to trial, defendant already had paid plaintiff $822.52 for one week of work loss benefits and all other payments that defendant owed as a result of the computer glitch. Because plaintiff did not attribute *any* of the $79,415 that the trial court awarded her in attorney fees and costs to collecting $822.52 in overdue work loss benefits, plaintiff is not entitled to attorney fees. [*Id*. at 524 (emphasis added).]

We find *Moore* distinguishable from the instant case. Unlike in *Moore*, the trial court found that all of the attorney's time for which plaintiff sought compensation was sufficiently related to securing the overdue benefits compensable under MCL 500.3148(1).

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that the jury's rejection of plaintiff's attendant care claim equates to a finding that Dolphus did not suffer a closed head injury. At the end of trial, the trial court disagreed with defendant, explaining that the verdict did not compel such an inference. We agree with the trial court.

Because the language of MCL 500.3148(1) does not unambiguously require the apportionment defendant advocates, we hold the trial court did not abuse its discretion by refusing to apportion plaintiff's award of attorney fees.

Defendant's next argument is based on *Wood* factor (3), "the amount in question and the results achieved." Defendant argues that the majority of plaintiff's claim concerned attendant care services totaling over $90,000, which the jury denied completely. Defendant stresses that plaintiff's recovery of $1,453.95, which included penalty interest, constituted less than two percent of the amount of damages plaintiff sought overall. While it is within the discretion of the trial court to adjust the award of attorney fees in light of the result achieved, it is not required to do so as long as the ultimate award remains reasonable. See *Schellenberg v Rochester Lodge No 2225 of the Benevolent & Protective Order of Elks*, 228 Mich App 20, 45; 577 NW2d 163 (1998). In awarding plaintiff attorney fees, the trial court noted its familiarity with plaintiff's counsel and his experience in the area of no-fault insurance, and found that all the attorney hours for which plaintiff sought compensation related to securing the PM&R claim. The trial court explained that the jury apparently used the testimony of each physician to determine that the PM&R costs were related to the accident. And the trial court indirectly addressed plaintiff's small recovery by explaining that he did not want to deter plaintiffs in general from bringing claims for benefits that are unreasonably withheld by their insurers. In light of the trial court's analysis of the *Wood* factors on the record, we conclude that the trial court did not abuse its discretion by awarding plaintiff attorney fees and thus affirm the award.

Defendant also contests the trial court's award of taxable costs to plaintiff. We review a trial court's decision on a motion for costs under MCR 2.625 for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996).

MCR 2.625(A)(1) provides:

> In General. Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

The trial court awarded plaintiff $9,651.67 in taxable costs, $7,050 of which represented the costs of procuring the expert opinions and testimony of a psychiatrist and a psychologist. Implicit in defendant's challenge to this portion of the costs is again the assumption that Dolphus's closed head injury was the sole basis for plaintiff's claim for attendant care. As discussed above, the trial court did not clearly err when it found that Dolphus's closed head injury sufficiently related to plaintiff's claim for PM&R treatment. Accordingly, the trial court did not abuse its discretion by awarding plaintiff the costs of procuring the expert testimony. See MCR 2.625(B)(2); see also *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 488-490; 717 NW2d 341 (2006).

We affirm. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

HOLLAND v TRINITY HEALTH CARE CORPORATION

Docket No. 280657. Submitted January 16, 2009, at Detroit. Decided March 16, 2010, at 9:00 a.m.

Kellie Holland brought an action in the Oakland Circuit Court, Michael Warren, J., against Trinity Health Care Corporation, alleging that defendant wrongfully charged her for medical services provided by defendant's hospital. Plaintiff, who does not have health insurance, executed an agreement to pay defendant's "usual and customary charges," but alleged that the usual and customary charges she agreed to pay meant the discounted payments that defendant accepts from health insurers and other third-party payors rather than the price stated in defendant's "Charge Master," which are higher than the discounted prices charged to insured patients. The trial court granted summary disposition in favor of defendant, holding that the phrase "usual and customary charges" referred to the Charge Master prices. Plaintiff appealed.

The Court of Appeals *held*:

1. Plaintiff, in contending that the phrase "usual and customary charges" is ambiguous, failed to establish that the term conflicts with another term in the agreement. Therefore, to the extent that plaintiff failed to identify terms that allegedly conflict with one another, her contention that the "conflicting terms" form of contract ambiguity exists must be rejected.

2. The trial court properly held that the phrase "usual and customary charges" unambiguously refers to the "Charge Master" prices.

3. The trial court did not utilize extrinsic evidence when it relied on the pleadings to show that plaintiff conceded that there is a difference between the charges maintained in the Charge Master and the discount payments that defendant accepted under a variety of circumstances.

4. The trial court did not rely on the no-fault motor vehicle insurance act, MCL 500.3101 *et seq*., in interpreting the parties' financial agreement.

Affirmed.

Bendure & Thomas (by *Mark R. Bendure*) and *Cohen & Malad, LLP* (by *Richard E. Shevitz, Arend J. Abel*, *Vess A. Miller*, and *Gabriel A. Hawkins*), for plaintiff.

Honigman Miller Schwartz and Cohn LLP (by *Raymond W. Henney*, *Robert M. Jackson*, and *Douglas C. Salzenstein*) and *McDermott Will & Emery LLP* (by *David S. Rosenbloom* and *Jocelyn D. Francoeur*) for defendant.

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

WILDER, J. Plaintiff appeals as of right an order granting summary disposition to defendant in this dispute over "usual and customary charges" for medical care given to an uninsured patient. The trial court held that the "usual and customary charges" language of the parties' agreement was unambiguous and referred to the prices stated in defendant's "Charge Master," which are higher than the discounted prices charged to insured patients. We agree with the trial court, and therefore affirm.

Defendant is a nonprofit corporation that owns and operates hospitals, including the Saint Joseph Regional Medical Center, in Plymouth, Indiana. On December 1, 2005, plaintiff went to that hospital for medical care, and was admitted for treatment of a kidney stone. But plaintiff was uninsured, so she executed an agreement with the hospital, in which she promised to pay "for all services rendered to me at the Medical Center's *usual and customary charges* . . . ." (Emphasis added.) Defendant and its agents discharged their duties under the agreement, by providing medical services to treat plaintiff's ailment. Then, defendant billed plaintiff for the services. But plaintiff refused to pay the charges billed,

and instead commenced this action, alleging, *inter alia*, that the "usual and customary charges" she promised to pay meant the discounted payments defendant accepts from health insurers and other third-party payors, for a majority of its patients, rather than the prices stated in defendant's "Charge Master." The Charge Master is an index of undiscounted charges defendant uses for its health care services to patients.

On appeal, plaintiff argues that the court erred by determining that the phrase "usual and customary charges" referred to the prices listed in defendant's Charge Master, rather than the discounted payments that defendant accepts for insured patients.[1] We disagree.

This Court reviews de novo summary disposition rulings. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). A written contract's interpretation is also reviewed de novo. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). Whether contractual terms are ambiguous is a question of law, and this Court reviews de novo the proper interpretation of a contract. *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 581; 739 NW2d 696 (2007).

Our Supreme Court's contracts jurisprudence emphasizes the well-defined role of courts in contract disputes: viz., *courts enforce unambiguous contract terms*. *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). We enforce contracts according to their terms, as a corollary of the parties' liberty of contracting. *Rory v Conti-*

[1] Plaintiff failed to raise her "good faith and fair dealing" claims on appeal, and has therefore abandoned those issues. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001). We express no opinion on whether claims of breaches of duties of good faith and fair dealing legally state claims on which relief can be granted.

nental Ins Co, 473 Mich 457, 468; 703 NW2d 23 (2005). We examine written contractual language, and give the words their plain and ordinary meanings. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). An unambiguous contractual provision reflects the parties' intent as a matter of law, and "[i]f the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Prod & Concepts Co*, 469 Mich at 375. Moreover, courts may not impose an ambiguity on clear contract language, *Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005), because Michigan courts honor parties' bargains and do not rewrite them, *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008); see also *Coates*, 276 Mich App at 511 n 7. For instance, courts generally may not attempt to evaluate whether a contract is one of "adhesion." See *Rory*, 473 Mich at 477. "An 'adhesion contract' is simply that: a *contract*. It must be enforced according to its plain terms unless one of the traditional contract defenses applies." *Id.*

On the other hand, a contract is ambiguous when two provisions "irreconcilably conflict with each other," or "when [a term] is equally susceptible to more than a single meaning," *Coates*, 276 Mich App at 503 (quotation marks and citations omitted). Only when contractual language is ambiguous does its meaning become a question of fact. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). The ancient common-law rule of *contra proferentem* (an agreement is construed against its drafter) is used only when there is a true ambiguity, and the parties' intent cannot be discerned through all conventional means, including extrinsic evidence. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470-471; 663 NW2d 447 (2003). Courts may consult dictionary definitions to

ascertain the plain and ordinary meaning of terms undefined in an agreement. *Coates*, 276 Mich App at 504. "Resort to dictionary definitions is acceptable and useful in determining ordinary meaning." *Cowles v Bank West*, 476 Mich 1, 34; 719 NW2d 94 (2006) (quotation marks and citation omitted).

In challenging the trial court's grant of summary disposition below, plaintiff contends that the phrase "usual and customary charges" is equally susceptible to more than a single meaning. *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004). Plaintiff argues that "usual and customary charges" might mean *either* (1) the prices in the Charge Master, or (2) the discounted prices charged to insured patients. We disagree. We first note that in contending that the phrase "usual and customary charges" is ambiguous, plaintiff does not establish that this term conflicts with another term in the contract. Thus, to the extent that plaintiff does not identify terms that allegedly conflict with one another, we reject the proposition that the "conflicting terms" form of ambiguity exists.

Next, we note that plaintiff is in partial agreement with defendant on the application of the phrase usual and customary—namely, that plaintiff "promised to pay . . . [defendant's] usual and customary *charges*" (emphasis supplied) for services rendered to her. Black's Law Dictionary (8th ed) defines "charge" as "[t]o demand a fee; to bill." Thus, plaintiff's claim does not hinge on the amount *charged* her; rather, plaintiff asserts that the phrase "usual and customary charges" reasonably refers to the amount defendant accepts as payment from the majority of its patients. Because it was undisputed that the amount defendant charged plaintiff was based on defendant's "Charge Master," resolution of this issue depends upon whether the

phrase "usual and customary charges" reasonably references the "Charge Master."

Because Michigan caselaw does not directly address this issue in the context at hand, both parties cite the Nebraska Supreme Court decision in *Midwest Neurosurgery, PC v State Farm Ins Cos*, 268 Neb 642; 686 NW2d 572 (2004), in support of their positions.[2] At issue in *Midwest Neurosurgery* was whether a physician's lien could "exceed the amount the health care provider agreed to accept for the services rendered to a patient, even if the usual and customary charge for such services is greater than that sum" under Nebraska's physician's lien statute. *Id*. at 647 (quotation marks and citation omitted). While ruling that the lien statute provided that the lien did not extend to the full amount due for "usual and customary charges," the Nebraska Supreme Court explained that "usual and customary charges" referred to the amount the "provider typically charges other patients for the services that it provided to the injured party." *Id*. at 650. No reference, however, was made linking "usual and customary charges" to discounted payments—i.e., that to which plaintiff contends "usual and customary charges" refers. Thus, *Midwest Neurosurgery* does not support plaintiff's position.

In any event, *DiCarlo v St Mary Hosp*, 530 F3d 255, 260 (CA 3, 2008),[3] contains a factual situation analogous to the instant case and is directly on point.[4] In *DiCarlo*, when the defendant hospital charged the un-

[2] Cases from other jurisdictions, although not binding, may be persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

[3] Because the *DiCarlo* court adopted the lower court's opinion as its own, subsequent citation to this case will be to the lower court's opinion. *DiCarlo*, 530 F3d at 260.

[4] Opinions of lower federal courts, although not binding, may be considered persuasive authority. *Walters v Nadell*, 481 Mich 377, 390 n 32; 751 NW2d 431 (2008).

insured plaintiff for medical services in accordance with its "Charge Master" price index, the plaintiff brought a class action suit against the defendant alleging, *inter alia*, breach of contract for the defendant's failure to bill an amount consistent with the discounted prices the defendant accepted from other patients. *DiCarlo v St Mary's Hosp*, 2006 US Dist LEXIS 49000 (2006), unpublished opinion of the United States District Court for the District of New Jersey, issued July 19, 2006 (Docket No. 05-1665). In finding that the term "all charges" unambiguously referred to the defendant's "Charge Master," the Court explained:

> While Plaintiff's contentions have facial persuasiveness, they fail to take into account the peculiar circumstances of hospitals, such as St. Mary's, and the bearing these circumstances have upon the interpretation of contracts between a patient and the hospital. St. Mary's has a uniform set of charges (casually known as the "Chargemaster") that it applies to all patients, without regard to whether the patient is insured, uninsured, or a government program beneficiary. As Plaintiff in his complaint and in his briefs recites, St. Mary's accepts a variety of discounted payments in different situations. It negotiates differing discounts with some managed care payors and insurance companies. It accepts discounted payments if the patient is covered by a government program that legislatively imposes discounts. It has provided discounts to uninsured patients based on demonstrated financial need pursuant to its Charity Care policy . . . .
>
> * * *
>
> The price term "all charges" is certainly less precise than [the] price term of the ordinary contract for goods or services in that it does not specify an exact amount to be paid. It is, however, the only practical way in which the obligations of the patient to pay can be set forth, given the fact that nobody yet knows just what condition the patient has, and what treatments will be necessary to remedy what

> ails him or her. Besides handing the patient an inches-high stack of papers detailing the hospital's charges for each and every conceivable service, which he or she could not possibly read and understand before agreeing to treatment, the form contract employed by St. Mary's is the only way to communicate to a patient the nature of his or her financial obligations to the hospital. Furthermore, "it is incongruous to assert that [a hospital] breached the contract by fully performing its obligation to provide medical treatment to the plaintiff[] and then sending [him] [an] invoice[] for charges not covered by insurance." *Burton v. Beaumont Hosp.*, 373 F. Supp. 2d 707, 719 (E.D. Mich. 2005). [*Id*. at *9-*12.]

The instant case is nearly identical to *DiCarlo*. In both cases, the parties executed financial agreements not explicitly referencing the "Charge Master." Similarly, the defendants in both cases accepted discounted payments of which the plaintiffs in both cases were unaware and offered discounts to patients demonstrating financial need. *DiCarlo*, *supra*. Although plaintiff contends that *DiCarlo* is distinguishable because that case employed the phrase "all charges" as opposed to the phrase "usual and customary charge" as used in the financial agreement, this appears to be a distinction without a difference given the similar context of the financial agreements executed in both cases. Also, even though plaintiff asserts that *DiCarlo* is distinguishable because plaintiff does not dispute that the financial agreement at issue contains an open price term, recourse to *DiCarlo* is appropriate because it addresses the central issue of this case—namely whether the phrase "usual and customary charge" reasonably refers to the "Charge Master." Indeed, the crux of *DiCarlo*'s holding was that the defendant hospital properly utilized the "Charge Master" to uniformly charge all patients despite its acceptance of discounted payments. Plaintiff concedes that while defendant maintains

"standard or master charges," it negotiates discounted payments that are lower than the amount the patients are charged. Consequently, given these similarities, we conclude that the trial court properly held that the phrase "usual and customary charges" unambiguously refers to the "Charge Master."[5]

Although plaintiff asserts that the trial court improperly examined the pleadings in making this determination, the court relied on the pleadings to show that plaintiff conceded a difference between the charges maintained in the "Charge Master" and the "discount payments" that defendant accepted under a variety of circumstances. This was not a utilization of extrinsic evidence. Rather, the court's point was that the pleadings undercut plaintiff's argument that the phrase "usual and customary charges" referred to the "discount payments" accepted by defendant.

Plaintiff asserts that in addition to *Midwest Neurosurgery*, caselaw from other jurisdictions supports her argument that "usual and customary charges" did not reasonably refer to the "Charge Master." However, all the cited cases are distinguishable from the instant case.

First, the Tennessee Supreme Court found in *Doe v HCA Health Servs of Tennessee, Inc*, 46 SW3d 191, 194, 197 (Tenn, 2001), that the defendant hospital's confidential "Charge Master" was insufficient to determine the plaintiff's charges where the form contract only indicated that the plaintiff was responsible for "charges

[5] Because the financial agreement was unambiguous, plaintiff's alternative argument that the Court must construe ambiguities against the drafter is irrelevant. Also, contrary to plaintiff's argument, the court did not address the concluding phrase of the agreement requiring plaintiff to pay for services not covered by insurance, Medicare, or Medicaid. Regardless, that portion of the agreement is irrelevant to interpretation of the phrase "usual and customary charges."

not covered" under her insurance policy. The court held that without reference to the "Charge Master," the defendant hospital's charges were indefinite. *Id*. at 197. Here, however, there is no issue regarding whether the charges were indefinite. On the contrary, plaintiff conceded that patients' expectations are reasonably based on defendant's "Standard Charges" (i.e., "Charge Master"). Thus, *Doe* is distinguishable from this case.

Next, plaintiff cites *Anonymous v Monarch Life Ins Co*, 42 Misc 2d 308; 247 NYS2d 894 (NY Dist, 1964), a New York District Court case, in support of her argument. However, *Monarch Life Ins Co* pertained to the interpretation of "usual and customary charges" in an insurance policy rather than the price mechanism hospitals use to determine such charges at issue in this case. *Id*. at 896. Similarly, although defendant cites the Florida Court of Appeals finding in *Payne v Humana Hosp Orange Park*, 661 So 2d 1239, 1241 & n 2 (Fla App, 1995), that a reasonable price is implied in a contract where the contract fails to fix a price, the parties in that case disagreed on whether the defendant hospital's contract prices were set and ascertainable. In contrast, here, there is no issue pertaining to whether defendant's charges are ascertainable. *Servedio v Our Lady of the Resurrection Med Ctr*, unpublished memorandum opinion of the Illinois Circuit Court, issued January 6, 2005 (Docket No. 04 L 3381),[6] is also unavailing to plaintiff because even though the trial court in that case determined that the plaintiffs' assertion that the defendant hospital's acceptance of discounted payments created a *de facto* "usual and customary charge" sufficient to survive a motion for failure to state a claim on which relief could be granted, no

[6] This case is not available on Westlaw or Lexis, but is attached as Exhibit F to plaintiff's brief on appeal.

mention was made in that case of a uniform pricing mechanism, such as the "Charge Master."

Plaintiff further contends that the trial court's reliance on the Arizona Court of Appeals decision in *Banner Health v Med Savings Ins Co*, 216 Ariz 146, 148-151; 163 P3d 1096 (Ariz App, 2007), was misplaced. Plaintiff is wrong. In *Banner Health*, the Arizona Court of Appeals found that the phrase "usual and customary charges" did not constitute an open price term because the patient agreement specified that such charges referred to "those rates filed annually with the Arizona Department of Health Services." Despite the fact that defendant, here, was not required by law to file its "Charge Master" with the state, the issue in this case does not pertain to an open price term, and that case is also distinguishable. In any event, the trial court cited *Banner* merely to distinguish charges from discount payments. Therefore, this argument is meritless.

Plaintiff also argues that the trial court misconstrued the no-fault motor vehicle insurance act, MCL 500.3101 *et seq*., in finding that Michigan's jurisprudence supported the conclusion that "usual and customary charges" unambiguously referenced the "Charge Master" rather than "discount payments." In making her argument, plaintiff contends that the no-fault act is not instructive because the statutory language in the no-fault act is different from, and therefore may not be applied to, the contractual language in the parties' financial agreement. Specifically at issue is MCL 500.3107(1)(a), requiring insurers to pay "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation," and MCL 500.3157, requiring that health care charges be "reasonable" and not exceed the amount "customarily charge[d]" for similar services rendered to uninsured patients.

However, the court did not rely upon caselaw interpreting the no-fault act to apply the statutory provisions of the no-fault act to the contractual provision at issue in this case as plaintiff asserts. On the contrary, the court merely cited cases interpreting the no-fault act to demonstrate how Michigan caselaw has consistently found that discounted payments accepted by health care providers are irrelevant to the determination whether health care providers' charges are "customary" under § 3157. See *Munson Med Ctr v Auto Club Ins Ass'n*, 218 Mich App 375, 381-385; 554 NW2d 49 (1996) (finding that a "customary charge" under § 3157 of the no-fault act refers to the amount a health care provider charges rather than the amount accepted as payment), and *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 113; 535 NW2d 529 (1995) (rejecting the insurance provider's argument that the "customary charge" under § 3157 referred to the amount that an insurance provider paid for the services rather than the amount it was charged for the services).

Johnson v Mich Mut Ins Co, 180 Mich App 314; 446 NW2d 899 (1989), cited by plaintiff in support of her contention that the trial court misconstrued the no-fault act, actually undermines her position. In *Johnson*, this Court found that the no-fault insurer was required to pay the medical provider's "customary" charges rather than the discounted payment the provider was required to accept from Medicaid for those services. *Id*. at 321-322. Thus, under *Johnson*'s reasoning, the acceptance of discounted payments does not define a health care provider's "customary" charge. This is the fundamental argument defendant asserts in the case at hand.

In any event, the trial court did not rely upon the no-fault act in interpreting the financial agreement, but

merely noted that its reasoning was consistent with Michigan courts' interpretation of "customary" charges under the no-fault scheme. Thus, plaintiff's argument is without merit.[7] Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

Affirmed.

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[7] We note that defendant contends that plaintiff received a 20 percent discount, and that this constitutes an additional reason to affirm the order granting summary disposition because the amount she paid was comparable to discounts available to defendant's insured patients. However, defendant presented no evidence as required to prevail under MCR 2.116(C)(10) concerning the actual amount of discounted payments it accepted from other patients. MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Thus, this claim fails as insufficiently established to justify summary disposition under MCR 2.116 (C)(10).

PROGRESSIVE MICHIGAN INSURANCE COMPANY v SMITH

Docket No. 287505. Submitted December 1, 2009, at Grand Rapids. Decided March 16, 2010, at 9:05 a.m.

Progressive Michigan Insurance Company brought an action in the Kent Circuit Court, Dennis B. Leiber, J., against William Smith, Sheri Harris, and Scott and Andrea Mihelsic, seeking a declaration regarding its obligations under a motor vehicle insurance policy issued to Harris to indemnify Smith after a default judgment was entered against Smith in an action by the Mihelsics for injuries sustained in a motor vehicle accident that occurred when a truck driven by Smith crossed the centerline of the road and struck the Mihelsics' vehicle. Smith had added his friend Harris to the title of the truck when he purchased it because he had a suspended driver's license and was unable to obtain license plates and insurance. Harris obtained the insurance and Smith paid for it. A form signed by Harris listed Smith as an excluded driver and the declarations page of the policy and the certificate of insurance also listed Smith as an excluded driver. The trial court allowed Pioneer State Mutual Insurance Company to intervene as a defendant and granted Progressive's motion for summary disposition that was based on the named driver exclusion. The Mihelsics appealed, alleging that Progressive failed to use the required statutory language in some of the documents containing the named driver exclusion and, therefore, the exclusion was not valid.

In a lead opinion by Judge BANDSTRA and an opinion by Judge MURRAY concurring in the reasoning and the result of the lead opinion, the Court of Appeals *held*:

The named driver exclusion in the policy is invalid because it did not strictly comply with the wording of the statutorily required warning regarding the named driver exclusion. The trial court erred by granting Progressive's motion for summary disposition and denying the Mihelsics' cross-motion for summary disposition. The judgment of the trial court must be reversed and the case must be remanded to the trial court for further proceedings.

Judge BANDSTRA stated in the lead opinion that to satisfy the notice requirement of MCL 500.3009(2) the warning must appear on the certificate of insurance and at least one of the following, the

face of the policy, the declaration page, or the certificate of the policy. The trial court correctly concluded that the requirements of § 3009(2) were not satisfied merely by inclusion of the correctly worded warning on the declaration page. The statute provides the warning that must be provided verbatim by insurers. Progressive failed to provide the statutorily required notice verbatim.

Judge MURRAY, concurring, wrote separately to point out that MCL 500.3009(2) unambiguously requires the named driver exclusion to be provided in the exact words that the Legislature mandated. The absurd result doctrine of statutory construction employed by the dissent cannot be used to modify an unambiguous statute. The statute's unambiguous commands must be enforced.

Reversed and remanded.

Judge MARKEY, dissenting, would hold that Progressive complied with the statutory notice requirement when it substituted the term "responsible" for the term "liable" in the named driver exclusion on some of the insurance documents. Progressive accomplished the intent of the Legislature in enacting § 3009(2) notices by substituting the totally synonymous word "responsible" for the word "liable." Although it is the Court's function to apply the law as written, on rare occasions there may arise situations where following this philosophy with myopic rigidity effects not only a complete thwarting of the Legislature's intent but also a profoundly unfair and inequitable result. The narrow facts of this case and the majority's treatment of them create precisely that situation. Upholding the exclusion under the facts of this case would fulfill the Legislature's intent. The judgment of the trial court should be affirmed.

INSURANCE — MOTOR VEHICLE LIABILITY COVERAGE — NAMED EXCLUDED OPERATORS — NOTICE OF EXCLUDED OPERATORS.

The Insurance Code provides that, if authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named excluded person; the warning that must be provided with regard to a named excluded person must be verbatim the warning provided in MCL 500.3009(2) and must appear on the certificate of insurance and at least one of the following: the face of the policy, the declaration page, or the certificate of the policy.

Bensinger, Cotant & Menkes, P.C. (by *Kerr L. Moyer*), for Progressive Michigan Insurance Company.

RizzoBryan, P.C. (by *Devin R. Day*), for Scott and Andrea Mihelsic.

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

BANDSTRA, J. In this matter of first impression, I would conclude that the warning notice requirement of MCL 500.3009(2) must be enforced as written. Thus, the named driver exclusion in the policy of insurance at issue here is invalid because it does not strictly comply with the statute.

BACKGROUND FACTS AND PROCEEDINGS BELOW

Defendants-appellants, Scott and Andrea Mihelsic, were injured in an automobile accident when a truck driven by defendant William Smith crossed the centerline of the road and struck their vehicle. When Smith purchased the truck, he did not have a driver's license because he had too many points on his record. In order to obtain license plates and insurance, he added his friend, defendant Sheri Harris, to the title. Harris obtained insurance with appellee, Progressive Michigan Insurance Company, and Smith paid for it. A form signed by Harris lists Smith as an excluded driver. The declaration page of the insurance policy also lists him as an excluded driver, as does the certificate of insurance.

Appellants brought an action against Smith, and a default was entered against him on October 4, 2006. Progressive then brought this declaratory judgment action to determine its liability to indemnify Smith and moved for summary disposition pursuant to MCR 2.116(C)(10) on the basis of the named driver exclusion. Appellants responded and filed a countermotion for summary disposition. They argued, in part, that appellee had failed to use the required statutory language for

exclusion of a named driver on the documents showing insurance coverage. Disagreeing, the trial court granted appellee's motion for summary disposition and denied appellants' cross-motion, leading to this appeal.

ANALYSIS

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Further, statutory interpretation is a question of law that is reviewed de novo. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 12; 773 NW2d 243 (2009).

" 'The primary goal of statutory interpretation is to give effect to the intent of the Legislature.' Fundamentally, '[t]his task begins by examining the language of the statute itself.' " *Id*. at 13 (citations omitted). Clear and unambiguous statutory language must be enforced as written. *Id*. at 12.

MCL 500.3009(2) states:

> If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance: Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.

In this case, the warning on the declaration page of plaintiff's policy is identical to the portion of this

statutory provision following the colon. However, in the warning provided both on the face of the policy and on the certificate of insurance, the last word is "responsible" instead of "liable."[1]

Appellee argues, first, that the warning on the declaration page alone is adequate. According to appellee, the "and" in the second sentence of MCL 500.3009(2) links the "certificate of the policy" and the "certificate of insurance," meaning that placing the warning on both of these documents is an alternative to placing it on either "the face of the policy or the declaration page." Thus, appellee argues that, because warning language identical to the statute is found on the declaration page, the statutory notice provision was satisfied notwithstanding any failure of the language used on the other documents.

I disagree. Appellee's argument disregards the grammatical structure of the statute. The sentence, "Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance," contains two parallel clauses after the verb "is": "on the face . . ." and "on the certificate of insurance . . . ." The first clause contains three alternatives, separated from each other by "or." The first and second clauses are joined by "and." Therefore, to satisfy the statute, the warning must appear on at least one of the three alternatives mentioned in the first clause *and* on the certificate of insurance. Appellee's interpretation that a correctly worded warning on the declaration page alone satisfies the statute is inconsistent with the grammatical structure of the statute. The trial court correctly concluded that the requirements of § 3009(2)

[1] The parties do not mention on appeal what warning, if any, appeared on the certificate of the policy.

were not satisfied merely by the correctly worded warning on the declaration page.

Nonetheless, the trial court determined that the excluded driver provision was valid under the statute, explaining:

> The fact that the warning on the certificate of insurance contained the word "responsible" rather than the word "liable" does not defeat the named driver exclusion election. If the Legislature intended that the warning must be taken verbatim from the statute and placed on the enumerated documents in order to be effective, it would have been simple to indicate as much in the statute itself. Absent such a requirement, this Court finds that Plaintiff complied with the mandates of MCL 500.3009(2) in that it received authorization from the insured; placed a suitable warning on the declaration page of the policy and on the certificate of insurance.

In essence, the trial court concluded that substantial compliance with the statute was sufficient; it was enough that a "suitable" warning was provided. I disagree.

Although there is no binding authority that states that "strict compliance" with § 3009(2) is necessary,[2] the statute itself indicates that failure to follow its requirements results in the invalidity of the exclusion. Again § 3009(2) provides:

> If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance: Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others

[2] But see *Detroit Auto Inter-Ins Exch v Felder*, 94 Mich App 40, 44; 287 NW2d 364 (1979).

> legally responsible for the acts of the named excluded person remain fully personally liable.

The Legislature did not merely set forth the substance of the required warning. Instead, the statute mandates use of "the following notice," which notice is explicitly provided for insurers to use verbatim.[3] Further, the Legislature did not merely state that this notice is required, without specifying the effect of noncompliance. If the required warning notice is not provided, the named person "exclusion shall not be valid." The statute could not be clearer.

In this case, the verbatim statutorily mandated warning notice does not appear, as required, on the certificate of insurance.[4] Accordingly, the mandate of the statute is clear: the named driver exclusion "shall not be valid . . . ." The trial court erred by granting appellee's motion for summary disposition and by denying appellants' cross-motion.[5] I would reverse and remand for further proceedings consistent with this opinion. I would not retain jurisdiction.

Having fully prevailed on appeal, appellants should be allowed to tax costs. MCR 7.219.

MURRAY, J. (*concurring*). Both the lead opinion and Judge MARKEY's dissent, though coming to opposite conclusions, are thoughtful and well-written. The only disagreement between the lead opinion and the dissent-

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[3] As noted earlier, appellee did use the prescribed language on the policy's declaration page.

[4] Whether the meaning of the language used by appellee conveys the same meaning as the statutorily mandated warning is immaterial. The statute does not require "the following notice or a notice of similar effect" or otherwise allow for any deviation from its terms.

[5] In light of this determination, we need not consider appellants' other arguments on appeal.

ing opinion is whether we enforce MCL 500.3009(2) as it was written, regardless of the fact that the result in this case is no doubt unfortunate. As briefly explained below, in my view our judicial duty is to enforce that indisputably unambiguous statute as written, and we cannot under Michigan law make exceptions to that rule. Thus, I join both the reasoning and the result of the lead opinion.

The essence of the dissent is that although our judicial duty is to *almost always* apply the statute's unambiguous words to the facts presented, "on rare occasion[s]" like this case, "where following this philosophy with myopic rigidity effects not only a complete thwarting of the Legislature's intent but also a profoundly unfair and inequitable result," we should disregard that judicial duty. With all due respect, for several reasons I do not believe we can apply this rationale, which is essentially the "absurd result" doctrine of statutory construction, to this case.

First, the "absurd result" doctrine cannot be used to essentially modify an unambiguous statute, and no one has argued that MCL 500.3009(2) is anything but unambiguous. See *People v McIntire*, 461 Mich 147, 155 n 2; 599 NW2d 102 (1999), and *Toaz v Dep't of Treasury*, 280 Mich App 457, 462; 760 NW2d 325 (2008), citing *Cairns v East Lansing*, 275 Mich App 102, 118; 738 NW2d 246 (2007).[1] Second, even if the Supreme Court

[1] *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 674-675; 760 NW2d 565 (2008), decided just three weeks after *Toaz*, concluded that a majority of the Supreme Court (in separate opinions) in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006), had rejected *McIntire*'s rejection of the absurd result doctrine. However, as the majority opinion by Chief Justice TAYLOR in *Cameron* recognizes, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN all agreed that any discussion of the "absurd result" doctrine would be dicta because the doctrine was not implicated in that case. *Cameron*, 476 Mich at 66 (opinion

recognized that doctrine, there is no reason to invoke it in this case. It is certainly reasonable to conclude that a rational legislator would have believed that, when an insurance contract did not contain the *exact* words the legislature actually mandated be used in those contracts, a court would rule the contract was invalid, just as the legislature mandated. See *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 80-82; 718 NW2d 784 (2006) (MARKMAN, J., concurring). Proof positive of this conclusion is the clear directive in the language, the lack of *any* "wiggle room" in the language, and the Legislature's explicit remedy of invalidation if the statutory notice language is not used. Indeed, I would posit that any insurance company attorney reading this statute—just like the legislators who passed the statute—would expect a court to invalidate an insurance provision that did not contain the required language.

Finally, it is difficult to discern *when* a court should ignore language to avoid "unfair and unjust" results. The dissent reasonably believes that "responsible" and "liable" are close enough to ignore the lack of compliance in this case, but what about the *next* case inevitably coming down the appellate pipeline? Are we left to pure judicial discretion as to which words must be enforced, with the answer coming down to the palatability of the result attained under the facts? I do not believe that is how the judicial branch should function when addressing unambiguous statutes. And, although enforcement of these "strict rules . . . can unfortunately . . . produce some [outrageous] outcomes," *id*. at 64, that is a product of the overall legislation chosen by the Legislature, and we must enforce the unambiguous commands of that legislation.

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of the Court); *id*. at 80-82 (MARKMAN, J., concurring). Thus, *Cameron* cannot be read as overturning *McIntire*'s rejection of the absurd result doctrine.

MARKEY, P.J. (*dissenting*). I respectfully dissent because I disagree with the majority's analysis of whether plaintiff complied with the statutory warning notice requirement of MCL 500.3009(2). I believe it did; consequently, I would affirm the trial court.

Before I proceed further, I must note that I do agree with the majority's rendition of the facts of this case and of the existing caselaw, including that this is a case of first impression. I also note that, like my colleagues, I too strongly adhere to the philosophy that it is this Court's function to apply the law as plainly written. It is not our job to modify, amend, or read into a statute something that is not there; such legislating from the bench is simply improper. Legislating belongs to the Legislature.

Nonetheless, on rare occasion there may arise a situation where following this philosophy with myopic rigidity effects not only a complete thwarting of the Legislature's intent but also a profoundly unfair and inequitable result. I believe that the narrow facts of this case and the majority's treatment of them create precisely that situation.

The purpose of MCL 500.3009(2) is to allow an insurer to exclude certain drivers from liability coverage. Clearly, that was the case here, and both the named insured, Sheri Harris, and the excluded driver, William Smith, as well as the insurer, Progressive Michigan Insurance Company, all understood and accepted that Mr. Smith was an excluded driver under the insurance policy issued to Ms. Harris.[1] This point is particularly important because Mr. Smith had such an atrocious driving record that he was no longer able to legally

[1] In his deposition, Mr. Smith stated that he "definitely" knew he should not have been driving on the day of the accident. Ironically, Ms. Harris was a passenger in the truck at the time of the accident.

drive. Still, he purchased a vehicle, and in order to obtain license plates and insurance, he added his friend and the named insured, Ms. Harris, to the title. Insurance documents list them as part of the same household. Harris obtained the insurance with plaintiff, and Smith paid for it. A form with Ms. Harris' signature lists Mr. Smith as an excluded driver. Plaintiff's declarations page and its insurance policy list him as an excluded driver, as do the certificates of insurance. So, defendants Smith and Harris had four separate insurance documents explicitly advising and warning that Smith was an excluded driver.

Moreover, there appears to be *no dispute* that both Mr. Smith and Ms. Harris knew that Mr. Smith was a named excluded driver under this insurance policy. In fact, one cannot read this record and not completely recognize that both Mr. Smith and Ms. Harris knew that Mr. Smith was not insurable even before he purchased the truck he was driving when the accident occurred. And, Smith and Harris knew what they needed to do to obtain insurance covering the vehicle. Together, they set about to accomplish that task. Indeed, considering it was Smith's truck, and that he obviously drove it, one can only conclude that Smith and Harris colluded to obtain insurance from Progressive without concern that Smith was not supposed to drive the vehicle. So, under these facts, there is not the slightest concern that the *intent* that the Legislature had in enacting § 3009(2) was completely accomplished.

It is also true that Progressive would never have issued an insurance policy to Ms. Harris covering the vehicle if it knew that Mr. Smith would drive it. Progressive, in taking the application for insurance from Ms. Harris and obtaining the driver exclusion form from her pertaining to Mr. Smith, required that

information and her implicit promise that Mr. Smith would not drive the vehicle when it calculated the fair and appropriate insurance premiums for the vehicle. Insurance companies must have some knowledge in order to compute premiums, and it is not fair, practical, or reasonable to expect insurance companies to either act in the dark or be required to assume that their named insureds are lying. Quite the contrary, an insurance company must be allowed to generally accept as true and accurate whatever information its named insured gives to it when completing an insurance application.

MCL 500.3009(2) mandates that its warning notice of the effect of the named driver exclusion be placed on various documents. Here, again, no one disputes that Progressive placed the required warning notice on the declarations page, on the insurance policy itself, and on the certificates of insurance. There is only one very narrow issue: whether Progressive's substitution of one word, "liable," for another word, "responsible," in one sentence renders the notice requirement completely null and void and thereby vitiates the named driver exclusion. The majority believes that Progressive's substitution of "responsible" for the word "liable" does just that. Consequently, under the majority's analysis, Progressive bears the full responsibility for an accident caused by a driver that everyone involved, i.e. the insurance company, the named insured, and the excluded driver, knew that the consequence of his driving and causing an accident would be no insurance coverage.

The specific language of MCL 500.3009(2) is, again:

> Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured.

> Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.

In this case, the warning on the declarations page of plaintiff's policy mirrors verbatim the statutory language; however, the warning on both the face of the policy itself and on the certificates of insurance contains the word "responsible" instead of "liable" as the very last word in the warning. But the certificates of insurance themselves go above and beyond providing the statutory notice. On their reverse sides, they also state:

> **Named Excluded Driver:**
>
> If this vehicle is driven by the person named below, residual liability insurance does not apply and the vehicle will be considered uninsured.
>
> WILLIAM SMITH

According to Black's Law Dictionary (8th ed), the word "liable" means both "[r]esponsible or answerable in law; legally obligated," and "subject to or likely to incur (a fine, penalty, etc.)." The word "responsible" means "[l]iable; legally accountable or answerable." Black's Law Dictionary (6th ed).

Patently, the words "liable" and "responsible" are completely and totally synonymous. See *In re Beck*, 287 Mich App 400, 403; 788 NW2d 697 (2010), wherein this Court determined that "[a] 'responsibility' . . . is a 'liability.' " (Quoting Black's Law Dictionary [7th ed].) Indeed, it could even be surmised or argued that Progressive used the word "responsible" instead of "liable" in two of its required notices because it is more readily comprehendible. The average lay person is very unlikely to misunderstand what it means to be "fully personally responsible." On the other hand, the word "liable" has more legal sounding connotations. So,

should even those of us who strongly believe that statutes must be strictly complied with go so far as to vitiate a named driver exclusion because of the use of one synonym under the unequivocal facts of this case? Must we as strict constructionists abandon "common sense" and render a decision not only remarkably hyper-technical legally but also profoundly unjust and jarring to what I will presume to say is the average person's sense of justice and fair play? I think not.

I believe that Progressive Michigan Insurance Company complied with the mandate of § 3009(2) and the named driver exclusion of Progressive's policy remained fully effective. It is our responsibility to give effect to the interpretation that accomplishes the statute's purpose. *People v Adair*, 452 Mich 473, 479-480; 550 NW2d 505 (1996). The choice of "liable" versus "responsible" does not in any way frustrate the Legislature's intent to ensure that strong warning be provided as to the import of an excluded driver provision. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). Here, upholding the exclusion where the warning notice substitutes one word for its synonym fulfills the Legislature's intent. It is also fair to assume that the Progressive policy

> was approved by the Commissioner of [the Office of Financial and Insurance Regulation]. MCL 500.2236 requires that basic insurance policy forms be filed with the Commissioner's office and be approved by the Commissioner before the policy may be issued by the insurance company. See also, *Rory v Continental Insurance Company*, 473 Mich 457, 474; 703 NW2d 23 (2005). Subparagraph (5) of this statute provides:
>
> "(5) Upon written notice to the insurer, the commissioner may disapprove, withdraw approval or prohibit the

> issuance, advertising, or delivery of any form to any person in this state if it violates any provisions of this act, or contains inconsistent, ambiguous, or misleading clauses, or contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy. The notice shall specify the objectionable provisions or conditions and state the reasons for the commissioner's decision. If the form is legally in use by the insurer in this state, the notice shall give the effective date of the commissioner's disapproval, which shall not be less than 30 days subsequent to the mailing or delivery of the notice to the insurer. If the form is not legally in use, then disapproval shall be effective immediately." (Emphasis added.)
>
> By implication the Commissioner of Insurance has determined that Progressive's notice language does not unreasonably or deceptively affect the risk assumed by the coverage. This is somewhat persuasive that the policy's notice complies with the legislative intent of MCL 500.3009(2). *Cruz v State Farm Mutual Auto Insurance Company*, 241 Mich App 159, 167; 614 NW2d 689 (2000). I.e., "responsible" is synonymous with "liable."[2]

Consequently, since Mr. Smith was driving the vehicle in knowing defiance of that exclusion and was the cause of the accident at issue, there is no insurance coverage under Progressive's policy. So, although my analysis is somewhat different from that of the trial court, I believe the trial court reached the correct conclusion and properly granted Progressive's motion for summary disposition.

I would affirm the judgment of the trial court.

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[2] Letter from Progressive's attorney Kerr L. Moyer to the trial court dated August 4, 2008.

WARD v TITAN INSURANCE COMPANY

Docket No. 284994. Submitted November 3, 2009, at Grand Rapids. Decided March 16, 2010, at 9:10 a.m.

Timothy Ward brought an action in the Kent Circuit Court, George S. Buth, J., against Titan Insurance Company, seeking, in part, work-loss benefits, housing expenses, penalty interest, and attorney fees for injuries sustained in an automobile accident. The trial court denied the claim for work-loss benefits, penalty interest, and attorney fees and awarded plaintiff housing expenses based on the full amount of rent that he was paying at the time of the trial. Plaintiff appealed the denial of his request for work-loss benefits, penalty interest, and attorney fees and defendant cross-appealed the award of housing expenses.

The Court of Appeals *held*:

1. There were numerous factual questions regarding plaintiff's employment at the time of the accident and thus his entitlement to wage-loss benefits resulting from the accident. These factual questions were not properly resolved against plaintiff through a summary disposition order. The order granting summary disposition of the wage-loss claim in favor of defendant must be reversed and the case must be remanded for further proceedings.

2. Although MCL 500.3158(1) requires an employer of an injured person to furnish a sworn statement regarding the earnings of the injured person upon request of a personal protection insurer, the statute does not state that, if such information is not provided, the injured person completely loses the right to work-loss benefits under MCL 500.3107(1)(b).

3. The relevant statutes do not suggest that the manner for proving wage loss provided in MCL 500.3158(1) is the only manner in which a wage loss may be provided or that the right to a wage-loss claim under MCL 500.3107(1)(b) hinges on compliance with MCL 500.3158(1).

4. The wrongful conduct rule only bars a claim of a plaintiff who founded his or her cause of action on his or her own illegal conduct. The rule does not bar plaintiff's claim for work-loss benefits because

his alleged wrongful conduct, the failure to file income tax returns, is only incidentally or collaterally connected to his work-loss claim.

5. The failure to file an income tax return is not one of the reasons listed by the Legislature in MCL 500.3113 that would support denying a person personal protection insurance benefits.

6. Plaintiff's housing expenses are compensable only to the extent that the expenses became greater as a result of the accident. Plaintiff must show that his housing expenses are different from those of an uninjured person. The trial court erred in awarding plaintiff housing expenses without such a showing. The order granting the housing expenses must be reversed and the case must be remanded for further proceedings.

Reversed and remanded.

MARKEY, J., dissenting, stated that it is incumbent on claimants to prove how much they would have earned had they not been injured in the automobile accident. The fact that neither plaintiff nor his employer is able to comply with the insurer's request under MCL 500.3158(1) to show how much plaintiff would have earned, because plaintiff worked "under the table" and no records were retained, leaves plaintiff unable to prove how much he would have earned. The statute does not provide an alternative method of proving a claim for work-loss benefits. Because of his own and his employer's actions, it is impossible for plaintiff to prove his claim for work-loss benefits under MCL 500.3107(1)(b). There is no issue of material fact regarding the amount of work loss plaintiff sustained because the initial requirement of MCL 500.3158(1) to document that amount was not met. Without such documentation, plaintiff cannot prove his claim for work-loss benefits. The order granting summary disposition of the claim for work-loss benefits in favor of defendant should be affirmed.

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — WORK-LOSS BENEFITS.

Although MCL 500.3158(1) requires an employer of a person injured in an automobile accident to furnish a sworn statement regarding the earnings of the injured person upon request of a personal protection insurer, the statute does not state that, if such information is not provided, the injured person completely loses the right to work-loss benefits under MCL 500.3107(1)(b).

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — HOUSING EXPENSES.

Housing expenses for a person injured in an automobile accident are compensable by a personal protection insurer only to the extent that the expenses are greater as a result of the accident.

John D. Tallman for plaintiff.

Law Offices of Ronald M. Sangster, PLLC (by *Ronald M. Sangster*), for defendant.

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

BANDSTRA, J. Plaintiff appeals as of right the trial court's denial of his request for work loss benefits, penalty interest, and attorney fees. Defendant cross-appeals, arguing that the trial court incorrectly awarded the full cost of plaintiff's housing expenses. We reverse and remand.

We review a decision on a motion for summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper under MCR 2.116(C)(10) where the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz*, *supra* at 568, quoting *Maiden*, *supra*.

With respect to plaintiff's first issue on appeal, MCL 500.3107(1)(b) provides that personal protection insurance benefits are payable for "[w]ork loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." A plaintiff must suffer a loss of income to be entitled to benefits under this section. *Ross v Auto Club Group*, 481 Mich 1,

12; 748 NW2d 552 (2008). Claimants have the burden of proving the amount they would have earned had they not been injured in the automobile accident. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 472-473; 521 NW2d 831 (1994). Independent contractors can recover work loss benefits because work loss benefits include not only lost wages, but also lost profit, which is attributable to personal effort and self-employment. *Kirksey v Manitoba Pub Ins Corp*, 191 Mich App 12, 17; 477 NW2d 442 (1991).

Here, plaintiff's deposition testimony that he was regularly employed at Club Tequila as a bouncer at the time of his accidental injuries was corroborated by two fellow employees, Alvin Bright and Larry Howard, as well as by an affidavit from the person plaintiff claimed had employed him, Teion Crews. In response, defendant points out that the owner of Club Tequila denied ever having plaintiff as an employee. However, Crews later gave sworn testimony that plaintiff was an independent contractor rather than a direct employee. But, on the other hand, as defendant also points out, Crews' testimony also indicated that plaintiff did not work as often as he claimed (and as Crews has previously averred) and, further, that plaintiff was not likely to have continued on as a bouncer in any capacity as a result of plaintiff's marijuana use.

Suffice it to say that this case was replete with factual questions surrounding plaintiff's employment at the time of the accident and thus his entitlement to wage loss benefits resulting from the accident. How often plaintiff worked, what he earned, his prospects for continued employment, whether he was an employee or an independent contractor and related questions are best left to the fact-finder; they were not properly resolved against plaintiff through a summary disposition order.

Defendant argues vociferously that plaintiff's inability to produce documentation of his employment should be dispositive, but with no precedential support for that proposition. We find our dissenting colleague's agreement with defendant to be based on a mistaken understanding of the statutory scheme. MCL 500.3158(1) does require an employer to furnish a sworn statement regarding the earnings of an injured person but nowhere does it state that, if such information is not provided, an injured person completely loses the right to work loss benefits under MCL 500.3107(1)(b).[1] The dissent would penalize plaintiff for his former employer's failure to comply with MCL 500.3158 even though that statutory provision says nothing about employees and only places a responsibility on employers. As the dissent contends, under the facts and circumstances of this case, penalizing an employee for an employer's failure to produce a sworn statement might be appropriate. However, imposing such a penalty would be a public policy decision for the Legislature, not the courts. Nowhere do the statutes suggest that MCL 500.3158(1) is the only manner in which a wage loss claim may be proved or that the right to a wage loss claim under 500.3107(1)(b) hinges on compliance with MCL 500.3158(1). We are not free to read something into the statute that doesn't exist, no matter how egregious the facts may be.

Further, we note that, while plaintiff freely admitted at his deposition that the wages he claimed he earned at Club Tequila were paid "under the table" and the record suggests that plaintiff failed to properly file income tax returns regarding any income he earned, his claim would not be barred under the wrongful conduct

[1] Of course, the lack of earnings documentation is something for the fact-finder to consider in weighing plaintiff's work loss claim.

rule. *Orzel v Scott Drug Co*, 449 Mich 550, 558-559; 537 NW2d 208 (1995). That rule only bars a claim of a plaintiff "who founded his cause of action on his own illegal conduct." *Id*. at 559. Plaintiff's claim here is not based upon his failure to properly file income tax returns; it is based on his allegations of an automobile accident and resulting work loss injuries. The wrongful conduct rule does not apply because plaintiff's alleged failure to file income tax returns would be only incidentally or collaterally connected to his claim for work loss benefits. *Id*. at 564. Further, we note that the failure to file federal tax returns is not listed as one of the reasons identified by the Legislature to deny a person personal protection insurance benefits. See MCL 500.3113; *Cervantes v Farm Bureau Gen Ins Co*, 272 Mich App 410, 418; 726 NW2d 73 (2006).

In sum, we agree with plaintiff that factual questions existed with respect to his wage loss claim. The trial court improperly granted defendant summary disposition on that claim.

Turning next to defendant's cross-appeal, we further conclude that the trial court erred by awarding plaintiff housing costs based on the full amount he currently pays for rent. This issue is governed by *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521; 697 NW2d 895 (2005). Although *Griffith* considered compensation for food expenses, it indicated, in dicta, that its reasoning and analysis would also apply to housing costs. *Id*. at 538. Under the *Griffith* analysis, plaintiff's housing costs are only compensable to the extent that those costs became greater as a result of the accident. *Id*. at 535-540. Plaintiff must show that his housing expenses are different from those of an uninjured person, for example, by showing that the rental cost for handicapped accessible housing is higher than the rental cost

of ordinary housing. In the absence of that kind of factual record, the trial court erred by concluding that plaintiff was entitled to housing costs compensation merely on the basis of the amount plaintiff was currently paying in rent, for a residence that the record does not even demonstrate was handicapped accessible.

Accordingly, we reverse the orders granting summary disposition to defendant regarding the wage loss claim and to plaintiff regarding the housing cost claim. In light of those determinations, we need not consider plaintiff's arguments regarding penalty interest and attorneys fees, which would be better addressed initially by the trial court following factual determinations as to timing and the propriety of plaintiff's no-fault insurance claims, as well as defendant's actions in response.

We reverse and remand for further proceedings not inconsistent with this opinion. Neither party having fully prevailed, no costs shall be imposed. We do not retain jurisdiction.

SERVITTO, P.J., concurred.

MARKEY, J. (*dissenting*). I believe that the trial court properly denied plaintiff's request for work-loss benefits, penalty interest, and attorney fees; therefore, I dissent in respect to the majority's decision to reverse on that issue.

MCL 500.3158(1) provides:

> An employer, when a request is made by a personal protection insurer against whom a claim has been made, *shall* furnish forthwith, in a form approved by the commissioner of insurance, a sworn statement of the earnings since the time of the accidental bodily injury and for a reasonable period before the injury, of the person upon whose injury the claim is based. [Emphasis added.]

The language of § 3158(1) is unequivocal and unambiguous. The word "shall" signals that the requirement of § 3158(1) is mandatory. There is absolutely nothing about the wording of § 3158(1) that provides for any method of proving a claim for work-loss benefits when an insurer has requested verification from an employer other than that set forth in § 3158(1). Nor is there any caselaw that creates an alternate means. The majority's decision creates, although perhaps inadvertently, an exception to § 3158(1) or an alternative method of proving the amounts claimed for work-loss benefits. Under the facts of this case, I find the majority's crafting a loophole for an employer and his complicit employee who cannot or will not provide the requisite documentation because they are flouting federal and state tax laws contrary to the plain language, intent, and spirit of the no-fault act. The majority is legislating from the bench and creating public policy while that function resides with the Legislature. Moreover, under the facts of this case, I can find no injustice to plaintiff. Indeed, both the law and the equities of this fact situation to me lie with Titan Insurance Company, the personal protection benefits insurer.

Here, there is simply no question whatsoever that plaintiff's employer, although requested by Titan Insurance, failed to provide any documentation whatsoever of wages paid to plaintiff, much less provided documentation in accord with § 3158(1). There is no dispute about this, nor is there any dispute about the fact that plaintiff's employer provided no documentation because the employer maintained no records. Plaintiff worked "under the table." It is, however, incumbent upon claimants to prove how much they would have earned had they not been injured in the automobile accident. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 472; 521 NW2d 831 (1994). Plaintiff and his employer

patently decided *together* that plaintiff would work "under the table." This was a joint decision obviously made to avoid either of them having to pay taxes. But the side effect of that decision is that it renders the employer and the employee unable—or unwilling—to comply with § 3158(1), and in this case, it patently leaves plaintiff unable to prove how much he would have earned had he not been injured in the automobile accident. MCL 500.3158(1) does not provide for any alternative method of proving a claim for work-loss benefits. Nor under this particular situation, should we allow for affidavits, testimony, or any other means of proving a claim for wage-loss benefits. Had the Legislature intended for there to be another way of proving such a claim under these circumstances, surely by now it would have done so, and if it sees the need to, the Legislature may still, of course, modify the existing statutory requirement.[1]

What makes this decision, I believe, particularly easy is that plaintiff and his employer were provided numerous opportunities to furnish the requisite sworn statement of plaintiff's earnings. The case languished for years; subpoenas were issued for such records and documentation, and depositions were scheduled. Yet the information was never provided. This is not a situation where an injured employee is being punished because of a recalcitrant employer stubbornly or neglectfully failing to provide proof of income.

When one chooses to accept employment for which he or she will be paid "under the table," surely there may be some negative repercussions, and people who make such decisions should expect some. Because of his own and his employer's actions, I believe plaintiff forfeited

[1] I can envision factual situations where this Court might consider such evidence to prove a work-loss claim.

his ability to claim work-loss benefits under MCL 500.3158(1). It is improper for this Court to write in exceptions to the requirement of § 3158(1), and I believe the plain language of the statute absolutely forbids us from doing anything other than affirming the trial court in this respect.

Additionally, there is no authority, nor has the majority cited any, for the creation of an exception to § 3158(1). The other employees of plaintiff's employer, also paid under the table, have indeed submitted affidavits and other evidence, but it is all conflicting. Moreover, without plaintiff's satisfying the requirements of § 3158(1), the issue should be examined no further. The courts cannot create "a genuine issue of material fact" as the majority concludes there is where the initial statutory requirement has not and cannot be met. The simple fact of this case is that plaintiff cannot provide documentation as required under the statute to make a claim for wage-loss benefits. It is profoundly unfair to allow a judicially created means to collaterally attack the requirement that such documentation be provided because it puts the no-fault insurance carrier in an untenable position. It has no way whatsoever to dispute or prove—when it is not its burden of proof—the amount the plaintiff was earning at the time of the accident. It creates a situation rife with the potential for fraud, frankly, what seems to be precisely the case here. Moreover, we must look at the no-fault statute in its entirety to interpret it harmoniously. When one reads MCL 500.3107(1)(b), that portion of the statute that sets forth in detail the computation of work loss for an injured party, it is again patent that the calculations must stem from the documentation received from the employer as to how much the injured claimant was earning.

Additionally, I do not believe that my analysis requires us to address or be concerned with whether plaintiff or his employer filed federal or state income tax returns. I agree that plaintiff apparently is entitled to other forms of first-party, no-fault benefits, for example the attendant care and housing expenses that are also claimed in this case. I would not deny, nor do I believe that the trial court denied, his claim for work-loss benefits on the basis of the fact that he or his employer failed to comply with tax laws. In short, I see no applicability under the facts of this case and in view of the statutory language previously discussed for any resort to MCL 500.3113.

In conclusion, the unfortunate ramification for plaintiff in this case who chose to work "under the table" is that he cannot meet the statutory requirements for documenting his wages. Nor can his employer supply the requisite proof by any other means. Without documentation of the amount he was allegedly earning, I do not believe he can prove a claim for work-loss benefits under MCL 500.3107(1)(b). Summary disposition is proper under MCR 2.116(C)(10) where the evidence fails to establish a genuine issue regarding any material of fact, and the moving party is entitled to judgment as a matter of law. Here, there is no genuine issue of the material fact that plaintiff cannot and did not provide the requisite statutory documentation in respect to his earnings at the time of the accident. The statute requires that he provide such documentation when the insurer, here, Titan, so requests. Because there is no genuine issue regarding that fact, defendant was entitled to summary disposition as a matter of law, and the trial court was correct in doing so.

I would affirm the trial court on this issue.

KASBERG v YPSILANTI TOWNSHIP

Docket No. 287682. Submitted December 2, 2009, at Grand Rapids. Decided March 16, 2010, at 9:15 a.m.

Joseph Kasberg, an officer of National Church Residences of Win Ypsilanti, MI (National), a nonprofit housing concern, and National brought an appeal in the Michigan Tax Tribunal, alleging that Ypsilanti Township wrongfully denied a property tax exemption known as a "payment in lieu of taxes" (PILOT) pursuant to the State Housing Development Authority (SHDA) Act. MCL 125.1415a. The Tax Tribunal granted summary disposition in favor of the township and dismissed the case on the ground that the Tax Tribunal lacked jurisdiction over the matter because the claimed exemption is a creature of the state's police power under the State Housing Development Authority Act, MCL 125.1401 *et seq*., not the General Property Tax Act, MCL 211.1 *et seq*. Kasberg and National appealed.

The Court of Appeals *held*:

1. The Tax Tribunal has exclusive and original jurisdiction over any proceeding for direct review of a final decision relating to assessment under the property tax laws of this state. The case involves an assessment imposed under the property tax laws of Michigan. The assessment at issue was imposed under the property tax laws in the sense that the township's power to impose the tax was granted by the property tax laws. The Tax Tribunal has exclusive and original jurisdiction.

2. The Tax Tribunal has exclusive and original jurisdiction as to the imposition of taxes by agencies operating under the authority of the property tax laws. There is no "except" clause for cases where other laws might limit that authority or exempt taxpayers from tax liability. The Tax Tribunal's jurisdiction under MCL 205.731(a) and (b) is not limited to cases where provisions of the property tax laws are to be exclusively or primarily interpreted. The order of the Tax Tribunal must be reversed and the case must be remanded to the Tax Tribunal for further proceedings.

Reversed and remanded.

MARKEY, P.J., dissenting, stated that because the appellants' sole basis for relief was a claim to an exemption that did not arise

under the property tax laws of this state the order of the Tax Tribunal should be affirmed. The Tax Tribunal could not grant an exemption that the Legislature has entrusted to the SADA to grant. The Tax Tribunal does not have the authority to grant Kasberg a PILOT exemption that has not been certified for Kasberg by the SHDA. In addition, the Tax Tribunal may not ignore the appellants' failure to comply with the statutory requirement that a certificate of exemption be filed with the local assessing officer before November 1 of the year preceding the tax year in which the exemption is to begin. MCL 125.1415a(1). The Tax Tribunal lacked jurisdiction over the underlying claim to an exemption under a nontax statute. A matter that does not arise under the property tax laws of this state cannot be within the jurisdiction of the Tax Tribunal under MCL 205.731(a) and (b). The present claim to an exemption under MCL 125.1415a stems from the state's police powers, not its property tax laws.

TAXATION — TAX TRIBUNAL — JURISDICTION.

The Tax Tribunal has exclusive and original jurisdiction over any proceeding for the direct review of a final decision relating to an assessment under the property tax laws of this state; such jurisdiction is not limited to cases where provisions of the property tax laws are to be exclusively or primarily interpreted; the Tax Tribunal has exclusive and original jurisdiction as to the imposition of taxes by agencies operating under the authority of the property tax laws, including cases where other laws might limit that authority or exempt taxpayers from tax liability (MCL 205.731[a] and [b]).

Honigman Miller Schwartz and Cohn LLP (by *Michael B. Shapiro* and *Daniel L. Stanley*) for Joseph Kasberg and National Church Residences of Win Ypsilanti, MI.

McLain & Winters (by *Wm. Douglas Winters* and *Angela B. King*) for Ypsilanti Township.

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

BANDSTRA, J. Appellants, the National Church Residences of Win Ypsilanti, MI (National), a nonprofit housing concern, and one of its officers, Joseph Kas-

berg, appeal as of right the August 29, 2008, order of the Michigan Tax Tribunal (MTT) dismissing an appeal of appellee Ypsilanti Township's tax assessment of certain real property. Appellants assert that appellee wrongfully determined the property was not exempt from taxation under MCL 125.1415a. The hearing officer granted appellee's motion for summary disposition pursuant to MCR 2.116(C)(4) on the ground that the MTT lacked jurisdiction because the claimed exemption is a creature of the state's police power under the State Housing Development Authority Act, MCL 125.1401 *et seq.*, not of the General Property Tax Act, MCL 211.1 *et seq*. We reverse.

Appellants filed this appeal with the MTT, arguing appellee wrongfully denied a property tax exemption known as a "payment in lieu of taxes" (PILOT) pursuant to the State Housing Development Authority (SHDA) Act. MCL 125.1415a.[1] Appellants assert that National is "a non-profit charitable corporation, which makes it PILOT eligible." Appellee moved in the MTT for summary disposition pursuant to MCR 2.116(C)(4)

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[1] If a housing project owned by a nonprofit housing corporation, consumer housing cooperative, limited dividend housing corporation, mobile home park corporation, or mobile home park association is financed with a federally-aided or authority-aided mortgage or advance or grant from the authority, then, except as provided in this section, the housing project is exempt from all ad valorem property taxes imposed by this state or by any political subdivision, public body, or taxing district in which the project is located. The owner of a housing project eligible for the exemption shall file with the local assessing officer a notification of the exemption, which shall be in an affidavit form as provided by the authority. The completed affidavit form first shall be submitted to the [SHDA] for certification by the [SHDA] that the project is eligible for the exemption. The owner then shall file the certified notification of the exemption with the local assessing officer before November 1 of the year preceding the tax year in which the exemption is to begin. [MCL 125.1415a(1).]

on the ground that the MTT lacked jurisdiction and asserting that the PILOT exemption is a creature of the state's police power, not of the General Property Tax Act, MCL 211.1 *et seq*. The hearing officer agreed with appellee, so he granted summary disposition and dismissed the case.

Whether the MTT has jurisdiction[2] is a question of law that we review de novo. *W A Foote Mem Hosp v Dep't of Pub Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995). We note that a court must be vigilant in respecting the limits of its jurisdiction. *Fox v Univ of Mich Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965). This is because any actions of a court regarding a matter over which it lacks jurisdiction are void. *Id*.

The Legislature has granted the MTT "exclusive and original jurisdiction" over certain proceedings, including the following:

> (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, *under the property tax laws of this state*.
>
> (b) A proceeding for a refund or redetermination of a tax levied *under the property tax laws of this state*. [MCL 205.731(a) and (b) (emphases added).]

In other words, the MTT has "exclusive and original jurisdiction" over any "proceeding for direct review of a final decision . . . relating to assessment . . . under the

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[2] This is the only issue before us. We note that much of our dissenting colleague's discussion has to do with the merits of appellant's arguments, not with the jurisdiction of the MTT to review the appeal. We express no opinion whether appellants were entitled to and should have been granted certification of exemption from taxation under the PILOT program by SHDA nor the merits of appellants' MTT appeal in light of the absence of such PILOT certification.

property tax laws of this state." MCL 205.731(a). Obviously, this case involves an assessment imposed under the property tax laws of Michigan and, applying the straightforward statutory language, the MTT has exclusive and original jurisdiction.

Arguing otherwise, appellee relies on dictum from *Wikman v City of Novi*, 413 Mich 617; 322 NW2d 103 (1982), as well as *Beattie v East China Charter Twp*, 157 Mich App 27; 403 NW2d 490 (1987). *Wikman* actually determined that the MTT *had* jurisdiction over the matter at issue, special assessments imposed for a road paving project in the city of Novi. *Wikman*, 413 Mich at 626, 630-631. The Court reasoned that, because the city was granted power and authority to levy the special assessments by the Legislature through the property tax laws, the MTT had jurisdiction to review them. *Id*. at 636. The dispositive question under *Wikman* is whether the assessment at issue here was imposed "under the property tax laws" in the sense that appellee's power to impose the tax was granted by the property tax laws. That is clearly the case, and, therefore, the MTT has jurisdiction.

Further, we note that the *Wikman* Court contrasted the case before it and those involving "special assessments [that] are clearly not related to property taxes" like assessments "exacted through the state's police power as part of the government's efforts to protect society's health and welfare" or "special assessments . . . collected in connection with a regulatory program to defray the cost of such regulation . . . ." *Id*. at 635. The assessment at issue here was imposed under the property tax laws, not some other authority; it is not within the category of cases declared to be outside the jurisdictional rule established by *Wikman*.

While noting that *Beattie* is not binding upon us, MCR 7.215(J), appellee nonetheless argues that its

reasoning is persuasive. Appellee reads *Beattie* as meaning that, even though a tax assessment has been imposed under the authority of the property tax laws, the MTT is divested of jurisdiction if the propriety of that imposition depends on the availability of an exemption created by some other law, like the SHDA Act here.

As appellants point out, however, this *Beattie* reasoning cannot prevail over either *Wikman* or the clear and unambiguous language of the statute. The statute does not limit the MTT's jurisdiction to cases where provisions of the property tax laws are to be exclusively or primarily interpreted. Instead, as *Wikman* concluded, the MTT has exclusive and original jurisdiction as to the imposition of taxes by agencies operating under the authority of the property tax laws. There is no "except" clause for cases where other laws might limit that authority or exempt taxpayers from tax liability. See *In re Petition of Wayne Co Treasurer for Foreclosure*, 286 Mich App 108, 111; 777 NW2d 108 (2009) ("The Tax Tribunal has jurisdiction under MCL 205.731(a) to determine whether a taxpayer is entitled to a property tax exemption because the determination relates to an assessment."); MCL 205.735a(3) (The MTT has jurisdiction regarding the "exemption of property" from an assessment as long as a protest has been filed before the Board of Review.) As this panel has recently noted, the MTT has been granted exclusive jurisdiction to decide all sorts of statutory and constitutional questions that might impact the propriety of taxation imposed under the authority of the property tax laws. *Michigan's Adventure, Inc v Dalton Twp*, 287 Mich App 151; 782 NW2d 806 (2010).

We reverse and remand for further proceedings in the MTT. No costs should be taxed, a public question being at issue. We do not retain jurisdiction.

MURRAY, J., concurred.

MARKEY, P.J. (*dissenting*). I respectfully dissent. While appellants appealed a property tax assessment "under the property tax laws of this state," their sole basis for relief was a claim to an exemption that did not arise "under the property tax laws of this state." Consequently, I would affirm. The Tax Tribunal could not grant an exemption that the Legislature has plainly entrusted to the State Housing Development Authority (SHDA) to grant. MCL 125.1415a. Moreover, even if the Tax Tribunal has jurisdiction, I would still affirm because appellant National Church Residences of Win Ypsilanti, MI (National), did not obtain its certified § 1415a exemption until 2007, the tax year at issue. National could not have complied with § 1415a by filing its exemption "with the local assessing officer before November 1 of the year *preceding* the tax year in which the exemption is to begin." *Id*. (emphasis added).

Petitioner, Joseph Kasberg, originally filed this appeal with the Tax Tribunal asserting that respondent wrongfully denied a property tax exemption known as a "payment in lieu of taxes" (PILOT) pursuant to MCL 125.1415a. Petitioner asserted that National is "a nonprofit charitable corporation, which makes it PILOT eligible." The materials filed with this appeal indicate that in late 2006, National acquired the subject property from an entity that had for many years been certified by the SHDA as PILOT eligible. After closing, the SHDA processed and granted National PILOT certification in early 2007. Respondent assessed National for property taxes for the 2007 tax year because National had not complied with the provisions of MCL 125.1415a. Respondent moved in the Tax Tribunal for summary disposition pursuant to MCR 2.116(C)(4), on the ground that the Tax Tribunal lacked jurisdiction,

asserting that the PILOT exemption is a creature of the state's police power, not of the General Property Tax Act, MCL 211.1 *et seq*. The hearing officer agreed with respondent and dismissed the appeal.

Whether the Tax Tribunal has jurisdiction is a question of law subject to review de novo. *W A Foote Mem Hosp v Dep't of Pub Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995). "[A] court is continually obliged to question sua sponte its own jurisdiction over a person, the subject matter of an action, or the limits of the relief it may afford . . . ." *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 399; 651 NW2d 756 (2002). This is so because any actions of a court regarding a matter over which it lacks jurisdiction are void. *Fox v Univ of Mich Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965).

The Legislature has granted the Tax Tribunal "exclusive and original jurisdiction" over certain proceedings, including the following:

> (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, *under the property tax laws of this state*.
>
> (b) A proceeding for a refund or redetermination of a tax levied *under the property tax laws of this state*. [MCL 205.731(a) and (b) (emphasis added).]

In *Wikman v City of Novi*, 413 Mich 617, 635-636; 322 NW2d 103 (1982), our Supreme Court held that some special assessments that are "exacted through the state's police power as part of the government's efforts to protect society's health and welfare," or that "may be collected in connection with a regulatory program to defray the cost of such regulation . . . are not ones under the property tax laws and are not within the jurisdiction

of the Tax Tribunal." This Court has applied the reasoning of the *Wikman* Court in determining that the Tax Tribunal lacked jurisdiction regarding a tax exemption granted under the authority of the Michigan Energy Employment Act, MCL 460.801 *et seq*. See *Beattie v East China Charter Twp*, 157 Mich App 27, 35; 403 NW2d 490 (1987).

I find *Beattie*, decided before the operative date of the conflict rule, MCR 7.215(J)(1), and therefore not binding on this Court, persuasive. Appellants' petition calls for interpretation of part of the State Housing Development Authority Act, MCL 125.1401 *et seq*., not any part of the General Property Tax Act, MCL 211.1 *et seq*. I would hold that the Tax Tribunal properly concluded that it did not have jurisdiction to determine whether petitioner qualified for the exemption or to grant relief on the basis of an interpretation of MCL 125.1415a.

The majority holds that because appellants frame this appeal as one seeking review of an assessment of property under the general property tax laws of this state, this case falls within the plainly expressed exclusive jurisdiction of the Tax Tribunal. MCL 205.731(a) and (b). But when examining the question of jurisdiction, " 'this Court will look beyond a plaintiff's choice of labels to the true nature of the plaintiff's claim.' " *Michigan's Adventure, Inc v Dalton Twp*, 287 Mich App 151, 155; 782 NW2d 806 (2010), quoting *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998). A court's jurisdiction " 'is the power to hear and determine a cause or matter.' " *Bowie v Arder*, 441 Mich 23, 36; 490 NW2d 568 (1992), quoting *Langdon v Wayne Circuit Judges*, 76 Mich 358, 367; 43 NW 310 (1889). "A court has subject-matter jurisdiction to hear a case if the law has given the court the power to grant the

rights requested by the parties." *Cipri v Bellingham Frozen Foods, Inc*, 213 Mich App 32, 39; 539 NW2d 526 (1995).

Here, the relief petitioner sought from the Tax Tribunal was a determination that National was exempt from property taxation for the 2007 tax year under MCL 125.1415a; such relief cannot be granted "under the property tax laws of this state" as that phrase is used in MCL 205.731(a) and (b). Further, the Legislature has plainly vested the power to certify whether a property owner is eligible for a PILOT exemption with the SHDA: "The owner of a housing project eligible for the exemption shall file with the local assessing officer a notification of the exemption, which shall be in *an affidavit form as provided by the authority*. The completed affidavit form first shall be submitted to the authority *for certification by the authority that the project is eligible for the exemption*." MCL 125.1415a(1) (emphasis added). Consequently, the Tax Tribunal does not have the authority to grant petitioner a PILOT exemption when the SHDA has not certified one for petitioner. Moreover, the Tax Tribunal may not ignore the requirement of the statute that a certificate of exemption be filed "with the local assessing officer before November 1 of the year *preceding* the tax year in which the exemption is to begin." MCL 125.1415a(1) (emphasis added). Because appellants underlying claim is to an exemption under a nontax statute, I conclude that the Tax Tribunal lacked jurisdiction to determine petitioner's claim to the exemption or to grant the relief petitioner sought.

As noted already, my conclusion is supported by our Supreme Court's decision in *Wikman*. The majority diminishes *Wikman* by referring to its discussion of the meaning of the phrase "under the property tax

laws of this state" as dicta. Statements contained in an opinion that pertain to law not essential to a determination of the case are dicta and do not have the force of an adjudication. See *Reynolds v Bureau of State Lottery*, 240 Mich App 84, 95; 610 NW2d 597 (2000). But the *Wikman* Court's discussion of the meaning of "under the property tax laws of this state" *was* essential to its opinion and differentiated its conclusion from that of the dissent. See *Wikman*, 413 Mich at 633-636, 638-640 (COLEMAN, C.J.); *id*. at 655 (LEVIN, J., dissenting). Indeed, the *Wikman* Court held that the phrase "under the property tax laws of this state" modified the words "special assessment" in the jurisdictional grant of MCL 205.731. *Wikman*, 413 Mich at 633. While noting that some special assessments do not arise from the property tax laws, the ones at issue "levied against property owners for public improvements to realty which especially benefit their property are special assessments under the property tax laws for the purposes of the Tax Tribunal Act." *Id*. at 636. Hence, the Court held that MCL 205.731 granted the Tax Tribunal exclusive jurisdiction over direct review of a municipal special assessment for a public improvement. *Id*. at 626. The clear lesson of the *Wikman* decision is that a matter that *does not arise* "under the property tax laws of this state" cannot be within the jurisdiction of the Tax Tribunal under MCL 205.731(a) and (b). *Wikman*, 413 Mich at 635-636.

I also find *In re Petition of the Wayne Co Treasurer for Foreclosure*, 286 Mich App 108; 777 NW2d 507 (2009), inapposite. That case held that whether the petitioner was entitled to a tax exemption under the General Property Tax Act, specifically, MCL 211.7s, regarding houses of public worship, was a factual determination within the exclusive jurisdiction of the Tax Tribunal. But, as discussed earlier in this opinion, appellants' claimed exemption here flows from the State Housing

Development Authority Act, MCL 125.1401 *et seq*., not the General Property Tax Act.

The Legislature declared that it enacted the State Housing Development Authority Act to address myriad concerns, including the need for "safe and sanitary dwelling accommodations within the financial means of low income or moderate income families or persons," and that "the existence of blight, the inability to redevelop cleared areas, and the lack of economic integration is detrimental to the general welfare of the citizens of this state and the economic welfare of municipalities in this state," and in order to "promote the financial and social stability of housing for families and persons of low and moderate income . . . ." MCL 125.1401(1). The Legislature additionally determined "that it is a proper public purpose to prevent the erosion of the supply of existing low and moderate cost housing available for occupancy by certain persons with disabilities and elderly persons by taking appropriate action to prevent the displacement of those persons with disabilities and elderly persons from existing low and moderate cost housing . . . ." MCL 125.1401(2). These and many other purposes set forth in MCL 125.1401 clearly establish that the State Housing Development Authority Act arises not from the tax laws of this state, but from "the state's police power as part of the government's efforts to protect society's health and welfare . . . ." *Wikman*, 413 Mich at 635. Accordingly, appellants' claim to an exemption under MCL 125.1415a, payment in lieu of taxes, stems from the state's police powers, not its property tax laws. The Tax Tribunal properly recognized that it lacked jurisdiction in this case and properly dismissed this case for that reason. *Beattie*, 157 Mich App at 35.

Additionally, even if the majority were correct in concluding that the Tax Tribunal erred by ruling it

lacked jurisdiction, I would still affirm because appellant did not obtain certification of its exemption under MCL 125.1415a until 2007, the tax year at issue in this appeal. Petitioner could not have filed "the certified notification of the exemption with the local assessing officer before November 1 of the year *preceding* the tax year in which the exemption is to begin." MCL 125.1415a(1) (emphasis added). This Court will affirm a lower court when it reaches the correct result even if for the wrong reason. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

I would affirm.

PERSELL v WERTZ

Docket No. 288858. Submitted March 9, 2010, at Lansing. Decided March 23, 2010, at 9:00 a.m.

David and Kaye Persell brought an action in the Eaton Circuit Court, Thomas S. Eveland, J., against Dennis Wertz, alleging common-law and statutory trespass, for allegedly spraying an unknown herbicide on plaintiffs' lawn, statutory trespass and nuisance, for erecting a fence across a pond along the boundary line of the parties' adjoining properties, defamation, and intentional infliction of emotional distress. The jury held in favor of plaintiffs on all counts except the defamation count. A judgment awarding damages, costs, case evaluation sanctions, and prejudgment interest was entered for plaintiffs. Defendant appealed.

The Court of Appeals *held*:

1. The common law does not establish riparian rights in artificial bodies of water like the pond made by the parties. Under Michigan law, no riparian rights arise from an artificial body of water. The artificial pond did not create riparian lands with riparian rights. The trial court erred by determining that plaintiffs could establish that they had riparian rights to use the entire surface of the artificial pond. The trial court erred in submitting the counts regarding the erection of the fence to the jury. The judgment with regard to those counts must be reversed. It is impossible to determine the extent to which the erection of the fence may have improperly influenced the jury's determination that defendant inflicted emotional distress or its assessment of damages therefor. That part of the judgment must also be reversed and the case must be remanded for a new trial on the emotional distress count at which plaintiffs' proofs may not include reference to the fence across the pond.

2. Testimony by David Persell created a factual dispute regarding the spraying of herbicide that was properly submitted for the jury to resolve. The judgment must be affirmed with regard to the common-law trespass claim relating to the herbicide spraying.

3. MCL 600.2919(1)(c), which provides in part that a person who intentionally cuts down or carries away any grass, hay, or grain from another's land is liable for treble damages, does not

include any requirement that the item cut down or carried away be of agricultural value. The statute also does not cover the alleged poisoning or damaging of grass. The count of plaintiffs' complaint seeking treble damages under the statute for the alleged placement of herbicide on plaintiffs' grass should have been dismissed and the part of the judgment based on that count must be reversed.

4. The award of case evaluation sanctions must be vacated.

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

1. WATER AND WATERCOURSES — RIPARIAN RIGHTS — ARTIFICIAL WATERCOURSES.

No riparian rights arise from an artificial body of water under Michigan law; land abutting on an artificial watercourse has no riparian rights; artificial watercourses are waterways that owe their origin to acts of men.

2. TRESPASS — TREBLE DAMAGES — CUTTING DOWN OR CARRYING AWAY GRASS, HAY, OR GRAIN.

The statute that provides, in part, that a person who intentionally cuts down or carries away any grass, hay, or grain from another's land is liable for treble damages does not require that the item that is cut down or carried away be of agricultural value; the alleged poisoning or damaging of grass is not included within the coverage of the statute (MCL 600.2919[1][c]).

Willingham & Coté, P.C. (by *Curtis R. Hadley*), for plaintiffs.

Bodwin & Stover, P.C. (by *Randolph L. Bodwin*), for defendant.

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

SAWYER, J. Defendant appeals a judgment of the circuit court entered on a jury verdict in favor of plaintiffs. We affirm in part, reverse in part, vacate the case evaluation sanctions, and remand for further proceedings.

Plaintiffs and defendant are neighbors in Charlotte. They originally had a very amicable relationship. In-

deed, that relationship gave rise to an event that ultimately forms part of the instant dispute. Defendant had hired an excavator to dig a pond toward the rear of his property. Plaintiffs apparently found the idea appealing and it was agreed that the excavation would extend across the common property line. As a result, an artificial pond was created, with approximately three-quarters of the pond on defendant's property and the remainder on plaintiffs' property.

But that relationship seems to have deteriorated in recent years and a number of disputes have given rise to the instant litigation, with plaintiffs having filed a six-count complaint against defendant. The first two counts of the complaint alleged common-law and statutory trespass over an incident in June 2006 in which plaintiffs claim that defendant entered upon their property and sprayed an unknown herbicide, resulting in the killing of a large portion of their lawn. The third and fourth counts of the complaint allege statutory trespass and nuisance arising from defendant's, in August 2006, erecting a two-strand wire fence across the pond along the boundary line of the adjoining properties. Count V of the complaint alleged defamation based upon several statements defendant made to third parties regarding plaintiff David Persell. Count VI alleged intentional infliction of emotional distress based upon defendant's conduct regarding the preceding counts. At trial, the jury found in favor of plaintiffs on all counts except for defamation. The herbicide counts resulted in a judgment of $3,000, while the pond fence allegations resulted in a judgment of $2,200. The emotional distress claim resulted in a judgment of $15,000. With the addition of costs, case evaluation sanctions, and prejudgment interest, the total judgment was in the amount of $42,937.76.

Defendant first argues that the trial court erred by failing to dismiss counts III and IV regarding the fencing of the pond. We review this question de novo[1] and agree with defendant that these counts should have been dismissed. Plaintiffs' right to recover under these counts is dependent upon the conclusion that plaintiffs possess riparian rights in the pond giving them the right to use the entire surface of the pond. Unlike the trial court, we believe that it is clear under Michigan law that no riparian rights arise from an artificial body of water. In reaching this decision, we rely on the Supreme Court's decision in *Thompson v Enz*.[2]

Thompson involved the development of a parcel of land that abutted Gun Lake. The development provided for 144 lots, approximately 16 of which actually abutted the natural shoreline of Gun Lake. The remaining lots would front on canals that would give access to the lake.[3] In determining whether these back lots had riparian rights, the Supreme Court made it clear that artificial waterways do not give rise to riparian rights. First, the Court observed the following principles:[4]

> "Riparian land" is defined as a parcel of land which includes therein a part of or is bounded by a natural water course. 4 Restatement, Torts, § 843, p 326. See, also, *Palmer v. Dodd*, 64 Mich 474, 476 [31 NW 209 (1887)]; *Stark v. Miller*, 113 Mich 465 [71 NW 876 (1897)]; *Monroe Carp Pond Co. v. River Raisin Paper Co.*, 240 Mich 279, 287 [215 NW 325 (1927)].
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> A "riparian proprietor" is a person who is in possession of riparian lands or who owns an estate therein. 4 Restatement, Torts, § 844, p 331.

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[1] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

[2] 379 Mich 667; 154 NW2d 473 (1967).

[3] *Id.* at 675.

[4] *Id.* at 677.

See also *Little v Kin*,[5] which adopted *Thompson*'s definition of "riparian land" being land bounded by a natural watercourse.

While the above alone would make it clear that an artificial pond does not create riparian lands with riparian rights, the Court went on to make the point even clearer:[6]

> Artificial water courses are waterways that owe their origin to acts of man, such as canals, drainage and irrigation ditches, aqueducts, flumes, and the like. 4 Restatement, Torts, § 841, subd h, p 321.
>
> Land abutting on an artificial water course has no riparian rights.

The trial court's error in the case at bar is its reliance on an unpublished decision of this Court in *Parsons v Whittaker*,[7] which incorrectly distinguished *Thompson*. That case considered riparian rights arising from an artificial lake created when a gravel pit filled with water. The Court[8] acknowledged that there were no published decisions of a Michigan court regarding whether riparian rights arose in an artificial lake. Indeed, it acknowledged that the common-law rule was that land abutting an artificial watercourse had no riparian rights, citing *Thompson* for that proposition. But *Parsons* then distinguished *Thompson* on the basis that it considered the rights where the artificial watercourse connects to a natural body of water.[9] Ultimately, *Parsons* concluded that the common law did not preclude a determination that artificial bodies of water give

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[5] 249 Mich App 502, 508; 644 NW2d 375 (2002).

[6] *Thompson*, 379 Mich at 679.

[7] *Parsons v Whittaker*, unpublished opinion per curiam, issued August 23, 1996 (Docket Nos. 170274 and 171456).

[8] *Id*. at 2.

[9] *Id*. at 3.

rise to riparian rights and that, in any event, the Inland Lakes and Streams Act[10] created riparian rights to an artificial lake at least five acres in size.

While *Thompson* did deal with an artificial waterway that connected to a natural lake, there is nothing in the opinion to suggest that the Court was relying on any such distinction. Rather, it seems clear to us that *Thompson* relied on the very broad principle that the common law does not establish riparian rights in artificial bodies of water. Furthermore, we need not determine whether *Parsons* correctly determined that there are statutory riparian rights because, even if *Parsons* is correct on this point, it does not apply to the case at bar because the pond at issue is smaller than five acres in size.

For these reasons, we conclude that the trial court erred by its reliance on *Parsons* and by concluding that plaintiffs could establish that they had riparian rights to use the entire surface of the artificial pond. Because plaintiffs could not establish riparian rights with respect to the artificial pond, the trial court erred by submitting counts III and IV to a jury. Furthermore, we also agree with defendant that this conclusion compels a reversal of the jury verdict on count VI, the claim for intentional infliction of emotional distress. While it is true that the emotional distress claim was based not just on the construction of the fence across the pond and the jury could have found for plaintiffs on this count without regard to the fence across the pond, it is equally true that it is impossible to determine the extent to which the fence may have improperly influenced the jury's determination that defendant inflicted emotional distress or its assessment of damages. Accordingly, while our decision on counts III and IV does

[10] Former MCL 281.951 *et seq.*

not compel a judgment for defendant on count VI, it does invalidate the jury's verdict on that count and necessitates a new trial on count VI.

Defendant's remaining argument on appeal is that the trial court erred by denying summary disposition as to counts I and II regarding the herbiciding of plaintiffs' lawn. We disagree. With respect to count I, the common-law trespass claim involving the spraying of herbicide on plaintiffs' lawn, it is true that plaintiffs do not point to any direct evidence establishing that defendant did so on the one occasion alleged in the complaint. But, plaintiff David Persell did testify that he observed defendant spraying herbicide on plaintiffs' side of the pond on a different occasion and that he observed defendant spraying a herbicide on defendant's property about the time in question and that the resulting effect appeared similar to what plaintiffs thereafter observed on their own lawn. We conclude that this did create a factual dispute for the jury to resolve, which it resolved in plaintiffs' favor.[11]

But we do agree with defendant that count II, seeking treble damages under MCL 600.2919(1)(c) should have been dismissed because that statute is inapplicable to this case. Like summary disposition, questions of statutory interpretation are reviewed de novo.[12] The goal of statutory interpretation is to give effect to the legislative intent.[13] In doing so, we examine the language of the statute and where the intent is clearly expressed in the statute, no further construction is necessary.[14]

MCL 600.2919(1) provides that a person who inten-

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[11] *Dressel v Ameribank*, 468 Mich 557; 664 NWd 151 (2003).

[12] *Id*.

[13] *Id.* at 562.

[14] *Id.*

tionally does one of the following on the land of another is liable for treble damages:

> (a) cuts down or carries off any wood, underwood, trees, or timber or despoils or injures any trees on other's lands, or
>
> (b) digs up or carries away stone, ore, gravel, clay, sand, turf, or mould or any root, fruit, or plant from another's lands, or
>
> (c) cuts down or carries away any grass, hay, or any kind of grain from another's lands . . . .

Defendant essentially argues that the statute only applies to items of agricultural value. Plaintiffs counter that a strict reading of the statute does not include any requirement that the item cut down or carried away must be of agricultural value.

Plaintiffs are correct in that nothing in the statute limits the applicability of the statute to crops or other valuable resources. But for the same reason, a proper interpretation of the statute necessitates that plaintiffs lose because nothing in the statute covers the poisoning of the grass. That is, by its very terms, § (1)(c) only applies to grass that a person "cuts down or carries away" and it is not alleged that defendant did either. In other words, just as defendant may not read into the statute a requirement that the grass, hay, or grain be a crop or otherwise a valuable resource, plaintiffs may not read into the statute that it covers poisoning the grass in addition to cutting it down or carrying it away. While, as plaintiffs suggest, the grass may have "essentially been cut down," it was not actually cut down and, therefore, the statute is inapplicable.

Moreover, this is not a mere parsing of words. Section (1)(a) clearly reflects that the Legislature could have included coverage of damage to the grass. That section, in dealing with trees, in addition to providing for

coverage for cutting down or carrying off trees, also specifically provides for coverage for despoiling or injuring a tree. This clearly reflects that the Legislature did not include within the concept of cutting vegetation down other injuries to vegetation and that, had the Legislature wanted to include injuries to grass in addition to cutting it down, it would have included language similar to that which it employed in reference to trees.[15]

In sum, we agree that the trial court should have dismissed counts II, III, and IV and not submitted these counts to the jury. But we do conclude that the verdict on count I should stand and we affirm the award of $750 on this count. As for count VI, while it is possible that plaintiffs could still prevail on this claim, it cannot be based upon the allegations of trespass with regard to the placing of the fence across the pond along the property line because defendant had a right to do this. Accordingly, we conclude that defendant is entitled to a new trial on count VI only, with plaintiffs' proofs not to include reference to the fence across the pond.

Affirmed in part, reversed in part, vacated with respect to the case evaluation sanctions, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

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[15] See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.").

DOE v CITIZENS INSURANCE COMPANY OF AMERICA

Docket No. 288776. Submitted January 12, 2010, at Lansing. Decided January 26, 2010. Approved for publication March 23, 2010, at 9:10 a.m.

John Doe, a minor, through his mother and next friend, brought an action in the Ingham Circuit Court against Citizens Insurance Company of America; Michael Hand, a minor, by his guardian ad litem, Thomas Woods; and Renee Boyle, seeking a declaration that Citizens has a duty to defend and indemnify Hand and Boyle on an underlying complaint filed by plaintiff against Hand and Boyle under a homeowners' insurance policy issued to Boyle. That action sought damages against Hand for negligence and false imprisonment and against Boyle for negligent supervision and was based on Hand's alleged sexual molestation of plaintiff. The trial court, Joyce Draganchuk, J., granted summary disposition in favor of Citizens, holding that the policy's exclusion from coverage of bodily injury arising out of sexual molestation applied. Plaintiff appealed.

The Court of Appeals *held*:

1. Although the policy does not define "sexual molestation," a dictionary defines "molest" as "to make indecent sexual advances to" and "to assault sexually." The conduct that plaintiff alleges that defendant Hand engaged in clearly and unambiguously falls within this definition.

2. The language of the exclusion in this case does not require that there be an intent to injure or that injury be reasonably foreseeable. Therefore, whether Hand intended to injure plaintiff is irrelevant. The exclusion applies, without regard to whether Hand intended to injure plaintiff, because the underlying complaint clearly alleges that plaintiff's injuries arose out of sexual molestation.

Affirmed.

The Keane Law Firm (by *Christopher J. Keane*) and *Robert S. Harrison & Associates, P.L.C.* (by *Robert S. Harrison* and *Matthew D. Klakulak*), for John Doe.

Cummins Woods (by *Thomas E. Woods* and *Brian Palmer Lick*) for Michael Hand.

Plunkett Cooney (by *Ernest R. Bazzana*) for Citizens Insurance Company of America.

Before: BANDSTRA, P.J., and SAWYER and OWENS, JJ.

PER CURIAM. Plaintiff, John Doe, a minor, through his mother and next friend, appeals an order of the circuit court granting summary disposition under MCR 2.116(C)(8) and (10) in favor of defendant Citizens Insurance Company of America on plaintiff's complaint seeking a declaration that Citizens has a duty to defend and indemnify defendants Michael Hand, a minor, by his guardian ad litem, Thomas Woods, and Renee Boyle on an underlying complaint filed against Hand and Boyle under a homeowners' insurance policy issued to Boyle. We affirm.

Plaintiff alleges that in 2006, when five years old, he was on a public beach in Traverse City. Hand, then a thirteen-year-old boy residing with Boyle, was taken by Boyle to the same beach. At some point while Hand and Doe were swimming or playing in the same area, Hand asked Doe if he had to go to the bathroom. Both then went to the public restroom where, at Hand's request, Doe disrobed and submitted to Hand's performing fellatio on Doe as well as Doe's performing fellatio on Hand. Upon leaving the restroom, Doe immediately informed others of the event and the police were summoned.

Plaintiff instituted an action against Hand and Boyle, alleging negligence and false imprisonment by Hand and negligent supervision by Boyle. Thereafter, plaintiff filed the instant action seeking a determination of Citizens' obligations regarding the underlying

suit.[1] The trial court granted summary disposition on the basis of the "sexual molestation" exclusion in the insurance policy.

Plaintiff first argues that the term "sexual molestation" is not defined in the policy and cannot serve as a basis for excluding coverage. We disagree. The insurance policy in this case does exclude coverage for bodily injury "arising out of sexual molestation," with the term "sexual molestation" being undefined in the policy. Where a term is not defined in an insurance policy, it is to be interpreted in accordance with its " 'commonly used meaning.' " *Allstate Ins Co v McCarn*, 466 Mich 277, 280; 645 NW2d 20 (2002). According to *Random House Webster's College Dictionary* (1997), the definition of "molest" includes "to make indecent sexual advances to" and "to assault sexually." The conduct that plaintiff alleges that defendant Hand engaged in clearly and unambiguously falls within this definition. See, also, e.g., *American Commerce Ins Co v Porto*, 811 A2d 1185, 1199 (RI, 2002) (the term "sexual molestation" includes many activities, including oral sexual activity).

Plaintiff additionally argues that the term "sexual molestation" only refers to actions of an adult committed on a child. But plaintiff only refers us to cases where the molester was, in fact, an adult. None of these cases, however, held that a molester *must* be an adult.

Finally, plaintiff's reliance on *Fire Ins Exch v Diehl*, 450 Mich 678; 545 NW2d 602 (1996), overruled in part

[1] It is unclear from plaintiff's pleadings whether the underlying suit was ever formally tendered to Citizens to defend Boyle and Hand and whether Citizens formally declined to defend. In any event, Citizens did file a motion for summary disposition in the instant action arguing that it has no duty to defend or indemnify and this appeal is focused on that issue.

in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 59-63 (2003), is similarly misplaced. Plaintiff argues that *Diehl* stands for the proposition that where an action is based upon a minor's performing sexual acts on another minor, intent cannot be inferred as a matter of law. While *Diehl*, *supra* at 689-690, did reach such a holding, it did so in analyzing policy exclusions for intentional injury and for injuries caused from intentional acts that are reasonably foreseeable. While similar exclusions are found in the insurance policy at issue in this case, those exclusions are not relevant to this appeal. At issue is a separate exclusion for any injury "arising out of sexual molestation," and the language of that exclusion does not require that there be an intent to injure or that injury be reasonably foreseeable.

The rationale of *Diehl* is that a child actor, unlike an adult, does not necessarily understand that sexual activity with a minor may be harmful to the minor. *Id.* at 691. But that rationale is relevant only with regard to an exclusion that requires some intent to injure. The exclusion at issue in the case at bar requires no such intent. That is, whether Hand intended to injure Doe is irrelevant to the case at bar. The policy excludes coverage for any injury arising out of sexual molestation, not just intended injuries. Because plaintiff's complaint clearly alleges that Doe's injuries arose out of sexual molestation, the exclusion applies and it applies without regard to whether Hand intended to injure Doe.

Accordingly, we conclude that the trial court properly granted summary disposition in favor of defendant Citizens.

Affirmed. Defendant Citizens may tax costs.

ALPHA CAPITAL MANAGEMENT, INC v RENTENBACH

Docket No. 287280. Submitted December 7, 2009, at Detroit. Decided March 23, 2010, at 9:05 a.m.

Alpha Capital Management, Inc., brought an action in the Wayne Circuit Court, John H. Gillis, Jr., J., against attorney Paul R. Rentenbach and his law firm, Dykema Gossett, P.L.L.C., and another of the firm's attorneys, alleging beach of fiduciary duties, tortious interference with contractual relations and with prospective economic and business advantages, and aiding and abetting Robert Warfield in violating his contractual covenant not to complete with Alpha Capital. The trial court denied a motion for summary disposition by Dykema Gossett and Rentenbach (hereafter defendants). The Court of Appeals denied defendants' application for leave to appeal in an unpublished order, entered October 27, 2006 (Docket No. 272819). The Supreme Court also denied leave to appeal. 477 Mich 1059 (2007). Following a trial, the jury returned a verdict finding that defendants had not breached a fiduciary duty to Alpha Capital, former employees of Alpha Capital tortiously interfered with contracts or business relations of Alpha Capital, defendants did not aid or abet the tortious interference, and Warfield did not breach the covenant not to compete. The trial court entered a judgment of no cause of action. Alpha Capital appealed.

The Court of Appeals *held*:

1. An attorney's duties of loyalty and confidentiality continue even after an attorney-client relationship concludes. However, the continuing duties of loyalty and confidentiality apply only to matters in which the new client's interests qualify as both adverse to those of the former client and substantially related to the subjects of the attorney's former representation.

2. A three-part test for examining the circumstances under which an adverse subsequent representation may be deemed substantially related to the legal services done for a former client asks: What is the nature and scope of the prior representation at issue? What is the nature of the present lawsuit against the former client? And, in the course of the prior representation, might the client have disclosed to his attorney confidences that could be relevant to the present action, and in particular, could any such confidences be detrimental to the

former client in the current litigation? Application of this test in this case yields a conclusion that material questions of fact precluded summary determination whether defendants breached their fiduciary duties to Alpha Capital.

3. The trial court properly denied Alpha Capital's motions for partial summary disposition, a directed verdict, and judgment notwithstanding the verdict because the expert testimony diverged with respect to whether defendants' representation of Alpha Capital had a substantial relationship to the work they later performed for Alpha Partners, L.L.C., and its employees.

4. Application of the three-part test shows that substantial evidence supports the jury's conclusion that Alpha Capital failed to prove a breach of defendants' fiduciary duties. Defendants did not as a matter of law breach their fiduciary duties.

5. Because Alpha Capital indisputably breached its obligation under the stock purchase agreement with Warfield, the unambiguous terms of the agreement precluded Alpha Capital's enforcement of Warfield's covenant not to complete. Therefore, Rentenbach correctly informed Warfield that he could disregard the covenant not to compete. The trial court should have decided this issue in favor of Warfield as a matter of law.

6. The trial court did not abuse its discretion under the facts of this case by limiting the time allocated for the examination and cross-examination of certain witnesses. The trial court abused its discretion in refusing to permit Alpha Capital to make an offer of proof in accordance with MRE 103(a)(2). However, Alpha Capital later fully preserved its claim by filing a separate offer of proof, rendering harmless the trial court's ruling that did not allow the earlier offer of proof.

7. The trial court did not abuse its discretion by allowing defense counsel to refer to the settlement in a prior action by Alpha Capital against Warfield and others because Alpha Capital raised the issue first. Any error in this regard was harmless.

8. The trial court did not abuse its discretion by declining to remove a certain juror that Alpha Capital alleged was not impartial. Alpha Capital failed to substantiate its claim.

9. Although somewhat incomplete and imperfect, the trial court's jury instructions fairly and accurately presented the theories of the parties and the applicable law and did not substantially prejudice Alpha Capital's case. The trial court's refusal to give supplemental instructions requested by Alpha Capital did not prejudice Alpha Capital.

Affirmed.

1. ATTORNEY AND CLIENT — DUTIES OF LOYALTY AND CONFIDENTIALITY — FORMER CLIENTS.

An attorney's duties of loyalty and confidentiality continue even after an attorney-client relationship concludes; the continuing duties of loyalty and confidentiality apply only to matters in which a new client's interests qualify as both adverse to those of the former client and substantially related to the subjects of the attorney's former representation.

2. ATTORNEY AND CLIENT — DUTIES OF LOYALTY AND CONFIDENTIALITY — FORMER CLIENTS.

A three-part test may be employed to examine the circumstances under which a lawyer's subsequent representation of a client may be deemed substantially related to the legal services performed for a former client for purposes of determining a lawyer's continuing duties of loyalty and confidentiality to the former client: the test examines the nature and scope of the prior representation, the nature of the present lawsuit or representation, and whether, in the course of the prior representation, might the client have disclosed to the attorney confidences that could be detrimental to the former client in the current litigation.

3. JURY — JURY INSTRUCTIONS.

Jury instructions, even if somewhat imperfect, do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury; a verdict should not be set aside unless failure to do so would be inconsistent with substantial justice and reversal is not warranted when an instructional error does not affect the outcome of the trial.

Edward G. Lennon, PLLC (by *Edward G. Lennon*), and *Dennis A. Dettmer*, *PLLC* (by *Dennis A. Dettmer* and *Gary L. Hermanson*), for Alpha Capital Management, Inc.

Kerr, Russell and Weber, PLC (by *William A. Sankbeil, Fred K. Herrmann*, and *David R. Janis*), for Paul Robert Rentenbach and Dykema Gossett, P.L.L.C.

Before: GLEICHER, P.J., and FITZGERALD and WILDER, JJ.

GLEICHER, P.J. This action against a law firm and one of its attorneys arises from events that transpired during a separation of business partners and their joint ownership interests in a company they had owned. Plaintiff, Alpha Capital Management, Inc. (ACM), contended that its counsel, defendants Dykema Gossett PLLC and Dykema attorney Paul Rentenbach, breached fiduciary duties and committed other actionable wrongs by representing a former ACM shareholder in a dispute concerning his buyout agreement. A jury found in favor of defendants on all counts alleged in ACM's complaint. ACM appeals as of right the trial court's entry of a judgment of no cause of action effectuating the jury verdict. We affirm.

I. UNDERLYING FACTS AND PROCEEDINGS

In 1991, Ralph Burrell founded ACM to provide financial consulting services to businesses, pension funds, and nonprofit institutions. Initially, Burrell owned 55 percent of ACM's shares and Robert Warfield owned 45 percent. Within a year, Burrell and Warfield each owned 50 percent of ACM's shares. Soon after ACM's formation, the company hired Dawna Edwards as its portfolio manager. In 1996, ACM hired Napolean Rodgers as managing director of its fixed income portfolio.

Before starting ACM, Burrell had established a successful information systems and management consulting business called SymCon. Dykema served as SymCon's general counsel. Burrell and Warfield retained Dykema in 1991 to supply the legal services necessary to form ACM. After other Dykema lawyers completed ACM's corporate formation, Rentenbach provided ACM ongoing legal services.[1]

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[1] Rentenbach's billing records reflect that he worked the following hours on behalf of ACM from 1993 through 2001: 1993, 27.6; 1994, 8.6; 1995, 31.95; 1996, 8.3; 1997, 5.1; 1998, 34.3; 1999, 35; 2000, 13; 2001, 2.

Problems developed over time between Burrell and Warfield. They disagreed about Warfield's compensation, Edwards's equity share in the firm, and fees received by Munder Capital Management[2] (35 percent of ACM's client revenues). Because ACM "didn't grow as quickly" as Burrell thought it would, it accrued long-term debt payable to Munder Capital.[3] Warfield's compensation also created a debt. In 1998, Burrell entered into negotiations with Munder Capital seeking adjustments to the ACM-Munder Capital subadvisory agreement, and eventually achieved a lower cost structure. Warfield and Edwards wanted ACM "to move away from Munder" Capital, while Burrell hoped to expand ACM's relationship with Munder Capital.

In 1999, Burrell and Warfield began negotiating a buyout agreement contemplating that Burrell would buy Warfield's shares or vice versa. Rentenbach served as a "facilitator" during the negotiation sessions. Burrell recalled that at a meeting in mid-April 1999, Rentenbach turned to Warfield to "get approval" to answer one of Burrell's questions. Burrell felt "shocked" because "Rentenbach is the corporate attorney representing Alpha." After the meeting, Rentenbach informed Burrell that Warfield and Edwards had asked him to represent them. On April 15, 1999, Rentenbach wrote a letter to Burrell's personal counsel, former Michigan Supreme Court Justice CONRAD MALLETT, JR., advising that Rentenbach and Dykema sought to represent Warfield and Edwards

[2] From ACM's inception, it had a "sub-advisory relationship" with Munder Capital. Munder Capital operates as "an independent investment advisor" that manages assets for nonprofits or governmental units. Burrell explained that ACM's "business model and business strategy was to align with a firm that was in the industry, specifically, Munder, because it's very difficult to start an investment management firm."

[3] By October 2003, the debt to Munder Capital approximated $340,000.

"with respect to the negotiations that will take place regarding [Burrell's] proposed disengagement." Rentenbach requested that Burrell waive any conflict of interest that might arise from "our firm's representation of [Burrell] and his other business interest (Symcon, Inc.)." Burrell declined to waive the conflict, but Rentenbach continued to represent Warfield and Edwards. Rentenbach's billing records reveal that he proceeded to prepare draft agreements in contemplation of a buyout by one shareholder or the other, while Dykema sent ACM invoices for Rentenbach's time.

In July 2000, Burrell and Warfield signed a document entitled "Alpha Capital Management, Inc. Process for Separation/Buy-Out," which contemplated a three-phased stock purchase process. In phase I, Burrell would present an offer to Warfield, which Warfield could accept or counter. If Warfield did neither, phase II would commence, during which a facilitator would assist the parties in crafting a transaction. If that failed, in phase III Burrell would "make[] a final written offer to sell his shares to Mr. Warfield or to purchase Mr. Warfield's shares," and Warfield would "decide[] whether to buy Mr. Burrell's shares or to sell his shares to Mr. Burrell."

Phases I and II did not result in ACM's sale. On April 20, 2001, the parties embarked on phase III. In a document drafted by Burrell's counsel, entitled "Offer to Purchase and Stock Purchase Agreement," Burrell offered either to sell his ACM shares to Warfield or to purchase Warfield's shares.[4] In May 2001, Warfield elected to sell his shares to Burrell, and in June 2001 Burrell assigned to ACM his right to purchase Warfield's shares. The deal closed on October 24, 2001, and

[4] At this point, Honigman Miller Schwartz and Cohn represented Burrell and Rentenbach represented Warfield.

Burrell then terminated Dykema's services on behalf of ACM. Warfield, Edwards, and Rodgers continued to work for ACM.

Section 2 of the stock purchase agreement governed the "purchase price and payment" applicable to the seller's shares. Section 2.1 required an initial payment of $75,000 at the closing and § 2.2 mandated execution of a promissory note in the amount of $1,425,000, to be paid in 20 equal quarterly installments. Section 2.8 addressed what would happen if the buyer became "unwilling or unable to pay any remaining amounts owing to Seller[.]" In that event, the seller had 30 days in which to exercise an option "to obtain all ownership interests in" ACM for $1.00 "in full satisfaction of the Unpaid Amounts[.]" If the seller failed to exercise that option, "any claims of Seller to the Unpaid Amounts will be deemed to be waived and released as of the end of such 30 day period." The stock purchase agreement also contained mutual covenants not to compete effective for three years after the closing date.

In July 2003, Burrell notified Warfield that he could not make the quarterly payment required under the buyout agreement unless Warfield approved a secured loan "of up to $150,000 from SymCon to Alpha." Warfield did not respond to this letter, and Burrell did not make the July payment. On August 1, 2003, Burrell wrote to Warfield and again sought approval for a loan. Warfield replied on August 4, 2003, declining to approve the loan on the basis that "I am not required to consent to this type of a transaction under the stock buy-out agreement . . . and this arrangement is unfair to the other creditors of Alpha Capital (principally me and Munder Capital) because no other creditor has a lien on Alpha's assets." Warfield's letter continued, "Since I have not received the payment due on July 31, I hereby declare Alpha Capital in default

under the Note." On August 29, 2003, Warfield sent Burrell another letter stating in part, "Further, I am notifying Alpha and you that due to Alpha's non-payment of its obligations, my covenant not to compete with Alpha is no longer applicable, pursuant to the provisions of Section 6.1(i) of the Offer to Purchase and Stock Purchase Agreement dated April 20, 2001."

Burrell responded on September 24, 2003, informing Warfield that "by receipt of this letter . . . I am issuing a Refusal Notice pursuant to Paragraph 2.8 of our agreement." The pertinent portion of ¶ 2.8 sets forth:

> If, at any point prior to or on the date which is 45 days following the end of the 20th full fiscal quarter of the Company following the Closing Date (the "Last Payment Date"), Buyer notifies Seller, in writing (the "Refusal Notice"), that Buyer is unwilling or unable to pay any remaining amounts owing to Seller pursuant to the Promissory Note or Sections 2.4, 2.5 or 2.6 of the Offer (the "Unpaid Amounts"), Seller will have the right, upon giving written notice to Buyer within 30 days of either Seller's receipt of the Refusal, to obtain all ownership interests in the Company then owned by the Buyer (and the Guarantor, if applicable) for $1.00 paid to Buyer or Guarantor, as applicable, in full satisfaction of the Unpaid Amounts, and the parties will cooperate to effectuate a transfer of such ownership interests to Seller.

On October 10, 2003, Warfield declined to exercise his right to purchase ownership of ACM.

Rentenbach supplied legal services to Warfield, Rodgers, and Edwards both before and after Burrell notified Warfield of his inability to make the July 31, 2003, payment. Rentenbach's billing records reflect that on August 4, 2003, Rentenbach spent time drafting a default letter to Burrell. In August 2003, Rentenbach received a call from Warfield inquiring whether Burrell's missed quarterly payment rendered unenforce-

able the stock purchase agreement's noncompete clause. Rentenbach read the stock purchase agreement and advised Warfield that Burrell's breach negated the noncompete clause. On August 25, 2003, Rentenbach met with Warfield, Rodgers, and Edwards and reviewed Warfield's letter of that date to Burrell. Two days later, Rentenbach drafted an operating agreement for Alpha Partners, L.L.C. On October 9, 2003, the day before Warfield declined to purchase ACM, Rentenbach faxed to Rodgers a schedule describing the backgrounds of Alpha Partners's three founding partners: Warfield, Edwards, and Rodgers. Rodgers and Edwards resigned from ACM on October 15, 2003. By the end of October 2003, most of ACM's clients had withdrawn their funds from ACM and invested them with Alpha Partners.

On November 4, 2003, ACM and Burrell sued Alpha Partners, Warfield, Edwards, and Rodgers in the Oakland Circuit Court seeking injunctive relief and damages. Honigman Miller Schwartz and Cohn represented the plaintiffs in the Oakland Circuit Court action and Dykema represented the defendants. The plaintiffs alleged that the defendants had violated the noncompete clauses in their contracts and the stock purchase agreement, misappropriated confidential information, breached their fiduciary duties to ACM, and tortiously interfered with ACM business relationships. The Oakland Circuit Court denied injunctive relief, and the parties ultimately settled the damages claims for a relatively small amount—a $60,000 payment to ACM and Burrell.[5]

On April 28, 2006, ACM filed the instant case in the Wayne Circuit Court against Dykema and Rentenbach, alleging breach of fiduciary duty (count I), tortious

[5] Burrell testified in this case that he had invested approximately $300,000 in the Oakland Circuit Court litigation.

interference with contractual relations and with prospective economic and business advantage (count II), and aiding and abetting Warfield in violating his covenant not to compete (count III). In June 2006, defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (8). They contended that the allegations in ACM's complaint arose solely from their prior attorney-client relationship with ACM, and that the statute of limitations barred this malpractice claim. In the alternative, defendants argued that the plaintiffs' release of the Oakland Circuit Court defendants in the prior litigation, Alpha Partners, Warfield, Edwards, and Rodgers, barred an "aiding and abetting" theory against defendants as a matter of law. They also averred that the covenant not to compete had dissolved before the formation of Alpha Partners.

ACM answered that the breach of fiduciary duty claim did not sound in legal malpractice, but rather was properly pleaded as a separate cause of action subject to a three-year period of limitations. ACM denied that the release barred its claims for aiding and abetting, and contended that the covenant not to compete remained in effect when defendants formed Alpha Partners. The trial court denied defendants' motion, and this Court denied their application for leave to appeal. *Alpha Capital Mgt*[,] *Inc v Rentenbach*, unpublished order of the Court of Appeals, entered October 27, 2006 (Docket No. 272819). The Supreme Court also denied leave to appeal. 477 Mich 1059 (2007).

On May 19, 2008, a jury trial commenced. The trial concluded on June 3, 2008, when the jury returned a special verdict finding that: (1) defendants had not breached a fiduciary duty to ACM; (2) former employees of ACM tortiously interfered with contracts or business relationships of ACM; (3) defendants did not aid or abet

the tortious interference; and (4) Warfield did not breach the covenant not to compete.

II. SUMMARY DISPOSITION RULINGS

A. STANDARD OF REVIEW

ACM initially contests the propriety of the trial court's denial of ACM's motion for partial summary disposition concerning its breach of fiduciary duty claim. Because the trial court considered documentation beyond the pleadings in reaching its ruling and denied the motion on the basis of the existence of conflicting questions of fact, we review the court's ruling under MCR 2.116(C)(10). *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). This Court reviews de novo a trial court's summary disposition ruling. *Id*. "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

ACM additionally asserts that the trial court should have granted a directed verdict or judgment notwithstanding the verdict (JNOV) regarding its breach of fiduciary duty count. We also review de novo a trial court's rulings on motions for a directed verdict and JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). "A motion for directed verdict or JNOV should be granted only if the evidence viewed in th[e] light [most favorable to the nonmoving party] fails to establish a claim as a matter of law." *Id*.

B. BREACH OF FIDUCIARY DUTY CLAIM

Defendants do not dispute that they owed ACM a fiduciary duty premised on ACM's status as their

former client. See *Rippey v Wilson*, 280 Mich 233, 243; 273 NW 552 (1937) (observing that "[t]he relationship between client and attorney is a fiduciary one, not measured by the rule of dealing at arm's length"); *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 47; 698 NW2d 900 (2005) ("Damages may be obtained for a breach of fiduciary duty when a position of influence has been acquired and abused, or when confidence has been reposed and betrayed.") (quotation marks and citation omitted). Defendants insist that material questions of fact precluded a grant of summary disposition, a directed verdict, or JNOV with respect to whether they breached their fiduciary duty by working on behalf of Alpha Partners, Warfield, Edwards, and Rodgers in 2003.

Few Michigan cases elaborate concerning the substantive elements of a former client's breach of fiduciary duty claim against an attorney. ACM relies on the seminal Michigan case addressing an attorney's liability for breach of fiduciary duty, *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509; 309 NW2d 645 (1981).[6] However, *Fassihi* does not resolve the question whether, as a matter of law, defendants' conduct violated their fiduciary duties.

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[6] *Fassihi* has been described as "the preeminent case recognizing a stakeholder's claim of breach of fiduciary duty against an attorney who represents only the business." Rossman, *The descendants of Fassihi: A comparative analysis of recent cases addressing the fiduciary claims of disgruntled stakeholders against attorneys representing closely-held entities*, 38 Ind L R 177 (2005). The Massachusetts Supreme Court singled out *Fassihi* as "a well-reasoned opinion supporting" the view that "even though counsel for a closely held corporation does not by virtue of that relationship alone have an attorney-client relationship with the individual shareholders, counsel nevertheless owes each shareholder a fiduciary duty." *Schaeffer v Cohen, Rosenthal, Price, Mirkin, Jennings & Berg, PC*, 405 Mass 506, 513; 541 NE2d 997 (1989).

The plaintiff in *Fassihi*, a radiologist, owned 50 percent of Livonia Physicians X-Ray, P.C., a closely held corporation. The defendant law firm represented Livonia Physicians and had drafted "all the agreements pertaining to membership in the professional corporation." *Id*. at 513. Dr. Rudolfo Lopez owned the other half of the corporation's shares. *Id*. at 511-512. Lopez had a prior agreement with St. Mary's Hospital that invested him with "personal and sole responsibility for staffing [its] radiology department." *Id*. at 513. Lopez and Fassihi practiced together for about 18 months before Lopez reached the decision that he no longer wished to associate with Fassihi. *Id*. at 512. Lopez asked the defendant, Livonia Physicians's lawyer, to ascertain how Fassihi "could be ousted from Livonia Physicians . . . ." *Id*. In June 1975, an employee of the defendant delivered Fassihi a letter advising that Livonia Physicians's board of directors had met in Fassihi's absence and voted to terminate his employment. *Id*. at 513. Fassihi then learned that due to his "termination" from Livonia Physicians, he could no longer practice at St. Mary's Hospital. *Id*. Fassihi filed a complaint asserting that the defendant had "represented both Lopez individually and the professional corporation without disclosing to him this dual representation." *Id*.

This Court identified the "difficult question" of first impression presented in the case as "what duties, if any, an attorney representing a closely held corporation has to a 50% owner of the entity, individually." *Id*. at 514. The Court began its analysis by adopting the proposition that "the attorney's client is the corporation and not the shareholders." *Id*. Notwithstanding that no attorney-client relationship existed between Fassihi and the defendant law firm, the Court cautioned that

this fact did not categorically preclude a fiduciary duty from arising between the law firm and Fassihi. *Id*. The Court explained:

> A fiduciary relationship arises when one reposes faith, confidence, and trust in another's judgment and advice. Where a confidence has been betrayed by the party in the position of influence, this betrayal is actionable, and the origin of the confidence is immaterial. Furthermore, whether there exists a confidential relationship apart from a well defined fiduciary category is a question of fact. [*Id*. at 515 (citation omitted).]

The Court further noted the "difficulties" inherent in "treating a closely held corporation with few shareholders as an entity distinct from the shareholders." *Id*. at 516. "Instances in which the corporation attorneys stand in a fiduciary relationship to individual shareholders are obviously more likely to arise where the number of shareholders is small." *Id*. In these situations, "the corporate attorneys, because of their close interaction with a shareholder or shareholders, simply stand in confidential relationships in respect to both the corporation and individual shareholders." *Id*.

This Court in *Fassihi* examined whether, by virtue of "close" attorney-shareholder interaction giving rise to "confidential relationships," a distinct fiduciary relationship existed between an attorney for a closely held corporation and a shareholder. *Id*. at 516. Because Fassihi and the defendant law firm lacked an attorney-client relationship, any liability on the part of the law firm arose on the basis of a cause of action—breach of fiduciary duty—separate and apart from the defendant's breach of a traditional duty of care. Here, the parties do not dispute that defendants and ACM had a fiduciary relationship through October 2001. Consequently, *Fassihi* does not resolve the issue at the core of

the parties' dispute, whether defendants violated the fiduciary duty they owed to ACM by providing legal services to Warfield, Rodgers, and Edwards in 2003.

The common law has long recognized that an attorney's fiduciary duties extend to both current and former clients. For example, in *T C Theatre Corp v Warner Bros Pictures, Inc*, 113 F Supp 265, 268 (SD NY, 1953), the district court explained:

> A lawyer's duty of absolute loyalty to his client's interests does not end with his retainer. He is enjoined for all time, except as he may be released by law, from disclosing matters revealed to him by reason of the confidential relationship. Related to this principle is the rule that where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited.

The United States Court of Appeals for the Sixth Circuit has declared it "well settled that an attorney who has acted for one party cannot render professional services in the same matters to the other party, and it makes no difference in this respect whether the relation itself has terminated, for the obligation of fidelity still continues." *United States v Bishop*, 90 F2d 65, 66 (CA 6, 1937). In *Consol Theatres, Inc v Warner Bros Circuit Mgt Corp*, 216 F2d 920, 927 (CA 2, 1954), the United States Court of Appeals for the Second Circuit held that Canon 6 of the American Bar Association Canons of Professional Ethics "is devised to protect the secrets and confidences reposed in the attorney by his clients," and required the disqualification of an attorney representing the plaintiff in an antitrust action "substantially similar" to matters on which the attorney had worked on behalf of the defendants.[7] *Id*. at 927.

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[7] The Second Circuit in *Consol Theatres*, *id*. at 926, described the American Bar Association Canons of Professional Ethics as "a codifica-

These descriptions of an attorney's obligation to a former client derive from the principle that the attorney's duties of loyalty and confidentiality continue even after an attorney-client relationship concludes. But under the common law and pursuant to the rules of professional responsibility, the continuing duties of loyalty and confidentiality apply only to matters in which the new client's interests qualify as both adverse to those of the former client *and* substantially related to the subjects of the attorney's former representation. Michigan Rule of Professional Conduct 1.9(a) embodies these concepts as follows: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." An attorney does not necessarily breach his or her duty of loyalty and confidentiality to a former client by representing a new client whose interests are merely adverse to those of the former client. The attorney breaches his or her fiduciary duty to a former client only by undertaking representation of a client who has interests both adverse and substantially related to work the attorney performed for the former client.[8]

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tion of the more important limitations on legal practice broadly deemed necessary for the protection of clients." At that time, Canon 6 read, in pertinent part:

> The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

[8] The comments to MRPC 1.7, which sets forth the "General Rule" regarding conflicts of interest, include the following observation: "[S]imultaneous representation in unrelated matters of clients whose inter-

A number of courts around the country have examined the circumstances under which an adverse subsequent representation may be deemed substantially related to legal services done for a former client. Most commonly, courts have adopted a three-part test set forth in *INA Underwriters Ins Co v Nalibotsky*, 594 F Supp 1199, 1206 (ED Pa, 1984):

> 1. What is the nature and scope of the prior representation at issue?
>
> 2. What is the nature of the present lawsuit against the former client?
>
> 3. In the course of the prior representation, might the client have disclosed to his attorney confidences which could be relevant to the present action? In particular, could any such confidences be detrimental to the former client in the current litigation?

The district court in *INA Underwriters* further elaborated,

> In answering the first question, the court should consider both the purposes for which the attorney was employed and the facts underlying the matter for which the attorney was responsible. However, the focus should be upon the reasons for the retention of counsel and the tasks which the attorney was employed to perform. Once the purposes for which the attorney was employed are clear, it is then possible to consider the type of information which a client would impart to an attorney performing such services for him.
>
> The second question is relatively simple to answer. All that is necessary is an evaluation of the issues raised in the present litigation and the general facts upon which the legal claims asserted in the present action are based.
>
> In resolving the third question—whether confidential information "might" have been received in the course of

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ests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients."

> the prior representation which would be substantially related to the present representation—the court should not allow its imagination to run free with a view to hypothesizing conceivable but unlikely situations in which confidential information "might" have been disclosed which would be relevant to the present suit. "The lawyer 'might have acquired' the [substantially related] information in issue if (a) the lawyer and the client ought to have talked about particular facts during the course of the representation, or (b) the information is of such a character that it would not have been unusual for it to have been discussed between lawyer and client during their relationship." [*Id*., quoting *Realco Servs, Inc v Holt*, 479 F Supp 867, 871-872 (ED Pa, 1979).]

Application of the *INA Underwriters* analysis to the instant facts yields a conclusion that material questions of fact precluded summary determination whether defendants breached their fiduciary duties to ACM. At trial, three witnesses testified about whether Rentenbach breached his fiduciary duties to ACM: Mallett, John Beckerman, and Charles Borgsdorf. These witnesses offered differing views regarding whether Rentenbach's work on behalf of Alpha Partners qualified as "substantially related" to the work he had done for ACM.

Mallett described the "continuing ethical responsibility" to a former client as follows:

> You have an ongoing relationship with this client. It isn't that you simply get to pick a new side at the end of the day just because you say I no longer represent you; therefore, I can represent someone whose interests are adverse to yours. It doesn't work that way.
>
> You can end your relationship with a client and many times lawyers do because the relationship is broken down. That doesn't mean that you can then switch sides, it just means that you can leave the field.

He opined that "the establishment of a competing firm against [ACM] would have been directly adverse to

Alpha Capital," and "I don't think the conflict gets any more direct than that." Mallett added that "if . . . two corporations are competing in the same field, competing for the same client base and delivering the same product," a corporate counsel for one company could not ethically represent the other without a waiver. During his direct examination, Mallett did not specifically address whether Rentenbach's representation of Alpha Partners and its principals had a substantial relationship to defendants' representation of ACM. On recross-examination, Mallett acknowledged his awareness of MRPC 1.7 regarding conflicts of interest and a relevant comment to the rule:

> [A] lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. *On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients*. [Emphasis added.]

Beckerman testified as ACM's primary liability expert.[9] Beckerman opined that a lawyer can represent two clients whose interests conflict only "when they consent." After an attorney-client relationship has ended, Beckerman believed that "two duties remain; one is the duty of confidentiality," and the other is "the duty of loyalty to the client[.]" Beckerman summarized the duty of loyalty as follows: "[A] lawyer may not represent a client adversely to a former client in a matter that is the same or substantially the same in which he has represented the former client unless the former client consents."

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[9] At the time of trial, Beckerman was an associate dean at Rutgers University School of Law. He had served as a visiting professor at the University of Michigan Law School between 1997 and 2000.

In Beckerman's view, during the 2001 discussions about how to separate the interests of Burrell and Warfield, Rentenbach still had an attorney-client relationship with ACM. Beckerman concluded that in 2003, Rentenbach could not advise Warfield concerning whether to purchase ACM's stock for a dollar "because it involved a direct conflict with a former client." Beckerman explained that this conflict arose because

> Mr. Rentenbach knew every detail of [the Munder Capital] debt; how it was structured, was it secured, or unsecured. He did that work for Alpha Capital, and he could not have advised . . . Mr. Warfield. It's inconceivable th[at] he could have advised Mr. Warfield whether or not to purchase the company for a dollar without some consideration of Alpha Capital Management's liabilities including the Munder [Capital] debt.[10]

Beckerman also expressed that defendants' assistance of Warfield, Edwards, and Rodgers in 2003 constituted "a grotesque breach of their own fiduciary duties." He explained that defendants established Alpha Partners while Warfield and "Warfield's confederates" remained employed at ACM:

> [Rentenbach] did all of these things knowing that they [Warfield, Edwards, and Rodgers] were still employees of Alpha Capital Management, and knowing . . . that these people were breaching their fiduciary duties. They were starting their new company on company time, while they were still employed by Alpha. So, he was assisting them in breaching their fiduciary duties, and not only does the law prohibit a lawyer from assisting someone else in breaching their fiduciary duties, but it is clear that if a lawyer does

[10] The record lacks any evidence suggesting that Rentenbach possessed confidential information about the Munder Capital debt that Warfield did not also possess.

> assist someone in breaching their fiduciary duties, the lawyer will be held responsible for all losses that are caused by that breach.

Finally, Beckerman opined that defendants breached their duty of loyalty to ACM by representing Alpha Partners and the individual defendants in the Oakland Circuit Court litigation.

Borgsdorf, defendants' expert witness,[11] agreed with Beckerman that "to the extent that" defendants' work for Alpha Partners might be adverse to ACM, defendants were precluded from performing legal services on matters "substantially related" to the work defendants had done for ACM. He continued, "There is [sic] lots of ways to describe this, but you cannot attack on behalf of another client, what you did for your former client. And, I saw no evidence that Mr. Rentenbach of Dykema ever did anything like that." Borgsdorf pointed out that lawyers who specialize often work for competing entities:

> There are lawyers that specialize in helping dentists set up their dental practices, and there are lawyers that might have over the course of five years set up 50 different dental practices, all in southeast Michigan, and there is no rule that requires that each and every one of those dental practices consent to this lawyer who specializes in putting the paperwork together. It would dismantle the ability of lawyers specializing from ever acting for more than one client . . . .

According to Borgsdorf, Rentenbach's legal services for Alpha Partners did not substantially relate to the work he had done for ACM. Borgsdorf described as follows defendants' work on behalf of ACM:

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[11] At the time of trial, Borgsdorf was a shareholder with Hooper & Hathaway, an Ann Arbor firm. He had taught legal ethics at the University of Michigan Law School from 1989 through 1997.

> [A]ll that Dykema did was do the paperwork to help get another business started. It filed articles of incorporation, lawyers did that all the time. It helped fill out and perhaps file the documents by which employees of Alpha Partners could become registered with the Securities Exchange Commission. This is the kind of bureaucratic stuff that lawyers help investment management firms do all the time. There is nothing improper about that.

Given that the expert testimony diverged with respect to whether defendants' representation of ACM had a substantial relationship to the work they performed for Alpha Partners and its employees, the trial court properly denied ACM's motions for partial summary disposition, a directed verdict, and JNOV. Furthermore, applying the *INA Underwriters* factors to the evidence introduced at trial, substantial evidence supports the jury's conclusion that ACM failed to prove a breach of defendants' fiduciary duties. Neither Beckerman's trial testimony nor ACM's appellate brief identifies *any* confidential information in defendants' possession that somehow advantaged Alpha Partners. Even assuming that Rentenbach possessed confidential information concerning the Munder Capital debt, ACM neglected to explain how this confidential information advantaged Warfield. Without question, ACM and Alpha Partners had adverse interests. But Borgsdorf correctly noted that defendants apparently performed only the most routine, "bureaucratic" work on behalf of ACM, and that aside from sharing the same general nature, these legal services lack any substantial relationship to Rentenbach's activities on behalf of Alpha Partners. Accordingly, we reject ACM's position that as a matter of law defendants breached their fiduciary duties.

C. BREACH OF COVENANT NOT TO COMPETE CLAIM

ACM next characterizes as erroneous the trial court's denial of summary disposition in its favor with respect

to the complaint count asserting that Rentenbach "aided and abetted Warfield in violating" the stock purchase agreement's covenant not to compete. The trial court found that the contractual sections at issue, §§ 2.8 and 6.1(i), gave rise to "reasonable but conflicting interpretations," and continued, "Hence, the Court further finds that they are ambiguous. It further follows that summary disposition is inappropriate since further factual development is necessary to determine the intent of the parties." We again consider de novo this portion of the trial court's summary disposition ruling. *Walsh*, 263 Mich App at 621. We also review de novo questions involving the proper interpretation of a contract and the legal effect of a contractual clause. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

A contract must be interpreted according to its plain and ordinary meaning. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). Our interpretation of contractual language is further guided by the following precepts:

> Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning. [*Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997) (citations omitted).]

"A contract is said to be ambiguous when its words may reasonably be understood in different ways." *Raska v Farm Bureau Mut Ins Co of Mich*, 412 Mich 355, 362; 314 NW2d 440 (1982). The trier of fact must determine

the meaning of an ambiguous contract. *Badiee v Brighton Area Sch*, 265 Mich App 343, 351; 695 NW2d 521 (2005). However, if contractual language is unambiguous and no reasonable person could differ concerning application of the term or phrase to undisputed material facts, summary disposition should be awarded to the proper party. *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002).

According to § 6.1(i) of the stock purchase agreement:

> Notwithstanding anything herein to the contrary, the covenants of Seller contained in this Section 6.1 shall not apply, and Seller shall not be held liable for any breach thereof, if Buyer or Guarantor has breached the Buyer's and Guarantor's Representations and Warranties or any covenant or obligation contained in this Offer or any of the Related Agreements, including, without limitation, the obligation to pay and perform the Obligations.

Section 2.8 identifies the buyer's obligations if it is "unwilling or unable to pay":

> If . . . Buyer notifies Seller, in writing (the "Refusal Notice"), that Buyer is unwilling or unable to pay any remaining amounts owing to Seller pursuant to the Promissory Note or Sections 2.4, 2.5 or 2.6 of the Offer (the "Unpaid Amounts"), Seller will have the right, upon giving written notice to Buyer . . . to obtain all ownership interests in the Company then owned by the Buyer . . . for $1.00 paid to Buyer or Guarantor, as applicable, in full satisfaction of the Unpaid Amounts, and the parties will cooperate to effectuate a transfer of such ownership interests to Seller. In the event Seller fails to make such election within such 30-day period, such ownership interests in the Company shall not be transferred but any claims of Seller to the Unpaid Amounts will be deemed to be waived and released as of the end of such 30 day period.

ACM insists that it did not breach its "obligation to pay" under the contract because the agreement contemplated an alternative form of performance, written notice of an inability to pay, that triggered the seller's right to buy the company for $1. However, the plain language of the contract refutes ACM's interpretation. Under § 6.1(i), the covenant not to compete "shall not apply, and Seller shall not be held liable for any breach thereof," if the buyer, ACM, breaches "any covenant or obligation contained in this Offer or any of the Related Agreements, including, without limitation, the obligation to pay and perform the Obligations." This language is not reasonably susceptible to more than one interpretation, and thus is not ambiguous. Because ACM indisputably breached its obligation to pay Warfield, the unambiguous contractual term precluded its enforcement of the seller's covenant not to compete. This result comports with Michigan law, specifically the principle that " 'one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform.' " *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994), quoting *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972). Consequently, Rentenbach correctly informed Warfield that Burrell's missed July 2003 payment justified Warfield's breach or disregard of the covenant not to compete.

In support of ACM's position, it proffers an "alternative performance contract" theory, which we reject for multiple reasons. First, the case on which ACM principally relies does not support its argument. In *McBain v Pratt*, 514 P2d 823, 824-825 (Alas, 1973), an attorney executed a marital separation agreement in which he agreed to bequeath to a trust for the benefit of his children either his law practice or $42,000, representing the current worth of the law practice. In his final will,

the attorney left the law practice to his new wife. *Id*. at 825. The Alaska Supreme Court determined that the measure of damages for the breach of the separation agreement was $42,000, holding that "the trust is entitled to damages measured according to the least onerous alternative[.]" *Id*. at 827. The Alaska Supreme Court explained that " '[a]n alternative contract is one in which a party promises to render some of two or more alternative performances either one of which is mutually agreed upon as the bargained-for equivalent given in exchange for the return performance by the other party[.]' " *Id*., quoting 5A Corbin on Contracts, § 1079, pp 453-454 (1964). As described in *McBain* and by Professor Corbin, the alternative contract doctrine creates two or more mechanisms for performance of contractual obligations, but does not serve to excuse a contractual breach or to eliminate other contractual obligations.

Second, the contractual language here does not support ACM's contention that the parties entered into or intended an "alternative performance contract." Section 2.8 envisioned that if the buyer, ACM, was "unwilling or unable to pay any remaining amounts owing to Seller pursuant to the Promissory Note," the seller had the right to purchase ACM for $1, "in full satisfaction of the Unpaid Amounts[.]" If the seller elected not to purchase the company, "any claims of Seller to the Unpaid Amounts will be deemed to be waived and released . . . ." The plain language of this clause reflects that if ACM breached its agreement to pay Warfield, he could either elect to buy the company or simply forego further payment. These elections describe alternative *remedies* for ACM's breach; they do not create alternative methods for Warfield's performance.

In summary, the trial court improperly submitted to the jury the special question, "Do you find that Robert Warfield breached the covenant not to compete?" On the basis of the analysis described above, ACM's failure to pay under the promissory note breached the stock purchase agreement and excused Warfield from abiding by the covenant not to compete. The trial court should have decided this issue as a matter of law in defendants' favor. But the court's error affords ACM no basis for relief because as a matter of law Warfield legally competed with ACM.

III. LIMITATION OF CROSS-EXAMINATION

ACM additionally complains that the trial court improperly limited the total time for examinations of key witnesses Warfield and Rentenbach to 1.5 hours, allowing each side only 45 minutes, an "arbitrary and unreasonable" period given that (1) the relevant facts occurred over the course of 10 years, and (2) the limitation prevented ACM's counsel from adequately cross-examining Rentenbach regarding several critical documents and impeaching him with deposition testimony. ACM further argues that the trial court erred in a related fashion by denying it an opportunity to make an offer of proof documenting the information that counsel would have elicited had the court permitted more time. We review for an abuse of discretion a trial court's exercise of its power to control the interrogation of witnesses. *People v Marji*, 180 Mich App 525, 532-533; 447 NW2d 835 (1989). "To the extent that [the court's] inquiry requires examination of the meaning of the Michigan Rules of Evidence, we address such a question . . . de novo." *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

Pursuant to MRE 611(a), "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." In *Hartland Twp v Kucykowicz*, 189 Mich App 591, 595; 474 NW2d 306 (1991), this Court emphasized that "[t]he mode and order of admitting proofs and interrogating witnesses rests within the discretion of the trial court." The trial court in *Hartland*, on the fifth day of a trial, limited witness examinations to one hour each for direct and cross-examination, but later amended its ruling to permit defense counsel more time with one expert witness. *Id*. at 596. On appeal, this Court held, "The record shows that the trial court properly exercised its discretion in limiting the time for examination of witnesses." *Id*.

Here, when ACM called Burrell, its first witness, the trial court announced that it would limit Burrell's examination to "[a]n hour a side." The following colloquy ensued between the trial court and ACM's counsel:

> [*ACM's Counsel*]: I can't get it done in an hour, your Honor. There's way too much information. I want to lay in the predicate, *and everybody else becomes a half hour.* You know, that's—
>
> *The Court*: Okay.
>
> [*ACM's Counsel*]: I need to tell the story with him so the jury gets the overall picture. Otherwise—and *the rest of these witnesses shouldn't take long*. [Emphasis added.]

The trial court did not enforce its one-hour ruling for the examinations of Burrell. ACM's counsel questioned Burrell for approximately 4½ hours. Burrell's direct examination and cross-examination extended for three

days of trial, in part because the examinations were interrupted for the testimony of another witness. The parties agree that after Burrell's testimony concluded, the trial court limited the entire time for additional witness examinations to 1.5 hours, 45 minutes for each side.

During ACM's counsel's cross-examination of Warfield, counsel inquired of the trial court about the time remaining and the trial court responded, "Fifteen minutes." When ACM's counsel objected that "this is not adequate considering the serious nature—," the trial court interjected, "I know, but we're moving on. We're moving on. We've wasted a lot of time in this trial, and the next witness is gonna be an hour. We'll move quickly through these witnesses." Counsel for ACM again objected to the time limitation the next day. After citing *Hartland*, the trial court responded, "I've been appealed on this issue many times, and I've always been affirmed. I pick the amount of time for each witness. Mr. Rentenbach will be an hour and a half witness. Mr. Eaton will be an [sic] one hour witness, that's half hour [sic] for each side."

Counsel for ACM apparently examined Rentenbach for 45 minutes, and did not reserve any time for recross-examination. At the conclusion of defense counsel's examination of Rentenbach, ACM's counsel objected to the time limitation and asked if he could make an offer of proof concerning "what I intend to prove when I'm being precluded from having the opportunity to make evidence in this case by the Court's rulings." The trial court did not permit ACM's counsel to describe the testimony and exhibits he intended to offer through Rentenbach, responding, "One minute. We can't go through all that. We've got to go on back to the next witness, okay?" The following exchange ensued:

> [*ACM's Counsel*]: Your Honor, you're not gonna let me make a record?
>
> *The Court*: No, no, because I've already made—we've discussed this ad nauseum. You had 45 minutes, you have 45 minutes to ask whatever you wanted. You could have saved five minutes to come back and ask about that document about the billing.
>
> We're going on to the next witness.
>
> [*ACM's Counsel*]: Your Honor, case law is very clear, I have the right to make a record.
>
> *The Court*: You've made a record, I've made a ruling.

After trial concluded, ACM filed an "offer of proof" with the court. This offer does not appear in the lower court record. However, the parties have referred to it extensively in their appellate briefs.

Under the specific circumstances presented here, the trial court did not abuse its discretion by limiting to 1.5 hours the parties' examinations of Rentenbach and Warfield. The record reveals that counsel had adequate time to develop the facts and issues at the center of the parties' dispute. Moreover, the trial court permitted ACM more than three hours for its examination of Burrell on the basis of counsel's pledge that he could complete the rest of the witness examinations in a half hour.[12]

With respect to the trial court's offer of proof ruling, MRE 103(a) provides, in relevant part, as follows:

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[12] We emphasize our disapproval of utterly arbitrary time limitations unrelated to the nature and complexity of a case or the length of time consumed by other witnesses. Here, however, because the trial court selected a time limitation suggested by ACM's counsel, the period permitted did not qualify as arbitrary. And even if the time period selected could be fairly characterized as arbitrary, by proposing a half-hour for all witnesses other than Burrell, plaintiff's counsel waived any possible error.

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right the of the party is affected, and
>
> * * *
>
> (2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Because the trial court's refusal to permit ACM to make an offer of proof may have prevented ACM from fully exercising its right to challenge on appeal the trial court's time limitations, the trial court abused its discretion by ignoring or misapplying MRE 103(a)(2) and precluding ACM from presenting its offer of proof in a manner permitted by the court rules. The trial court's need to complete witness testimony, however urgent, does not absolve it from its obligation to permit an offer of proof in accordance with MRE 103(a)(2). Here, ACM later fully preserved its claim of appeal by filing a separate offer of proof in the trial court, rendering harmless the court's ruling transcribed above.

ACM avers that the limited examinations prevented questioning of Rentenbach about several documents that Alpha Partners filed with the Securities and Exchange Commission, deposition testimony inconsistent with Rentenbach's trial testimony, and Rentenbach's involvement in drafting the covenant not to compete and a 2001 amendment to ACM's articles of incorporation. But because ACM has not explained the importance of these areas of inquiry or the manner in which their foreclosure prejudiced its case, we conclude that ACM has failed to prove that the trial court's time limitation affected its substantial rights. MCR 2.613(A).

IV. REFERENCES TO PRIOR LITIGATION

ACM avers that the trial court improperly allowed defendants to repeatedly elicit testimony regarding the settlement of the prior Oakland Circuit Court litigation, in violation of MRE 408, and to make other prejudicial references to the merits of the Oakland Circuit Court litigation. "A trial court's decision whether to admit or exclude evidence will not be disturbed on appeal absent an abuse of discretion. The trial court abuses its discretion if its decision is outside the range of principled outcomes." *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008) (citation omitted). To the extent that this issue involves the meaning of a Michigan Rule of Evidence, we consider this legal issue de novo. *Waknin*, 467 Mich at 332.

ACM moved in limine to exclude at trial evidence or references to "case evaluation settlements, judicial opinions or rulings issued in . . . the Oakland County Circuit Court." ACM maintained that the settlement-related references fell within the precluded category of evidence in MRE 408 and that the settlement-related remarks and other references to the Oakland Circuit Court litigation had no relevance to this case. MRE 401. The trial court denied ACM's motion in limine, explaining that "that other suit has [been] pled, so I believe it can be brought out," and that MRE 408 did not apply because "[t]hat rule refers to settlements in this case, not in another case[.]"

Pursuant to MRE 408:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct

> or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The rationale of this rule "is that settlement discussions are best encouraged when parties can freely discuss their dispute and offer to compromise their litigation positions without fear that their settlement discussions might be used against them as evidence of the strength or weakness of their cases." 1 Robinson & Longhofer, Michigan Court Rules Practice, Evidence, § 408.1, p 587.

Here, defendants sought to introduce evidence regarding plaintiff's resolution of its prior suit against Alpha Partners, Warfield, Rodgers, and Edwards. Although MRE 408 does not directly address the admissibility of settlements with third parties, in *Windemuller Electric Co v Blodgett Mem Med Ctr*, 130 Mich App 17, 23; 343 NW2d 223 (1983), this Court held that "under MRE 408, evidence of a settlement made by a party to the present litigation with a third person is not admissible to prove liability." Accordingly, the trial court incorrectly determined that MRE 408 lacks applicability to settlements "in another case," because the rule plainly does not take into account a "prior action" exception. However, the trial court correctly observed that ACM first raised the topic of the prior litigation, including the relief sought and the ultimate case evaluation award, in eight detailed paragraphs of the complaint in this case, including the following:

44. On November 4, 2003, Alpha Capital and Burrell, represented by Honigman Miller, filed a lawsuit (denominated herein as "Alpha Capital I") in the Oakland County Circuit Court, Case No. 03-053915-CK, naming Alpha Partners, Warfield, Edwards and Rodgers as defendants. The Complaint sought injunctive relief to preclude Alpha Partners from providing services to Alpha Capital's former clients and included claims against the defendants for the misappropriation of Alpha Capital's confidential information and clients, breach of fiduciary duties, tortious interference with advantageous business relations and unfair competition.

45. The defendants in Alpha Capital I were represented in the lawsuit by Defendants [Mark] Hauck and Dykema Gossett. . . .

* * *

48. The lawsuit proceeded to mediation on November 22, 2004. The mediators recommended an award in favor of the plaintiffs in the amount of $70,000, and in favor of Warfield on his counter-claim against Alpha Capital in the amount of $10,000.

49. Honigman Miller had been billing Alpha Capital and Burrell for legal representation in connection with the lawsuit on an hourly basis of $390 per hour. As of December 14, 2004, Honigman Miller had billed the plaintiffs $85,628.86, which exceeded the plaintiffs' net mediation award. During the months of November and December, 2004, alone, Honigman Miller billed Alpha Capital an additional $93,606.10.

50. The expense of the litigation was depleting Alpha Capital's resources and had become unaffordable, with the prospect of substantial additional legal fees yet to come. Even though Burrell believed that the mediation award was inadequate and did not reflect the plaintiffs' actual damages, he concluded that the plaintiffs could not afford to continue the litigation and had no choice but to accept the recommended mediation award. The defendants also accepted the mediation award.

ACM's complaint further averred that defendants' breaches of fiduciary duty "were a proximate cause of Alpha Capital's damages arising from Alpha Partner's theft of its business and of the litigation costs arising therefrom." In other words, ACM sought compensatory damages for the amounts it had expended in the prior lawsuit against Alpha Partners, Warfield, Rodgers, and Edwards.

In conclusion, because ACM's theory of the case placed the Oakland Circuit Court settlement and its attendant legal fees at issue in the instant case, the trial court did not abuse its discretion by allowing defense counsel to refer to the prior litigation on several occasions. See *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003) ("It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence."). *Id*. To the extent that defense counsel's comments may have violated the letter or the spirit of MRE 408, we conclude that any error was harmless and does not warrant a new trial. MCR 2.613(A).

V. EXPERT'S TESTIMONY AS TO MATTERS OF LAW

ACM also submits that contrary to law the trial court allowed defense expert Borgsdorf to testify regarding legal opinions, including about contract interpretation. We again review for an abuse of discretion the trial court's decision whether to admit or exclude evidence. *Morales*, 279 Mich App at 729.

Neither side challenged at trial the legal ethics expertise of Beckerman, ACM's expert, or Borgsdorf, defendants' expert. A review of Beckerman's and Borgsdorf's testimony reveals that the experts did not disagree with respect to the ethical standards guiding

lawyers' behavior and conduct toward clients and former clients, just that the experts disputed the extent to which the relevant ethical principles applied to the facts of this case. In conformity with MRE 702 and MRE 703, the experts properly brought their specialized legal expertise to bear on the instant facts.

Concerning ACM's position that the trial court improperly allowed Borgsdorf to render legal opinions involving contract interpretation, ACM has waived appellate review of this assertion. In the course of Beckerman's testimony, which ACM introduced before Borgsdorf testified, ACM elicited over defendants' objection Beckerman's opinions about the interrelationship between §§ 2.8 and 6.1 of the parties' stock purchase agreement. As noted above, "error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis*, 258 Mich App at 210.

VI. JUROR DISMISSAL

According to ACM, notwithstanding that its counsel observed the court reporter motion to a juror and gesture "in a manner adverse to [ACM]," the trial court inexcusably refused to investigate the full extent of the improper communication or give the jury a curative instruction. However, after reviewing the record, we detect no substantiation by ACM that (1) the court reporter engaged in misconduct, (2) the reporter engaged in any conduct that affected the impartiality of a juror, (3) the trial court should have granted ACM an evidentiary hearing to further investigate any potential misconduct, or (4) the trial court's decision not to investigate further can be characterized as "inconsistent with substantial justice." MCR 2.613(A).

The entirety of the trial record devoted to ACM's counsel's allegation of impropriety by the court reporter consists of the following:

> [*ACM's Counsel*]: The Court will recall that the Court gave me the ok to move around, and during the course of the trial, the Court's court reporter—
>
> * * *
>
> The problem, though, and this is what I want to address. In the course of this, Mary [the court reporter] has become very upset with me a number of times, made faces and acted disdained, corrected me in an inappropriate way and an unprofessional way, and . . . [defense counsel] had a little of that also, and I understand that.
>
> But, now what I'm concerned about, on Friday, as one of the jurors was leaving, Mary waived [sic] to him and kind of spoke to him a little bit, made some mouth movement, and I—
>
> *The Court*: I don't recall that, and I was here.
>
> [*ACM's Counsel*]: Well, you didn't see it. I saw it, and I'm very concerned about the direct impact on this trial as a result of that conduct. And, what I'm asking is that the Court dismiss Juror No. 4 as a result of that, and if we need to make a separate record on this, I want to do that.
>
> *The Court*: Any comment?
>
> [*Defense Counsel*]: I didn't see it, your Honor, and I haven't seen any inappropriate conduct by the court reporter.
>
> *The Court*: I was here and don't recall seeing any [sic] of that nature, so, that request is denied.

Even accepting ACM's counsel's perception that the court reporter occasionally had "made faces and acted disdained, corrected me in an inappropriate way," we perceive no potential substantial prejudice to ACM arising from the court reporter's conduct, especially in

light of ACM's counsel's belief that the reporter had at some points apparently done the same things toward defense counsel. MCR 2.613(A). Regarding the reporter's perceived wave and mouth motion directed at a juror, given that (1) neither the trial court nor defense counsel detected the same behavior, and (2) ACM's counsel's failed to suggest any manner in which the reporter's wave, even assuming it occurred, may have threatened the juror's fairness and impartiality, the trial court did not abuse its discretion when it declined to remove the juror. *People v Unger*, 278 Mich App 210, 259; 749 NW2d 272 (2008). Moreover, ACM presents no authority on appeal in support of its contention that the trial court should have investigated further the court reporter and potential juror bias.[13] *Hughes v Almena Twp*, 284 Mich App 50, 72; 771 NW2d 453 (2009) (noting that "[t]he failure to cite sufficient authority results in the abandonment of an issue on appeal").

VII. JURY INSTRUCTIONS

Lastly, ACM submits that the trial court erred in multiple respects by rejecting several of its proposed jury instructions. We review de novo properly preserved instructional errors, *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002), and consider the jury instructions as a whole to determine whether they

[13] ACM cites only *People v Johnson*, 46 Mich App 212, 217; 207 NW2d 914 (1973), in which this Court rejected the defendant's complaint that "a detective's silent laughter during the cross-examination of a defense witness denied him a fair trial." Although the parties in *Johnson* agreed that a detective had a bout of silent laughter during a witness's cross-examination, the trial court "found no prejudice resulting from this conduct and denied [the] defendant's motion for mistrial." *Id*. This Court affirmed, observing that the defendant had demonstrated no prejudice, and saying nothing about the trial court's responsibility to conduct an evidentiary hearing. *Id*.

adequately present the theories of the parties and the applicable law. *Mull v Equitable Life Assurance Society of the United States*, 196 Mich App 411, 423; 493 NW2d 447 (1992), aff'd 444 Mich 508 (1994). "[A] verdict should not be set aside unless failure to do so would be inconsistent with substantial justice. Reversal is not warranted when an instructional error does not affect the outcome of the trial." *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008).

After reviewing the record, we find that although somewhat incomplete and imperfect, the trial court's instructions fairly and accurately presented the theories of the parties and the applicable law. Any minor omissions or other deficiencies did not substantially prejudice ACM's case. MCR 2.613(A).

A. COUNT I: BREACH OF FIDUCIARY DUTY

The trial court instructed the jury as follows regarding ACM's breach of fiduciary duty claim:

> In this lawsuit, Plaintiff has three claims against the Defendants. In the first claim, Plaintiff maintains that the Defendants breached their fiduciary duty to Alpha Capital Management as a former client.
>
> Plaintiff has the burden of proof on this claim and must prove that (1) Defendants at some time had an attorney/client relationship with Alpha Capital Management; (2) Defendants violated their fiduciary duty arising out of the attorney/client relationship with their former client Alpha Capital Management; and (3) that the breach of fiduciary duty by the Defendant was a proximate cause of injury or harm to Alpha Capital Management.
>
> An attorney's breach of fiduciary duty to a former client is a proximate cause of the former client's injury or harm if the attorney's breach of fiduciary duty was a substantial factor in causing that injury or harm.

Your verdict will be for the Plaintiff if you find that Plaintiff has proved all of these elements.

Your verdict will be for the Defendant if you find that Plaintiff has failed to prove any of these elements.

ACM requested the following additional instructions:

Plaintiff's Special Instruction—Attorney's Fiduciary Duty

An attorney has a fiduciary duty to his client. This means that he must conduct himself in a spirit of loyalty to his client, assuming a position of the highest trust and confidence. The attorney's fiduciary duty to the client does not end after the attorney-client relationship has terminated. The attorney's fiduciary duty continues to apply to a former client and encompasses two main aspects: (1) a continuing duty of loyalty to the former client and also, (2) a duty not to use confidential information that the attorney obtained during the representation of the former client to the disadvantage of the former client.

Plaintiff's Special Instruction—Breach of Fiduciary Duty by Attorney With Respect to Former Client.

An attorney breaches his fiduciary duty to a former client if he provides legal representation or legal advice to a new client with respect to matters which are the same as, or substantially related to, matters with respect to which the attorney provided legal representation or legal advice to the former client, the interests of the new client with respect to the matters in question are materially adverse to the interests of the former client, and the attorney has not requested and obtained the permission of the former client to represent the new client with respect to the matters in question.

Plaintiff's Special Instruction—Substantially Related Matters.

The legal matters involved in an attorney's representation of two different clients are "substantially related" if the factual contexts of the two representations are similar or related, or if the attorney may have obtained confiden-

> tial information during the legal representation of the first client that could be relevant or useful with respect to his legal representation of the current client.
>
> *Plaintiff's Special Instruction—Billing of Attorney's Services*
>
> In determining when the attorney-client relationship between the Plaintiff, Alpha Capital Management, and the Defendants, Paul Rentenbach and Dykema Gossett, ended—you are instructed that an attorney's act of sending a bill constitutes an acknowledgment that the attorney was performing legal services for the client.

"Generally, a trial court may give an instruction not covered by the standard instructions as long as the instruction accurately states the law and is understandable, concise, conversational, and nonargumentative." *Central Cartage Co v Fewless*, 232 Mich App 517, 528; 591 NW2d 422 (1998); see also MCR 2.516(D)(4). But a trial court need not give a supplemental instruction if doing so would not "enhance the ability of the jury to decide the case intelligently, fairly, and impartially." *Central Cartage*, 232 Mich App at 528. Even if a requested supplemental instruction accurately states the law, a trial court does not abuse its discretion in rejecting it if the supplemental instruction adds nothing to an otherwise balanced and fair jury charge. *Beadle v Allis*, 165 Mich App 516, 527; 418 NW2d 906 (1987).

With the exception of the instruction regarding "Substantially Related Matters," ACM's proposed jury instructions accurately state the law relating to an attorney's fiduciary duty and the circumstances under which it may be breached. However, neither the existence of a fiduciary duty nor the last date that defendants performed legal services was the subject of dispute at trial. The experts for both sides testified extensively that attorneys owe their current and former clients a fiduciary duty, and that the duty prohibits the use of

confidential information obtained from one client in a manner adverse to another. The experts spent considerable time discussing whether Rentenbach's representation of ACM qualified as "substantially related" to the legal work he performed for Alpha Partners. And the parties agreed that defendants continued to provide legal services to ACM until Burrell terminated the attorney-client relationship in 2001. Because the parties never disputed the legal principles described in ACM's requested supplemental jury instructions, the instructions would not have enhanced the jury's ability to intelligently and fairly decide the case. Accordingly, the trial court did not abuse its discretion by refusing to read ACM's proposed supplemental fiduciary duty instructions.

B. MRPC INSTRUCTION

The trial court instructed the jury as follows with regard to Michigan's Rules of Professional Conduct:

> You have heard . . . some testimony regarding the Michigan Rules of Professional Conduct, or "MRPC." When deciding whether Defendants are liable for the claims in this lawsuit, you must keep in mind that a violation of the Michigan Rules of Professional Conduct do not create the basis for a claim, nor does it create any presumption that a legal duty has been breached. The Michigan Rules of Professional Conduct are not designed to be a basis for civil liability.

This instruction applies to the facts of the case and accurately states the law. ACM correctly observes that "to the extent that any valid common law claim may happen to find a corollary" in the MRPC, the rules of professional conduct do not eliminate or render invalid a fiduciary duty claim. But we do not view the instruction given as objectionable simply because it neglected

to include this additional qualification. "Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The trial court's reading of its MRPC instruction cannot be characterized as inconsistent with substantial justice.

C. AIDING AND ABETTING INSTRUCTIONS

Count II of ACM's complaint alleged that defendants aided and abetted Warfield's, Edwards's, and Rodgers's breaches of their fiduciary duties to ACM, and that Rentenbach's actions made him "a joint tortfeasor with Warfield, Edwards and Rodgers." The trial court instructed the jury as follows regarding this claim:

> As part of Plaintiff's second claim against the Defendants, Plaintiff also claims that Defendant[s] aided and abetted Warfield, Rogers [sic], and/or Edwards, who intentionally and improperly interfered with Plaintiff's business relationship and expectancy with existing and potential clients of Alpha Capital Management, in breach of their fiduciary duties to the company. In order to establish the underlying wrong, Plaintiff has the burden of proving each of the following:
>
> 1. Plaintiff had a business relationship or expectancy with existing clients at the time of the claimed interference.
>
> 2. The business relationships or expectancies had a reasonable likelihood of future economic benefit for Plaintiff;
>
> 3. Warfield, Rogers [sic], and/or Edwards knew of the business relationship or expectancy at the time of the claims interference.
>
> 4. Warfield, Rogers [sic], and/or Edwards intentionally interfered with the business relationship or expectancy.

> 5. The conduct of Warfield, Rogers [sic], and/or Edwards caused clients of the Plaintiff to terminate the business relationship or to disrupt the expectancy.
>
> 6. Plaintiff was damaged as a result of the conduct of Warfield, Rogers [sic], and/or Edwards.
>
> Your verdict will be for the Plaintiff if you find that Plaintiff has proved all of these elements and has also proved that Defendant Rentenbach gave substantial assistance to Warfield, Rogers [sic], and/or Edwards in effecting the tortuous [sic] interference and either (1) knew that either Warfield, Rogers [sic], and/or Edwards were engaging in the wrong or (2) Rentenbach's own conduct, separately considered, constituted a breach of duty to Plaintiff.

ACM contends that the trial court should have supplied additional instructions describing in detail the nature of the fiduciary relationships between ACM and Warfield, Rodgers, and Edwards. However, ACM's lengthy proposed supplemental instructions are neither concise nor conversational. Moreover, even if they qualified as proper supplemental instructions, the trial court's failure to read them was harmless given the jury's finding that Warfield, Rodgers, and Edwards tortiously interfered with ACM's contractual and business relationships.

D. DEFENDANTS' CONDUCT BEFORE SEPTEMBER 2003

In the instructions concerning counts II and III of ACM's complaint, the trial court limited the jury's consideration of the facts to the time period "during or after September, 2003." Although ACM correctly asserts that the evidence demonstrated that Rentenbach had conferred with Warfield, Rodgers, and Edwards in August 2003, ACM averred in at least one trial court filing that "Defendants' actions upon which the breach of fiduciary duty claim is based began in September, 2003 . . . ." "A party may not take a position in the trial

court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006) (quotation marks and citations omitted), aff'd 478 Mich 348 (2007).

E. COUNT III: AIDING AND ABETTING WARFIELD'S VIOLATION OF THE COVENANT NOT TO COMPETE

ACM insists that the trial court erred by failing to instruct the jury about alternative performance contracts and other "basic legal principles of contract interpretation." However, because Burrell's breach of the stock purchase agreement precluded his enforcement of the covenant not to compete, as discussed *supra* at 610-615, ACM's argument on this ground lacks merit.

F. INTERVENING CONDUCT OF NONPARTIES AND SETTLEMENT

ACM further suggests that the trial court committed error requiring reversal when it "failed to give . . . requested instructions regarding the legal effect of any intervening conduct of persons not a party to the action, and . . . regarding the jury's consideration of evidence of a settlement." In 2003, the Committee on Model Civil Jury Instructions deleted M Civ JI 15.05, an instruction addressing the intervening conduct of a person not a party to the action. The committee explained, "The instruction was deleted because the effect of nonparty fault is addressed in M Civ JI 15.03 . . . ." ACM did not request that the trial court give M Civ JI 15.03. Accordingly, the trial court committed no error substantially prejudicing ACM to the extent that it neglected to read the jury an intervening conduct instruction.

ACM urged the trial court to instruct the jury that it "must not consider the fact that there was a settlement in the prior case as having any bearing" on the jury's determination of ACM's claims in the instant case. Although this proposed instruction accurately stated the law, the trial court's refusal to give it was not inconsistent with substantial justice. ACM presented abundant evidence about the Oakland Circuit Court litigation, but virtually no information regarding the small settlement achieved. After reviewing the trial court's instructions as a whole in light of the evidence introduced at trial, we simply cannot conclude that the trial court's refusal to give a supplemental settlement instruction substantially prejudiced ACM.

G. ACM'S THEORY OF THE CASE

The trial court refused to read the case theories submitted by the parties. According to MCR 2.516(A)(5), "The court need not give the statements of issues or theories of the case in the form submitted if the court presents to the jury the material substance of the issues and theories of each party." The trial court did not abuse its discretion by refusing to read ACM's lengthy and argumentative case theory because the balance of the instructions adequately explained the material substance of the disputed issues in this case. Furthermore, the parties aggressively advocated their theories of the case during their closing arguments.

Affirmed.

DYBATA v WAYNE COUNTY

Docket Nos. 283413 and 283414. Submitted October 7, 2009, at Detroit. Decided March 25, 2010, at 9:00 a.m.

Tina and Ryan Dybata and other residents of the city of Dearborn Heights brought an action in the 20th District Court, Mark J. Plawecki, J., against Wayne County and the city, seeking damages that resulted when sewage backed up into their homes following a significant rainfall. The district court denied the county's motion for summary disposition on the basis that the plaintiffs had provided the required statutory notice of their claims to the city, which in turn was required to notify the county, and the notice to the city was sufficient to allow plaintiffs' claims to proceed against the county. The county and the city appealed separately in the Wayne Circuit Court and the appeals were consolidated. The circuit court, Prentis Edwards, J., agreed with the district court and affirmed its decision to deny the county's motion for summary disposition. The Court of Appeals granted two separate applications for leave to appeal by the county and consolidated the appeals.

The Court of Appeals *held*:

1. Notice of an "event" together with a list of the affected households does not constitute written notice of a "claim" for purposes of MCL 691.1419(1).

2. MCL 691.1419(2) controls under the facts of this case and is dispositive of the parties' arguments. This section provides that if a person who owns or occupies affected property notifies a contacting agency orally or in writing of an event before providing notice of a claim that complies with MCL 691.1419(1), the contacting agency shall provide the person with written information concerning where and how to file a claim. Here, the county was sufficiently notified of an event before the affected individuals provided a notice of a claim that complies with MCL 691.1419(1). Therefore, the county's receipt of the list of affected properties from the city was sufficient to trigger the county's obligation under MCL 691.1419(2) to provide information to the affected households and property owners concerning where and how to file a claim. Despite receiving the list, the county's contacting agency

never provided the affected individuals any written information concerning where and how to file a claim.

3. Plaintiffs made the necessary showing required by MCL 691.1419(3)(a) and (b), namely, that the county received timely notice of an event as envisioned by MCL 691.1419(2), that the county failed to provide plaintiffs information concerning where and how to file a claim, and that plaintiffs' failure to file a notice of their claims under MCL 691.1419(1) was caused by the county's failure to provide the information required by MCL 691.1419(2). Therefore, plaintiffs' failure to comply with the notice requirements of MCL 691.1419(1) did not bar plaintiffs from bringing a civil action under MCL 691.1417 against the county. The district court and the circuit court reached the correct result, although for the wrong reason.

Affirmed.

DRAINS — SEWAGE DISPOSAL SYSTEM EVENTS — NOTICE — CLAIMS.

An appropriate governmental agency's receipt of notice of a sewage disposal system event together with a list of the households affected by the event from a person who owns or occupies the affected property does not constitute written notice of a "claim" regarding the event for purposes of providing notice of a claim that complies with MCL 691.1419(1) (MCL 691.1416[b]).

*Ball & Ball, LLP (*by *Bettie K. Ball*), for Tina and Ryan Dybata and others.

*Wayne County Corporation Counsel (*by *Edward M. Thomas* and *Ronald P. Weitzman*) and *Bodman LLP* (by *R. Craig Hupp* and *Thomas P. Bruetsch*) for Wayne County.

Before: K. F. KELLY, P.J., and JANSEN and FITZGERALD, JJ.

JANSEN, J. In these consolidated appeals, defendant Wayne County (the county) appeals by leave granted the circuit court's order affirming the district court's denial of its motion for summary disposition brought pursuant to MCR 2.116(C)(7) (governmental immunity). We affirm for the reasons set forth in this opinion.

Plaintiffs are residents of the city of Dearborn Heights (the city). Plaintiffs sued the city and the county to recover damages that resulted when sewage backed up into their homes following a significant rainfall. The issue presented in this appeal is whether the county was entitled to summary disposition on the ground that plaintiffs had failed to comply with certain statutory notice requirements contained in the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. Both the district and circuit courts concluded that plaintiffs had provided the required statutory notice of their claims to the city, which in turn was required to notify the county of those claims pursuant to MCL 691.1419(4). Both courts concluded that plaintiffs' notice to the city was sufficient to allow their claims to proceed against the county, and that the county was therefore not entitled to summary disposition on the issue of notice. Although we disagree with the exact reasoning of the district and circuit courts, we conclude that the correct result was reached in denying the county's motion for summary disposition.

Summary disposition may be granted when, among other things, a claim is barred by governmental immunity. MCR 2.116(C)(7). When considering a motion brought under subrule C(7), the trial court must consider any affidavits, depositions, admissions, or other documentary evidence submitted by the parties to determine whether there is a genuine issue of material fact precluding summary disposition. MCR 2.116(G)(5); *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997). If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred by governmental immunity is an issue of law. See *id*. However, if a question of fact exists to the extent that

factual development could provide a basis for recovery, dismissal is inappropriate. *Id.*

A trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "We review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law." *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). We review de novo questions of statutory interpretation, as well as the application of governmental immunity. *Id.*; *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996).

The GTLA provides various exceptions to the doctrine of governmental immunity. One of those exceptions, contained in § 17 of the GTLA, MCL 691.1417, allows individuals to sue for damages resulting from a "sewage disposal system event."[1] MCL 691.1417 provides:

> (1) To afford property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages or physical injuries caused by a sewage disposal system event, a

[1] MCL 691.1416(k) defines the terms "[s]ewage disposal system event" and "event" as

> the overflow or backup of a sewage disposal system onto real property. An overflow or backup is not a sewage disposal system event if any of the following was a substantial proximate cause of the overflow or backup:
>
> (*i*) An obstruction in a service lead that was not caused by a governmental agency.
>
> (*ii*) A connection to the sewage disposal system on the affected property, including, but not limited to, a sump system, building drain, surface drain, gutter, or downspout.
>
> (*iii*) An act of war, whether the war is declared or undeclared, or an act of terrorism.

claimant and a governmental agency subject to a claim shall comply with this section and the procedures in sections 18 and 19.

(2) A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency.[2] Sections 16 to 19 abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory.

(3) If a claimant, including a claimant seeking noneconomic damages, believes that an event caused property damage or physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:

(a) The governmental agency was an appropriate governmental agency.

(b) The sewage disposal system had a defect.

(c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.

(d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.

(e) The defect was a substantial proximate cause of the event and the property damage or physical injury.

(4) In addition to the requirements of subsection (3), to obtain compensation for property damage or physical injury from a governmental agency, a claimant must show both of the following:

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[2] MCL 691.1416(b) defines "[a]ppropriate governmental agency" as "a governmental agency that, at the time of a sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage or physical injury."

(a) If any of the damaged property is personal property, reasonable proof of ownership and the value of the damaged personal property. Reasonable proof may include testimony or records documenting the ownership, purchase price, or value of the property, or photographic or similar evidence showing the value of the property.

(b) The claimant complied with section 19.

Section 19 of the GTLA, MCL 691.1419, provides, in pertinent part:

(1) Except as provided in subsections (3) and (7), a claimant is not entitled to compensation under section 17 unless the claimant notifies the governmental agency of a claim of damage or physical injury, in writing, within 45 days after the date the damage or physical injury was discovered, or in the exercise of reasonable diligence should have been discovered. The written notice under this subsection shall contain the content required by subsection (2)(c) and shall be sent to the individual within the governmental agency designated in subsection (2)(b). To facilitate compliance with this section, a governmental agency owning or operating a sewage disposal system shall make available public information about the provision of notice under this section.

(2) If a person who owns or occupies affected property notifies a contacting agency[3] orally or in writing of an

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[3] MCL 691.1416(d) provides that a

"[c]ontacting agency" means any of the following within a governmental agency:

(*i*) The clerk of the governmental agency.

(*ii*) If the governmental agency has no clerk, an individual who may lawfully be served with civil process directed against the governmental agency.

(*iii*) Any other individual, agency, authority, department, district, or office authorized by the governmental agency to receive notice under section 19, including, but not limited to, an agency, authority, department, district, or office responsible for the opera-

event before providing a notice of a claim that complies with subsection (1), the contacting agency shall provide the person with all of the following information in writing:

(a) A sufficiently detailed explanation of the notice requirements of subsection (1) to allow a claimant to comply with the requirements.

(b) The name and address of the individual within the governmental agency to whom a claimant must send written notice under subsection (1).

(c) The required content of the written notice under subsection (1), which is limited to the claimant's name, address, and telephone number, the address of the affected property, the date of discovery of any property damages or physical injuries, and a brief description of the claim.

(3) A claimant's failure to comply with the notice requirements of subsection (1) does not bar the claimant from bringing a civil action under section 17 against a governmental agency notified under subsection (2) if the claimant can show both of the following:

(a) The claimant notified the contacting agency under subsection (2) during the period for giving notice under subsection (1).

(b) The claimant's failure to comply with the notice requirements of subsection (1) resulted from the contacting agency's failure to comply with subsection (2).

(4) If a governmental agency that is notified of a claim under subsection (1) believes that a different or additional governmental agency may be responsible for the claimed property damages or physical injuries, the governmental agency shall notify the contacting agency of each additional or different governmental agency of that fact, in writing, within 15 business days after the date the governmental agency receives the claimant's notice under subsection (1). This subsection is intended to allow a different or additional governmental agency to inspect a claimant's property or investigate a claimant's physical injury before

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tion of the sewage disposal system, such as a sewer department, water department, or department of public works.

> litigation. Failure by a governmental agency to provide notice under this subsection to a different or additional governmental agency does not bar a civil action by the governmental agency against the different or additional governmental agency.
>
> (5) If a governmental agency receives a notice from a claimant or a different or additional governmental agency that complies with this section, the governmental agency receiving notice may inspect the damaged property or investigate the physical injury. A claimant or the owner or occupant of affected property shall not unreasonably refuse to allow a governmental agency subject to a claim to inspect damaged property or investigate a physical injury. This subsection does not prohibit a governmental agency from subsequently inspecting damaged property or investigating a physical injury during a civil action brought under section 17.

When interpreting a statute, our primary goal is to give effect to the intent of the Legislature. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). When the language of a statute is clear and unambiguous, the statute must be enforced as written. *Id*. But a statute may be ambiguous if it irreconcilably conflicts with another provision "or when it is *equally* susceptible to more than a single meaning." *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (emphasis in original). In construing such a statute, we must always use common sense to effectuate the Legislature's purpose and to avoid unreasonable consequences. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994); *In re RFF*, 242 Mich App 188, 198; 617 NW2d 745 (2000).

In the present case, it is undisputed that none of the plaintiffs provided the county with written notice of their claims pursuant to MCL 691.1419(1). The county argues that, under § 19(1), the mere giving of notice

that an event occurred and a list of affected households is insufficient to constitute notice that a specific individual actually intends to file a *claim*. In response, plaintiffs contend that the county failed to comply with the public information provision contained in the final sentence of § 19(1), which requires that "[t]o facilitate compliance with this section, a governmental agency owning or operating a sewage disposal system shall make available public information about the provision of notice under this section." But plaintiffs have failed to submit any evidence with regard to the applicability of this public information requirement. Moreover, we note that in contrast to §§ 19(2) and (3), § 19(1) is silent concerning the effect of an agency's failure to comply. Thus, even assuming that plaintiffs are correct that the county did not provide the public information envisioned by this provision, it does not necessarily follow that plaintiffs were relieved of the requirement to provide written notice of their claims under § 19(1).

Plaintiffs also contend that § 19(1) should have been deemed satisfied in these cases because the county received notice that an event occurred, and was provided with a list of names, addresses, and telephone numbers of the affected households. However, the plain language of § 19(1) requires written notice of a *claim*, and not merely notice of an event with a list of affected households. We must agree with the county that notice of an event, together with a list of affected households, does not constitute written notice of a *claim* for purposes of § 19(1). See *Nuculovic v Hill*, 287 Mich App 58, 69-70; 783 NW2d 124 (2010) (holding that notice of an "occurrence" was not sufficient to comply with an unrelated statutory provision requiring written notice of a "claim").

Nevertheless, we conclude that the county was not entitled to summary disposition on the issue of notice. While the parties, the district court, and the circuit court focused their analyses on MCL 691.1419(4), we believe that MCL 691.1419(2) controls in this situation and is dispositive of the parties' arguments here.

Section 19(2) provides that "[i]f a person who owns or occupies affected property *notifies a contacting agency* orally or in writing *of an event* before providing a notice of a claim that complies with subsection (1), the contacting agency *shall provide* the person with" written information concerning where and how to file a claim. MCL 691.1419(2) (emphasis added). Plaintiffs provided evidence that John Baratta and Steve Kalinowski, both identified as county representatives, attended a meeting on May 24, 2004, where they discussed the "event" with representatives of the affected communities, including the city. The parties do not address whether Kalinowski or Baratta can be considered a "contacting agency" within the meaning of MCL 691.1416(d) (a county clerk, an individual authorized to accept process, or "[a]ny other individual, agency, authority, department, district, or office authorized by the governmental agency to receive notice under section 19, including, but not limited to, an agency, authority, department, district, or office responsible for the operation of the sewage disposal system, such as a sewer department, water department, or department of public works"). But in any event, Baratta also attended a meeting on May 27, 2004, where he "requested that the Downriver Communities forward address information on properties that experienced basement flooding during the storm events which began on May 21st." It is undisputed that the city was one of the affected communities and responded to Baratta's request by sending the county a list of names, addresses, and telephone

numbers of many affected homeowners, including all plaintiffs except Diane McBride.[4]

We acknowledge that although § 19(2) contemplates that "a person who owns or occupies affected property" will provide notice of the event, the list provided to the county in these cases was actually received from the city rather than the individual property owners.[5] However, it is evident that the information contained in the list—i.e., the names, addresses, and telephone numbers of the affected individuals—originally came from the persons who owned or occupied the affected properties, and was merely compiled and transmitted to the county by the city. Accordingly, we conclude that the county was sufficiently "notifie[d] . . . orally or in writing *of an event* before [the affected individuals] provid[ed] a notice of a claim that complies with subsection (1) . . . ." MCL 691.1419(2) (emphasis added). Therefore, we further conclude that the county's receipt of the list from the city was sufficient to trigger its obligation under

[4] McBride submitted an affidavit stating that she had contacted the city and that her name was included on the city's list of persons who had called. Therefore, it appears that McBride's name should have been on the list of affected households provided by the city to the county. Nevertheless, McBride's name does not appear on the list provided by the city to the county. We find that there is a factual question regarding the omission of McBride's name from this list (e.g., whether McBride never contacted the city in the first instance, whether she called the city but her name was omitted inadvertently from the list forwarded to the county, whether a page is missing, or whether the list was prepared and forwarded to the county before McBride called the city). If McBride can establish that the county received notice that she was among the affected property owners, her claim should be entitled to proceed with the claims of the remaining plaintiffs. However, if McBride is unable to satisfy § 19(2), her claim against the county will be barred by governmental immunity.

[5] The county concedes that it produced the list during discovery, but claims that it did not know what the list meant or where it came from. This argument simply raises a question of fact to be resolved below.

§ 19(2) to provide information to the affected households and property owners concerning where and how to file a claim.

Despite receiving the list, which constituted notice of an event sufficient to trigger its obligation under § 19(2), it is undisputed that the county's "contacting agency" never provided the affected individuals with any written information concerning where and how to file a claim as required by § 19(2). Section 19(3) provides that "[a] claimant's failure to comply with the notice requirements of subsection (1) does not bar the claimant from bringing a civil action" if the claimant has provided notice to the contacting agency under subsection (2) and "[t]he claimant's failure to comply with the notice requirements of subsection (1) resulted from the contacting agency's failure to comply with subsection (2)." MCL 691.1419(3)(a) and (b). Plaintiffs have specifically alleged that they would have filed notices of their claims with the county under § 19(1) if they had known of the requirement to do so, and that the reason they did not file notices of their claims with the county was that they were never provided with information concerning where and how to file a claim, contrary to § 19(2).

Accepting these allegations as true, as we must, *Guerra*, 222 Mich App at 289, we conclude that plaintiffs have made the necessary showing required by §§ 19(3)(a) and (b)—namely, that the county received timely notice of an event that affected plaintiffs' properties as envisioned by § 19(2), that the county failed to provide plaintiffs any information concerning where and how to file a claim as required by § 19(2), and that plaintiffs' failure to file a notice of their claims under § 19(1) was caused by the county's failure to provide the information required by § 19(2). Accordingly, plaintiffs'

"failure to comply with the notice requirements of subsection (1) *d[id] not bar [plaintiffs] from bringing a civil action under section 17* against [the county] . . . ." MCL 691.1419(3) (emphasis added).

In sum, the present claims are not barred by plaintiffs' failure to provide written notice of their claims directly to the county under § 19(1). See MCL 691.1419(3). The district court reached the correct result when it denied the county's motion for summary disposition, and the circuit court reached the correct result when it affirmed the district court's ruling. It is axiomatic that we will not reverse when the lower courts have reached the correct result, even when they have done so for the wrong reason. See, e.g., *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006); *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

In light of our conclusions, we need not address whether plaintiffs' notice to the city was also sufficient to satisfy the requirement of notice to the county under the language of § 19(4).

Affirmed. No taxable costs pursuant to MCR 7.219, a public question having been involved.

PEOPLE v MALONE

Docket No. 286958. Submitted January 5, 2010, at Detroit. Decided March 30, 2010, at 9:00 a.m.

Patricia A. Malone was convicted by a jury in the Wayne Circuit Court, Carole F. Youngblood, J., of three counts of stealing or retaining a financial transaction device without consent, MCL 750.157n(1). Defendant appealed.

The Court of Appeals *held*:

1. MCL 750.157m(f)(*v*) does not require actual physical possession of identification numbers that can be used to access a proprietary account, and an attempt to access a proprietary account need not occur. Rather, stealing or retaining a record or copy of information that can be used to obtain access to money, credit accounts, or anything of value is sufficient. Therefore, defendant's decision to copy and retain the driver's license numbers, social security numbers, and bank account numbers of fellow employees on "post-it" notes without the authorization of the employees was conduct prohibited by the statute. The statute does not require an actual attempt to gain access to the accounts by the possessor of the copy of the proprietary information. Defendant's challenge to the sufficiency of the evidence to support the convictions is without merit because, although defendant testified that she gathered the information in the course of her employment and innocently took the information home, the jury rejected the credibility of those assertions.

2. Defendant's challenge to the constitutionality of MCL 750.157n(1) is without merit. A defendant may not challenge a statute as unconstitutionally vague when, as in this case, the defendant's own conduct is fairly within the constitutional scope of the statute. The fact that a hypothetical may be posed that would cast doubt upon the statute does not render it unconstitutionally vague.

3. Defendant's claim that she was wrongfully convicted because the action was tried in Wayne County but the evidence was recovered in Oakland County is without merit. Although the evidence was recovered in Oakland County, it was taken in the course of defendant's employment in Wayne County. Whenever a

felony consists or is the culmination of two or more acts done in the perpetration thereof, the felony may be prosecuted in any county in which any one of said acts was committed. MCL 762.8.

4. Evidence of other criminal acts is admissible when it explains the circumstances of the crime. It is proper to provide background information to the jury to allow them to examine the full transaction. The prosecutor was not required, under the facts of this case, to file a motion to admit prior bad acts evidence when the prosecutor offered evidence to show that an investigation was initiated by the report of identity theft of a number of Wayne County employees and to show how investigators came to focus on defendant.

5. The trial court did not err by denying defendant's motion to suppress evidence. There was probable cause to issue the search warrant and the affidavit supporting the warrant did not contain false information.

Affirmed.

CRIMINAL LAW — FINANCIAL TRANSACTION DEVICES.

A person who knowingly retains, possesses, secretes, or uses a financial transaction device without the consent of the device-holder is guilty of a felony regardless of whether the person attempts to access a proprietary account with the device; a record or copy of information that can be used to gain access to money, credit accounts, or anything of value may be a financial transaction device (MCL 750.157m[f][*v*], 750.157n).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Olga Agnello*, Assistant Prosecuting Attorney, for the people.

Law Offices of Robert J Boyd III, P.C. (by *Robert J Boyd III*), and Patricia A. Malone, *in propria persona*, for defendant.

Before: DAVIS, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM. Defendant was convicted, following a jury trial, of three counts of stealing or retaining a

financial transaction device without consent, MCL 750.157n(1). She was sentenced to one year of probation. Defendant appeals as of right, and we affirm.

Carla Sledge, Wayne County's chief financial officer, contacted the Wayne County Sheriff's Department after learning that several high-ranking employees were the victims of identity theft. Specifically, the credit card information for several employees was now being mailed to the same address. With regard to Sledge, an individual named Terry Lewis had attempted to change the mailing address and approved users for her credit card. Detective Eric Catner investigated the case and found that Terry Lewis had attempted to change the account information of other employees who worked in the financial offices of Wayne County government. When Lewis was located, he identified DeJuan Whitehead as the source of the personal identification information belonging to Wayne County employees. Whitehead reportedly obtained the information from a female employee who worked for Wayne County. Through the use of the "auto track" system, Detective Catner learned that, at one time, Whitehead lived with defendant. The auto track system reveals connections between individuals using references, mailing addresses, credit applications, and other information.

As a result of the investigation, a search warrant was executed at defendant's residence in Oakland County. Under some clothing, a blue notebook was recovered from a dresser in defendant's bedroom. The blue notebook contained "post-it" self-stick notes with personal information relating to four Wayne County employees written on them. A dietician employed by the county identified a post-it note containing her social security number, driver's license number, date of birth, phone number, and bank account number. She had provided

bank account information to allow her checks to be deposited directly in her bank account. The dietician did not know defendant and never authorized her to have this information. A former summer law clerk identified a post-it note containing her social security number, date of birth, and driver's license number. She did not know defendant and did not authorize her to have this information. An assistant prosecuting attorney identified a post-it note containing her social security number, driver's license number, date of birth, home address, telephone numbers, and bank account number. The bank account number was provided to the county to allow for direct deposits. The prosecutor did not know defendant and did not authorize defendant to have that information at her home.[1]

Wayne County employees testified that a recently enacted federal law required that the government protect the social security numbers of employees. Thereafter, employees were given identification numbers when hired and were identified by this number. Additionally, payroll department employees had no use for all of the information found on the post-it notes. Specifically, the payroll department did not maintain records containing driver's license numbers. The human resources department would maintain records containing driver's license numbers. An employee's work password limited their access to information dealing with their department.[2] An employee could not log onto the system and obtain information retained for other departments.

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[1] The fourth employee was out of state and did not testify at trial. The trial court granted defendant's motion for a directed verdict with regard to the charge concerning this individual.

[2] The testimony at trial indicated that file cabinets containing personal information were kept near the payroll department. The payroll manager testified that defendant had access to the keys, but defendant denied this assertion.

Defendant testified that she was assigned to the management and budget office, but worked in payroll when necessary. She testified that she was not assigned a password to access the payroll division information, rather payroll employee Alyse Cade would log onto the system under her identification and allow defendant to work under her password. Defendant testified that Cade had to leave early one day and needed to lock up all of the forms. Therefore, defendant wrote all of the information that she may need for data entry on post-it notes and placed it in a notebook she used at work.[3] Defendant forgot that she had this information and did not realize that she had taken it home. She learned about the post-it notes after the police executed a search warrant at her home when she was not present. Defendant testified that she never utilized the information and did not intend to use the information. She testified that she did not live extravagantly. However, on cross-examination, defendant admitted that she declared bankruptcy in 2005. Despite her testimony, defendant was convicted of three counts of stealing or retaining a financial transaction device without consent.

I. SUFFICIENCY AND GREAT WEIGHT OF THE EVIDENCE

Defendant contends that there was insufficient evidence to support the convictions for stealing or retaining a financial transaction device without consent, MCL

[3] Cade denied the assertion that she had ever allowed defendant to access the computer through the use of Cade's password. She also denied the assertion that defendant needed to write information on post-it notes to allow Cade to leave early. Cade testified that the processing of direct deposits was not crucial and could wait until the next day if she needed to leave early. Cade also testified that the information compiled on the post-it notes was not necessary in the course of the payroll work.

750.157n(1), or, in the alternative, that the verdict was against the great weight of the evidence. We disagree. MCL 750.157n(1) provides:

> A person who steals, knowingly takes, or knowingly removes a financial transaction device from the person or possession of a deviceholder, or who knowingly retains, knowingly possesses, knowingly secretes, or knowingly uses a financial transaction device without the consent of the deviceholder, is guilty of a felony.

MCL 750.157m(f) defines "financial transaction device" as any of the following:

> (*i*) An electronic funds transfer card.
>
> (*ii*) A credit card.
>
> (*iii*) A debit card.
>
> (*iv*) A point-of-sale card.
>
> (*v*) Any instrument, device, card, plate, code, account number, personal identification number, or a record or copy of a code, account number, or personal identification number or other means of access to a credit account or deposit account, or a driver's license or state identification card used to access a proprietary account, other than access originated solely by a paper instrument, that can be used alone or in conjunction with another access device, for any of the following purposes:
>
> (A) Obtaining money, cash refund or credit account credit, goods, services, or any other thing of value.
>
> (B) Certifying or guaranteeing to a person or business the availability to the deviceholder of funds on deposit to honor a draft or check payable to the order of that person or business.
>
> (C) Providing the deviceholder access to a deposit account for the purpose of making deposits, withdrawing funds, transferring funds between deposit accounts, obtaining information pertaining to a deposit account, or making an electronic funds transfer as defined in section

3(4) of Act No. 322 of the Public Acts of 1978, being section 488.3 of the Michigan Compiled Laws.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). When reviewing a claim of insufficient evidence, this Court reviews the record in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *In re Contempt of Henry*, 282 Mich App 656, 677; 765 NW2d 44 (2009). Appellate review of a challenge to the sufficiency of the evidence is deferential. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The reviewing court must draw all reasonable inferences and examine credibility issues in support of the jury verdict. *Id*. When assessing a challenge to the sufficiency of evidence, the trier of fact, not the appellate court, determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court must not interfere with the jury's role as the sole judge of the facts when reviewing the evidence. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

Statutory construction issues present questions of law subject to review de novo. *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007). When the manifest intention of the Legislature is derived from the language of a clear statute, nothing will be read into the clear statute. *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 189; 740 NW2d 678 (2007). The Legislature is presumed to intend the meaning it plainly expressed. *People v Petty*, 469 Mich 108, 114; 665 NW2d 443 (2003), and courts may not speculate as to the intent of the Legislature beyond the language plainly expressed in

the statute. *People v Hock Shop, Inc*, 261 Mich App 521, 528; 681 NW2d 669 (2004). The function of a reviewing court resolving disputed interpretations of statutory language is to effectuate the legislative intent. *People v Valentin*, 457 Mich 1, 5; 577 NW2d 73 (1998). When the statutory language is clear, the courts must enforce the statute as written. *Id*. The application of the law to the facts is reviewed de novo. *People v Barrera*, 451 Mich 261, 269 n 7; 547 NW2d 280 (1996).

Defendant contends that there was insufficient evidence to convict her because she did not have a physical card belonging to any of the complainants. That is, she merely "innocently possessed some personal information/account numbers." Defendant argues that the possession of another's "social security number alone does not qualify as a 'financial transaction device,' " and that defendant did not use the information found on the post-it notes to "access a proprietary account." Defendant posits that when an intent to defraud has not been shown to exist, there has been no violation of the statute and insufficient evidence to convict has been presented. We disagree.

Review of the plain language of the statute at issue reveals that defendant was not required to possess the physical cards that allow access to proprietary accounts and the complainants did not need to suffer an actual loss to support the convictions. As previously stated, MCL 750.157m(f)(*v*) addresses the conduct at issue by providing:

> Any instrument, device, card, plate, code, account number, personal identification number, or a record or copy of a code, account number, or personal identification number or other means of access to a credit account or deposit account, or a driver's license or state identification card used to access a proprietary account, other than access

> originated solely by a paper instrument, that can be used alone or in conjunction with another access device, for any of the following purposes:
>
> (A) Obtaining money, cash refund or credit account credit, goods, services, or any other thing of value.
>
> (B) Certifying or guaranteeing to a person or business the availability to the deviceholder of funds on deposit to honor a draft or check payable to the order of that person or business.
>
> (C) Providing the deviceholder access to a deposit account for the purpose of making deposits, withdrawing funds, transferring funds between deposit accounts, obtaining information pertaining to a deposit account, or making an electronic funds transfer as defined in section 3(4) of Act No. 322 of the Public Acts of 1978, being section 488.3 of the Michigan Compiled Laws. [MCL 750.157m(f)(*v*).]

MCL 750.157m(f)(*v*) does not require actual physical possession of identification numbers that can be used to access a proprietary account, and an attempt to access a proprietary account need not occur.[4] Rather, a "record or copy" of information that "can be used" to obtain access to money, credit accounts, or anything of value is sufficient. MCL 750.157m(f)(*v*)(A) and (C). Therefore, defendant's decision to copy the driver's license numbers, social security numbers, and bank account numbers without the authorization of the employees is conduct prohibited by the plain language of the statute. MCL 750.157n; *Valentin*, 457 Mich at 5. The statute at issue does not require an actual attempt to gain access

[4] The dietician and the assistant prosecuting attorney testified that the information provided was necessary to allow for the direct deposit of their paychecks into their bank accounts. Therefore, this testimony demonstrated that this information could access a proprietary account. Moreover, driver's license numbers and social security numbers are commonly provided to verify identification on existing bank or credit accounts and to create new accounts.

to the accounts by the possessor of the copy of the proprietary information.

Defendant contends that her possession of the information was inadvertent and innocent, and therefore, there was insufficient evidence to support the convictions. We disagree. Although defendant testified that she copied the information in the course of her employment, payroll employee Cade contradicted defendant's testimony. Cade testified that she did not allow defendant to access the programs through the use of her password, and the information copied by defendant was not necessary to complete direct deposits. Additionally, other employees testified that the information compiled by defendant was not gathered in one location and was not necessary for the completion of defendant's work. Although defendant testified that she gathered the information in the course of her employment and innocently took the information home, the jury rejected the credibility of those assertions. *Nowack*, 462 Mich at 400. Therefore, the challenge to the sufficiency of the evidence to support the convictions is without merit.[5]

II. CONSTITUTIONAL CHALLENGE

Next, defendant challenges the constitutionality of the statute as vague and overbroad both on its face and

[5] Defendant contends that the innocent possession and the failure to acquire and use the actual account numbers also demonstrate that the verdict was against the great weight of the evidence. In light of the application of the law to the facts of the case, the inferences from the evidence, and the assessment of the credibility of the witnesses, this challenge is without merit. *Nowack*, 462 Mich at 400; *Barrera*, 451 Mich at 269 n 7. In a Standard 4 brief, defendant asserted that the information provided that the crime occurred in 2007, but trial testimony demonstrated that the information was gathered in 2005. MCL 750.157n(1) criminalizes the knowing *retention* and possession of a financial transaction device. Therefore, the challenge to the timeframe is without merit.

as applied to defendant. We disagree. Statutes are presumed to be constitutional. *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). To overcome this presumption, the unconstitutionality must be readily apparent. *In re McEvoy*, 267 Mich App 55, 68; 704 NW2d 78 (2005). "The party challenging a statute's constitutionality cannot merely claim unconstitutionality, but has the burden of proving its invalidity." *Id*. "The presumption of constitutionality may justify a narrow construction or even a construction against the natural interpretation of the statutory language." *People v Lueth*, 253 Mich App 670, 675; 660 NW2d 322 (2002). In *People v Hrlic*, 277 Mich App 260, 263; 744 NW2d 221 (2007), this Court delineated the rules applicable to a statute challenged as unconstitutionally vague:

> A statute may be unconstitutionally vague on any of three grounds: (1) it is overbroad, impinging on First Amendment freedoms, (2) it fails to provide fair notice of the conduct proscribed, or (3) it is so indefinite that it confers unlimited and unstructured discretion on the trier of fact to determine whether an offense has occurred. To evaluate a vagueness challenge, this Court must examine the entire text of the statute and give the words of the statute their ordinary meanings. "To afford proper notice of the conduct proscribed, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited." A term that requires persons of ordinary intelligence to speculate about its meaning and differ on its application may not be used. To be sufficiently definite, the meaning of a term must be "fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." Vagueness challenges must be considered in light of the facts at issue. [Citations omitted.]

A defendant may not challenge a statute as unconstitutionally vague when the defendant's own conduct is

fairly within the constitutional scope of the statute. *People v Hill*, 269 Mich App 505, 525; 715 NW2d 301 (2006). The fact that a hypothetical may be posed that would cast doubt upon the statute does not render it unconstitutionally vague. *People v Derror*, 475 Mich 316, 337; 715 NW2d 822 (2006). Rather, the analysis must center on whether the statute, as applied to the actions of the individual defendant, is constitutional. *Id*.

The statute at issue, MCL 750.157n(1) criminalizes the knowing retention and possession of a financial transaction device without the consent of the device-holder. A financial transaction device refers to any record or copy of an account number or personal identification number that can be used to access money, credit, a deposit account, or any other thing of value. MCL 750.157m(f)(*v*)(A) and (C). In the present case, defendant copied account numbers belonging to the complainants and had that information in her personal possession without their consent. Defendant was entitled to access *some* of the information in the course of her employment, but nonetheless, took the information to her home. The jury rejected defendant's testimony that her possession of the information was inadvertent and the result of a mistake. Although the monetary and credit accounts of the complainants had not yet been compromised, the statute at issue punishes retention or possession of a financial transaction device that *can be used* to access proprietary accounts. Accordingly, defendant's challenge to the constitutionality of the statute with regard to her conduct is without merit.[6]

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[6] Defendant contends that the statute is impermissibly vague because it does not identify the specific types of information, such as social security number or driver's license number, which is improper to possess. In the present case, defendant gained access to the driver's license number, social security number, and bank account information of em-

III. VENUE

Defendant argues that she was wrongfully convicted because the action was tried in Wayne County, but the evidence introduced at trial was recovered in Oakland County. We disagree. "A trial court's determination regarding the existence of venue in a criminal prosecution is reviewed de novo." *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996).

Generally, a defendant must be tried in the county where the crime is committed. *People v Jendrzejewski*, 455 Mich 495, 499; 566 NW2d 530 (1997). Jurisdiction addresses the judicial power to hear and determine a criminal prosecution whereas venue relates to and defines where the prosecution is to be brought or tried. *People v Gayheart*, 285 Mich App 202, 215-216; 776 NW2d 330 (2009). Although venue is not an essential element of a crime, it must be proven beyond a reasonable doubt, and the determination regarding venue presents a factual issue for the jury. *Id*. at 216. Venue may be proven by circumstantial evidence and reasonable inferences drawn from the evidence. *Id*.

"Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration thereof, said felony may be prosecuted in any county in which any 1

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ployees in the course of her employment. This information allowed access to proprietary accounts because it allowed direct deposits of paychecks into the account of the employee. Because defendant's conduct falls squarely within the terms of the statute, her challenge fails. *Derror*, 475 Mich at 337. Defendant also posits that the statute criminalizes the gathering of account information by bank employees and Secretary of State employees. The presentation of hypothetical scenarios does not alter the conclusion that defendant's conduct falls within the scope of the statute. *Id*. Moreover, there is a distinction between the provision of account information to an employee with the consent of the deviceholder for purposes of engaging in a transaction and the subsequent, nonconsensual appropriation by an employee outside the scope of one's employment.

of said acts was committed." MCL 762.8. When applying MCL 762.8, the location of the commission of an act is not limited to the place of the defendant's physical presence. *Fisher*, 220 Mich App at 151-152. Rather, when an act has effects elsewhere that are essential to the offense, the offense is effectively committed in the place where the act has its effects. *Id*. Although evidence was retrieved from defendant's Oakland County residence, the personal information was taken in the course of defendant's employment in Wayne County. Contrary to the argument raised by the defense, the date of the offense as stated in the information is not the test for determining venue. Accordingly, this claim of error is without merit.

IV. BAD ACTS EVIDENCE

Defendant asserts that her convictions must be reversed or vacated because the trial court improperly admitted other prior bad acts evidence that was more prejudicial than probative particularly when other persons committed the improper acts. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). When the decision to admit evidence involves a preliminary question of law, such as whether an evidentiary rule precludes admission of the evidence, this issue of law is reviewed de novo. *Id*. An abuse of discretion occurs when the trial court selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant's assertion of error is simply without merit. The prosecution did not seek permission to present other acts evidence in accordance with MRE 404(b). Rather, the evidence was offered to show that

the investigation was initiated by the report of identity theft of a number of Wayne County employees and how investigators came to focus on defendant. It is proper to provide background information to the jury to allow them to examine the full transaction. "The more the jurors kn[ow] about the full transaction, the better equipped they [are] to perform their sworn duty." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996).

> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. *State v Villavicencio*, 95 Ariz 199; 388 P2d 245 (1964); *People v Wardwell*, 167 Cal App 2d 560; 334 P2d 641 (1959); McCormick on Evidence (2d ed), § 190. [*People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).]

Evidence of other criminal acts is admissible when it explains the circumstances of the crime. *Sholl*, 453 Mich at 742 (citations omitted). In light of the limited purpose for the evidence, the prosecution was not required to file a motion to admit prior bad acts evidence. Thus, this issue does not entitle defendant to appellate relief.

V. MOTION TO SUPPRESS

Lastly, defendant contends that the trial court erred by denying the motion to suppress evidence because the search warrant lacked probable cause and the affidavit contained false information. We disagree. On appeal, the trial court's findings of fact on a motion to suppress evidence are reviewed for clear error, but the trial court's ultimate decision on the motion is reviewed de

novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). "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." *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

A search warrant may only be issued upon a showing of probable cause. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651(1). Probable cause for issuance of a search warrant exists if there is a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the location to be searched. *People v Unger*, 278 Mich App 210, 244; 749 NW2d 272 (2008). When reviewing a magistrate's decision to issue a search warrant, this Court must examine the search warrant and underlying affidavit in a common-sense and realistic manner. *People v Darwich*, 226 Mich App 635, 636-637; 575 NW2d 44 (1997). Under the totality of the circumstances, this Court must then determine whether a reasonably cautious person could have concluded that there was a substantial basis for the magistrate's finding of probable cause. *Id*. at 637. When a person of reasonable caution would conclude that contraband or evidence of criminal conduct will be found in the place to be searched, probable cause for a search exists. *Id*.

Defendant contends that probable cause was lacking because defendant's name was never mentioned in the search warrant, there was no nexus to defendant's home, the search warrant contained untrue statements, and the information was stale.[7] The trial court held an evidentiary hearing and rejected defendant's challenges to the search warrant.

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[7] At the evidentiary hearing, defendant did not argue that the information was stale, and the trial court did not rule on the issue.

Review of the search warrant and affidavit in a common-sense and realistic manner, *Darwich*, 226 Mich App at 636-637, reveals that the trial court did not err by denying the motion to suppress. Review of the affidavit reveals that the detective set forth the reason for the investigation into identity theft, the complaint from a county official regarding employee targets of identify theft, the initial person suspected in the crimes, and the information provided by the first suspect regarding associates. Defendant contends that deliberate falsehoods were placed into the affidavit. Specifically, it was asserted that the county employee allegedly involved in the crimes was the aunt of a suspect. However, the detective deliberately omitted this information and merely indicated that a female employee was involved. Defendant also asserts that the specific county building involved was never delineated, but the detective chose the building located on Randolph Street. When questioned regarding these challenges, the detective testified that defendant was identified as an "aunt" of a suspect, but she was not a blood relative, but merely a close friend. Additionally, the detective noted that the primary complainants and the financial division were housed in the Randolph building. The trial court concluded that the factual challenges did not constitute falsehoods that would invalidate the search warrant, and we cannot conclude that the factual findings are clearly erroneous. *Williams*, 472 Mich at 313. Finally, with regard to the staleness of the information, defense counsel did not question the detective regarding the timeframe between the interviews with the suspects and the execution of the search warrant. Because a factual record to support defendant's claim was never developed, the issue has been abandoned.

People v Howard, 226 Mich App 528, 537; 575 NW2d 16 (1997).[8]

Affirmed.

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[8] We note that defendant filed a Standard 4 brief that challenges the scope of MCL 750.157n and the great weight of the evidence. These issues were raised in the brief on appeal filed by counsel. Defendant contends that there was no testimony that post-it notes would allow access to proprietary accounts. Detective Catner testified that an investigation was triggered because of the dissemination of personal information belonging to Wayne County employees. This dissemination had resulted in changes to credit card information and attempts by other individuals to be added to legitimate accounts. As previously stated, these issues are without merit.

DECKER v ROCHOWIAK

Docket Nos. 284155, 285870, and 290633. Submitted January 6, 2010, at Lansing. Decided March 30, 2010, at 9:05 a.m.

Eric Decker, a minor, by his next friend, Robin Decker, brought a medical malpractice action in the Montcalm Circuit Court against Michael Rochowiak, D.O., Alberto Betancourt, M.D., Carson City Hospital, doing business as Center for Women's Health Care, and Carson City Hospital, Inc. (the Carson City defendants), and Michael Stoiko, M.D., and Spectrum Health Hospitals, Inc., doing business as Butterworth Hospital and DeVos Children's Hospital (the Spectrum defendants). Plaintiff alleged that defendants committed malpractice during the care and treatment of plaintiff following his birth at Carson City Hospital. On September 23, 2004, plaintiff served his notice of intent (NOI) to commence the action on defendants. On June 5, 2006, plaintiff filed his action with supporting affidavits of merit. On January 9, 2008, plaintiff moved to file an amended complaint. The trial court, Charles H. Miel, J., granted the motion. Plaintiff thereafter served on defendants a supplemental NOI. A written order granting the motion was entered on February 19, 2008, and plaintiff filed the amended complaint on February 28, 2008. The Spectrum defendants (Docket No. 284155) sought leave to appeal the February 19, 2008, order and also sought in the trial court partial summary disposition of the 17 new allegations regarding the specific ways in which the Spectrum defendants breached the applicable standards of care raised in plaintiff's amended complaint. The trial court denied the motion for summary disposition on May 19, 2008. The Spectrum defendants (Docket No. 285870) sought leave to appeal the May 19, 2008, order. The Court of Appeals granted the Spectrum defendants' applications for leave to appeal and consolidated the appeals in unpublished orders entered September 8, 2008, amended September 18, 2008 (Docket Nos. 284155 and 285870). While the applications for leave to appeal were pending, the Spectrum defendants again moved for summary disposition in the trial court with regard to all of plaintiff's claims. The Carson City defendants joined the motion in part. The trial court denied the motions and entered an order on February 9, 2009, denying the Spectrum defendants' motion for summary disposition. On March

2, 2009, the Spectrum defendants (Docket No. 290633) sought leave to appeal the February 9, 2009, order. The Court of Appeals granted leave to appeal and consolidated the appeal in Docket No. 290633 with the appeals in Docket Nos. 284155 and 285870 in an unpublished order entered May 5, 2009. The Carson City defendants filed in the Court of Appeals a cross-appeal on May 26, 2009. On June 4, 2009, the trial court entered an order denying the Carson City defendants' prior motion for joinder and concurrence in the Spectrum defendants' motion for summary disposition.

The Court of Appeals *held*:

1. The trial court did not err by denying the Spectrum defendants' motion for partial summary disposition regarding the 17 new allegations raised in the amended complaint. Plaintiff's amended complaint did not assert any new potential causes of injury but instead alleged 17 specific ways in which defendants breached the applicable standards of care. Plaintiff's NOI clearly provided the Spectrum defendants adequate notice of the claims against them. The allegations in the amended complaint merely set forth more specific details, clarifying plaintiff's claims against the Spectrum defendants. Plaintiff did make a good-faith effort to identify and provide notice of the new allegations of how the standards of care were breached.

2. Plaintiff was required under the facts of this case to provide the statutory NOI before he commenced his lawsuit and did provide such notice. Plaintiff was not required to file a second NOI where the amended complaint did not name any new defendants or set forth any new potential causes of injury and where the action had already been commenced by the filing of the original complaint.

3. The trial court did not abuse its discretion by granting plaintiff's motion to amend his complaint.

4. The NOI contained a sufficient statement of causation regarding the manner in which it was alleged that defendants' breach of the standards of practice or care was the proximate cause of the injuries claimed in the notice. The trial court properly denied defendants' motion for summary disposition with regard to the sufficiency of the NOI.

5. Plaintiff's expert witness with regard to the malpractice claims against the defendants' nurses applied the proper standard of care with regard to those claims. The expert recognized that, with regard to the procedures at issue, the same standard of care applied locally and nationally. The expert also demonstrated her familiarity with the standard of care in a community similar to the community in which the defendants' nurses practiced.

6. The claims did not merely allege the nurses' failure to chart their communications with other medical providers but also alleged the level of communication that should have existed. The trial court properly denied defendants' motion for summary disposition that alleged that the nurses were not obligated by hospital policy to document their verbal communications with the physicians who were providing care to plaintiff.

Affirmed and remanded.

1. ACTIONS — MEDICAL MALPRACTICE — PLEADING — AMENDMENT OF PLEADINGS — NOTICE OF INTENT TO COMMENCE AN ACTION.

A plaintiff in a medical malpractice action must provide the statutorily required notice of intent to file the action not less than 182 days before the action is commenced; a plaintiff who has complied with such requirement and thereafter files a complaint to commence the action is not required to file a second notice of intent when the plaintiff is then permitted to file an amended complaint that does not name new defendant parties or set forth new potential causes of injury but merely clarifies the plaintiff's claims against the defendants (MCL 600.2912b).

2. WITNESSES — EXPERT WITNESSES — MEDICAL MALPRACTICE — STANDARDS OF CARE.

A party offering the testimony of an expert witness in a medical malpractice action must demonstrate the witness' knowledge of the applicable standard of care; a nonlocal expert may testify if the expert demonstrates a familiarity with the standard of care in an area similar to the community in which the defendant practiced.

3. ACTIONS — MEDICAL MALPRACTICE — NURSES — STANDARDS OF CARE.

Nurses do not engage in the practice of medicine although they are licensed healthcare professionals; the common-law standard of care applicable to malpractice actions against nurses is the skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities.

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Turner & Turner, P.C.* (by *Matthew L. Turner*), for Eric Decker.

Johnson & Wyngaarden, P.C. (by *David R. Johnson* and *Michael L. Van Erp*), for Michael Rochowiak, D.O., Alberto Betancourt, M.D., Carson City Hospital, and Carson City Hospital, Inc.

Smith Haughey Rice & Roegge (by *William L. Henn* and *Carol D. Carlson*) for Michael Stoiko, M.D., and Spectrum Health Hospitals, Inc.

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

CAVANAGH, P.J. In Docket Nos. 284155 and 285870, defendants Michael Stoiko, M.D., Spectrum Health Hospitals, Inc., doing business as Butterworth Hospital, and Spectrum Health Hospitals, Inc., doing business as DeVos Children's Hospital (the Spectrum defendants), appeal by leave granted an order granting plaintiff, Eric Decker, a minor, by his next friend Robin Decker, leave to amend his medical malpractice complaint, and an order denying the Spectrum defendants' motion for partial summary disposition with regard to those claims added by amendment. We affirm.

In Docket No. 290633, the Spectrum defendants appeal by leave granted an order denying their motion for summary disposition that challenged the sufficiency of plaintiff's notice of intent (NOI) and the expert support for plaintiff's nursing malpractice claims. Also in Docket No. 290633, defendants Michael Rochowiak, D.O., Alberto Betancourt, M.D., Carson City Hospital, doing business as Center for Women's Health Care, and Carson City Hospital, Inc. (the Carson City defendants), challenge on cross-appeal an order denying their motion for joinder and concurrence in the Spectrum defendants' motion for summary disposition with regard to the sufficiency of plaintiff's NOI. We affirm.

These consolidated interlocutory appeals arise out of defendants' care and treatment of plaintiff, Eric Decker (Eric), who was born on July 17, 1996, at defendant Carson City Hospital. Plaintiff has averred that he was born by vacuum delivery necessitated by fetal distress.

He was not seen by a pediatrician. Although his bilirubin was elevated and he started becoming reluctant to feed, Eric was discharged the next day, on July 18, 1996.

On July 19, 1996, Eric was taken back to Carson City Hospital because he was lethargic and reluctant to feed. After being diagnosed with persistent hypoglycemia and jaundice caused by an elevated bilirubin level, he was airlifted to DeVos Children's Hospital on Spectrum Health's Butterworth Campus for medical management in the pediatric intensive care unit (PICU). Upon arrival, it was determined that Eric was profoundly hypoglycemic with a critically low glucose level of 4 mg/dl, where an acceptable range appears to be 60 to 100 mg/dl. A subclavian venous catheter was inserted to infuse glucose solutions. Although his blood glucose level increased somewhat for a short period, it remained dangerously low. Seizure activity was noted.

A brain CT scan performed on July 20, 1996, revealed an extensive hypoxic ischemic brain injury and hemorrhages. Eric's condition continued to deteriorate, culminating in a cardiac arrest. During the resuscitation efforts, it was determined that the subclavian venous catheter was not in the vein. Thus, the fluid that had been infused through it did not go into Eric's bloodstream, but into his chest cavity. The large amount of fluid in Eric's chest cavity interfered with the ability of Eric's heart to beat—a condition known as cardiac tamponade—which led to his cardiopulmonary arrest. After a functioning femoral vein catheter was placed, Eric's condition stabilized. He remained hospitalized through September 2, 1996. Eric has been diagnosed with cerebral palsy from an early anoxic (lack of oxygen) brain injury. He is developmentally delayed, suffers from sensory deficits, and is legally blind.

On September 23, 2004, plaintiff served his NOI on defendants as required by MCL 600.2912b, and on June 5, 2006, he filed his medical malpractice case with supporting affidavits of merit. On January 9, 2008, plaintiff moved for leave to file an amended complaint that alleged 17 specific ways in which the Spectrum defendants breached the applicable standards of care. Plaintiff argued that the amendment was proper because (1) discovery remained open and experts had not been deposed, (2) the amendment merely clarified allegations and issues and was made possible after particular information was learned through the discovery process, (3) the clarifications "ultimately relate[] back to the underlying lynch pin of this entire case which is that they did not appropriately monitor and maintain this baby's glucose level," and (4) defendants would not be prejudiced by the amendment.

The Spectrum defendants opposed plaintiff's motion to amend, arguing that (1) plaintiff had not shown why "justice" required that leave be granted under MCR 2.118(A)(2) in light of the inexcusable delay in bringing such claims that were discernable from their inception; (2) plaintiff failed to raise these new theories in the NOI as required by MCL 600.2912b, thus such claims were barred by the statute of limitations; and (3) defendants would be unduly prejudiced if plaintiff were allowed to amend the complaint to add these new allegations. Oral arguments were heard on January 31, 2008. The trial court agreed with plaintiff's arguments, and granted plaintiff's motion for leave to file an amended complaint. Thereafter, plaintiff served on defendants a supplemental NOI containing the additional allegations. A written order granting plaintiff's motion was entered on February 19, 2008, and plaintiff filed the amended complaint on February 28, 2008. On March 11, 2008, under Docket No. 284155, the Spectrum

defendants filed with this Court their application for leave to appeal the trial court's February 19, 2008, order.

On April 8, 2008, the Spectrum defendants moved for partial summary disposition, seeking dismissal of the 17 allegations raised in plaintiff's amended complaint. Defendants essentially reiterated the arguments they made in opposition to plaintiff's motion to amend, including that the specific allegations were not identified in the NOI and were barred from being added to this lawsuit by the expiration of the period of limitations. Defendants also contested the fact that plaintiff did not wait 182 days after serving the supplemental NOI before filing the amended complaint. The trial court heard oral arguments on April 24, 2008, and agreed with plaintiff's arguments. An order denying defendants' motion was entered on May 19, 2008. On June 9, 2008, under Docket No. 285870, the Spectrum defendants filed with this Court their application for leave to appeal the trial court's May 19, 2008, order.

On September 8, 2008, this Court granted the Spectrum defendants' applications for leave to appeal in Docket Nos. 284155 and 285870, and the appeals were administratively consolidated. See *Decker v Rochowiak*, unpublished order of the Court of Appeals, entered September 8, 2008 (Docket No. 284155), amended September 18, 2008; *Decker v Rochowiak*, unpublished order of the Court of Appeals, entered September 8, 2008 (Docket No. 285870), amended September 18, 2008.

On November 26, 2008, while Docket Nos. 284155 and 285870 were pending on appeal, the Spectrum defendants again moved for summary disposition in the trial court. They moved for summary dismissal as to all of plaintiff's claims, arguing that plaintiff's initial NOI

failed to contain a statement of proximate cause detailing the manner in which defendants' alleged negligence resulted in plaintiff's injuries as required by MCL 600.2912b(4)(e). The Spectrum defendants also moved for summary disposition as to plaintiff's nursing malpractice claims. They asserted that (1) plaintiff's only expert witness could not testify because she improperly relied upon a national, rather than local, standard of care with regard to these claims, and (2) plaintiff's expert was not qualified to testify in support of plaintiff's negligent charting claims. The Carson City defendants joined the motion for summary disposition, challenging the sufficiency of the statement of causation in plaintiff's NOI. Plaintiff opposed the motions.

On December 19, 2008, oral arguments were held. The trial court rejected defendants' claims that plaintiff's NOI was deficient, holding that "reading it in its entirety it describes the manner in which the various breaches of standard of care were the proximate cause of the injuries and I'll also adopt by reference the arguments of [plaintiff's counsel] and his brief in connection with that." The court also rejected the Spectrum defendants' challenge to plaintiff's nursing malpractice claims, holding that the expert seemed to testify that the national standard of care and the local standard of care were the same and, with regard to the charting claim, "the standard of care determines what the nurses should do, not whether the hospital form provides for it." After noting that it was adopting the arguments and brief of plaintiff, the trial court denied defendants' motions. On February 9, 2009, an order denying the Spectrum defendants' motion for summary disposition was entered.

On March 2, 2009, under Docket No. 290633, the Spectrum defendants filed with this Court their appli-

cation for leave to appeal the trial court's February 9, 2009, order. On May 5, 2009, this Court granted the Spectrum defendants' application for leave to appeal, and administratively consolidated the appeal with Docket Nos. 284155 and 285870. See *Decker v Rochowiak*, unpublished order of the Court of Appeals, entered May 5, 2009 (Docket No. 290633). On May 26, 2009, the Carson City defendants filed with this Court their claim of cross-appeal. On June 4, 2009, the trial court entered an order denying the Carson City defendants' motion for joinder and concurrence in the Spectrum defendants' motion for summary disposition with regard to the sufficiency of plaintiff's NOI.

I. DOCKET NOS. 284155 AND 285870

The Spectrum defendants argue that the trial court erred by denying their motion for partial summary disposition as to 17 "new" allegations raised in plaintiff's first amended complaint. More specifically, defendants argue that these allegations should have been dismissed because they were not raised in plaintiff's NOI and are barred by the statute of limitations. We disagree.

We review de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Likewise, issues of court rule and statutory interpretation, as well as whether a statute of limitations bars a claim, are reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 570-571; 703 NW2d 115 (2005).

A medical malpractice action cannot be filed until a plaintiff complies with MCL 600.2912b, which provides:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.
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> * * *
>
> (4) The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

The purpose of the notice requirement was explained in *Neal v Oakwood Hosp Corp*, 226 Mich App 701; 575 NW2d 68 (1997), as follows:

> The purpose of the notice requirement is to promote settlement without the need for formal litigation and reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs. [*Id*. at 705, citing Senate

Legislative Analysis, SB 270, August 11, 1993; House Legislative Analysis, HB 4403-4406, March 22, 1993.]

See, also, *Bush v Shabahang*, 484 Mich 156, 174; 772 NW2d 272 (2009). Once notice is given in compliance with MCL 600.2912b, the two-year limitations period is tolled during the notice period. MCL 600.5856(c). But a medical malpractice plaintiff has the burden of showing compliance with the requirements of MCL 600.2912b in order to toll the statute of limitations. *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 686, 691; 684 NW2d 711 (2004).

Here, the Spectrum defendants argue that plaintiff's NOI did not include 17 specific allegations that plaintiff raised in his first amended complaint; thus, those "theories of malpractice liability that are not encompassed within [his] NOI" should have been summarily dismissed. We disagree.

The NOI, examined as a whole, must advise "potential malpractice defendants of the basis of the claims against them." *Id*. at 696 n 14; *Boodt v Borgess Med Ctr*, 272 Mich App 621, 628, 630; 728 NW2d 471 (2006), rev'd in part on other grounds 481 Mich 558, 564 (2008). However, because the NOI comes at an early stage of the malpractice proceeding, the plaintiff does not have to craft the notice "with omniscience." *Roberts (After Remand)*, 470 Mich at 691. Rather, the plaintiff must "make good-faith averments that provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings." *Id*. at 701 (emphasis in original). The NOI must "set forth allegations in good faith, in a manner that is responsive to the specific queries posed by the statute, and with enough detail to allow the potential defendants to

understand the claimed basis of the impending malpractice action . . . ." *Id*. at 691 n 7.

Considered as a whole, plaintiff's NOI clearly set forth as the claimed basis of plaintiff's impending malpractice action against the Spectrum defendants their alleged failure to properly care for, evaluate, treat, and monitor Eric's hypoglycemic condition, including by the proper and timely administration of the necessary glucose solutions through a properly placed central venous line. The NOI also asserted that the hospital, as well as the registered nurses and the physicians who were involved in Eric's medical management, were liable for Eric's resulting injuries. Contrary to the Spectrum defendants' argument, plaintiff's subsequently filed amended complaint did not assert any "new" potential causes of injury.

More specifically, with regard to the registered nurses, plaintiff's NOI set forth, in ¶ C(j), (k), (*l*), (m), (n), (q), and (r), their alleged failures to (1) properly monitor Eric's glucose levels and the status of the central line in light of his medical history and condition, (2) provide the necessary care to Eric, (3) timely and completely record, apprise, and report to physicians and other providers with regard to Eric's condition, and (4) seek consultations with, or provide referrals to, qualified specialists. The contested claims in plaintiff's amended complaint with regard to the nurses, as set forth in ¶ 42(*ll*), (mm), (nn), (oo), (pp), (qq), (rr), (ss), and (tt), included failures to (1) check Eric's blood sugar between 1:13 p.m. and 4:01 p.m. in violation of an order that it be checked every hour, (2) administer glucagon, potassium, and a bolus of glucose in a timely manner and/or as ordered, (3) timely report to physicians Eric's changed and decreased heart rate, respiratory rate, and oxygen saturation, (4) timely report problems with the

central line and Eric's seizure activity, (5) execute a change from dextrose to D-25 as ordered, and (6) timely report a drop in blood sugar on July 20, from 90 at 4:00 a.m. to 48 at 5:07 a.m. to 37 at 5:50 a.m. Plaintiff's NOI clearly provided the Spectrum defendants with adequate notice of the basis of his claims against the registered nurses involved in Eric's medical management.

With regard to the physicians who were involved in Eric's medical management, plaintiff's NOI set forth, in ¶ C(a), (c), (d), (e), (f), (h), (i), (*l*), (m), (n), (r), (t), (u), (z), and (aa), their alleged failures to (1) properly place the central line and verify its placement as well as continued function, (2) properly monitor Eric's glucose levels and the status of the central line in light of his medical history and condition, (3) conduct proper, complete, and necessary examinations and diagnostic tests, (4) properly and timely observe, diagnose, and treat his medical conditions, (5) seek consultations with, or provide referrals to, qualified specialists, (6) timely and completely record, apprise, and report to other treating physicians regarding Eric's condition, and (7) supervise, advise, and/or instruct nonphysician personnel. The contested claims in plaintiff's amended complaint with regard to the physicians, as set forth in ¶ 42(dd), (ee), (ff), (gg), (hh), (ii), (jj), and (kk), included failures to (1) immediately treat Eric's hypoglycemic condition with intravenous fluids, including dextrose solutions, (2) properly place the central line, (3) verify the central line's placement and continued function, particularly in light of Eric's declining condition and the diagnostic results, (4) properly and timely respond to the problems the registered nurses were experiencing with the central line, and (5) properly and timely respond to and treat the decreases in Eric's blood sugar. Again, plaintiff's NOI clearly provided the Spectrum defendants with

adequate notice of these claims against the physicians involved in Eric's medical management. And, as the trial court noted, the allegations in plaintiff's amended complaint merely set forth more specific details, clarifying plaintiff's claims against the Spectrum defendants, including the registered nurses and physicians involved in Eric's medical management.

In support of their claim that plaintiff's amended complaint asserted new "theories of malpractice liability" that should have been summarily dismissed for lack of notice, defendants rely on *Gulley-Reaves v Baciewicz*, 260 Mich App 478; 679 NW2d 98 (2004). That reliance is misplaced because the facts in *Gulley-Reaves* are clearly distinguishable. In that case, the plaintiff's NOI set forth as the basis of her claim a particular surgical procedure that resulted in damage to her vocal cords which "likely occurred because of the inexperience of the medical students or resident, who actually performed the procedure." *Id*. at 480. However, when the plaintiff filed her complaint, she included claims based on the anesthesia that was administered during the surgery. *Id*. at 481. A motion for summary disposition premised on the failure to comply with MCL 600.2912b with respect to the anesthesia claim was denied. *Id*. at 484. This Court reversed, holding that "the notice did not set forth the minimal requirements to identify that the anesthesia was a potential cause of plaintiff's injury." *Id*. at 487. Further, in light of the purpose of the notice requirement to promote settlement without the need for formal litigation, "[d]efendant hospital was not given the opportunity to engage in any type of settlement negotiation with regard to the anesthesia claims because it was not given notice of the existence of any such claim." *Id*. at 488.

In the case before us, the basis of plaintiff's claim was that the Spectrum defendants failed to properly care for, evaluate, treat, and monitor Eric's hypoglycemic condition, including by the proper and timely administration of the necessary glucose solutions through a properly placed central venous line. Unlike the plaintiff in *Gulley-Reaves*, plaintiff's amended complaint did not allege any other potential cause of Eric's injury. The basis of plaintiff's claims against the Spectrum defendants was their failure to properly care for, evaluate, treat, and monitor Eric's hypoglycemic condition, including by the proper and timely administration of the necessary glucose solutions through a properly placed central venous line. Thus, the purpose of the notice requirement was realized—the Spectrum defendants were given the opportunity to engage in settlement negotiations with regard to these claims because they were given notice of the same claims. Accordingly, the trial court properly denied the Spectrum defendants' motion for summary disposition as to the contested allegations raised in plaintiff's first amended complaint.

For the same reasons, we reject the Spectrum defendants' argument that plaintiff did not make a good-faith effort to identify and provide notice of the "new" allegations of malpractice. The basis of the claims against these defendants did not change. The allegations in the amended complaint merely clarified with more specificity the manner in which the standards of care were breached, which could be discerned more clearly with the aid of the discovery process. This is not a case where, as in *Gulley-Reaves*, the plaintiff set forth a totally new and different potential cause of injury in an amended complaint compared to the potential cause of injury set forth in her NOI, e.g., the manner in which

a particular surgical procedure was performed compared to the manner in which anesthesia was administered during the surgery.

Further, the Spectrum defendants' argument that plaintiff's amended complaint should have been dismissed because it was filed before the 182-day waiting period set forth in MCL 600.2912b(1) had expired is without merit. The amended complaint did not name new defendant parties, MCL 600.2912b(3), and it did not set forth any new potential causes of injury. Thus, plaintiff was only required under MCL 600.2912b(1) to provide the statutory notice before he *commenced* his lawsuit against these same defendants and it is undisputed that the requisite notice was provided. Plaintiff was not required to file a second NOI with regard to these defendants after he was granted leave to file his amended complaint, a complaint that merely clarified plaintiff's claims against the Spectrum defendants. The purpose of the notice requirement—to promote settlement without the need for formal litigation—cannot be realized when the litigation has already been commenced. See *Neal*, 226 Mich App at 705.

Next, the Spectrum defendants argue that plaintiff should not have been granted leave to amend his complaint. We disagree. "This Court reviews a trial court's decision to permit a party to amend its pleadings for an abuse of discretion." *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008). An abuse of discretion occurs when the decision results in an outcome that falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Under MCR 2.118(A)(2), "a party may amend a pleading only by leave of the court . . . . Leave shall be freely given when justice so requires." Trial courts have

discretion to grant or deny motions for leave to amend, but leave "should ordinarily be denied only for particularized reasons such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments previously allowed, or futility." *In re Kostin Estate*, 278 Mich App at 52. In regard to undue delay, "[d]elay, alone, does not warrant denial of a motion to amend. However, a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result." *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997) (citation omitted). Prejudice "exists if the amendment would prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost." *Id*. at 659.

The Spectrum defendants first argue that plaintiff should not have been permitted to amend the complaint to add the 17 allegations discussed above because the requisite notice was not provided. However, in light of our conclusion that these allegations were encompassed within plaintiff's NOI, this argument is without merit. Next, the Spectrum defendants argue that the amendment resulted in undue prejudice because it unfairly imposed upon them "a significant expenditure of time and money." Again, this argument is unavailing. The allegations throughout this lawsuit were clearly set forth—the Spectrum defendants failed to properly care for, evaluate, treat, and monitor Eric's hypoglycemic condition, including by the proper and timely administration of the necessary glucose solutions through a properly placed central venous line. Accordingly, the trial court's decision to grant leave to amend was within the range of reasonable and principled outcomes and did not constitute an abuse of discretion.

II. DOCKET NO. 290633

By direct appeal and cross-appeal, respectively, the Spectrum defendants and the Carson City defendants argue that the trial court erred by denying their motions for summary disposition premised on their claims that the statement of causation in plaintiff's NOI failed to satisfy MCL 600.2912b. After review de novo of the trial court's decision to deny the motions for summary disposition, we disagree. See *Kreiner*, 471 Mich at 129. Whether an NOI complies with the statutory requirements is reviewed de novo as a question of law. *Jackson v Detroit Med Ctr*, 278 Mich App 532, 545; 753 NW2d 635 (2008).

Among the statutorily enumerated items required to appear in an NOI is a causation statement. MCL 600.2912b(4)(e); see, also, *Tousey v Brennan*, 275 Mich App 535, 539; 739 NW2d 128 (2007). More specifically, the plaintiff must state the "manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice." MCL 600.2912b(4)(e). To satisfy this requirement, the notice must contain specific allegations regarding the conduct of the named defendants. *Roberts (After Remand)*, 470 Mich at 701. It is not sufficient to state that the defendants' negligence caused the alleged harm. Rather, the plaintiff must describe the manner in which the alleged breach caused the complained of injury. *Id*. at 699 n 16; see, also, *Boodt*, 481 Mich at 560.

In this case, plaintiff's NOI contained the following causation statement:

> As a result of the failure of the defendants to take the actions identified in paragraph "C" Eric Decker suffers from cerebral palsy. He is developmentally delayed. He has

> difficulty walking and has limited use of his extremities. He has articulation delays. He has sensory deficits including being legally blind.

However, the notice must be read in its entirety. *Boodt*, 481 Mich at 560. We conclude that the NOI, read as a whole and in conjunction with the underlying facts, clearly describes the manner in which the alleged breaches of the standard of care by the Carson City defendants and the Spectrum defendants were the proximate cause of Eric's injuries.

Plaintiff's NOI indicates that the Carson City defendants delivered Eric by vacuum extraction while he was in distress without a pediatrician present and discharged him within 24 hours without being properly evaluated and despite having an elevated bilirubin level, hypoglycemia, and becoming reluctant to feed. The NOI asserts that "[t]hese problems would have been detected and corrected had Eric not been discharged on the 18th after 24 hours." Because of the Carson City defendants' negligent failure to detect and correct the problems, plaintiff alleged, Eric's medical condition deteriorated and he became profoundly hypoglycemic, necessitating extensive and intensive medical intervention. A CT of his brain "indicated extensive hypoxic ischemic injury of the posterior and possibly the frontal cerebrum. Left [b]asal ganglia and extra-axial hemorrhages were identified with blood over the tentorium, the temporal regions and the sub-arachnoid spaces." Plaintiff also alleged that the Spectrum defendants failed to properly care for, evaluate, treat, and monitor Eric's profound hypoglycemia considering his medical history, declining condition, and test results. According to plaintiff, the Spectrum defendants' negligence caused Eric's continued and progressive hemodynamic and cardiopulmonary deterioration that culmi-

nated in a cardiopulmonary arrest and the development of a large pneumothorax, which caused more complications that eventually required surgical repair. The NOI continues that "Eric has been diagnosed with Cerebral Palsy from early anoxic injury," has sensory deficits, is developmentally delayed, and is legally blind.

Contrary to defendants' contention that the NOI contains no description of how the harm to Eric was caused, we are clearly able to discern from the NOI the manner in which it is alleged the breaches of the standard of practice or care proximately caused the injuries claimed in the notice. See MCL 600.2912b(4)(e). Thus, the trial court properly denied defendants' motions for summary disposition premised on this ground.

Next, the Spectrum defendants argue that the trial court erred by denying their motion for summary disposition as to plaintiff's nursing malpractice claims because plaintiff's expert reviewed the case "in light of a 'national' standard of care"; thus the claim is unsupported by expert testimony. We disagree.

" 'In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury.' " *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003), quoting *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). Expert testimony is required to establish the standard of care and to demonstrate the defendant's alleged failure to conform to that standard. *Birmingham v Vance*, 204 Mich App 418, 421; 516 NW2d 95 (1994). "A party offering the testimony of an expert witness must demonstrate the witness' knowledge of the applicable standard of care." *Bahr v Harper-*

Grace Hosps, 448 Mich 135, 141; 528 NW2d 170 (1995). A nonlocal expert may be qualified to testify if he or she demonstrates a familiarity with the standard of care in an area similar to the community in which the defendant practiced. *Turbin v Graesser (On Remand)*, 214 Mich App 215, 218-219; 542 NW2d 607 (1995).

Although nurses are licensed healthcare professionals, they do not engage in the practice of medicine. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 20; 651 NW2d 356 (2002). Accordingly, the standards of care for general practitioners and specialists do not apply to nurses. *Id*. at 18-20. Rather, the common-law standard of care applies to malpractice actions against nurses. *Id*. at 21. "[T]he applicable standard of care is the skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities." *Id*. at 21-22. The standard of care required of a nurse must be established by expert testimony. *Wiley*, 257 Mich App at 492. "Expert testimony is necessary to establish the standard of care because the ordinary layperson is not equipped by common knowledge and experience to judge the skill and competence of the service and determine whether it meets the standard of practice in the community." *Id*., citing *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994).

Here, contrary to the Spectrum defendants' claims, it is clear from plaintiff's expert's deposition testimony that she applied the proper standard of care with regard to plaintiff's nursing malpractice claims. Defendants' argument is premised on the fact that when plaintiff's expert witness, Michele Wolff, R.N., was asked whether the standard of care she was applying to this case was either a national or local standard, Wolff replied that it was a "national" standard. However, the actual substance of Wolff's lengthy testimony was that the proce-

dures at issue here are so commonplace that the *same* standard of care applied locally and nationally. In other words, for example, no matter where a nurse is practicing: (1) central lines must be monitored and evaluated for patency, as well as utilized correctly, (2) particularized care must be given to a patient on the basis of the patient's medical condition, (3) physician orders must be followed, and (4) nurses must record, apprise, and report to physicians and other providers significant changes in a patient's condition, as well as record such verbal communications. Thus, plaintiff's expert applied the proper standard of care, which happened to be the same locally as well as nationally. See *LeBlanc v Lentini*, 82 Mich App 5, 19; 266 NW2d 643 (1978).

Further, contrary to the Spectrum defendants' claim, Wolff demonstrated her familiarity with the standard of care in an area similar to the community in which the defendant nurses practiced. See *Turbin (On Remand)*, 214 Mich App 217-218. Wolff testified regarding her extensive experience working in the pediatric intensive care unit at Children's Hospital of Orange County, California, dating back to at least 1986. She also had an extensive work history as a professor at Saddleback College in California, providing instruction in the area of pediatrics, including PICUs. Wolff further testified that the PICU at Children's Hospital of Orange County was very similar to the PICU at Butterworth Hospital, including with regard to the availability of appropriate resources. They were both well-staffed, well-equipped PICUs. Although she was not questioned extensively on the issue, Wolff testified that Grand Rapids is a medium or moderate-sized city, fairly well off, and pretty similar to Orange County, which is also a medium-sized city. In light of the evidence of record, we conclude that the trial court properly denied the Spectrum defendants' motion for summary disposition premised on the argu-

ment that the nursing malpractice claims were unsupported by expert testimony.

Finally, the Spectrum defendants argue that the trial court should have summarily dismissed plaintiff's nursing malpractice claims premised on the alleged failure to chart communications with physicians. We disagree.

The Spectrum defendants argue that the nurses who provided the contested care to Eric were not obligated by hospital policy to document their oral communications with physicians who were also providing care to Eric in the PICU. Therefore, the claims set forth at ¶ 42(q), (r), (nn), (oo), and (qq) of plaintiff's amended complaint, which "deal[] in some way with purported failures on the various nurses['] parts to chart their communications with other providers" should be dismissed.

The specific relevant claims set forth in ¶ 42 are:

> q. The RN's in the PICU failed to assure that all employees and physicians were at all times fully apprised of the patient's condition and requirements for the patient's care;
>
> r. The OBGYN, Pediatricians, pediatric critical care doctors, and the RN's failed to keep complete, detailed, and specific records concerning the progress, symptoms, and complaints demonstrated by the patient, so as to apprise treating physicians of the detailed and precise condition of the patient;
>
> * * *
>
> nn. The PICU nurse failed to report to the physicians the findings of decreased heart rate from the 130's to the 100's, decreased respiratory rate from the 30's to teens, and decreased oxygen saturation to the 70's which is charted at [3:04 a.m.].

> oo. Based upon the current information available it appears that the PICU nurse did not report the problems drawing from the catheter to a physician in a timely manner.
>
> * * *
>
> qq. If the PICU nurse did not inform a physician of the drop in blood sugar from 90 at [4:00 a.m.] on the 20th to 48 at [5:07 a.m.] and 37 at [5:50 a.m.] this was below the standard of care. A physician should have been informed of those changes so that appropriate action could be taken[.]

Contrary to defendants' argument, these allegations clearly do not merely allege the nurses' failure to *chart* their communications with other medical providers. In fact, they allege a failure to "apprise," "report," and "inform" physicians and other providers of their findings, problems, and/or changes in the patient's condition. Thus, as plaintiff argues, the allegations pertain to "the level of *communication* that should have existed between the physicians who treated plaintiff and the hospital staff." Accordingly, defendants' argument is wholly without merit. And, to the extent that negligent written communication, as well as negligent oral communication, may be included in plaintiff's claims, those claims are governed by the applicable standard of care—the standard of care for nurses.

Affirmed and remanded for further proceedings. We do not retain jurisdiction. Costs to plaintiff as the prevailing party. MCR 7.219(A).

PINE BLUFFS AREA PROPERTY OWNERS ASSOCIATION, INC v DeWITT LANDING AND DOCK ASSOCIATION

Docket No. 289200. Submitted March 9, 2010, at Lansing. Decided April 1, 2010, at 9:00 a.m.

The Pine Bluffs Area Property Owners Association, Inc., brought an action in the Roscommon Circuit Court, Michael J. Baumgartner, J., against the DeWitt Landing and Dock Association (DLDA) and others, alleging that defendants were improperly using a 20-foot by 120-foot strip of property at the west end of Hitchcock Avenue along the shore of Higgins Lake in Gerrish Township, Roscommon County. The Roscommon County Road Commission was added as a third-party defendant. Plaintiff moved for summary disposition, arguing that the property in question, the northern 20 feet of Hitchcock Avenue, was dedicated to the public for use as a road through common-law dedication. The trial court granted partial summary disposition, finding that questions of fact existed regarding whether the 20-foot strip constituted a road, but also ordering that the 20-foot strip could no longer be used for nontemporary mooring of watercraft or to erect nontemporary mooring structures on the bottom of Higgins Lake, including boat hoists and wet anchors. While setting forth its findings of fact on the record, the trial court indicated an apparent belief that the 20-foot strip was part of Hitchcock Avenue pursuant to a statutory dedication and that the dedication was never removed when the plat involved was later vacated. The trial court concluded that the 20-foot strip was accepted as a road pursuant to a resolution passed by the road commission. The trial court determined that, because the 20-foot strip was part of Hitchcock Avenue, the 20-foot strip was subject to the same restrictions regarding its use as those set forth in *Jacobs v Lyon Twp (After Remand)*, 199 Mich App 667 (1993). Some of the defendants appealed.

The Court of Appeals *held*:

1. There is no evidence that the road commission accepted the streets and alleys depicted in the Kenwood plat that were dedicated to the public before the plat was vacated in 1909. The property owner who requested vacation of the Kenwood plat

requested vacation of the streets and alleys and the trial court granted the request. Absent evidence to the contrary, the vacation of the plat constitutes an affirmative act to withdraw the offer of dedication. The trial court clearly erred by concluding that the dedication of the streets and alleys in the Kenwood plat was not withdrawn when the plat was vacated, before the county made any attempt to accept the streets and alleys. Any alleged attempt by the county to accept dedication of the streets and alleys over 25 years after the plat was vacated was not timely.

2. The evidence does not establish that the decision of the owners of the property that contained the 20-foot strip to not convey the 20-foot strip when they sold the adjoining property in 1931 showed their intent to offer the 20-foot strip for public use as a road.

3. The trial court erred by determining that the evidence established that the 20-foot strip had been used as a road for at least seven years before the 1931 sale of the adjoining property. The trial court erred when it determined that the 20-foot strip was a public road through a common-law dedication.

4. The evidence does not establish that the 20-foot strip is a road pursuant to the highway-by-user statute, MCL 221.20, because there is no evidence that the road was used and worked on by public authorities.

5. The case must be remanded to the trial court to consider the issue whether the DLDA has an adverse possession claim or a prescriptive easement over the 20-foot strip.

6. It was premature for the trial court to prohibit the DLDA from placing boat hoists in the water or mooring boats. On remand, a determination must be made regarding the DLDA's interest in the 20-foot strip and then the DLDA's right to place boat hoists or moor boats may be considered.

7. On remand, the trial court must address whether any of defendants' alleged activities on the 20-foot strip constitute a nuisance.

Reversed and remanded.

1. HIGHWAYS — DEDICATION — PUBLIC USE — ACCEPTANCE.

A valid statutory dedication of land for a public purpose requires two elements: a recorded plat designating the areas for public use, showing a clear intent by the plat proprietor to dedicate those areas to public use, and acceptance by the proper public authority; public acceptance must be timely and disclosed through a manifest act by the public authority either formally confirming or accepting

the dedication, or by exercising authority over the designated areas in some of the ordinary ways of improvement or regulation.

2. HIGHWAYS — DEDICATION — PUBLIC USE — ACCEPTANCE.

The mere certification of a plat does not constitute acceptance by the proper public authority of all the property in the plat dedicated to public use; acceptance by a governmental authority of a road dedicated to the public must be by a formal resolution or informally through the expenditure of public money for repair, improvement, or control of the roadway, or through public use.

3. HIGHWAYS — DEDICATION — PUBLIC USE — ACCEPTANCE — WITHDRAWAL OF DEDICATION.

Timely acceptance by a governmental authority of land in a recorded plat dedicated for a public purpose must take place before the offer lapses or the property owner withdraws the offer; an offer of dedication is withdrawn when the property owner undertakes an affirmative act to withdraw the offer, such as using the property in a manner that is inconsistent with public ownership; the vacation of the plat constitutes an affirmative act to withdraw the offer of dedication absent evidence to the contrary.

4. HIGHWAYS — DEDICATION — COMMON LAW — PUBLIC USE.

A valid common-law dedication of land for a public purpose requires an intent by the property owner to offer the land for a public use, an acceptance of the offer by public officials and maintenance of the land by public officials, and use by the public generally; a common-law dedication need not be formal and dedication may occur without a grant or even written words.

5. HIGHWAYS — HIGHWAY-BY-USER DOCTRINE.

A plaintiff, to establish a public road pursuant to the highway-by-user statute, must establish: a defined line, that the road was used and worked on by public authorities, public travel and use for 10 consecutive years without interruption, and open, notorious, and exclusive public use (MCL 221.20).

Carey & Jaskowski, P.L.L.C. (by *Richard J. Jaskowski*), for the Pine Bluffs Area Property Owners Association, Inc.

Olson, Bzdok & Howard, P.C. (by *Christopher M. Bzdok* and *Jeffrey L. Jocks*), for the DeWitt Landing and Dock Association, Kenneth Shinsky, and Eric Wegner.

Cummings, McClorey, Davis & Acho, P.L.C. (by *Haider A. Kazim* and *Andrew J. Brege*), for the Roscommon County Road Commission.

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

O'CONNELL, J. This case involves a dispute regarding the use of and property rights attached to a 20-foot by 120-foot strip of property at the end of Hitchcock Avenue along Higgins Lake in Gerrish Township, Roscommon County. After a bench trial, the trial court determined that the disputed strip of property was part of Hitchcock Avenue and, therefore, subject to the same restrictions regarding its use as those set forth in *Jacobs v Lyon Twp* (*After Remand*), 199 Mich App 667; 502 NW2d 382 (1993). We reverse and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

A. OVERVIEW AND DESCRIPTION OF THE SITE

The property in dispute is a 20-by-120-foot strip of land along the shore of Higgins Lake. Both plaintiff and the Roscommon County Road Commission claim that Hitchcock Avenue is 50 feet wide at this point, while defendants claim that the property in dispute is not part of Hitchcock Avenue, so Hitchcock Avenue is only 30 feet wide at this point. The northern 20 feet of Hitchcock Avenue are located in Section 9 of Township 24 North, Range 3 West, in Gerrish Township, while the southern 30 feet are located in Section 16, Township 24 North, Range 3 West in Gerrish Township. Accordingly, the road straddles the section line as it runs in an east-to-west direction.

Hitchcock Avenue dead-ends near the shore of Higgins Lake. In particular, the 50-foot-wide paved public roadway ends approximately 120 feet east of the shore of Higgins Lake. The 120-foot by 50-foot parcel of property west of the Hitchcock Avenue terminus, known as DeWitt's Landing, has long been used by property owners in the area (specifically, "back-lotters") and by the public as an access site for Higgins Lake. Because the road commission did not appear to maintain this parcel of land, area residents created the DeWitt Landing Association and the DeWitt Dock Association to maintain the property and a public seasonal dock on the site.[1]

Photographs of the site taken in 2006 indicate that Hitchcock Avenue is paved to approximately the eastern edge of DeWitt's Landing. On approximately the southern half of the property (corresponding to the portion of the property in Township Section 16), a paved cement boat ramp leads to the water.[2] The northern portion of the property (corresponding to the portion of the property in Township Section 9) consists of a mowed grassy area, a concrete retaining wall and patio, and a beach. In particular, a mowed grassy area is located on the easternmost two-thirds of the northern portion of the property. The mowed area ends at a low concrete retaining wall, located approximately two-thirds of the way down the strip of property toward the water. Past the retaining wall is a paved area, that is wide enough for two picnic

[1] Historically, the membership of and actions undertaken by these organizations were largely interchangeable, and eventually the DeWitt Landing Association and the DeWitt Dock Association merged to form the DeWitt Landing and Dock Association (DLDA). Accordingly, we will refer to these three organizations as the DLDA throughout this opinion.

[2] According to one area resident, vehicles only traveled west of the guardrail when using the boat ramp to launch or pick up boats.

tables, and a sandy beach leading to the water. At the northern edge of the property, a long dock stretches out into the water. Fences stretch to the water line to both the north and south of the property.

The photographs also show that a vehicle guardrail is located at the eastern edge of DeWitt's Landing, stretching along the northern half of the eastern boundary of the property. The guardrail is approximately 20 feet long, and it separates the roadway from the grassy area to the west. A "Road Ends" sign and a red diamond-shaped sign are posted immediately behind the guardrail. Another photograph depicts a sign posted by the DLDA on the property, which reads in part, "No tax dollars are spent on upkeep of this road end. Our volunteer organization keeps the dock, beach, ramp and grassy hill in a safe and sanitary condition for the public to enjoy." (Emphasis in original.)

B. THE 30-FOOT STRIP

The southern 30 feet of DeWitt's Landing (the 30-foot strip) is located in Section 16 of Gerrish Township and is part of the platted community of Pine Bluffs. The Pine Bluffs plat indicates that the northernmost 30 feet of the platted property, stretching approximately 400 feet from Higgins Lake to Pine Bluffs Road, was originally identified as "North Street." The westernmost 120 feet of "North Street" corresponds to the 30-foot strip. This plat dedicated the streets shown on the plat "to the use of the public."

Although the 30-foot strip was never used as a road per se, it has been used for some time to provide access for vehicles moving boats in and out of the water. Over half a century ago, DLDA members installed a cement boat ramp on the 30-foot strip, and over the years they have continued to maintain the boat ramp on behalf of

the public.[3] Apparently both DLDA members and the public have used this area consistently as a lake access point.

In separate litigation in the late 1990s, the Roscommon Circuit Court determined that the 30-foot strip was a platted road dedicated to the public and, accordingly, it limited certain shore activities on the 30-foot strip, precluded the erection of private docks, boat hoists, and other anchorage devices, and permitted the erection and maintenance of one common public dock. The use of the 30-foot strip is not in dispute in this case.

C. PROPERTY TRANSFERS INVOLVING THE 20-FOOT STRIP

Specifically, this case concerns the use and ownership of the northern 20-by-120 feet of DeWitt's Landing (the 20-foot strip). All parties acknowledge that this property is not located within the plat of Pine Bluffs, but is adjacent to the northern boundary of the plat. Unlike the 30-foot strip, which appears to consist primarily of the boat ramp, the 20-foot strip functions more as a small park. The underlying dispute in this case concerns whether this 20-foot strip is a public road and, therefore, whether the use restrictions that apply to the 30-foot strip also apply to the 20-foot strip.

At the turn of the 20th century, the land north of the Pine Bluffs plat, including the 20-foot strip, was also platted. This plat, known as the Kenwood plat, was dedicated and registered in 1901.[4] The platters designed

[3] Several members of the DLDA maintained that they did not recall the county road commission or any other governmental entity performing roadwork or maintenance on the 30-foot strip. Instead, the DLDA performed all maintenance on the 30-foot strip, including maintenance of the public boat ramp, with the consent and permission of the county road commission.

[4] The plat consisted of the following land:

the Kenwood plat to consist of 18 blocks, arranged in three groupings (on Lots 2, 3, and 4 of Section 9) of six blocks each along the shore of Higgins Lake. The plat indicates that blocks one through six were located in Lot 2, blocks seven through 12 were located in Lot 3, and block A[5] and blocks 14 through 18 were located in Lot 4. Each block in Lots 2 and 4 contained 80 lots, arranged in two rows of 40 lots each.[6] The blocks in Lot 3 contained 82 lots, arranged in two rows of 41 lots each. Each lot measured approximately 32 by 65 feet. None of the lots touched the water. Instead, a large road known as Chicago Boulevard was designated to run along the shore of Higgins Lake for the length of the plat separating the lots from the lake. Platted roads separated each grouping of blocks, and each block was separated by alleys that ran parallel to the shore of Higgins Lake. Another alley of undetermined width stretched along the southern edge of the plat to Chicago Boulevard on the lakeshore. At the time, the northern 20 feet of Hitchcock Avenue was part of this plat, and the westernmost portion of this alley appears to corre-

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> Comprising Lots No. (2) two (3) three and four (4) of Section nine (9) Town 24N R3 West Roscommon Co Mich. Commencing at a point marked thus ⊗ at the meander post on the east bank of Higgins Lake on Section Line Between Section Nine and Sixteen. Then running East on Section Line 880 to West 1/8 Post Bet. Sec 9 & 16 marked thus. ⊗Thence north on West 1/8 line Sec Nine 3996.96 feet to NW 1/8 Post Sec nine marked Thus ⊗, thence west on north 1/8 line 1255 feet to meander post marked thus. ⊗ Thence southerly along the meander line Sec. Nine 4007 ft to the place of beginning.

[5] There is no Block 13 on the plat. Instead, what would sequentially be labeled "Blk 13" is instead labeled "Blk A."

[6] Although these individual parcels are not called "lots" on the plat, but are simply numbered, they are referred to as "lots" in subsequent deeds. We will use the term "lots," with a lowercase "l," to refer to these smaller parcels, and to distinguish these parcels from the larger Lots 2, 3, and 4.

spond with the 20-foot strip.[7] The plat specified that "the Streets as shown on said pl[at] are hereby dedicated to the use of the Public."

Between 1903 and 1909, Myrtle E. Hellen purchased either all or a substantial portion of the property in the Kenwood plat. After acquiring this property, Hellen petitioned the circuit court to vacate the Kenwood plat. The portion of Hellen's petition for vacation included in the lower court record indicates that she sought vacation of the plat, in part, because the plat was badly conceived. According to the petition, the widths of the streets and alleys were not clearly laid out and, apparently, the property had never been marked to show the layout of the plat, making it impossible for Hellen to resell the property and artificially increasing the taxable value of her land. Finally, Hellen requested "that the court may vacate the said plat and its lots, blocks, streets, and alleys . . . ." The Roscommon Circuit Court, recognizing that there appeared to be no opposition to Hellen's petition, entered an order vacating the Kenwood plat on September 9, 1909, which was recorded by the register of deeds on August 13, 1912.

In its initial motion for summary disposition, plaintiff submitted an affidavit from the owner of a local title search company, who claimed that according to a title search that she conducted, Hellen never conveyed the 20-foot strip of land at the southern edge of her property (which included the 20-foot strip at issue in this case) when she sold her land years after the plat was vacated. However, both parties later agreed that the information provided in this affidavit was incorrect, because Hellen did include the 20 feet at the southern edge of her property in her subsequent sale of this land.

[7] Although the plat is unclear regarding the exact width of the alleys, the parties agree that the alley in question is 15 feet in width.

Further, the parties submitted deeds detailing the subsequent property transfers that included the 20-foot strip. On February 17, 1922, Hellen sold to William J. Tenney a 400-square-foot parcel of property that included the 20-foot strip. On April 28, 1924, Tenney sold a portion of the property, including the 20-foot strip, to Charles H. DeWaele. On May 19, 1924, DeWaele sold a portion of the property, including the 20-foot strip, to Charles T. Hayden. On July 4, 1924, Hayden sold his property to Osian and Hulda Anderson, with the guarantee that the property was free from encumbrances. The property deeded to the Andersons included the 20-foot strip.[8]

In February 1931, the Andersons sold some of their property to Francis and Faith Ross. The parcel that the Andersons sold to the Rosses excluded the 20-foot strip in question.[9] The Andersons continued to own this

[8] The deed described the property owned by the Andersons as follows:

> Commencing at the meander post between sections nine and sixteen, township twenty-four north, range three (3) west, thence east on section line four hundred feet, thence north at right angles two hundred and fifty feet, thence westerly and parallel with said section line to the shore of Higgins Lake, thence southerly along the shore of Higgins Lake to the place of beginning, being part of Lot (4) four, section (9) nine, township twenty-four (24) north, range three (3) west.

[9] The parcel that the Rosses acquired in this transaction is described as follows:

> Commencing at a point on the shore of Higgins Lake twenty (20) feet north of the meander post between Section Nine (9) and Sixteen (16) from place of beginning, thence East four hundred (400) feet thence north seventy three and one half (73½) feet, thence west about four hundred (400) feet to the shore of Higgins Lake, thence southerly about seventy three and one half (73½) feet along the shore of Higgins Lake to a line drawn east and west through the point of beginning, thence east along this line to point of beginning, except the following described property, commencing twenty (20) feet north and two hundred (200) feet east of the

strip, along with a 156½-foot parcel north of the Ross parcel and the land described in the exception to the 1931 deed. No subsequent transfers of the 20-foot strip were discovered, and the Andersons are the last owners of record of the strip.[10]

The Rosses owned the property they purchased from the Andersons for the rest of their lives.[11] In 1973, Francis and Faith Ross created a trust, in which Francis was trustee, and transferred ownership of their property to the trust. In 1995, the property was sold to Paul and Nancy Rose. In July 2000, the Roses sold approximately half their property to Thomas and Claudia McLellan. None of these property transfers included the 20-foot strip.

D. PUBLIC DEDICATION OF HITCHCOCK AVENUE

Although the Kenwood plat dedicated all the streets and alleys depicted therein to the use of the public, the

meander point between Sections Nine (9) and Sixteen (16) for a point of beginning, thence east thirty (30) feet, thence north seventy-three and one half (73½) feet, thence west thirty (30) feet, thence south seventy-three and one half (73½) feet to place of beginning. The land hereby conveyed is seventy three and one half feet in width throughout and is part of Lot Four (4), Section Nine (9), Township Twenty-four (24) North Range Three (3) West.

The deed parties of the second part, their heirs and assigns forever, shall have in common with first party, his heirs or assigns forever, the use for road purposes of the land excepted by the conveyance.

[10] The record does not indicate whether the Andersons later sold the 156½-foot parcel. Apparently the Andersons' heirs have not been identified, and they were never contacted regarding, nor are they involved in, this litigation.

[11] It appears that at some point the Rosses bought an additional 73½ feet to the north of their lot, making the total width of their lot 147 feet. Regardless, none of the descriptions of their property included in the lower court record include the 20-foot strip.

parties provided no evidence that the county accepted this dedication before the Kenwood plat was vacated. In fact, the parties provide no evidence that the county road commission took formal steps to accept dedications of any streets and alleys in the county before the 1930s. Plaintiff submitted copies of county maps from 1931 through the present that depicted Hitchcock Avenue as going to the edge of Higgins Lake, although a road commission employee admitted that the maps did not indicate the widths of the roads depicted. Plaintiff also submitted the minutes of an April 2, 1937, meeting of the Roscommon County Road Commission indicating that the county road commission had resolved to take over maintenance of all dedicated streets and alleys in all recorded plats in the county and a later resolution (apparently from 1953) designating these streets and alleys as county roads. Although the minutes of the 1937 meeting do not provide a list of the recorded plats in question, a handwritten note from this time written by a county official includes Kenwood among the list of recorded plats, even though the plat had been vacated for over 25 years at this point. A 1953 road commission resolution reaffirming under 1951 PA 51 the commission's prior takeover of roads pursuant to the McNitt act, 1931 PA 130, repealed by 1951 PA 51, § 21, did not include the plat of Kenwood among the recorded plats whose streets and alleys were taken over as county roads. The plat of Pine Bluffs was included.

At its April 16, 1940, meeting, the road commission resolved to incorporate particular metes-and-bound roads into the county road system. The roads listed for incorporation into the county road system included the road located on the north side of Section 16, but did not include a road located on the south side of Section 9.

In its answer to a discovery request, the road commission admitted that although it had historically considered the 20-foot strip to be part of Hitchcock Avenue, it could not find any information in its records indicating that there was "any dedication or conveyance which created this 20 [foot] portion of the road." Instead, the road commission averred that because there was continuous public use of the 20-foot strip for nearly a century, the 20-foot strip would be a road pursuant to the highway-by-user doctrine. At the trial in this case, Gloria Burns, a long-time employee and administrator of the Roscommon County Road Commission, testified that although it was the road commission's position that it had jurisdiction over the 20-foot strip and some maps depicted a part of Hitchcock Avenue as falling north of the section line, the road commission was unable to find any documentation confirming that it had accepted and certified the 20-foot strip as part of Hitchcock Avenue. Burns explained that "McNitt roads were accepted listing everything by plat" and that because mapmakers drawing a road on a section line tended to draw the road down the middle of a section line, the fact that part of Hitchcock Avenue was depicted as being north of the section line at the water's edge did not mean anything.

When asked if the road commission had ever performed maintenance on either the 20-foot or the 30-foot strips, Burns replied:

> Not that we can find in our records and not to anyone that I have asked. In fact, I asked someone just yesterday when I went to visit the site, Clint Stauffer, worked for the road commission for thirty-nine years, hiring in about sometime in the Fifties, I thought maybe he would know if we put that ramp in or we did some type of work, you know,

> on the other side. He said we have never done anything down there in any position that he has been in, nor has the current foreman.

Burns also acknowledged that a 1957 road commission map labeled the land at the end of Hitchcock Avenue "DeWitt Landing." Finally, she acknowledged that the 20-foot strip never contained a paved or dirt area that would permit vehicular access to the lake.

E. TESTIMONY OF MYRTLE MOORE

Myrtle Rydell Moore, an elderly area resident, discussed her family's use of DeWitt's Landing in the 1920s. Moore, who was born and raised near DeWitt's Landing, would accompany her family to DeWitt's Landing as a young child, where they would swim, recreate, and have parties and picnics. Moore explained that her family would usually recreate at an area along the lakeshore just to the south of DeWitt's Landing, along the beach in front of the cottages that were later built at the northern edge of the Pine Bluffs plat. Moore indicated that there was a "path" to the water that her family used to get to DeWitt's Landing, although she did not indicate where this path was located or whether any part of it traversed the 20-foot strip. She believed that others must have used the path to the water as well, because the path was "well-worn." Her impression was that the property at DeWitt's Landing was "[a]vailable for use by anyone."

Moore claimed that the area became known as "DeWitt's Landing" after the DeWitts built their house on the property immediately to the south of the 30-foot strip, but she could not remember when this occurred. She estimated that people began referring to the site as "DeWitt's Landing" in the late 1930s or early 1940s. According to Moore, the DeWitts often would maintain

the trail to the lake, keeping it free from snow in the winter and maintaining the path throughout the year so that "back-lot" neighbors could reach the lake. Moore claimed that Mr. DeWitt "did whatever he could to encourage" his neighbors to use DeWitt's Landing.

Moore testified that she would see cars drive down to the lake to unload boats into the water. She also saw others use the path in question to take trucks onto the lake to cut ice during the winter. Moore and her family would not picnic in the area where boats were launched into the water, but "to the side." Moore did not believe that the road commission ever maintained or plowed the lake access point, stating instead that she believed that the road commission "only went as far as where the people drove in to their house or garage." Moore was never asked, and never indicated, whether the path and the vehicular access to the lake were on the 20-foot strip or on the 30-foot strip.[12]

F. HISTORICAL USE OF DEWITT'S LANDING

Although Moore testified regarding the historical use of DeWitt's Landing as a recreational area and lake access point, it appears that by the 1940s and 1950s, DeWitt's Landing was overgrown and an "eyesore."[13]

[12] Moore discussed the contents of four photographs from the 1920s depicting her and her family recreating near DeWitt's Landing. In one of these photographs, a dirt road can be seen in the distance, and Moore claimed that this was the path or trail that she and her family used to access the lakeshore. The road depicted in the photograph does not appear to be within 120 feet of the water. Instead, it appears to be further back, where the paved portion of Hitchcock Avenue is located.

[13] Plaintiff claims that photographs from the 1940s depict a trail over the 20-foot strip to the lake. The trial court never discussed these photographs. These photographs depict a scrubby, sandy area roughly where the beach on the 20-foot strip is now located. It is not apparent from these photographs that the sandy area depicted is, in fact, a road.

Defendant Victor Teichman explained that when his family first came to the area in 1948, the property consisted of a

> gully wash-out with tin cans and junk and brush that people had thrown in there. And it was not very easy to get down to the lake even on foot and some people were beginning to get little boats, like a little rowboat or maybe a small aluminum boat or something. And they would try it back down there to unload their boat and have a problem getting out and it was a bad situation.

According to its members, apparently the DeWitt Landing Association, the precursor to the DLDA, was formed at some point in the late 1950s or early 1960s, when Roy DeWitt, who owned the property immediately to the south of DeWitt's Landing, obtained permission from the county road commission to improve the road end. DeWitt contacted a number of backlot owners to form the DeWitt Landing Association (later the DLDA) and to help care for DeWitt's Landing. The association members paid for and constructed the cement terrace/retaining wall and flat patio for picnic tables, planted and maintained the grassy area for sunbathing, and filled in the area along the lake with sand for use as a beach. The association members also paid for and installed the cement drive leading to the lake.[14] For years, both DeWitt and the Rosses had no objection to DLDA members using the property. The Rosses were aware of and consented to DLDA's use of the 20-foot strip for picnicking, lounging, sunbathing, recreating, and overnight boat storage. In fact, on one occasion, Francis

[14] Photographs that appear to be from the early 1960s show a cement truck and depict local men (not construction workers) laying cement and digging out sod on the boat ramp. Apparently this ramp replaced an earlier boat ramp on the site.

Ross even agreed to move his fence when it was thought that the fence was encroaching on the right-of-way.

Apparently a barrier was first installed on Hitchcock Avenue at the eastern edge of the 20-foot strip in 1960. Earlier photographs of the site show a series of posts indicating a road end and blocking further vehicular traffic, while later pictures depict a guardrail. The blacktop ended at the guardrail. Although it is undisputed that the area of Hitchcock Avenue east of the guardrail is a 50-foot wide blacktop road used by the public and maintained by the county road commission, the parties have not identified any evidence that the road commission ever took any steps to maintain the 20-foot strip. Instead, many DLDA members confirmed that the 20-foot strip was never used or maintained as a road, but instead had been used for over 50 years by DLDA members and the public for lounging, sunbathing, and recreating. The DLDA maintained picnic tables and a bulletin board on the site, and members helped mow, clean, and maintain the 20-foot strip. DLDA members affirmatively testified that for over 50 years, they had never seen the county road commission, or any other governmental entity, maintain or otherwise perform any work on the 20-foot strip.

Every year, DLDA members would install a seasonal dock on the 20-foot wide strip that extended into Higgins Lake. Several DLDA members used the seasonal dock at the end of the 20-foot strip to dock and moor boats overnight; for some, this use stretched as far back as the 1940s.[15] DLDA members also used the public boat ramp at the end of the 30-foot strip for access to Higgins Lake.

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[15] Apparently DLDA members conducted a lottery to determine which members could moor boats at the dock.

DLDA member Peggy McKibbin affirmed that her family had used the beach, dock, and bottomlands of DeWitt's Landing since 1941 and provided photographs as evidence. The photographs, dating from 1941 through 1991, show a dock and beach on the property. Victor Teichman, who testified regarding the depictions in the photographs, explained that a fence marked the property line separating the 20-foot strip from the Rosses' property, but there was no road on the property. Photographs from the late 1960s through the early 1990s show a paved boat ramp on what appears to be the 30-foot strip, and barriers blocking vehicular access to the 20-foot strip. The 20-foot strip contained a grassy area and, closer to the water, a cement retaining wall, a paved area for picnic tables, and a small beach. A dock then extended into the water, where boats were moored. Additional photographs submitted at trial also reflect this use of the property. None of the photographs submitted show the 20-foot strip being used as a road.

Beginning in the 1980s, the properties on the north and south sides of DeWitt's Landing began to change hands, and new owners began challenging the DLDA's historic use of the property. When a subsequent owner of the DeWitt property sought to have the road commission abandon the western 120 feet of Hitchcock Avenue in March 1987, several back-lot owners wrote letters opposing the proposed abandonment, noting that the general public regularly used the road-end to reach Higgins Lake. The county road commission voted against abandoning the road.

A few months later, the same landowner informed the road commission that picnic tables and a bulletin board, historically placed by DLDA members on the 20-foot strip, were located in the right-of-way. The road commission acknowledged these concerns and promised

to "review this site in the near future." However, there is no evidence that the road commission actually addressed or investigated this situation, and photographs show a bulletin board and picnic tables on the property as late as 2006. A 1991 flyer from the DLDA, which had been posted at DeWitt's Landing, indicated that the road commission provided no assistance in maintaining the property.[16]

G. THE MCLELLANS' OBJECTIONS REGARDING DEWITT'S LANDING

Thomas and Claudia McLellan currently own the property directly to the north of the 20-foot strip. Apparently the McLellans saw the property once before they purchased it, in November 1999, and there were no boats, hoists, or picnic tables on the 20-foot strip at the time.

Thomas McLellan, who testified at the bench trial in this case, did not appear to have any objection to most of the historical activities that took place on the 20-foot strip. He explained that the property had a "very long dock," and that individuals used the property "as a park, basically, swimming, lot of activities that weren't objectionable." McLellan's primary concern appeared to be with largely illegal activities that he claimed were occurring on the property, such as public urination and public intoxication. McLellan did not indicate that defendants or other DLDA members ever committed

[16] The flyer states:

> The Dewitt Landing Association, a group of 30 families, contribute money and volunteer work to provide maintenance of the grassy knoll, beach, dock and picnic tables for the public to enjoy. There is no maintenance assistance from any governmental organization and because litter of any kind left on the beach or road surface will wash into the lake with rain water and damage the delicate balance of nature in the lake water . . . we must be very diligent.

the offensive acts in question. McLellan also expressed concerns that children were accessing the lake at the 20-foot strip in order to swim unsupervised. McLellan later admitted that the activities on the property that he was concerned about were illegal, so precluding the DLDA from maintaining the area would not stop these activities from occurring.

H. PROCEDURAL HISTORY

The McLellans created the Pine Bluffs Area Property Owners Association, Inc.,[17] which was incorporated as a nonprofit entity on January 19, 2006. Thomas and Claudia McLellan were listed as the only incorporators. Plaintiff, the Pine Bluffs Area Property Owners Association, Inc., then filed the complaint in this case, alleging that defendants were acting outside the scope of the common-law dedication dedicating the 20-foot strip as a public road and requesting that the trial court declare these activities to be a nuisance.

Plaintiff moved for summary disposition, arguing that the northern 20 feet of Hitchcock Avenue was dedicated to the public for use as a road through common-law dedication and, therefore, could not be used to erect permanent mooring structures in Higgins Lake, for nonincidental and nontemporary docking, and for recreational purposes. The trial court granted partial summary disposition to plaintiff, finding that questions of fact existed regarding whether the 20-foot strip constituted a road, but it also ordered that the 20-foot strip of land could no longer be used for nontemporary

[17] The McLellans' property is the land to the north of and adjacent to the 20-foot strip. As discussed earlier, this property is part of the former Kenwood plat, which was vacated in 1909. The property is not part of the plat of Pine Bluffs.

mooring of watercraft or to erect nontemporary mooring structures on the bottom of Higgins Lake, including boat hoists and wet anchors. This ruling was apparently based on the trial court's determination that the property was functioning as a de facto marina without a permit, in violation of Michigan Department of Environmental Quality (MDEQ) regulations. The trial court also ruled that only one nonexclusive dock could be erected within the entire 50-foot section of lake frontage on Hitchcock Avenue, meaning that a dock could be erected either on the 30-foot strip or on the 20-foot strip, but not on both.[18]

After the August 2008 bench trial, the trial court set forth its findings of fact on the record. In its statements, the trial court indicated an apparent belief that the 20-foot strip was part of Hitchcock Avenue pursuant to a statutory dedication. The trial court, noting that the roads set forth in the Kenwood plat were dedicated to the public, reasoned that the dedication was never removed when the plat was later vacated. The court then stated that Hellen had not excluded the southernmost 20 feet of her property when she sold her property after the plat was vacated, confirming that she had not intended to remove the dedication of the streets and alleys to the public in the Kenwood plat when she sought vacation of the plat in 1909. When both parties pointed out that Hellen had sold the southernmost 20 feet of her property as part of a larger conveyance and that the Andersons were the first landowners who chose not to include in the deed describing the property conveyed the 20-foot strip when selling their property, the trial court concluded, "Well, the portion dedicated

[18] At this time, a cross-claim that defendants had filed against the MDEQ regarding the use of the dock on the 20-foot strip as a "marina" without a proper permit was dismissed as moot.

in Kenwood to the public was never sold out by the Andersons, and if that doesn't indicate that they knew there was a road that was used for the public, I don't know what does." The trial court concluded that this 20-foot strip was then accepted as a road pursuant to a McNitt act resolution and that *Jacobs* applied to the scope of the dedication.

In a written judgment, the trial court ruled that the contested 20-foot strip was a public road established by common-law dedication and ordered that the 20-foot strip could no longer be used for recreational purposes, including "sunbathing, lounging, picnicking, and other activities that are non-incidental to the use of the water's surface of Higgins Lake." The court also prohibited nontemporary mooring of watercraft and the erection of nontemporary mooring structures, including boat hoists and wet anchors, on the bottomlands of Higgins Lake. Although in its oral findings from the bench the trial court had indicated a belief that defendants' activities were a nuisance, it did not address this issue in the written judgment.

II. STATUS OF THE 20-FOOT STRIP

On appeal, defendants challenge the trial court's determination that the 20-foot strip is part of Hitchcock Avenue, arguing that particular findings of fact by the trial court were clearly erroneous and that the trial court's conclusion that the 20-foot strip was part of Hitchcock Avenue is incorrect. We agree. We review a trial court's findings of fact for clear error, MCR 2.613(C), and questions of law de novo, *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008).

In its judgment, the trial court indicated that the 20-foot strip was a public road pursuant to a common-law dedication. However, the trial court's fact-finding

does not clearly indicate how or why it came to this particular conclusion, and the trial court did not explicitly identify which facts supported its determination that a common-law dedication occurred. In its fact-finding at the close of the bench trial, the trial court determined that although the plat of Kenwood was vacated, the plat indicated that the streets depicted therein were dedicated to the use of the public. The court also acknowledged that the Pine Bluffs plat had dedicated the northern 30 feet of the plat toward the formation of what would become Hitchcock Avenue, and this 30-foot dedicated road included both the 30-foot strip of DeWitt's Landing and the southern 30 feet of Hitchcock Avenue. The trial court recognized that both the northern 20 feet of Hitchcock Avenue and the 20-foot strip were not part of a plat, but it also appeared to conclude that because this property was once part of a plat and had not been deeded out since then, both the 20-foot strip and the northern 20 feet of Hitchcock Avenue must have been dedicated as a road, and the dedication must never have been removed.

In particular, although the trial court ruled that the 20-foot strip was a public road pursuant to a common-law dedication, throughout its fact-finding it maintained that the 20-foot strip was a public road because the dedication of the Kenwood plat was never rescinded. Such reasoning appears to be more in keeping with a rationale that the 20-foot strip was part of Hitchcock Avenue pursuant to a statutory dedication. Finally, the parties raise as an issue whether the 20-foot strip could be considered a public road pursuant to the highway-by-user doctrine.

The somewhat disjointed reasoning presented by the trial court, as well as the parties' desire to address whether the property in question is a public road

pursuant to different theories of dedication and acceptance, reveals an important, fundamental point: proper adjudication of a dispute regarding whether a public road exists requires consideration of all three recognized means of creating a public road, namely, a statutory dedication and acceptance, a common-law dedication and acceptance, and recognition of a public road pursuant to the highway-by-user doctrine. In *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 554-555; 600 NW2d 698 (1999), this Court discussed these three methods under which property may become part of a public road:

> For a road to become public property, there generally must be a statutory dedication and an acceptance on behalf of the public, a common-law dedication and acceptance, or a finding of highway by public user. *Village of Bellaire v Pankop*, 37 Mich App 50, 54-55; 194 NW2d 379 (1971). For a statutory dedication under the Land Division Act, MCL 560.101 *et seq.*; MSA 26.430(101) *et seq.*, the well-established rule is that two elements are required: a recorded plat designating the areas for public use, evidencing a clear intent by the plat proprietor to dedicate those areas to public use, and acceptance by the proper public authority. *Kraus v Dep't of Commerce*, 451 Mich 420, 424; 547 NW2d 870 (1996). Public acceptance must be timely and must be disclosed through a manifest act by the public authority either formally confirming or accepting the dedication and ordering the opening of the street, or by exercising authority over it, in some of the ordinary ways of improvement or regulation. *Id.* Similarly, a valid common-law dedication of land for a public purpose requires (1) intent by the property owners to offer the land for public use, (2) an acceptance of the offer by the public officials and maintenance of the road by public officials, and (3) use by the public generally. *Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958); *Boone v Antrim Co Bd of Rd Comm'rs*, 177 Mich App 688, 693; 442 NW2d 725 (1989). Finally,

> establishing a public highway pursuant to the highway by user statute, MCL 221.20; MSA 9.21, requires (1) a defined line, (2) that the road was used and worked on by public authorities, (3) public travel and use for ten consecutive years without interruption, and (4) open, notorious, and exclusive public use. *Bain*, *supra*.

We will address each method of creation of a public road in turn, as well as whether the evidence supports a ruling that the 20-foot strip was a public road.

A. STATUTORY DEDICATION

In *Kraus v Dep't of Commerce*, 451 Mich 420, 423; 547 NW2d 870 (1996), our Supreme Court considered a circumstance similar to that found in this case, addressing whether unimproved roads platted along the shore of Higgins Lake and dedicated to public use in the first decade of the last century had been accepted by the public. The *Kraus* Court identified the general, long-accepted rule for valid dedication of land in this state:

> In cases like these, the well-established rule is that a valid dedication of land for a public purpose requires two elements: a recorded plat designating the areas for public use, evidencing a clear intent by the plat proprietor to dedicate those areas to public use, and acceptance by the proper public authority. *Lee v Lake*, 14 Mich 11, 18 (1865). Public acceptance must be timely, *Wayne Co v Miller*, 31 Mich 447, 448-449 (1875), and must be disclosed through a manifest act by the public authority "either formally confirming or accepting the dedication, and ordering the opening of such street, or by exercising authority over it, in some of the ordinary ways of improvement or regulation." *Tillman v People*, 12 Mich 401, 405 (1864). In *Miller*, this Court explained that the requirement of public acceptance by a manifest act, whether formally or informally, was necessary to prevent the public from becoming responsible

> for land that it did not want or need, and to prevent land from becoming waste property, owned or developed by no one. *Id.* at 448. [*Id.* at 424.]

"However, the mere certification of a plat does not constitute acceptance of all the dedicated property." *Marx v Dep't of Commerce*, 220 Mich App 66, 74; 558 NW2d 460 (1996). Instead, the governmental authority must accept the publicly dedicated parcel of land in question, either by a formal resolution or informally through " 'the expenditure of public money for repair, improvement and control of the roadway' " or through public use. *Id.*, quoting *Eyde Bros Dev Co v Roscommon Co Bd of Rd Comm'rs*, 161 Mich App 654, 664; 411 NW2d 814 (1987), abrogated in part on other grounds by *Kraus v Gerrish Twp*, 205 Mich App 25, 46-47 (1994).

Further, timely acceptance of dedicated lands in a plat requires that the acceptance of the dedication "must take place before the offer lapses or before the property owner withdraws the offer." *Marx*, 220 Mich App at 78. "As long as a plat proprietor or his successors take no steps to withdraw an offer to dedicate land for public use, the offer is treated as continuing." *Id.* at 79. However, when the property owner undertakes an affirmative act to withdraw the offer, such as using the property in a manner that is inconsistent with public ownership, the offer of dedication is withdrawn. *Id.* at 80.

The Kenwood plat was dedicated in 1901 and vacated by court order in 1909. The parties provided no evidence that the county ever attempted to accept the dedication of the streets and alleys located in the Kenwood plat before its vacation, either by formal resolution, by expending money on the property, or by indicating that the public used the streets and alleys (including the 20-foot strip) for their intended purpose.

In fact, the parties provide no evidence regarding any use of the property until the 1920s, and a county road commission employee admitted that after a search of road commission records, she could not find any records of any dedication or conveyance that included the 20-foot strip as part of Hitchcock Avenue.

Instead, the plat was vacated before any acceptance of the dedication therein occurred. Further, Hellen, who owned most or all of the property in the plat at the time of its vacation, specifically requested in her petition that the "lots, blocks, streets, and alleys" in the plat be vacated, apparently because the layout of the plat made the property difficult to resell and affected her property taxes. Although the dedication of the public land in the Kenwood plat was not formally withdrawn through a separate court action, Hellen specifically requested the vacation of streets and alleys in the plat in her petition for vacation, and the trial court granted her request, vacating the plat in its entirety. In the absence of any evidence to the contrary, the vacation of the plat constitutes an affirmative act to withdraw the offer of dedication. See *Olsen v Village of Grand Beach*, 282 Mich 364, 368-369; 276 NW 481 (1937) (recognizing the vacation of a plat as equivalent of the withdrawal of a dedication).

Accordingly, the evidence presented at trial leads to only one conclusion; that the dedication of the streets and alleys in the Kenwood plat was withdrawn when the plat was vacated, before the county made any attempt to accept these streets and alleys. The trial court's conclusion to the contrary was clearly erroneous.

Further, instead of treating the vacation of the Kenwood plat as a withdrawal of the dedication before acceptance, the trial court appears to conclude that the

county formally accepted jurisdiction over the 20-foot strip when it passed McNitt act resolutions in the 1930s, which were designed to incorporate township roads and streets and alleys in dedicated plats into the county road system. However, a general McNitt act resolution does not constitute acceptance of a dedicated road not specifically named in the resolution; instead, a McNitt act resolution must expressly identify the platted road in dispute or the recorded plat in which that road was dedicated "to effect manifest acceptance of the offer to dedicate the road to public use." *Kraus*, 451 Mich at 430. And, although road commission resolutions accepting jurisdiction over roads in certain plats and certain county roads were presented as evidence, the trial court never determined that the 20-foot strip was specifically included among the road sections over which the county road commission asserted jurisdiction. In fact, the only listed metes-and-bounds description of roads absorbed by the county road system found in the lower court record included a road on the north side of Section 16 of Gerrish Township (presumably the southern portion of Hitchcock Avenue), but did not include a road on the south side of Section 9 of Gerrish Township (which would include the 20-foot strip). A road commission employee admitted that the road commission could find no documentation confirming that it had accepted and certified the 20-foot strip as part of Hitchcock Avenue at any point.

More importantly, however, the Kenwood plat had been vacated for over 25 years before the county road commission passed the first McNitt act resolution. To accept the public lands dedicated in the Kenwood plat, the county had to accept the dedicated lands before the offer was withdrawn. *Marx*, 220 Mich App at 78. Even if the county road commission did attempt to accept the dedication in the Kenwood plat through McNitt act

resolutions, any attempts at acceptance over 25 years after vacation of the plat (and corresponding withdrawal of the dedication in the plat) are certainly not timely.

The trial court also determined that the dedication of streets and alleys for public use was never withdrawn after the Kenwood plat was vacated because the deeds of the property transferred after the Kenwood plat was vacated did not include the 20-foot strip. However, as the deeds introduced into evidence make clear, and as both parties noted during the trial court's oral findings of fact, Hellen included the 20-foot strip when she sold her property in 1922, and the deed did not identify the 20-foot strip as a road or distinguish it in any way. The 20-foot strip continued to be included in deeds in subsequent sales in 1924, and eventually Osian and Hulda Anderson acquired ownership of the 20-foot strip, along with the property to the north of it. They subsequently did not include the 20-foot strip with the property that they sold to the Rosses in 1931. Although the trial court was made aware of this at the end of its fact-finding, the trial court did not change its ruling or indicate in any detail the extent, if any, to which its apparent misunderstanding of the facts might have affected its decision.

B. COMMON-LAW DEDICATION

The trial court's rationale for determining that the 20-foot strip is a public road pursuant to common-law dedication is unclear. The clearest indication of its rationale for determining that a common-law dedication existed comes from its response to the parties at the end of its fact-finding, when the parties informed the trial court that several deeds describing transfers of the property after the Kenwood plat was vacated did not

include the 20-foot strip. When presented with this information, the court responded, "the portion dedicated in Kenwood to the public was never sold out by the Andersons, and if that doesn't indicate that they knew there was a road that was used for the public, I don't know what does." It appears that the trial court determined that a common-law dedication existed because all or part of the 20-foot strip had once been dedicated as a road in a plat that was subsequently vacated, and the Andersons did not include in the description of the property conveyed the 20-foot strip when they sold the adjacent property to the Rosses in 1931. The trial court appeared to conclude that this information established that the Andersons intended to dedicate the property as a road pursuant to a common-law dedication. We disagree.

Again, "a valid common-law dedication of land for a public purpose requires (1) intent by the property owners to offer the land for public use, (2) an acceptance of the offer by the public officials and maintenance of the road by public officials, and (3) use by the public generally." *Appleton Trust*, 236 Mich App at 554. A common-law dedication does not need to be formal, and "dedication may occur without a grant or even written words." *Boone v Antrim Co Bd of Rd Comm'rs*, 177 Mich App 688, 693; 442 NW2d 725 (1989). However, the *Boone* Court also noted that to have a common-law dedication, "there must be a clear and positive intent to dedicate, as unequivocally demonstrated by the actions of the owners. If intent is established, there must also be either an express declaration or some acts by a public authority indicating acceptance." *Id.* (citations omitted).

We do not agree with the trial court's conclusion that the mere fact that a subsequent owner of the property

did not convey the 20-foot strip by deed is sufficient to establish that this property is part of Hitchcock Avenue. Instead, we conclude that the evidence included in the lower court record is insufficient to establish that the Andersons intended to offer the 20-foot strip for public use when they excluded this property from their deed transferring title of some of their property to the Rosses. For this reason alone, the trial court's determination that the 20-foot strip is a public road pursuant to a common-law dedication is incorrect.

In the absence of any evidence to provide context for the sale, the Andersons' decision not to convey the 20-foot strip to the Rosses does not constitute an unequivocal demonstration of a clear and positive intent to dedicate the 20-foot strip to the public for use as a road. Although it is conceivable that the Andersons could have chosen not to convey the 20-foot strip because they intended for the property to be used as a road, it is also conceivable, for example, that they chose not to convey the 20-foot strip because they wanted to provide area residents with a site close to Hitchcock Avenue where they could recreate. Further, considering that the lower court record indicates that the Rosses consented to the historical recreational use of the 20-foot strip during their long residence at the property to the north of the strip, it is also conceivable that the Rosses chose not to purchase the 20-foot strip because they wanted their neighbors who lacked lake access to have a place available along the water for picnics and general recreation.

Further, we do not believe that the fact that all or part of the 20-foot strip had once been dedicated as a road in a vacated plat indicates that the Andersons had a clear and positive intent to dedicate the 20-foot strip to the public for use as a road when they sold some of

their property to the Rosses in 1931. The property that the Andersons purchased had changed hands several times after the Kenwood plat was vacated, and each of these transfers included the 20-foot strip as part of a larger parcel of property, without distinguishing the 20-foot strip or otherwise indicating that it was a road. Further, there is no evidence that the Andersons were even aware that all or part of the 20-foot strip had once been dedicated as a road. Without affirmative evidence that the Andersons were even aware that the property had once been dedicated as a road, we do not believe that a dedication in a plat vacated in 1909 is sufficient to establish that the Andersons had a clear and positive intent to dedicate the 20-foot strip to the public for a road in 1931.

In addition, the trial court appeared to base its conclusion that the Andersons intended to dedicate the 20-foot strip to the public as a road on its determination that the 20-foot strip had been used as a road for at least seven years by the time of the 1931 property transfer. The trial court based this fact-finding entirely on the testimony of a long-time Higgins Lake resident, Myrtle Moore, who had testified regarding her family's use of DeWitt's Landing for recreation in the 1920s. However, we agree with defendants that the trial court's factual determinations on this point are clearly erroneous.

When addressing whether the dedication of a strip of land along the southern boundary of the Kenwood plat was ever rescinded, the trial court stated:

> The only person we have who can say that is Myrtle Moore and she says—and she testified in her deposition, and it is there, that it was a road, they used it, people used it to launch, and that the DeWitts allowed them—the picture says in front of the DeWitt's—allowed people to use the beach in front of them, not that portion. And even if they did, does it outweigh the formal dedication, the

> writing in the plat of Kenwood? Does it outweigh the writing in the deeds out, where they don't deed out that twenty feet? No. So we have that.

It is not clear from the trial court's statements how much weight it placed on Moore's testimony when determining whether the 20-foot strip was intended to be a road, although the trial court admittedly placed more weight on her testimony than on testimony concerning later uses of the property. But regardless, the trial court appeared to base its determination that the 20-foot strip was used as a road in the 1920s on a misreading of Moore's testimony. Although Moore testified that she and her family would go to DeWitt's Landing for recreation when she was a child, she never specifically identified that the "path" that she and her family used to get to the water was on the 20-foot strip, and not on another part of the lakeshore. Further, although she also testified that she saw individuals drive trucks onto the lake to cut ice during the winter and launch boats from the lakeshore, again, she never identified whether this travel occurred on the 20-foot strip. Accordingly, the trial court's determination that Moore's testimony established that the 20-foot strip was used as a road or path to the water is clearly erroneous. At most, Moore's testimony establishes that a road or path to the water existed in the general area, but it does not, on its own, establish that the road or path was specifically on the 20-foot strip.

Accordingly, we conclude that the trial court erred when it determined that the 20-foot strip was a public road through a common-law dedication. Because the evidence included in the lower court record fails to establish that the Andersons intended to offer the 20-foot strip for public use, we need not address the other elements of a common-law dedication.

C. HIGHWAY-BY-USER DOCTRINE

The trial court never appeared to address whether the 20-foot strip is a public road pursuant to the highway-by-user doctrine. However, because the parties raise this as an issue, and because consideration of this doctrine is necessary to ensure a complete review of the issue, we will address whether the 20-foot strip is a public road pursuant to this doctrine. Again, to establish a public road pursuant to the highway-by-user statute, MCL 221.20, plaintiff must establish "(1) a defined line, (2) that the road was used and worked on by public authorities, (3) public travel and use for ten consecutive years without interruption, and (4) open, notorious, and exclusive public use."[19] *Appleton Trust*, 236 Mich App at 554-555. The evidence provided in the lower court record does not establish that the 20-foot strip is a road pursuant to the highway-by-user doctrine because it includes no evidence that the road was used and worked on by public authorities.

The evidence included in the lower court record is insufficient to establish that the road commission or other public officials ever used or maintained the 20-foot strip. Initially, the trial court determined that the road commission expended some money on the 20-foot strip, apparently by putting in a guardrail. However, we do not believe that the mere fact that the road commis-

[19] Although it is unclear whether the northern 20 feet of Hitchcock Avenue east of the guardrail is a public road by either statutory or common-law dedication, the county road commission, which has undisputedly maintained the entire 50-foot width of the road east of the guardrail for decades, would easily be able to establish that the entire 50-foot width of the paved, maintained portion of Hitchcock Avenue is a road pursuant to the highway-by-user statute. Accordingly, this Court's ruling with regard to the status of the 20-foot strip would not realistically call into question the road commission's jurisdiction over the maintained portion of Hitchcock Avenue.

sion put a guardrail and "Road Ends" sign up at the eastern edge of the 20-foot strip constitutes evidence that the road was used and worked on by public authorities. In fact, the presence of the guardrail and sign, both of which indicate to the public that the road ends at that point and not at the water's edge, *could* constitute evidence that the road commission would not, and did not, use or maintain the property to the west of the guardrail (consisting of virtually the entire 20-foot strip) as a road.[20]

Also, there is no evidence in the lower court record regarding whether the road commission actually performed maintenance work on the 20-foot strip itself. Instead, DLDA members testified (and their signs on the property indicate) that the road commission has never spent money on or otherwise maintained the 20-foot strip. Further, a road commission employee testified that she could find nothing in the road commission's records indicating that it performed maintenance on the 20-foot strip. Although there is some evidence that the road commission entertained requests to perform repairs on the boat ramp on the 30-foot strip and to seek removal of the picnic tables and bulletin board seasonally placed on the 20-foot strip, there is no evidence that the road commission ever acted on these requests. Accordingly, we conclude that the road commission never used and worked on the road, as is required to establish that certain property is a public road pursuant to the highway-by-user doctrine.

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[20] Further, to establish this element, the road commission must demonstrate that it has kept the road in a "reasonably passable condition." *Boone*, 177 Mich App at 694. We do not believe that placing a guardrail and a "Road Ends" sign at the eastern edge of the 20-foot strip indicates that the road commission (as opposed to DLDA members) intended to do anything to maintain the 20-foot strip itself in a "reasonably passable condition."

III. APPLICATION OF *JACOBS*

Next, defendants claim that the trial court erred when it concluded that the limitations set forth in *Jacobs*, regarding the use of road ends along Higgins Lake, applied to the 20-foot strip because the 20-foot strip is not a road and, even if the 20-foot strip were a road, *Jacobs* does not apply to roads created by common-law implied dedication. *Jacobs* addresses whether certain activities occurring at the end of a platted road along the shore of Higgins Lake violated the statutory dedication of the street in the original plat " 'to the use of the Public.' " *Jacobs*, 199 Mich App at 671. The *Jacobs* Court specifically confined its review to the question "whether the disputed activities are within the scope of the plat dedication." *Id.* Because we have concluded that the 20-foot strip is not a road under any of the previously discussed theories, this issue is moot.

IV. ADVERSE POSSESSION AND PRESCRIPTIVE EASEMENT CLAIMS

Defendants argue that they have a vested right in the 20-foot strip under either a theory of adverse possession or prescriptive easement. Because the 20-foot strip is not a road, the road commission has not acquired any jurisdiction over the 20-foot strip. Accordingly, title to the property rests in the Andersons, the last titleholders of the property, and their heirs or devisees.

There is no evidence that the Andersons or their descendents still maintain a presence at Higgins Lake. Yet the evidence also indicates that the DLDA, a nonprofit organization, used and maintained the 20-foot strip for at least 50 years. The evidence suggests that in this situation, the DLDA might have a claim of adverse

possession.[21] Alternately, the evidence presented also suggests that defendants might have a prescriptive easement over the property.[22] Because the trial court erroneously determined that the 20-foot strip was a road, it never addressed these issues. In light of our conclusion that the 20-foot strip is not a road, however, this question again becomes relevant. However, because a determination whether the DLDA has either adverse possession or a prescriptive easement over the property involves weighing evidence and making factual deter-

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[21] This Court has listed the circumstances under which a claim of adverse possession may be established:

> In order to establish a claim of adverse possession, a plaintiff must provide "clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years." *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). The fifteen-year period begins when the rightful owner has been disseised of the land. MCL 600.5829. "Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership." *Kipka*, [198 Mich App] at 439. In addition, a plaintiff must also show that the plaintiff's actions were "hostile" and "under claim of right," meaning that the use is "inconsistent with the right of the owner, without permission asked or given, and which use would entitle the owner to a cause of action against the intruder." *Wengel v Wengel*, 270 Mich App 86, 92-93; 714 NW2d 371 (2006) (quotation marks and citation omitted). [*Canjar v Cole*, 283 Mich App 723, 731-732; 770 NW2d 449 (2009).]

[22] "An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). A prescriptive easement is either

> "(1) a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or
>
> "(2) a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude." [*Mulcahy v Verhines*, 276 Mich App 693, 700; 742 NW2d 393 (2007), quoting 1 Restatement Property, 3d, Servitudes, § 2.16, pp 221-222 (emphasis omitted).]

minations, it would be premature for this panel to address these questions at this time. Instead, we remand this case to the trial court in order to permit the parties to pursue these issues further. In so doing, we advise the parties that it would be prudent to attempt to contact the Andersons or their heirs or devisees and add them as parties.

V. SUMMARY PROHIBITIONS REGARDING MOORING AND BOAT HOISTS

Defendants argue that the trial court erred when it granted plaintiff's motion for summary disposition in part and prohibited the DLDA from placing boat hoists in the water or mooring boats, claiming that this determination was incorrect and premature. We agree. Any determination regarding whether the DLDA is entitled to permit its members to place boat hoists in the water or to moor boats on the 20-foot strip depends on the nature of the rights that the DLDA has to the property. Accordingly, our review of this issue would be premature. Instead, remand for further fact-finding is necessary to determine actual rights to the 20-foot strip. After a determination is made regarding the nature of the DLDA's interest, if any, in the 20-foot strip, the trial court will then be in a position to reconsider the nature of the DLDA's right to place boat hoists in the water or moor boats in the water off the 20-foot strip in light of this factual determination.

VI. NUISANCE

Finally, defendants question the trial court's ruling that certain uses of the 20-foot strip constitute a nuisance. In particular, defendants claim that the evidence presented did not support the trial court's determination and, regardless, plaintiff had no claim under

the theory of coming to the nuisance. Defendants also argue that the trial court erred when it determined that prohibiting the historical uses of DeWitt's Landing, including use of the property for sunbathing, picnicking, and recreating, would be sufficient to abate the activities that were allegedly the source of plaintiff's allegation of nuisance. Because nuisance-abatement proceedings are generally equitable in nature, our review is de novo. *Capitol Props Group, LLC v 1247 Center Street, LLC*, 283 Mich App 422, 430; 770 NW2d 105 (2009).

The trial court's holding with regard to this issue is unclear. The trial court addressed the nuisance issue in its oral findings of fact, indicating that a nuisance existed because people were making loud noises, urinating, and having bonfires on the 20-foot strip. The trial court then appeared to conclude that a nuisance existed because DLDA members were using the property in a manner inconsistent with the limitations set forth in *Jacobs*. The judgment in this case does not address the nuisance issue specifically; instead, it simply prohibits certain activities on the 20-foot strip, including sunbathing, lounging, picnicking, and other activities nonincidental to the use of the water's surface of Higgins Lake, because these activities are "beyond the scope of the dedication." The trial court never actually ruled, either at the bench trial or in its judgment, that making loud noises, urinating, and having bonfires on the 20-foot strip was a nuisance, nor did it issue a ruling preventing these activities from occurring.

We speculate that the trial court simply concluded that its judgment restricting the use of the 20-foot strip would be sufficient to address any alleged nuisance. The trial court's statements at trial, combined with its failure to address the issue in its judgment in this case,

indicate that the trial court might have found the nuisance issue moot in light of its ruling restricting use of the 20-foot strip. It also appears that the trial court's order restricting certain uses of the 20-foot strip is simply an application of the limits of the uses of platted road ends set forth in *Jacobs*. However, in light of our holding that the 20-foot strip is not a road, remand to the trial court is necessary with regard to this issue. On remand, the trial court must readdress the issue to determine whether any of defendants' alleged activities on the 20-foot strip constitute a nuisance and issue a ruling to that effect.[23]

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

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[23] In its brief, plaintiff acknowledges that it is seeking relief under a theory of private nuisance. In *Capitol Props Group*, 283 Mich App at 431-432, this Court stated:

> The elements of a private nuisance are satisfied if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. *Cloverleaf Car Co* [*v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995)]. To prove a nuisance, significant harm to the plaintiff resulting from the defendant's unreasonable interference with the use or enjoyment of property must be proven. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 490; 608 NW2d 531 (2000).

Accordingly, the trial court would need to apply this test to determine if a nuisance, in fact, occurred in this case.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered March 11, 2010:

PEOPLE v DOWDY, Docket No. 287689; reported at 287 Mich App 278. The Court on its own motion orders that the February 2, 2010, opinion is hereby amended. The opinion is modified on page two, paragraph two, first sentence, with minor, nonsubstantive changes to eliminate any potential ambiguities. The opinion is amended as follows:

The old opinion read, "There is no argument that defendant has a domicile."

The new opinion reads, "Domicile is not an issue in this case because the parties agree that as a homeless person, defendant has no 'true, fixed, principal, and permanent home.' "

In all other respects, the February 2, 2010, opinion remains unchanged.

Order Entered March 23, 2010:

ALPHA CAPITAL MANAGEMENT, INC v RENTENBACH, Docket No. 287280; reported at 287 Mich App 589. The Court orders that the March 9, 2010, opinion is hereby vacated, and a new opinion is attached.

Index-Digest

INDEX–DIGEST

STANDING

4. Standing is not established by a party by merely indicating a subjective interest in the litigation; instead, a party must demonstrate an interest in the litigation that is distinct from that of the general public; standing requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large. *County Rd Ass'n of Michigan v Governor*, 287 Mich App 95.

5. The irreducible constitutional minimum of standing contains three elements; first, the plaintiff must have suffered an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical; second, there must be a causal connection between the injury and the conduct complained of, that is the injury has to be fairly traceable to the challenged action of the defendants and not the result of the independent action of some third party not before the court; third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision; the party invoking jurisdiction bears the burden of establishing these elements. *County Rd Ass'n of Michigan v Governor*, 287 Mich App 95.

TRANSPORATION AUTHORITIES

6. The Metropolitan Transportation Authorities Act requires notice of any claim against a transportation authority based upon injury to persons or property to be served upon the authority no later than 60 days from the occurrence through which such injury is sustained; under the court rules, where service is not done by mailing, service means delivery at a particular time and place; the term "service" is defined as the formal delivery of a writ, summons, or other legal process (MCR 2.102, 2.103, 2.104, 2.105; MCL 124.419). *Nuculovic v Hill*, 287 Mich App 58.

ADJUSTMENT OF AWARDS—*See*

TRIAL 1

AFFIDAVITS—*See*

WITNESSES 2

AMENDMENT OF PLEADINGS—*See*

ACTIONS 1

ality apply only to matters in which a new client's interests qualify as both adverse to those of the former client and substantially related to the subjects of the attorney's former representation. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589.

4. A three-part test may be employed to examine the circumstances under which a lawyer's subsequent representation of a client may be deemed substantially related to the legal services performed for a former client for purposes of determining a lawyer's continuing duties of loyalty and confidentiality to the former client: the test examines the nature and scope of the prior representation, the nature of the present lawsuit or representation, and whether, in the course of the prior representation, might the client have disclosed to the attorney confidences that could be detrimental to the former client in the current litigation. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589.

ATTORNEY FEES

See, also, JUDGMENTS 1

TRIAL 1

FRIVOLOUS LAWSUITS

1. *Auto-Owners v Ferwerda (On Remand)*, 287 Mich App 248.

PENALTY INTEREST

2. *Auto-Owners v Ferwerda (On Remand)*, 287 Mich App 248.

ATTORNEY GENERAL

CONFLICTS OF INTEREST

1. The Attorney General has the responsibility to recognize and avoid conflicts of interest; the Attorney General has an affirmative duty to perform a conflict check before undertaking the prosecution of a judge or other person whom the office is statutorily required to defend. *People v Waterstone*, 287 Mich App 368.

MICHIGAN RULES OF PROFESSIONAL CONDUCT

2. The Attorney General is subject to the Michigan Rules of Professional Conduct; the unique status of the Attorney General requires accommodation, not exemption, under the rules; mechanical application of the rules to the Attorney General is not possible and dual represen-

particular issues that spring from a termination of employment and the resulting claims (MCL 15.361 *et seq*., 37.2101 *et seq*.). *Weishuhn v Lansing Catholic Diocese*, 287 Mich App 211.

2. The ministerial exception to the application of employment-discrimination and civil rights statutes to religious institutions and their ministerial employees does not apply to all employment decisions by religious institutions, nor does it apply to all claims by ministers; it applies only to claims that involve a religious institution's choice as to who will perform spiritual functions; termination of the employment of a ministerial employee by a religious institution is an action absolutely protected under the First Amendment, regardless of the reason for doing so. *Weishuhn v Lansing Catholic Diocese*, 287 Mich App 211.

CONFRONTATION CLAUSE

3. Testimonial hearsay is inadmissible against a criminal defendant unless the declarant is unavailable at trial and there was a prior opportunity for cross-examination of the declarant; statements are testimonial where the primary purpose of the statements or the questioning that elicits them is to establish or prove past events potentially relevant to later criminal prosecution. *People v Lewis (On Remand)*, 287 Mich App 356.

4. The class of testimonial statements covered by the Confrontation Clause includes material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; also included are extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, confessions, and statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial (US Const, Am VI; Const 1963, art 1, § 20). *People v Lewis (On Remand)*, 287 Mich App 356.

CONTRACTS—*See*

HOSPITALS 1

CONVERTIBLE AREAS—*See*

CONDOMINIUMS 3

COUNTIES

WASTE DISPOSAL FACILITIES

1. Counties are authorized by statute to own and run waste disposal facilities; although certain provisions of the Natural Resources and Environmental Protection Act prohibit the operation of an unlicensed landfill by a county, those provisions do not show a legislative intent to withdraw a county's authority to operate a waste disposal facility for a violation of the environmental protection laws; a county landfill operating in violation of state licensing and environmental protection laws does not constitute an ultra vires activity (MCL 123.737, 324.11509, 324.11512[2]). *Dextrom v Wexford County*, 287 Mich App 406.

CRIMINAL LAW

ARMED ROBBERY

1. An armed robber's conduct in fleeing the scene of the crime is included within the course of committing the armed robbery (MCL 750.529, 750.530). *People v Mann*, 287 Mich App 283.

ATTORNEY AND CLIENT

2. *People v McCauley*, 287 Mich App 158.

ASSAULTING POLICE OFFICERS

3. It is illegal for a person to assault, batter, resist, or obstruct a police officer, even if the officer is taking unlawful action, as long as the officer's actions are done in the performance of the officer's duties (MCL 750.81d[1]). *People v Corr*, 287 Mich App 499.

4. The statute that makes it a crime for an individual to assault, batter, wound, resist, obstruct, oppose, or endanger a person who the individual knows or has reason to know is performing his or her duties as a police officer encompasses all the duties of a police officer as long as the officer is acting in the performance of those duties (MCL 750.81d[1]). *People v Corr*, 287 Mich App 499.

EVIDENCE

5. *People v Gipson*, 287 Mich App 261.

FINANCIAL TRANSACTION DEVICES

6. A person who knowingly retains, possesses, secretes, or uses a financial transaction device without the consent of the deviceholder is guilty of a felony regardless of

whether the person attempts to access a proprietary account with the device; a record or copy of information that can be used to gain access to money, credit accounts, or anything of value may be a financial transaction device (MCL 750.157m[f][v], 750.157n). *People v Malone*, 287 Mich App 648.

HOMICIDE

7. Identity is an element of every criminal offense; the elements of the crime of premeditated murder are an intentional killing of a human being with premeditation and deliberation; premeditation and deliberation may be inferred from the circumstances and minimal circumstantial evidence is sufficient to prove an actor's state of mind (MCL 750.316). *People v Lewis (On Remand)*, 287 Mich App 356.

SEX OFFENDERS REGISTRATION ACT

8. The Sex Offenders Registration Act provides for the registering of and reporting by individuals convicted of specified crimes where those individuals have either a domicile or a residence, as defined by the act (MCL 28.721 *et seq*.). *People v Dowdy*, 287 Mich App 278.

CUSTODIAL STATEMENTS—*See*

CRIMINAL LAW 5

CUTTING DOWN OR CARRYING AWAY GRASS, HAY, OR GRAIN—*See*

TRESPASS 1

DECLARATIONS OF PARTY PREFERENCE—*See*

ELECTIONS 3

DEDICATIONS OF PROPERTY—*See*

HIGHWAYS 1, 2, 3, 4

DEFERRED PRESENTMENT SERVICE TRANSACTIONS ACT—*See*

BILLS, NOTES, AND CHECKS 1

DELIBERATION—*See*

CRIMINAL LAW 7

that are not specifically described and exempted from disclosure under MCL 168.495a(2), as amended by 1995 PA 213; the "voter registration record[s]" that amended § 495a(2) exempts from disclosure are completely distinct from the "separate records[s]" kept under § 615c(3) of 2007 PA 52. *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434.

3. The "information" kept under MCL 168.615c(3), as added by 2007 PA 52, following the 2008 presidential primary election that includes the printed name, address, and qualified voter file number of each elector and the participating political party ballot selected by the elector is not an elector's "declaration of party preference" or no party preference under MCL 168.495a(2), as amended by 1995 PA 213. *Practical Political Consulting, Inc v Sec of State*, 287 Mich App 434.

ELEMENTS OF GAMBLING—*See*

GAMBLING 2

ELEMENTS OF HOMICIDE—*See*

CRIMINAL LAW 7

ELEMENTS OF LOTTERIES—*See*

LOTTERIES 4

ELEMENTS OF STANDING—*See*

ACTIONS 5

EMPLOYMENT DISCRIMINATION—*See*

CONSTITUTIONAL LAW 2

EVIDENCE

See, also, CRIMINAL LAW 5

EXCLUSIONARY RULE

1. The exclusionary rule does not act to bar the introduction of evidence of independent crimes directed at police officers as a reaction to an illegal arrest or search. *People v Corr*, 287 Mich App 499.

EXCLUSIONARY RULE—*See*

EVIDENCE 1

agency's activities are subject to the proprietary function exception (MCL 691.1413). *Dextrom v Wexford County*, 287 Mich App 406.

PUBLIC-BUILDING EXCEPTION

6. *Ward v Michigan State Univ (On Remand)*, 287 Mich App 76.

WORDS AND PHRASES

7. A governmental agency is generally immune from tort liability if it is engaged in the exercise or discharge of a governmental function; a governmental function is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law (MCL 691.1401[f], 691.1407[1]). *Dextrom v Wexford County*, 287 Mich App 406.

HIGHWAY-BY-USER DOCTRINE—*See*

HIGHWAYS 5

HIGHWAYS

DEDICATION

1. A valid statutory dedication of land for a public purpose requires two elements: a recorded plat designating the areas for public use, showing a clear intent by the plat proprietor to dedicate those areas to public use, and acceptance by the proper public authority; public acceptance must be timely and disclosed through a manifest act by the public authority either formally confirming or accepting the dedication, or by exercising authority over the designated areas in some of the ordinary ways of improvement or regulation. *Pine Bluffs Area Property Owners Ass'n, Inc v DeWitt Landing & Dock Ass'n*, 287 Mich App 690.
2. The mere certification of a plat does not constitute acceptance by the proper public authority of all the property in the plat dedicated to public use; acceptance by a governmental authority of a road dedicated to the public must be by a formal resolution or informally through the expenditure of public money for repair, improvement, or control of the roadway, or through public use. *Pine Bluffs Area Property Owners Ass'n, Inc v DeWitt Landing & Dock Ass'n*, 287 Mich App 690.
3. Timely acceptance by a governmental authority of land

LIMITATION OF ACTIONS

MEDICAL MALPRACTICE

1. The two-year limitations period applicable to medical malpractice actions is tolled, for a maximum of 182 days, when the plaintiff provides a valid notice of intent to bring the action before the period of limitations expires; the plaintiff must then wait for the duration of the notice of intent period before a complaint may be filed; a plaintiff has not commenced a medical malpractice action where the plaintiff files the complaint before the notice of intent period has expired (MCL 600.2912b[1], 600.5805[6], 600.5856). *Driver v Naini*, 287 Mich App 339.
2. The nonparty fault statute, MCL 600.2957, and the notice of intent statute, MCL 600.2912b(1), relate to the same subject matter and are in pari materia for purposes of a medical malpractice action where there is a notice of nonparty fault given and a failure to wait the entire notice of intent waiting period before filing an amended complaint naming that party; the provisions of the notice of intent statute, which apply only to medical malpractice actions, control the determination whether the action is barred by the applicable statute of limitations (MCL 600.2912b[1], 600.5805[6], MCL 600.5856). *Driver v Naini*, 287 Mich App 339.

LOTTERIES

GAMBLING

1. Michigan's lottery and gambling statutes were validly enacted to preserve the public safety, morals, and welfare; harm to the public is presumed to flow from violation of a valid statute enacted to preserve the public health, safety, and welfare. *Attorney General v Power-Pick Club*, 287 Mich App 13.

GIFT ENTERPRISES

2. A gift enterprise is, among other things, a merchant's scheme to induce sales by giving buyers tickets that carry a chance to win a prize (MCL 750.372). *Attorney General v PowerPick Club*, 287 Mich App 13.

LICENSES

3. The Legislature, in enacting MCL 432.27(1), intended that the prohibition against sales of lottery tickets by persons who are not licensed agents is to be read

2. A "future advance mortgage" is a mortgage that secures a future advance and is recorded; if a recorded mortgage is amended to secure, expressly and not by implication, a future advance arising after the amendment, the mortgage becomes a future advance mortgage at the time the amendment is recorded; the instrument creating a future advance mortgage must be recorded (MCL 565.901 [b]). *Citizens State Bank v Nakash*, 287 Mich App 289.

MOTIONS AND ORDERS

See, also, WITNESSES 2

SUMMARY DISPOSITION

1. Summary disposition of all or part of a claim or defense may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact; 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; in general, a factual dispute exists when there is conflicting evidence concerning what happened, or when, where, or how something happened, or who was involved, or some other similar factual inquiry (MCR 2.116 [C][10]). *Attorney General v PowerPick Club*, 287 Mich App 13.

MOTOR VEHICLE LIABILITY COVERAGE—*See*

INSURANCE 1

MOTOR VEHICLES—*See*

CONFLICT OF LAWS 1

NAMED EXCLUDED OPERATORS—*See*

INSURANCE 1

NEGLIGENCE—*See*

ACTIONS 1, 2

NO-FAULT—*See*

INSURANCE 2, 3

NOTICE BY INJURED PERSON—*See*

GOVERNMENTAL IMMUNITY 6

must consider the client's showing of actual prejudice and examine the extent to which the client's confidential information could be used to his or her detriment. *People v Waterstone*, 287 Mich App 368.

RECORDS

FREEDOM OF INFORMATION ACT

1. A "public record" for purposes of the Freedom of Information Act is a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created; mere possession of a record by a public body does not render the record a public document; the use or retention of a record by a public body must be in the performance of an official function for the record to be a public record (MCL 15.232[e]). *Howell Ed Ass'n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228.
2. A back-up system employed by a public school system to retain all e-mails sent through the school's computer system and that does not distinguish between e-mails sent pursuant to the school's education goals and those sent by employees for personal reasons is not performing an "official function" sufficient to render the e-mails public records subject to the Freedom of Information Act (MCL 15.232[e]). *Howell Ed Ass'n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228.
3. Purely personal documents can become public documents for purposes of the Freedom of Information Act where the subsequent use or retention of the personal

documents by a public body is in the performance of an official function of the public body (MCL 15.232[e]). *Howell Ed Ass'n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228.

REGULATORY FEES—*See*

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RELEVANT EVIDENCE—*See*

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RELIEF FROM JUDGMENTS—*See*

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REVISED JUDICATURE ACT—*See*

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RIGHT OF CONFRONTATION—*See*

CONSTITUTIONAL LAW 3, 4

RIPARIAN RIGHTS—*See*

WATER AND WATERCOURSES 1

ROLE OF JURY—*See*

TRIAL 2

RULES OF PROFESSIONAL CONDUCT—*See*

ATTORNEY GENERAL 2

SCHOOLS—*See*

SEARCHES AND SEIZURES 2

SEARCHES AND SEIZURES

ANONYMOUS TIPSTERS

1. Whether reasonable suspicion for a search exists in a case involving an anonymous tipster must be tested under the totality of the circumstances with a view to the question whether the tip carries with it sufficient indicia of reliability to support a reasonable suspicion of criminal activity; an anonymous tip can provide reasonable suspicion if it is considered along with a totality of the circumstances that show the tip to be reliable, but, alone, without any indicia of reliability or means to test the informant's knowledge or credibility, an anonymous

does not require that the item that is cut down or carried away be of agricultural value; the alleged poisoning or damaging of grass is not included within the coverage of the statute (MCL 600.2919[1][c]). *Persell v Wertz*, 287 Mich App 576.

TRIAL

ATTORNEY FEES

1. Although it is within a trial court's discretion to adjust an award of attorney fees in light of the result achieved, it is not required to do so as long as the ultimate award remains reasonable. *Tinnin v Farmers Ins Exch*, 287 Mich App 511.

JURY TRIALS

2. The proper role of a jury is to decide what the facts are and not what the facts mean. *Attorney General v PowerPick Club*, 287 Mich App 13.

ULTRA VIRES ACTIVITIES—*See*

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UNIVERSITIES—*See*

GOVERNMENTAL IMMUNITY 2

USUAL AND CUSTOMARY CHARGES—*See*

HOSPITALS 1

VOTER REGISTRATION RECORDS—*See*

ELECTIONS 2

WAIVER OF IMMUNITY—*See*

ACTIONS 3

WASTE DISPOSAL FACILITIES—*See*

COUNTIES 1

WATER AND WATERCOURSES

RIPARIAN RIGHTS

1. No riparian rights arise from an artificial body of water under Michigan law; land abutting on an artificial watercourse has no riparian rights; artificial watercourses are waterways that owe their origin to acts of men. *Persell v Wertz*, 287 Mich App 576.